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—S. 15 — See Ibid, S. 14 SC 1708 A, B
—S. 38 — See Ibid, S. 14 SC 1708 A**—Karnataka Municipalities (Election of Councillors) Rules (1965)**

—R. 75 — See Municipalities — Karnataka Municipalities Act (1964), S. 14 SC 1708 A

—U. P. Municipalities Act (2 of 1916)

—S. 87-A (3) — Requirement regarding manner for sending notice — Directory — Substantial compliance — Interference in writ jurisdiction — Observations in 1968 All WR 114 and 1968 All LJ 704, Overruled All 315 (FB)

—U. P. Nagar Mahapalika Adhiniyam (2 of 1959)

—Ss. 128 (1) and Sch. I, Part B — Lease deed executed by Sahayak Nagar Adhikari and not by Mukhya Nagar Adhikari — Lease invalid All 341 C

—Sch. I, Part B — See Ibid, S. 128 (1) All 341 C

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—Principles of — See

(1) Constitution of India; Art. 226 Ker 158 B

(2) Industrial Employment (Standing Orders) Act (1946), Sch., Item 9 SC 1689 B

—Principles of — Applicability — See Constitution of India, Art. 226 All 344 (FB)

—Principles of — Right to be represented by counsel — See Constitution of India, Art. 226 Ker 158 A

Orissa Merged States (Laws) Act (4 of 1950)

—S. 7 (g) — See Constitution of India, Art. 226 Orissa 146 C (FB)

—S. 7 (g) — Bhogra lands attached to thekadar tenure in ex-State of Bolangir — S. 7 (g) does not apply. (1960) 26 Cut LT 187 and AIR 1961 Orissa 15, Overruled Orissa 146 B (FB)

Patna State Land Revenue Act (3 of 1940)

—S. 3 (v) — See Orissa Merged States (Laws) Act (1950), S. 7 (g) Orissa 146 B (FB)

Patna State Land Revenue Act (contd.)

- Ss. 3 (xviii) and 101 to 108 — Thekadar
— Rights and duties of — Nature and incidents of Thekadari tenure — Bhogra lands in Ex-State of Bolangir Orissa 146 A (FB)
—Ss. 101 to 108 — See Ibid, S. 3 (xviii)
Orissa 146 A' (FB)

Payment of Bonus Act (21 of 1965)

- S. 16 (1) — New Establishment — Tests
SC 1639

Penal Code (45 of 1860)

- S. 21 — Minister presiding over meetings of District Advisory Committee under Governmental Notification is a public servant
SC 1685

- Ss. 96, 97, 99 and 100 — Right of private defence of person and property — Limitations on exercise of — When extends to causing of death — Right held not exceeded
SC 1674 B

- S. 97 — See also Ibid, S. 96 SC 1674 B

- S. 97 — Right of Private defence of person and property — Trespasser in possession — Nature of possession required for exercising right against others including true owner. Cr. A. 1034 of 1969, D/- 10-2-1971 (Punj and Har), Reversed
SC 1674 A

- S. 99 — See Ibid, S. 96 SC 1674 B

- S. 100 — See Ibid, S. 96 SC 1674 B

- S. 302 — Sentence — No brutality or dastardliness about crime committed by accused — No premeditation — Accused getting excited at the spot and firing at deceased — Held it was not a fit case in which sentence of death was called for
SC 1703 F

- S. 302 — Murder — Appreciation of evidence — Injuries caused by lethal weapon — Prosecution evidence inconsistent with medical evidence and that of ballistic expert — Accused are entitled to acquittal. Criminal Appeal No. 778 of 1973, D/- 19-2-1974 (Punj & Har) Reversed
SC 1727

- S. 353 — See Ibid, S. 21 SC 1685

- S. 355 — See Ibid, S. 21 SC 1685

Presidency Towns Insolvency Act (3 of 1909)

- S. 9 — Acts of insolvency — Instances
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- S. 9 (e) — Validity of judgment debt — Court whether can go behind the decree
Cal 341 A

- S. 9 (e) — Act of insolvency — Property remaining attached for not less than 21 days — Creditor himself can move for initiating insolvency proceedings
Cal 341 C

- Ss. 9 (e), 12 (2) — Execution of a decree by attachment — Analogy of secured creditor cannot be extended
Cal 341 D

- S. 12 (2) — See Ibid, S. 9 (e)
Cal 341 D

Provincial Insolvency Act (5 of 1920)

- Ss. 6 (g) and 9 (c) — Act of insolvency by debtor — Subsequent payment by him — Effect of
Pat 259 B

- S. 9 (c) — See also Ibid, S. 6 (g)
Pat 259 B

- S. 9 (c) — Limitation — Initial act of insolvency committed — Subsequent act of insolvency whether provides fresh starting point of limitation
Pat 259 A

- S. 25 — Insolvency petition — Grounds for dismissal — Collusion between creditor and debtor can be a ground
Pat 259 C

PUBLIC SAFETY**—Maintenance of Internal Security Act (26 of 1971)**

- S. 3 — Inordinate delay in passing order of detention after the occurrence of the theft on the basis of which the detaining authority professed to be "satisfied" about the necessity of the detention — Held, The bona fides of the "satisfaction" was not established
SC 1722

- Ss. 3 and 8 — Detention — Grounds of detention supplied, clear and specific and having clear nexus with object of detention — Detention held valid
SC 1631

- S. 8 — See Ibid, S. 3 SC 1631

Railways Act (9 of 1890)

- Ss. 28, 54 — Restriction on booking of coal in 'smalls' — Similar restriction not imposed on booking of other articles — Validity
Cal 316

- Ss. 47, 87 — Rules framed under — S. R. 229 (3) (b) — Level Crossings — Duty to close gates of level crossings when trains pass — Neglect to close the gates — Liability of Railway for accident
Punj 259 B

- S. 54 — See Ibid, S. 28 Cal 316

- S. 87 — See Ibid, S. 47 Punj 259 B

Rajasthan Minor Mineral Concession Rules (1959)

- R. 18 Proviso — Failure to execute lease within one month — Power of Government to extend period
Raj 182 C

- R. 18, Proviso — Satisfaction of Government — Order of Government is administrative resting upon subjective satisfaction of Government
Raj 182 D

- R. 18, Proviso — Extension of period for execution of lease — Consideration
Raj 182 E

- R. 18, Proviso — Satisfaction of Government — Whether express statement necessary
Raj 182 F

- R. 59 — See Ibid, R. 18, Proviso
Raj 182 F

Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950)

- See under Houses and Rents.

Religious and Charitable Endowments.

- Dedication — What constitutes valid dedication to God — See Pat 246 (Pt. B)

Representation of the People Act (43 of 1951)

- S. 83 (1) (b) — See Ibid, S. 123 (2)
Pat 267

- S. 116-A — Appeal to Supreme Court — Findings of fact — Interference
SC 1718 D

- S. 123 — Corrupt practice — Proof — Benefit of doubt
SC 1612 A

- S. 123 (1) — Corrupt practice — 'Bribery' — What constitutes — Payment or offer to an important person in an area to 'work' for a candidate is not covered. Decision of Gauhati High Court, Reversed
SC 1612 F

- S. 123 (1) — Corrupt practice — Bribery — Evidence and proof
SC 1718 C

- S. 123 (1) (A) (a) and (b) — Money paid by one candidate to another candidate to retire from contest and for canvassing — Person paying such money is not guilty of corrupt practice within S. 123 (1) (A) (b) — Ele. Petn. No. 22 of 1972, D/- 11-12-1972 (Madh Pra), Reversed
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Representation of the People Act (contd.)

—S. 123 (2) — Undue influence — Threat — Proof SC 1612 E

—Ss. 123 (2) and 83 (1) (b) — Pleadings and proof — Corrupt practice — Names of only some of the voters said to have been prevented by force from casting vote mentioned in Schedule to election petition — Voters not so mentioned cannot be allowed to be examined to give specific evidence Pat 267

—S. 123 (3) and (3A) — Election challenged on ground of corrupt practice under S. 123 (3) and (3A) — Printing and distribution of offending matter proved to have been done at the instance of successful candidate — Election set aside — Ele. Petn. No. 38 of 1972, D/- 16-2-1973 (Punjab and Har), Reversed SC 1627

—S. 123 (3) — Corrupt practice — Religious appeal — Inscription of name or caste suffix in posters or pamphlets is not religious appeal — Decision of Gauhati High Court, Reversed SC 1612 B

—S. 123 (3) — Corrupt practice — Appeal by a Muslim candidate that his mother is a Kachar Hindu and so he may be taken as a Hindu — Held not a religious or communal appeal — Decision of Gauhati High Court, Reversed SC 1612 C

—S. 123 (3) — Religious or communal appeal — Calling rival candidate a "revolutionary communist" is not an appeal in the name of religion SC 1612 D

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—R. 38 (1) (2) — See Ibid, R. 56 (2) (h) SC 1718 B

—Rr. 56 (2) (h) and 38 (1) and (2) — Rejection of ballot paper — It cannot be rejected on ground that signature or thumb impression of the voter had not been taken on counterfoil as required by R. 38 (2) — R. 56 (2) (h) makes non-compliance with R. 38 (1) a ground for rejecting ballot paper SC 1718 B

—R. 93 — Inspection of election papers — When to be ordered SC 1718 A

Sale of Goods Act (3 of 1930)

—S. 19 — See Contract Act (1872), S. 2 (h) Mad 292 C

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—S. 5 (1) — See Constitution of India, Art. 286 (1) (b) SC 1652

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—Ss. 6 (1A), 8 (2A) — Central Sales Tax (Amendment) Act (1969), S. 10 — Power of Sales Tax Officers to rectify assessment orders after the coming into force of Amendment Act of 1969 SC 1604 C

—S. 8 (2) (a) — Validity — Adoption by Parliament of rate of sales-tax in respect of intra-State sales to inter-State sales — Whether abdication of legislative function SC 1604 A

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—R. 38 — "Any order" — Rectified order is included SC 1604 D

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—S. 22 — Suit for specific performance of contract for sale pending when Act came into force — Relief of delivery of possession neither claimed in the plaint nor granted in the decree — Executing court if can grant delivery of possession Delhi 155 A

—S. 22 — Object of — Avoidance of multiplicity of proceedings Delhi 155 C

—S. 38 — See

(1) Civil P. C. (1908), S. 91 All 341 B

(2) Hindu Law — Alienation of Andh Pra 250

—S. 39 — See Civil P. C. (1908), S. 91 All 341 B

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—S. 30 — See Ibid, S. 102 Cal 323

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—S. 103 — See Ibid, S. 102 Cal 323

—S. 140 — See Ibid, S. 102 Cal 323

—S. 372 — Rules framed under Act, R. 13-A — Succession certificate to guardian of minor without his being appointed as such — Condition of appointment as guardian prescribed by R. 13-A when may be dispensed with Andh Pra 267

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—S. 3 (c) — Definition of land in consonance with Entry 18 of List II, Sch. 7 of Constitution — Act is intra vires the State Legislature Andh Pra 262 A

—S. 3 (c) — 'Capable of being used for agriculture' — Meaning of Andh Pra 262 B

—S. 3 (c) — Question whether land is 'capable of being used for agriculture' — Registration of land as 'agricultural land' is not determinative of the question Andh Pra 262 C

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—Bombay Tenancy and Agricultural Lands Act (67 of 1948)

—S. 32-F — See Civil P. C. (1908), S. 11 Bom 233

—S. 32-G — See Civil P. C. (1908), S. 11 Bom 233

—U. P. Consolidation of Holdings Act (5 of 1954)

—Ss. 9, 11-A, 12, 48 — Non-filing of objection under S. 9 (2) within prescribed time — Effect of — Application purporting to be under Section 12 filed long after publication of notice under S. 9 (1) — Delay in preferring objection not explained — Prayer to treat application as one under S. 9 rejected — Rejection upheld in revision — No error of law — Revisional order, not interfered under Art. 226 of Constitution SC 1716

—S. 11-A — See Ibid, S. 9 SC 1716

—S. 12 — See Ibid, S. 9 SC 1716

—S. 48 — See Ibid, S. 9 SC 1716

—U. P. Zamindari Abolition and Land Reforms Act (I of 1951)

—Chap. IX-A, (Ss. 240A to 240M) — See Ibid, S. 240J All 324 A (FB)

—S. 240-F and Rule 193-E — Manner of publication of compensation statement All 324 B (FB)

—S. 240-J and Chap. IXA (Ss. 240-A to 240-M) — Finality of compensation statement — Statement if and when can be challenged in collateral proceedings — Principle of res judicata — Applicability — ILR (1966) 2 All 580, Overruled All 324 A (FB)

—U. P. Zamindari Abolition and Land Reforms Rules (1952)

—R. 193-E (1) — See Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1951), S. 240F All 324 B (FB)

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Transfer of Property Act (4 of 1882)

—S. 6 (dd) — See Civil P. C. (1908), S. 60 (1) (n) Mad 267

—S. 41 — Benami transaction — Tests for determining whether transaction is benami, indicated Mad 278 A

—S. 52 — Doctrine of lis pendens applies to property directly involved in the earlier suit Ker 155

—S. 53-A — See Hindu Law — Alienation of Andh Pra 250

—S. 58 (c) — Sale or mortgage by conditional sale Mad 282

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—Ss. 105, 108 — Attornment — What amounts to Raj 190

—S. 108 — See Ibid, S. 105 Raj 190

—S. 116 — See Houses and Rents — C. P. and Berar Letting of Houses and Rent Control Order (1949), Cl. 13 Bom 218

—S. 123 — Proof of some act on the part of the donor showing that he has parted with possession is sufficient Ker 150 C

—S. 129 — Gifts — Saving of Muhammadan Law — Distinction between secular and non-secular gifts not valid — Oral gift — Subsequent document need not be registered. AIR 1972 Ker 27, Dissented from. AIR 1936 Rang 430 (FB) held no longer good law. Andh Pra 271 A

U. P. Consolidation of Holdings Act (5 of 1954) See under Tenancy Laws.

U. P. Industrial Disputes Act (28 of 1947)

—S. 6-S (e) and 6-T — Illegal strike — Strike between commencement and conclusion of proceedings before the Tribunal SC 1689 A

—S. 6-T — See Ibid, S. 6-S (e) SC 1689 A

—Sch. I, Item 3 — See Industrial Disputes Act (1947), S. 15 SC 1689 C

U. P. Municipalities Act (2 of 1916)

See under Municipalities.

U. P. Nagar Mahapalika Adhiniyam (2 of 1959)

See under Municipalities.

U. P. Sugar Control Order (1966)

—Cls. 3 to 5 — See Constitution of India, Art. 226 All 344 (FB)

U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972)

See under Houses and Rents.

U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules (1972)

See under Houses and Rents.

U. P. Zamindari Abolition and Land Reforms Act (I of 1951)

See under Tenancy Laws.

U. P. Zamindari Abolition and Land Reforms Rules (1952)

See under Tenancy Laws.

Wealth Tax Act (27 of 1957)

—S. 17 — See Constitution of India, Art. 226 Cal 348 C
W. B. Land Development and Planning Act (21 of 1948)

—S. 8 (1) Proviso Cl. (b), Second para (as amended by Amending Act, 1955) — Validity — Does not get protection of Art. 31-B

Cal 325 A
 —S. 8 (1) Proviso, Cl. (b), Second para (as amended by Amending Act, 1955) — Validity — Violates Art. 14 Cal 325 B

W. B. Land Development and Planning Act (contd.)

—S. 8 (2) — Validity — Provision depriving owner of land of his right to solatium under S. 23 (2) of Land Acquisition Act — It violates Art. 14 Cal 325 C

Words & Phrases

—Word 'badchalan' — Does not merely mean misbehaviour but it connotes unchastity All 337 A

**LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM
 ETC. IN A. I. R. 1975 SEPTEMBER**

**Diss. = Dissented From in; Not F. = Not Followed in; Over = Overruled in;
 Revers. = Reversed in.**

ALLAHABAD

ILR (1966) 2 All 580 — Over. AIR 1975 All 324 A (FB)

1968 All LJ 704 — Over. AIR 1975 All 315 (FB)

1968 All WR 114 — Over. AIR 1975 All 315 (FB)

(1973) Spl. Appeal No. 2 of 1973, D/- 13-2-1973 (All) — Over. AIR 1975 All 344 (FB)

BOMBAY

AIR 1958 Bom 1 = 59 Bom LR 860 — Diss. AIR 1975 Him Pra 43 A (FB)

AIR 1959 Bom 443 = 61 Bom LR 143 — Diss. AIR 1975 Kant 162.

(1971) Spl. Appln. No. 2780 of 1971, D/- 20-12-1971 (Bom) — Revers. AIR 1975 SC 1725

CALCUTTA

ILR (1943) 1 Cal 250 = 47 Cal WN 627 — Diss. AIR 1975 Kant 162

AIR 1961 Cal 1 = 65 Cal WN 361 (SB) — Held impliedly overruled in AIR 1966 SC 447. AIR 1975 Punj 265 B (FB)

DELHI

(1972) Judgment of Delhi High Court, D/- 16-6-1972 — Revers. AIR 1975 Delhi 149.

KERALA

AIR 1972 Ker 27 = 1971 Ker LJ 659 — Diss. AIR 1975 Andh Pra 271 A.

MADHYA PRADESH

(1972) Ele. Petn. No. 22 of 1972, D/- 11-12-1972 (Madh Pra) — Revers. AIR 1975 SC 1634 A

MADRAS

AIR 1915 Mad 63 (Pt. B) = 1 Mad LW 704 — Over. AIR 1975 Mad 275 (FB)

Madras (contd.)

AIR 1935 Mad 815 (Pt. B) = 69 Mad LJ 264 — Not F. in view of AIR 1917 Mad 79 (2) and AIR 1924 Mad 22. AIR 1975 Mad 267.

(1968) S. A. No. 698 of 1963, D/- 25-1-1968 (Mad) — Revers. AIR 1975 Mad 273 (FB).

ORISSA

(1960) 26 Cut LT 187 = (1960) 2 Orissa JD 56 — Over. AIR 1975 Orissa 146 B (FB)

AIR 1961 Orissa 15 = 26 Cut LT 216 — Over. AIR 1975 Orissa 146 B (FB)

PUNJAB

(1961) Civ. Revn. No. 648 of 1960, D/- 6-4-1961 (Punj) — Diss. AIR 1975 Him Pra 43 A (FB)

(1962) 64 Pun LR 467 = ILR (1962) 2 Punj 108 — Diss. AIR 1975 Him Pra 43 A (FB)

(1969) L. P. A. Nos. 53-55 of 1965, D/- 18-11-1969 (Punj) — Revers. AIR 1975 SC 1652

1970 Serv. LR 889 = 73 Pun LR 364 — Diss. AIR 1975 Him Pra 42

(1971) Cri. Appeal No. 1034 of 1969, D/- 10-2-1971 (Punj) — Revers. AIR 1975 SC 1674 A, B.

(1973) Ele. Petn. No. 38 of 1972, D/- 16-2-1973 (Punj) — Revers. AIR 1975 SC 1627

(1974) Cri. Appeal No. 778 of 1973, D/- 19-2-1974 (Punj) — Revers. AIR 1975 SC 1727

MISCELLANEOUS

AIR 1936 Rang 430 = ILR 14 Rang 439 (FB) — Held no longer good law. AIR 1975 Andh Pra 271 A

(1968) 2 All ER 545 = (1968) 2 WLR 1471 — Diss. AIR 1975 Ker 158 A

ERRATA

AIR 1975 Patna 267 (Sept)

(1) Substitute the following for the existing headnote:

“(A) Representation of the People Act (1951), Ss. 123 (2) and 83 (1) (b) — Corrupt practice under S. 123 (2) — Pleadings and proof — Allegation that voters were prevented from casting vote. — Names of only some of the voters said to have been prevented by force from casting votes, mentioned in Schedule to election petition. — Voters; not so mentioned cannot be allowed to be examined to give

specific evidence: M. J. C. No. 36 of 1954, D/- 12-4-1955 (Pat) — AIR 1961 Pat. 189. and 21 Elec. L. R. 121 (Pat), Rel. on. (1954) 10 E.L.R. 245 (Mad.), 1969 Doabias Ele. Cases 116 (SC), A. I. R. 1972 S. C. 359 and A. I. R. 1973 S. C. 2158, Disting. (Paras 8, 14)

(2) On Page 270, Col. 2, Line 3 from the top, read ‘not’ after word ‘must’.

(3) For the existing remark at the end of the judgment on page 270, Col. 2, read ‘Order accordingly’.

COMPARATIVE TABLE

(10-8-1975)

1975 SEPTEMBER

All India Reporter — Other Journals

AIR 1975 S C		AIR 1975 Andh Pra		AIR 1975 Him Pra		AIR 1975 Madras	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1604	1975 S C O (Tax) 78 (1975) 8 S C O 585	254	---	85	ILR (1974) Him Pra 905	261	(1974) 2 Mad L J 222
1612	---	257	---	40	ILR (1974) Him Pra 784	263	87 Mad L W 895 (1974) 2 Mad L J 286
1627	1975 Cur L J 276	262	1975 Andh L T 45	42	ILR (1974) Him Pra 748	267	87 Mad L W 899 88 Mad L W 86 (2) (1975) 2 Mad L J 12
1681	1975 U J (S O) 185	267	(1975) 1 Andh Pra L J 126	48(FB)	---	270(FB)	88 Mad L W 285
1682	1975 U J (S O) 252	269	(1975) 1 Andh Pra L J 70	AIR 1975 Karnataka		273(FB)	88 Mad L W 282
1688	1975 S C O (Ori) 368	271	---	AIR	Other Journals	275(FB)	88 Mad L W 129 (1975) 1 Mad L J 359
1684	---	AIR 1975 Bombay		162	(1975) 1 Kant L J 508	278	88 Mad L W 54
1689	(75) 80 Fac L R 391	AIR	Other Journals	166	(1975) 1 Kant L J 895	282	(1974) 2 Mad L J 860
1646	---	218	1975 Mah L J 186	171	(1975) 1 Kant L J 401	285	87 Mad L W 868
1652	---	225	1975 Mah L J 774	174	(1975) 1 Kant L J 28	286	88 Mad L W 64
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1685	1975 Serv L C 418	233	(75) 77 Bom L R 141	186	ILR (1975) Kant 25 (1974) 2 Kant L J 371	308	87 Mad L W 841
1685	(1975) 1 S C O 847	237	(75) 77 Bom L R 289	188	ILR (1974) Kant 1818	AIR 1975 Orissa	
1685	1975 S C O (Ori) 288	1975 Mah L J 883		188	(1974) 2 Kant L J 228	AIR	Other Journals
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1685	(1975) 1 S C W R 617	316	78 Cal W N 884	147	ILR (1975) 1 Ker 279	AIR 1975 Patna	
1689	(75) 47 F J R 350	322	---	150	---	AIR	Other Journals
1689	---	328	(1975) 1 Cal L J 518	155	---	241	---
1708	1975 S C O (Ori) 489	328	78 Cal W N 818	158	ILR (1974) 1 Ker 459	246	---
1708	---	328	(1975) 1 Cal L J 452	158	ILR (1974) 1 Ker 504	249	---
1716	---	328	78 Cal W N 598	AIR 1975 Madh Pra		259	---
1718	---	332	---	AIR	Other Journals	262	---
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1728	---	337	(1975) 1 Cal L J 801	189	1975 M P L J 842	270	---
1725	---	341	---	189	1975 Jab L J 468	272	---
1727	---	347	(1975) 1 Cal L J 234	189	1975 M P L J 413	AIR 1975 Punjab	
AIR 1975 Allahabad		348	---	AIR 1975 Madras		AIR	Other Journals
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835	---	159	---	AIR 1975 Madras		182	1974 Raj L W 830
837	(1975) 1 All L R 818	164	---	AIR 1975 Madras		190	1975 Raj L W 86
841	---	168	---	AIR 1975 Madras			
844(FB)	---	175	---	AIR 1975 Madras			
AIR 1975 Andh Pra		AIR 1975 Gujarat		AIR 1975 Madras			
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(c) in clause (13A), for the words "three hundred rupees", the words "four hundred rupees" shall be substituted;

(d) in clause (14), the following *Explanation* shall be inserted, and shall be deemed always to have been inserted, at the end, namely:—

Explanation.—For the removal of doubts, it is hereby declared that any allowance granted to the assessee to meet his personal expenses at the place where the duties of his office or employment of profit are ordinarily performed by him or at the place where he ordinarily resides shall not be regarded, for the purposes of this clause, as a special allowance granted to meet expenses wholly, necessarily and exclusively incurred in the performance of such duties;"]

(e) clause (27) shall be omitted with effect from the 1st day of April, 1976.

4. Amendment of section 32.

In section 32 of the Income-tax Act, in clause (i) of sub-section (1) after the proviso, the following proviso shall be inserted, namely:—

"Provided further that no deduction shall be allowed under this clause or clause (iii) in respect of any motor car manufactured outside India, where such motor car is acquired by the assessee after the 28th day of February, 1975 and is used otherwise than in a business of running it on hire for tourists;".

5. Amendment of section 33A.

In section 33A of the Income-tax Act, the following *Explanation* shall be inserted, and shall be deemed always to have been inserted, at the end, namely:—

Explanation.—For the purposes of this section, an assessee having a leasehold or other right of occupancy in any land shall be deemed to own such land and where the assessee transfers such right he shall be deemed to have sold or otherwise transferred such land."

6. Amendment of section 40A.

In section 40A of the Income-tax Act,—

(a) after sub-section (6), the following sub-section shall be inserted, and shall be deemed to have been inserted, with effect from the 1st day of April, 1973, namely:—

(7) (a) Subject to the provisions of clause (b), no deduction shall be allowed in respect of any provision (whether called as such or by any other name) made by the assessee for the payment of gratuity to his employees on their retirement or on termination of their employment for any reason.

(b) Nothing in clause (a) shall apply in relation to—

(i) any provision made by the assessee for the purpose of payment of a sum by way of any contribution towards an approved gratuity fund, or for the purpose of payment of any gratuity, that has become payable during the previous year;

(ii) any provision made by the assessee for the previous year relevant to any assessment year commencing on or after the 1st day of April, 1973 but before the 1st day of April, 1976, to the extent the amount of such provision does not exceed the admissible amount, if the following conditions are fulfilled, namely:—

(1) the provision is made in accordance with an actuarial valuation of the ascertainable liability of the assessee for payment of gratuity to his employees on their retirement or on termination of their employment for any reason;

(2) the assessee creates an approved gratuity fund for the exclusive benefit of his employees under an irrevocable trust, the application for the approval of the fund having been made before the 1st day of January, 1976; and

(3) a sum equal to at least fifty per cent. of the admissible amount, or where any amount has been utilised out of such provision for the purpose of payment of any gratuity before the creation of the approved gratuity fund, a sum equal to at least fifty per cent. of the admissible amount as reduced by the amount so utilised, is paid by the assessee by way of contribution to the approved gratuity fund before the 1st day of April, 1976 and the balance of the admissible amount or, as the case may be, the balance of the admissible amount as reduced by the amount so utilised, is paid by the assessee by way of such contribution before the 1st day of April, 1977.

Explanation 1.—For the purpose of sub-clause (ii) of clause (b) of this sub-section, "admissible amount" means the amount of the provision made by the assessee for the payment of gratuity to his employees on their retirement or on termination of their employment for any reason, to the extent such amount does not exceed an amount calculated at the rate of eight and one-third per cent. of the salary [as defined in clause (b) of rule 2 of Part A of the Fourth Schedule] of each employee entitled to the payment of such gratuity for each year of his service in respect of which such provision is made.

Explanation 2.—For the removal of doubts it is hereby declared that where any provision made by the assessee for the payment of gratuity to his employees on their

retirement or on termination of their employment for any reason has been allowed as a deduction in computing the income of the assessee for any assessment year, any sum paid out of such provision by way of contribution towards an approved gratuity fund or by way of gratuity to any employee shall not be allowed as a deduction in computing the income of the assessee of the previous year in which the sum is so paid."

(b) after sub-section (7) as so inserted, the following sub-section shall be inserted, with effect from the 1st day of April, 1976, namely :—

"(8) Where the assessee, being a company (other than a banking company or a financial company), incurs any expenditure by way of interest in respect of any deposit received by it, fifteen per cent. of such expenditure shall not be allowed as a deduction.

Explanation. — In this sub-section,—

(a) "banking company" means a company to which the Banking Regulation Act, 1949 applies and includes any bank or banking institution referred to in section 51 of that Act;

(b) "deposit" means any deposit of money with, and includes any money borrowed by, a company, but does not include any amount received by the company—

(i) from the Central Government or any State Government or any local authority, or from any other source where the repayment of the amount is guaranteed by the Central Government or a State Government;

(ii) from the Government of a foreign State, or from a citizen of a foreign State, or from any institution, association or body (whether incorporated or not) established outside India;

(iii) as a loan from a banking company or from a co-operative society engaged in carrying on the business of banking (including a co-operative land mortgage bank or a co-operative land development bank);

(iv) as a loan from any institution or body specified in the list in the Tenth Schedule or such other institution or body as the Central Government may, having regard to the nature and objects of the institution or body, by notification in the Official Gazette, specify in this behalf;

(v) from any other company;

(vi) from an employee of the company by way of security deposit;

(vii) by way of security or as an advance from any purchasing agent, selling agent or other agent in the course of, or for the purpose of, the business of the company or as advance against orders for the supply of goods or for the rendering of any service;

(viii) by way of subscription to any share, stock, bond or debenture (such bond or debenture being secured by a charge or a lien on the assets of the company) pending the allotment of the said share, stock, bond or debenture, or by way of advance payment of any moneys uncalled and unpaid upon any shares in the company, if such moneys are not repayable in accordance with the articles of association of the company;

(ix) as a loan from any person where the loan is secured by the creation of a mortgage, charge or pledge of any assets of the company (such loan being hereafter in this sub-clause referred to as the relevant loan) and the amount of the relevant loan, together with the amount of any other prior debt or loan secured by the creation of a mortgage, charge or pledge of such assets, is not more than seventy-five per cent. of the price that such assets would ordinarily fetch on sale in the open market on the date of creation of the mortgage, charge or pledge for the relevant loan;

(c) "financial company" means—

(i) a hire-purchase finance company, that is to say, a company which carries on, as its principal business, hire-purchase transactions or the financing of such transactions; or

(ii) an investment company, that is to say, a company which carries on, as its principal business, the acquisition of shares, stock, bonds, debentures, debenture stock, or securities issued by the Government or a local authority, or other marketable securities of a like nature; or

(iii) a housing finance company, that is to say, a company which carries on, as its principal business, the business of financing of acquisition or construction of houses, including acquisition or development of land in connection therewith;

(iv) a loan company, that is to say, a company [not being a company referred to in sub-clauses (i) to (iii)] which carries on, as its principal business, the business of providing finance, whether by making loans or advances or otherwise;

(v) a mutual benefit finance company, that is to say, a company which carries on, as its principal business, the business of acceptance of deposits from its members and which is declared by the Central Government under section 20A of the Companies Act, 1956 to be a Nidhi or Mutual Benefit Society;

(vi) a miscellaneous finance company, that is to say, a company which carries on exclusively, or almost exclusively, two or more classes of business referred to in the preceding sub-clauses.

7. Amendment of section 43.

In section 43 of the Income-tax Act, in the proviso to clause (1), after the words, figures and letters "the 31st day of March 1967", the words, figures and letters, "but before the 1st day of March 1975"; shall be inserted.

8. Insertion of new section 44B.

In the Income-tax Act, after section 44A, the following section shall be inserted with effect from the 1st day of April 1976, namely :—

Special provision for computing profits and gains of shipping business in the case of non-residents.

"44B. (1) Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, engaged in the business of operation of ships, a sum equal to seven and a half per cent. of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

(2) The amounts referred to in sub-section (1) shall be the following, namely :—

(i) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the carriage of passengers, live-stock, mail or goods shipped at any port in India ; and

(contd. on col. 2)

- (a) where such aggregate does not exceed Rs. 4,000
- (b) where such aggregate exceeds Rs. 4,000 but does not exceed Rs. 10,000
- (c) where such aggregate exceeds Rs. 10,000

11. Insertion of new section 80FF.

In the Income-tax Act, after section 80F, the following section shall be inserted, with effect from the 1st day of April, 1976, namely :—

Deduction in respect of expenses on higher education in certain cases.

"80FF. (1) Where an individual who is a citizen of India and whose gross total income does not exceed twelve thousand rupees, has expended any sum during the previous year out of his income chargeable to tax for the full time education of a dependent, he shall, in accordance with and subject to the provisions of this section, be allowed a deduction of the amount specified in sub-

(ii) the amount received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, live-stock, mail or goods shipped at any port outside India."

9. Amendment of section 52.

In section 52 of the Income-tax Act, in sub-section (2), the following proviso shall be inserted, and shall be deemed to have been inserted, with effect from the 1st day of April 1974, namely :—

"Provided that this sub-section shall not apply in any case—

(a) where the capital asset, is transferred to the Government, or

(b) where the full value of the consideration for the transfer of the capital asset is determined or approved by the Central Government or the Reserve Bank of India and the adequacy of the full value of the consideration so determined or approved is not questioned by the assessee."

10. Amendment of section 80C.

In section 80C of the Income-tax Act, for sub-section (1), the following sub-section shall be substituted with effect from the 1st day of April 1976, namely :—

"(1) In computing the total income of an assessee, there shall be deducted, in accordance with and subject to the provisions of this section, an amount calculated, with reference to the aggregate of the sums specified in sub-section (2), at the following rates, namely :—

The whole of such aggregate ;

Rs. 4,000 plus 50 per cent. of the amount by which such aggregate exceeds Rs. 4,000 ;

Rs. 7,000 plus 40 per cent of the amount by which such aggregate exceeds Rs. 10,000."

section (2) in the computation of his total income.

(2) The amount referred to in sub-section (1) shall be—

(i) in a case where the individual has a dependent undergoing a degree or post-graduate course in medicine (including surgery and obstetrics) or architecture or engineering or technology or business management, one thousand rupees in respect of each such dependent; and

(ii) in a case where the individual has a dependent undergoing a diploma course in medicine (including surgery and obstetrics) or architecture or engineering or technology or business management, or undergoing any degree or post-graduate course other than a

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degree or post-graduate course referred to in clause (i), five hundred rupees in respect of each such dependent :

Provided that where the individual has, during the previous year, incurred expenditure on the education of more than two dependents as aforesaid, the deduction under sub-section (1) shall be allowed only with reference to two such dependents as may be chosen by him.

Explanation. — For the purposes of this sub-section,—

(a) "dependent," in relation to an individual, means a child brother or sister of the individual, wholly or mainly dependent on the individual;

(b) "degree course," "post-graduate course" and "diploma course" include respectively any course of study for obtaining a qualification, which though not described as a degree or post-graduate qualification or diploma, is recognised for purposes of employment under the Central Government as equivalent to a degree, post-graduate qualification or diploma.

12. Amendment of section 80J.

In section 80J of the Income-tax Act,—

(a) in sub-section (1), the following proviso shall be inserted at the end with effect from the 1st day of April, 1976, namely:—

'Provided that in relation to the profits and gains derived by an assessee, being a company, from an industrial undertaking which begins to manufacture or produce articles or to operate its cold storage plant or plants after the 31st day of March, 1976, or from a ship which is first brought into use after that date, or from the business of a hotel which starts functioning after that date, the provisions of this sub-section shall have effect as if for the words "six per cent.", the words "seven and a half per cent." had been substituted.'

(b) in sub-section (4),—

(i) in clause (ii), the words and brackets "a building (not being a building taken on rent or lease)," shall be omitted with effect from the 1st day of April, 1976;

(ii) in clause (iii), for the words "twenty-eight years," the words "thirty-three years" shall be substituted;

(iii) the following proviso and Explanations shall be inserted at the end with effect from the 1st day of April, 1976, namely:—

"Provided further that, where any building or any part thereof previously used for any purpose is transferred to the business of the industrial undertaking, the value of the building or part so transferred shall not be

taken into account in computing the capital employed in the industrial undertaking.

Explanation 1. — For the purposes of clause (ii) of this sub-section, any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely:—

(a) such machinery or plant was not, at any time, previous to the date of the installation by the assessee, used in India;

(b) such machinery or plant is imported into India from any country outside India; and

(c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of the Indian Income-tax Act, 1922 or this Act in computing the total income of any person for any period prior to the date of the installation of the machinery or plant by the assessee.

Explanation 2. — Where in the case of an industrial undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent. of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with and the total value of the machinery or plant or part so transferred shall not be taken into account in computing the capital employed in the industrial undertaking."

(c) in sub-section (b), in clause (iii), for the words "twenty-eight years," the words "thirty-three years" shall be substituted;

(d) in sub-section (3),—

(i) for clause (a), the following clause shall be substituted, namely:—

"(a) the business of the hotel is not formed by the splitting up, or the reconstruction, of a business already in existence or by the transfer to a new business of a building previously used as a hotel or of any machinery or plant previously used for any purpose;"

(ii) after clause (d), the following clause shall be inserted, namely:—

"(e) the business of the hotel starts functioning on or after the 1st day of April, 1981, but before the 1st day of April, 1981;"

(iii) for the *Explanation*, the following *Explanation* shall be substituted, with effect from the 1st day of April, 1976, namely:—

Explanation. — Where in the case of the business of a hotel, any building, or any part

thereof previously used as a hotel, or any machinery or plant, or any part thereof, previously used for any purpose, is transferred to a new business and the total value of the building, machinery or plant or part so transferred does not exceed twenty per cent of the total value of the building, machinery or plant used in the business, then, for the purposes of clause (a) of this sub-section, the condition specified therein shall be deemed to have been complied with and the total value of the building, machinery or plant or part so transferred shall not be taken into account in computing the capital employed in the business of the hotel.”

(e) after sub-section (3), the following sub-sections shall be inserted with effect from the 1st day of April, 1976, namely:—

(6A) Where the assessee is a person other than a company or a co-operative society, the deduction under sub-section (1) from profits and gains derived from an industrial undertaking shall not be admissible unless the accounts of the industrial undertaking for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the *Explanation* below sub-section (2) of section 288, and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant.

(6B) Where any goods held for the purposes of the business of the industrial undertaking or the hotel or the operation of the ship are transferred to any other business carried on by the assessee, or where any goods held for the purposes of any other business carried on by the assessee are transferred to the business of the industrial undertaking or the hotel or the operation of the ship and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the business of the industrial undertaking or the hotel or the operation of the ship does not correspond to the market value of such goods as on the date of the transfer, then, for the purposes of the deduction under this section the profits and gains of the industrial undertaking or the business of the hotel or the operation of the ship shall be computed as if the transfer, in either case, had been made at the market value of such goods as on that date:

Provided that where, in the opinion of the Income-tax Officer, the computation of the profits and gains of the industrial undertaking or the business of the hotel or the operation of the ship in the manner hereinbefore specified presents exceptional difficulties, the Income-tax Officer may compute such profits

and gains on such reasonable basis as he may deem fit.

Explanation.—In this sub-section, “market value”, in relation to any goods, means the price that such goods would ordinarily fetch on sale in the open market.

(6C) Where it appears to the Income-tax Officer that, owing to the close connection between the assessee carrying on the business of the industrial undertaking or the hotel or the operation of the ship to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in the business of the industrial undertaking or the hotel or the operation of the ship, the Income-tax Officer shall, in computing the profits and gains of the industrial undertaking or the hotel or the ship for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom’.

13. Insertion of new section 80JJ.

In the Income-tax Act, after section 80J, the following section shall be inserted with effect from the 1st day of April, 1976, namely:—

Deduction in respect of profits and gains from business of live-stock breeding or poultry or dairy farming.

“80JJ. Where the gross total income of an assessee includes any profits and gains derived from a business of live-stock breeding, or poultry or dairy farming, there shall be allowed, in computing the total income of the assessee, a deduction as specified hereunder, namely:—

(a) in a case where the amount of such profits and gains does not exceed, in the aggregate, ten thousand rupees, the whole of such amount; and

(b) in any other case, one-third of the aggregate amount of such profits and gains or ten thousand rupees, whichever is higher.”.

14. Amendment of section 80K.

In section 80K of the Income-tax Act, the following proviso shall be inserted at the end, namely:—

‘Provided that no deduction under this section shall be allowed in respect of any income by way of dividends which is attributable to the profits and gains derived by the company from an industrial undertaking which begins to manufacture or produce articles or to operate its cold storage plant or plants after the 31st day of March, 1976 or

from a ship which is first brought into use after that date or from the business of a hotel which starts functioning after that date."

15. Amendment of section 80M.

In section 80M of the Income-tax Act, in sub-section (1), for clauses (a) and (b), the following clauses shall be substituted with effect from the 1st day of April, 1976, namely:—

"(a) where the assessee is a domestic company—

(i) in respect of such income the whole of by way of dividends from a such in. company formed and registered come; under the Companies Act, 1956 after the 28th day of February, 1975 and engaged exclusively or almost exclusively in the manufacture or production of any one or more of the articles or things specified in items 11 and 18, item 23 (excluding refractories) and item 24 in the list in the Ninth Schedule

(ii) in respect of such income sixty per cent. of by way of dividends other than such in. the dividends referred to in sub. clause (i) such in. come;

(b) where the assessee is a sixty-five per cent. of foreign company, in respect of such income by way of dividends such in. come."

16. Amendment of section 80QQ.

In section 80QQ of the Income-tax Act, in sub-section (1), for the words "four assessment years" the words "nine assessment years" shall be substituted.

17 Insertion of new section 80RRA.

In the Income-tax Act, after section 80BB, the following section shall be inserted, namely:—

Deduction in respect of remuneration from foreign employers.

'80RRA. (1) Where the gross total income of an individual who is a citizen of India includes any remuneration received by him from any foreign employer for any service rendered by him outside India, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the individual, a deduction from such remuneration of an amount equal to fifty per cent thereof:

Provided that where the individual renders continuous service outside India under or for the foreign employer for a period exceeding

thirty-six months, no deduction under this section shall be allowed in respect of the remuneration for such service relating to any period after the expiry of the thirty-six months aforesaid.

(2) The deduction under this section shall be allowed—

(i) in the case of an individual who is or was, immediately before undertaking the service under or for the foreign employer, in the employment of the Central Government or any State Government, only if such service is sponsored by the Central Government; and

(ii) in the case of any other individual, only if he is a technician and the contract of service under or for the foreign employer is approved in this behalf by the Central Government or the prescribed authority.

Explanation 1.— In this section, "foreign employer" means,—

(a) the Government of a foreign State; or

(b) a foreign enterprise; or

(c) any association or body established outside India.

Explanation 2.— For the purposes of this section, "technician" means a person having specialised knowledge and experience in—

(i) constructional or manufacturing operations or mining or the generation or distribution of electricity or any other form of power; or

(ii) agriculture, animal husbandry, dairy farming, deep sea fishing or ship building; or

(iii) public administration or industrial or business management; or

(iv) accountancy; or

(v) any field of natural or applied science (including medical science) or social science; or

(vi) any other field which the Board may prescribe in this behalf,

who is employed by the foreign employer in a capacity in which such specialised knowledge and experience are actually utilised."

18. Substitution of new section for section 106.

In the Income-tax Act, for section 106, the following section shall be substituted, namely:—

Period of limitation for making orders under section 104.

"106. No order under section 104 shall be made at any time after—

(a) the expiry of—

(i) four years from the end of the assessment year relevant to the previous year referred to in sub-section (1) of that section, where such assessment year is an assessment year commencing on or before the 1st day of April, 1974;

(ii) two years from the end of the assessment year relevant to the previous year referred to in sub-section (1) of that section, where such assessment year is an assessment year commencing after the 1st day of April, 1974; or

(b) the expiry of one year from the end of the financial year in which the assessment or re-assessment of the profits and gains of the previous year referred to in sub-section (1) of that section is made, whichever is later;

Provided that the period of limitation specified in this section shall not apply in a case where the company has made an application to the Board under section 107A."

19. Amendment of section 172.

In section 172 of the Income-tax Act, with effect from the 1st day of June, 1975,—

(a) in sub-section (1), the words, "unless the Income-tax Officer is satisfied that there is an agent of the non-resident from whom the tax will be recoverable under the other provisions of this Act" shall be omitted;

(b) in sub-section (2), for the words "one-sixth", the words "seven and a half per cent" shall be substituted.

20. Amendment of section 194A.

(1) In section 194A of the Income-tax Act,—

(a) in sub-section (3),—

(i) for clause (i), the following clause shall be substituted, namely:—

(i) where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year by the person referred to in sub-section (1) to the account of, or to, the payee, does not exceed one thousand rupees;";

(ii) after clause (vii), the following clause shall be inserted, namely:—

"(viii) to such income credited or paid by the Central Government under any provision of this Act or the Indian Income-tax Act, 1922 or the Estate Duty Act, 1953 or the Wealth-tax Act, 1957 or the Gift-tax Act, 1958 or the Super Profits Tax Act, 1963 or the Companies (Profits) Surtax Act, 1964 or the Interest-tax Act, 1974";

(b) after sub-section (3), the following sub-section shall be inserted, namely:—

"(4) The person responsible for making the payment referred to in sub-section (1) may, at the time of making any deduction, increase or reduce the amount to be deducted under this section for the purpose of adjusting any excess or deficiency arising out of any

previous deduction or failure to deduct during the financial year."

(2) Notwithstanding the substitution of clause (i) of sub-section (3) of section 194A of the Income-tax Act by sub-section (1) of this section, nothing in section 201 or section 276B of that Act shall apply to, or in relation to, any failure to deduct income-tax under sub-section (1) of the said section 194A on any income by way of interest other than income chargeable under the head "Interest on securities" credited or paid on or after the 1st day of April 1975 but before the 1st day of June, 1975, where the income so credited or paid at any one time does not exceed four hundred rupees.

21. Amendment of section 195.

In section 195 of the Income-tax Act, in sub-section (1), after the proviso, the following proviso shall be inserted, namely:—

"Provided further that the deduction of income-tax from any sum, being income chargeable under the head "Capital gains" relating to capital assets other than short-term capital assets, paid to a company which is neither an Indian company nor a company which has made the prescribed arrangements for the declaration and payment of dividends within India, shall be of an amount equal to the amount of income-tax on such sum calculated in accordance with the provisions of clause (i) of section 115."

22. Amendment of Ninth Schedule.

In the Income tax Act, in the Ninth Schedule [as directed to be inserted by section 16 of the Direct Taxes (Amendment) Act, 1974], after item 23, the following item and *Explanation* shall be inserted with effect from the 1st day of April, 1976, namely:—

"24. Pesticides.

Explanation.—The article specified in item 24 does not include any formulation of pesticides unless the formulation is prepared by the manufacturer or producer of the basic pesticidal chemicals from which such formulation has been prepared."

23. Insertion of Tenth Schedule.

In the Income-tax Act, the following Schedule shall be inserted at the end with effect from the 1st day of April, 1976, namely:—

"THE TENTH SCHEDULE

[See section 40A (8)]

List of institutions and bodies

1. The Industrial Finance Corporation of India, established under the Industrial Finance Corporation Act, 1948.

2. Financial Corporations or Joint Financial Corporations, established under the State Financial Corporations Act, 1951 and any institution deemed under section 46 of that Act to be a Financial Corporation established by the State Government for the State within the meaning of that Act.

3. The Shipping Development Fund Committee, constituted under section 15 of the Merchant Shipping Act, 1958.

4. The Unit Trust of India, established under the Unit Trust of India Act, 1963.

5. The Industrial Development Bank of India, established under the Industrial Development Bank of India Act, 1984.

6. State Electricity Boards, constituted under the Electricity (Supply) Act, 1948.

7. The Life Insurance Corporation of India, established under the Life Insurance Corporation Act, 1956.

8. The Rehabilitation Industries Corporation of India Limited.

9. The State Trading Corporation of India Limited.

10. The Minerals and Metals Trading Corporation of India Limited.

11. The Rural Electrification Corporation Limited.

12. The Agricultural Finance Corporation Limited.

13. The Industrial Reconstruction Corporation of India Limited.

14. The Industrial Credit and Investment Corporation of India Limited.

15. The National Industrial Development Corporation of India Limited.

16. The State Industrial and Investment Corporation of Maharashtra Limited."

24. Consequential Amendments to certain sections.

(1) The following amendments (being amendments of a consequential nature) shall be made in the Income-tax Act, name'y:—

In section 155,—

(a) in sub-section (5A), the following *Explanation* shall be inserted, and shall be deemed always to have been inserted, at the end, namely:—

"*Explanation.*—For the purposes of this sub-section, where an assessee having any leasehold or other right of occupancy in any land transfers such right, he shall be deemed to have sold or otherwise transferred such land."

(b) after sub-section (12), the following sub-section shall be inserted, namely:—

"(13) Where in the assessment for any year, any provision made by the assessee for

the payment of gratuity to his employees on their retirement or on termination of their employment for any reason has not been allowed as a deduction in the computation of the income of the assessee under the head "Profits and gains of business or profession" on the ground that all the conditions specified in sub-clause (ii) (2) and sub-clause (ii) (3) of clause (f) of sub-section (7) of section 40A had not been complied with before the assessment was made and subsequently the assessee complies with such of those conditions as had not been complied with, the disallowance originally made shall be deemed to have been wrongly made and the Income-tax Officer shall, notwithstanding anything contained in this Act, recompute the total income of the assessee for the relevant previous year and make the necessary amendment; and the provisions of section 154 shall, so far as may be, apply thereto, the period of four years specified in sub-section (7) of that section being reckoned from the end of the financial year ending on the 31st day of March, 1977."

(2) The following amendments (being amendments of a consequential nature) shall be made in the Income-tax Act with effect from the 1st day of April, 1976, namely:—

(a) in sub-clause (ii) of clause (3) of section 17, after the word; brackets, figures and letter "clause (10A)," the word, brackets, figures and letter "clause (10B)," shall be inserted;

(b) in sub-section (3) of section 80A, after the words, figures and letter "or section 80J", the words, figures and letters "or section 80JJ" shall be inserted;

(c) in sub-section (3) of section 80P,—

(i) after the words, figures and letter "or section 80J", the words, figures and letters "or section 80JJ" shall be inserted;

(ii) for the words, figures and letters "section 80HH and section 80J", the words, figures and letters "section 80HH, section 80J and section 80JJ" shall be substituted.

Wealth-tax

25. Amendment of section 2.

In section 2 of the Wealth-tax Act, 1957 (hereinafter referred to as the Wealth-tax Act), for clause (h), the following clause shall be substituted, namely:—

"(h) "company" means a company formed and registered under the Companies Act, 1956 and includes—

(i) a company formed and registered under any law relating to companies formerly in force in any part of India;

(ii) a corporation established by or under a Central, State or Provincial Act;

(iii) any institution, association or body, whether incorporated or not and whether Indian or non-Indian, which the Board may, having regard to the nature and objects of such institution, association or body, declare by general or special order to be a company:

Provided that such institution, association or body shall be deemed to be a company only for such assessment year or assessment years (whether commencing before the 1st day of April, 1975 or on or after that date) as may be specified in the declaration;

(iv) any body corporate incorporated by or under the laws of a country outside India.

26. Amendment of section 4.

In section 4 of the Wealth-tax Act, for sub-section (3), the following sub-section shall be substituted, namely :—

"(3) Where the value of any assets is to be included in the net wealth of an assessee in accordance with clause (a) of sub-section (1),—

(a) there shall be deducted from such value any debts owing on the valuation date by the transferee mentioned in that clause in so far as such debts are referable to such assets; and

(b) the provisions of section 5 shall apply in relation to such assets as if such assets were assets belonging to the assessee."

27. Amendment of section 5.

In section 5 of the Wealth-tax Act,—

(a) in sub-section (1),—

(i) in the second proviso to clause (viii), for the words "twenty-five thousand rupees", the words "thirty thousand rupees" shall be substituted;

(ii) after clause (viii), the following clause shall be inserted with effect from the 1st day of April, 1976, namely :—

"(viii) trees standing on agricultural land, not being trees in an orchard or a plantation;"

(iii) in clauses (xx) and (xxviii), the words "held by the assessee" shall be omitted;

(iv) after clause (xx), the following clause shall be inserted, namely :—

"(xxa) the value of any equity shares in any company of the type referred to in clause (d) of section 45 which is established with the main object of carrying on the business of manufacture or production of any one or more of the articles or things specified in the list in the Ninth Schedule to the Income-tax Act, where such shares form part of the initial issue of equity share capital made by the company after the 28th day of February, 1975,

for a period of five successive assessment-years commencing with the assessment year next following the date on which such shares were first issued;"

(v) in clause (xxiii), for the brackets, words and figures "[not being shares referred to in clause (xx)] held by the assessee," the brackets, words, figures and letter "[not being shares referred to in clause (xx) or clause (xxa)]" shall be substituted;

(b) in the proviso to sub-section (1A), for the words "held by the assessee," the words "owned by the assessee" shall be substituted;

(c) in sub-section (3),

(i) for the brackets and figures "(xix)," the brackets, figures and letter "(xix), (xxa)" shall be substituted;

(ii) for the words "held by him," the words "owned by him" shall be substituted;

(iii) in the Explanation, for the words "ceased to hold," the words "ceased to own" and for the words "held such other asset," the words "has owned such other asset" shall be substituted.

28. Amendment of section 45.

In section 45 of the Wealth-tax Act, after clause (g), the following clause shall be and shall be deemed always to have been, inserted, namely :—

"(h) any company incorporated outside India which has no place of business in India."

Gift-tax

29. Amendment of Act 18 of 1958.

In section 4 of the Gift-tax Act, 1958, in clause (a) of sub-section (1), the following proviso shall be inserted, and shall be deemed to have been inserted, at the end, with effect from the 1st day of April, 1974, namely :—

"Provided that nothing contained in this clause shall apply in any case where the property is transferred to the Government or where the value of the consideration for the transfer is determined or approved by the Central Government or the Reserve Bank of India."

Miscellaneous

30. Amendment of Act 20 of 1974.

In section 18 of the Finance Act, 1974, in clause (a), for the words, figures and letters "the 1st day of June, 1975," the words, figures and letters "the 1st day of January, 1977" shall be substituted.

CHAPTER IV INDIRECT TAXES

31. Auxiliary duties of customs.

(1) In the case of goods mentioned in the First Schedule to the Indian Tariff Act, 1934

(hereinafter referred to as the Tariff Act) or in that Schedule as amended from time to time, there shall be levied and collected as an auxiliary duty of customs an amount equal to twenty per cent. of the value of the goods as determined in accordance with the provisions of section 14 of the Customs Act, 1962 (hereinafter referred to as the Customs Act.)

(2) Sub-section (1) shall cease to have effect after the 30th day of June, 1976, except as respects things done or omitted to be done before such cesser; and section 6 of the General Clauses Act, 1897, shall apply upon such cesser as if the said sub-section had then been repealed by a Central Act.

(3) The auxiliary duties of customs referred to in sub-section (1) shall be in addition to any duties of customs chargeable on such goods under the Customs Act, or any other law for the time being in force.

(4) The provisions of the Customs Act, and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties, shall, as far as may be, apply in relation to the levy and collection of the auxiliary duties of customs leviable under this section in respect of any goods as they apply in relation to the levy and collection of the duties of customs on such goods under that Act or those rules and regulations, as the case may be.

32. Amendment of Act 1 of 1949.

In the Indian Tariff (Amendment) Act, 1949, in sections 4 and 5, for the figures "1973," the figures "1975" shall be substituted.

33. Amendment of Act 1 of 1944.

(1) In the Central Excises and Salt Act, 1944 (hereinafter referred to as the Central Excises Act),—

(a) in section 2, in clause (f) after sub-clause (i) the following sub-clause shall be inserted, namely:—

"(ia) in relation to manufactured tobacco, includes the labelling or re-labelling of containers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer;"

(b) the First Schedule shall be amended in the manner specified in Parts I and II of the Second Schedule.

(2) The amendment made to Item No. 18 in the First Schedule to the Central Excises Act by paragraph (ii) of Part II of the Second Schedule to this Act shall be deemed to have

had effect on and from the 1st day of March, 1975 and accordingly—

(a) refunds shall be made of all duties collected which would not have been collected if the amendment had come into force on that date; and

(b) recoveries shall be made of all duties which have not been collected but which would have been collected if the amendment had so come into force.

34. Auxiliary duties of excise.

(1) In the case of goods mentioned in the First Schedule to the Central Excises Act, or in that Schedule as amended from time to time, there shall be levied and collected as an auxiliary duty of excise an amount equal to twenty per cent. of the value of the goods as determined in accordance with the provisions of section 4 of the Central Excises Act.

(2) Sub-section (1) shall cease to have effect after the 30th day of June, 1976, except as respects things done or omitted to be done before such cesser; and section 6 of the General Clauses Act, 1897, shall apply upon such cesser as if the said sub-section had then been repealed by a Central Act.

(3) The auxiliary duties of excise referred to in sub-section (1) shall be in addition to any duties of excise chargeable on such goods under the Central Excises Act, or any other law for the time being in force.

(4) The auxiliary duties of excise leviable under sub-section (1) in the financial year 1975-76 shall be for the purposes of the Union and the proceeds thereof shall not be distributed among the States and the auxiliary duties of excise leviable under sub-section (1) in the financial year 1976-77 shall, for the purposes of section 2 of the Union Duties of Excise (Distribution) Act, 1962, be deemed to be auxiliary duties of excise levied and collected under the Finance Act of the financial year 1976-77 and the provisions of the 1962 Act aforesaid shall apply accordingly.

(5) The provisions of the Central Excises Act and the rules made thereunder, including those relating to refunds and exemptions from duties, shall, as far as may be, apply in relation to the levy and collection of the auxiliary duties of excise leviable under this section in respect of any goods as they apply in relation to the levy and collection of the duties of excise on such goods under that Act or those rules, as the case may be.

35. Amendment of Act 58 of 1957.

The First Schedule to the Additional Duties of Excise (Goods of Special Importance) Act,

1957 shall be amended in the manner specified in the Third Schedule.

36. Discontinuance of salt-duty.

For the year beginning on the 1st day of April, 1975, no duty under the Central Excises Act or the Tariff Act shall be levied in respect of salt manufactured in, or imported into, India.

37. Special provisions as to duties of excise on skelp.

(1) Notwithstanding any judgment, decree or order of any court, in all Central laws, providing for or relating to the levy on iron or steel products of duties of excise, as in force during or at any time during the period commencing with the appointed day and ending with the 28th day of February, 1975,—

(I) any reference to strips shall be construed as including and as having always included skelp as defined in Explanation 2 unless such Central law excluded, expressly or by necessary implication, skelp from strips; and

(II) any reference to skelp shall be construed as having and having always had the meaning assigned to it in Explanation 2, and accordingly—

(a) all duties of excise levied, assessed or collected or purporting to have been levied, assessed or collected on skelp, as defined in Explanation 2, under any such Central law shall be deemed to be as validly levied, assessed or collected as if the provisions of this section had been in force at all material times when such duties of excise were levied, assessed or collected;

(b) no suit or other proceeding shall be maintained or continued in any court for the refund of, and no enforcement shall be made by any court of any decree or order directing the refund of, any such duties of excise which have been collected and which would have been validly collected if the provisions of this section had been in force at all material times when such duties were collected;

(c) refund shall be made of all such duties of excise which have been collected but which would not have been collected if the provisions of this section had been in force at all material times when such duties were collected; and

(d) recoveries shall be made of all such duties of excise which have not been collected but which would have been collected if the provisions of this section had been in force as from the appointed day.

Explanation 1.—In this sub-section—

(a) "appointed day" means the 24th day of April, 1962, being the day immediately following the date of introduction of the Finance (No. 2) Bill, 1962, which; inter alia, provided for the levy of duties of excise on strips;

(b) "Central law" means—

(i) a Central Act;

(ii) any provision in a Bill introduced in the House of the People in respect of which a declaration was made under section 3 of the Provisional Collection of Taxes Act, 1931;

(iii) any rule or notification made or issued under such Central Act or provision;

(c) "duties of excise" include regulatory duties of excise and auxiliary duties of excise.

Explanation 2.—For the purposes of this section, "skelp" means hot rolled narrow strip of width not exceeding six hundred millimetres with rolled (square, slightly round or bevelled) edge.

(2) For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force.

CHAPTER V

CENTRAL SALES TAX

38. Amendment of Act 74 of 1956.

In the Central Sales Tax Act, 1956, with effect from the 1st day of July, 1975,—

(1) in section 6, in sub-section (2), in clause (a) of the second proviso, for the words "three per cent.", the words "four per cent." shall be substituted;

(2) in section 8,—

(a) in sub-section (1), for the words "three per cent.", the words "four per cent." shall be substituted;

(b) in sub-section (2), in clause (a), for the words "at the rate," the words "at twice the rate" shall be substituted;

(c) in sub-section (2A),—

(i) for the words, brackets and figure "or sub-section (2)," the words, brackets, letter and figure "or clause (b) of sub-section (2)" shall be substituted;

(ii) for the words "three per cent." the words "four per cent." shall be substituted;

(3) in section 15, in clause (a), for the words "three per cent." the words "four per cent." shall be substituted.

THE FIRST SCHEDULE

(See section 2)

PART I

INCOME-TAX AND SURCHARGE ON INCOME-TAX

Paragraph A

Sub-Paragraph I

In the case of every individual or Hindu undivided family or unregistered firm or other association of persons or body of individuals, whether incorporated or not, or every artificial juridical person referred to in sub-clause (vii) of clause (31) of section 2 of the Income-tax Act, not being a case to which Sub-Paragraph II of this Paragraph or any other Paragraph of this Part applies,—

Rates of income-tax

- | | |
|--|--|
| (1) where the total income does not exceed Rs. 6,000 | Nil; |
| (2) where the total income exceeds Rs. 6,000 but does not exceed Rs. 10,000 | 12 per cent. of the amount by which the total income exceeds Rs. 6,000; |
| (3) where the total income exceeds Rs. 10,000 but does not exceed Rs. 15,000 | Rs. 480 plus 15 per cent. of the amount by which the total income exceeds Rs. 10,000; |
| (4) where the total income exceeds Rs. 15,000 but does not exceed Rs. 20,000 | Rs. 1,230 plus 20 per cent. of the amount by which the total income exceeds Rs. 15,000; |
| (5) where the total income exceeds Rs. 20,000 but does not exceed Rs. 25,000 | Rs. 2,230 plus 30 per cent. of the amount by which the total income exceeds Rs. 20,000; |
| (6) where the total income exceeds Rs. 25,000 but does not exceed Rs. 30,000 | Rs. 3,730 plus 40 per cent. of the amount by which the total income exceeds Rs. 25,000; |
| (7) where the total income exceeds Rs. 30,000 but does not exceed Rs. 50,000 | Rs. 5,730 plus 50 per cent. of the amount by which the total income exceeds Rs. 30,000; |
| (8) where the total income exceeds Rs. 50,000 but does not exceed Rs. 70,000 | Rs. 15,730 plus 60 per cent. of the amount by which the total income exceeds Rs. 50,000; |
| (9) where the total income exceeds Rs. 70,000 | Rs. 27,730 plus 70 per cent. of the amount by which the total income exceeds Rs. 70,000. |

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Sub-Paragraph II

In the case of every Hindu undivided family which at any time during the previous year has at least one member whose total income of the previous year relevant to the assessment year commencing on the 1st day of April, 1975 exceeds Rs. 8,000,—

Rates of income tax

- | | |
|--|--|
| (1) where the total income does not exceed Rs. 8,000 | Nil; |
| (2) where the total income exceeds Rs. 8,000 but does not exceed Rs. 10,000 | 15 per cent. of the amount by which the total income exceeds Rs. 8,000; |
| (3) where the total income exceeds Rs. 10,000 but does not exceed Rs. 15,000 | Rs. 600 plus 20 per cent. of the amount by which the total income exceeds Rs. 10,000; |
| (4) where the total income exceeds Rs. 15,000 but does not exceed Rs. 20,000 | Rs. 1,600 plus 30 per cent. of the amount by which the total income exceeds Rs. 15,000; |
| (5) where the total income exceeds Rs. 20,000 but does not exceed Rs. 25,000 | Rs. 3,100 plus 40 per cent. of the amount by which the total income exceeds Rs. 20,000; |
| (6) where the total income exceeds Rs. 25,000 but does not exceed Rs. 30,000 | Rs. 5,100 plus 50 per cent. of the amount by which the total income exceeds Rs. 25,000; |
| (7) where the total income exceeds Rs. 30,000 but does not exceed Rs. 50,000 | Rs. 7,600 plus 60 per cent. of the amount by which the total income exceeds Rs. 30,000; |
| (8) where the total income exceeds Rs. 50,000 | Rs. 19,600 plus 70 per cent. of the amount by which the total income exceeds Rs. 50,000. |

Surcharge on income-tax

The amount of income tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph B

In the case of every co-operative society, —

Rates of income-tax

- | | |
|--|---|
| (1) where the total income does not exceed Rs. 10,000 | 15 per cent. of the total income; |
| (2) where the total income exceeds Rs. 10,000 but does not exceed Rs. 20,000 | Rs. 1,500 plus 25 per cent. of the amount by which the total income exceeds Rs. 10,000; |
| (3) where the total income exceeds Rs. 20,000 | Rs. 4,000 plus 40 per cent. of the amount by which the total income exceeds Rs. 20,000. |

Surcharge on income-tax

The amount of income tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

*Paragraph C**Sub-Paragraph I*

In the case of every registered firm, not being a case to which Sub-Paragraph II of this Paragraph applies, —

Rates of income-tax

- | | |
|--|--|
| (1) where the total income does not exceed Rs. 10,000 | Nil; |
| (2) where the total income exceeds Rs. 10,000 but does not exceed Rs. 25,000 | 5 per cent. of the amount by which the total income exceeds Rs. 10,000; |
| (3) where the total income exceeds Rs. 25,000 but does not exceed Rs. 50,000 | Rs. 750 plus 7 per cent. of the amount by which the total income exceeds Rs. 25,000; |
| (4) where the total income exceeds Rs. 50,000 but does not exceed Rs. 1,00,000 | Rs. 2,500 plus 15 per cent. of the amount by which the total income exceeds Rs. 50,000; |
| (5) where the total income exceeds Rs. 1,00,000 | Rs. 10,000 plus 24 per cent. of the amount by which the total income exceeds Rs. 1,00,000. |

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by the surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Sub-Paragraph II

In the case of every registered firm whose total income includes income derived from a profession carried on by it and the income so included is not less than fifty-one per cent. of such total income, —

Rates of income-tax

- | | |
|--|---|
| (1) where the total income does not exceed Rs. 10,000 | Nil; |
| (2) where the total income exceeds Rs. 10,000 but does not exceed Rs. 25,000 | 4 per cent. of the amount by which the total income exceeds Rs. 10,000; |
| (3) where the total income exceeds Rs. 25,000 but does not exceed Rs. 50,000 | Rs. 600 plus 7 per cent. of the amount by which the total income exceeds Rs. 25,000; |
| (4) where the total income exceeds Rs. 50,000 but does not exceed Rs. 1,00,000 | Rs. 2,350 plus 13 per cent. of the amount by which the total income exceeds Rs. 50,000; |
| (5) where the total income exceeds Rs. 1,00,000 | Rs. 8,850 plus 22 per cent. of the amount by which the total income exceeds Rs. 1,00,000. |

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Explanation. — For the purposes of this Paragraph, "registered firm" includes an unregistered firm assessed as a registered firm under clause (b) of section 183 of the Income-tax Act.

Paragraph D

In the case of every local authority,—

Rate of income-tax

On the whole of the total income 50 per cent.

Surcharge on income-tax

The amount of income-tax computed at the rate hereinbefore specified shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph E

In the case of the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956,—

Rates of income-tax

(i) on that part of its total income which consists of profits and gains from life insurance businesses 52.5 per cent.;

(ii) on the balance, if any, of the total income the rate of income-tax applicable, in accordance with Paragraph F of this Part, to the total income of a domestic company which is a company in which the public are substantially interested.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge calculated at the rate of five per cent. of such income-tax.

Paragraph F

In the case of a company, other than the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956.—

Rates of income-tax

I. In the case of a domestic company,—

(1) where the company is a company in which the public are substantially interested,—

(i) in a case where the total income does not exceed Rs. 1,00,000 45 per cent. of the total income;

(ii) in a case where the total income exceeds Rs. 1,00,000 55 per cent. of the total income;

(2) where the company is not a company in which the public are substantially interested,—

(i) in the case of an industrial company—

(a) on so much of the total income as does not exceed Rs. 2,00,000 55 per cent.;

(b) on the balance, if any, of the total income 60 per cent.;

(ii) in any other case 65 per cent. of the total income;

Provided that the income-tax payable by a domestic company, being a company in which the public are substantially interested, the total income of which exceeds Rs. 1,00,000, shall not exceed the aggregate of—

(a) the income-tax which would have been payable by the company if its total income had been Rs. 1,00,000 (the income of Rs. 1,00,000 for this purpose being computed as if such income included income from various sources in the same proportion as the total income of the company); and

(b) eighty per cent. of the amount by which its total income exceeds Rs. 1,00,000.

II. In the case of a company other than a domestic company—

(i) on so much of the total income as consists of—

(a) royalties received from an Indian concern in pursuance of an agreement made by it with the Indian concern after the 31st day of March, 1961, or

(b) fees for rendering technical services received from an Indian concern in pursuance of an agreement made by it with the Indian concern after the 29th day of February, 1964,

and where such agreement has, in either case, been approved by the Central Government 50 per cent.;

(ii) on the balance, if any, of the total income 70 per cent.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge calculated at the rate of five per cent. of such income tax.

PART II

Rates for deduction of tax at source in certain cases

In every case in which under the provisions of sections 193, 194, 194A, 194B, 194D and 195 of the Income-tax Act, tax is to be deducted at the rates in force, deduction shall be made from the income subject to deduction at the following rates:—

	Income-tax	
	Rate of income-tax	Rate of surcharge
1. In the case of a person other than a company—		
(a) where the person is resident—		
(i) on income by way of interest other than "Interest on securities"	10 per cent.	Nil;
(ii) on income by way of winnings from lotteries and crossword puzzles	30 per cent.	3 per cent.;
(iii) on income by way of insurance commission	10 per cent.	Nil;
(iv) on any other income (excluding interest payable on a tax-free security)	21 per cent.	2 per cent.;
(b) where the person is not resident in India—		
(i) on the whole income (excluding interest payable on a tax-free security)	income-tax at 30 per cent. and surcharge at 3 per cent. of the amount of the income, or income-tax and surcharge on income-tax in respect of the income at the rates prescribed in Sub Paragraph I. of Paragraph A of Part III of this Schedule, if such income had been the total income, whichever is higher;	
(ii) on income by way of interest payable on a tax-free security	15 per cent.	1.5 per cent.
2. In the case of a company—		
(a) where the company is a domestic company—		
(i) on income by way of interest other than "Interest on securities"	20 per cent.	1 per cent.;
(ii) on any other income (excluding interest payable on a tax-free security)	22 per cent.	1 per cent.;

	Income-tax	
	Rate of income-tax	Rate of surcharge
(b) where the company is not a domestic company—		
(i) on income by way of dividends payable by any domestic company	24.5 per cent.	1.225 per cent.;
(ii) on income by way of royalties payable by an Indian concern in pursuance of an agreement made by it with the Indian concern after the 31st day of March, 1961, and which has been approved by the Central Government	50 per cent.	2.5 per cent.;
(iii) on income by way of fees payable by an Indian concern for rendering technical services in pursuance of an agreement made by it with the Indian concern after the 29th day of February, 1964, and which has been approved by the Central Government	50 per cent.	2.5 per cent.;
(iv) on income by way of interest payable on a tax-free security	44 per cent.	2.2 per cent.;
(v) on any other income	70 per cent.	3.5 per cent.

PART III

Rates for calculating or charging income-tax in certain cases, deducting income-tax from income chargeable under the head "Salaries" or any payment referred to in sub-section (9) of section 80E and computing "advance-tax".

In cases in which income-tax has to be calculated under the first proviso to sub-section (5) of section 132 of the Income-tax Act or charged under sub-section (4) of section 172 or sub-section (2) of section 174 or section 175 or sub-section (2) of section 176 of the said Act or deducted under section 192 of the said Act from income chargeable under the head "Salaries" or deducted under sub-section (9) of section 80E of the said Act from any payment referred to in the said sub-section (9) or in which the "advance tax" payable under Chapter XVII-C of the said Act has to be computed, at the rate or rates in force, such income-tax or, as the case may be, "advance tax" (not being "advance tax" in respect of any income chargeable to tax under section 164 of the Income-tax Act at the rate of sixty-five per cent.) shall be so calculated, charged, deducted or computed at the following rate or rates:

Paragraph A

Sub-Paragraph I

In the case of every individual or Hindu undivided family or unregistered firm or other association of persons or body of individuals, whether incorporated or not, or every artificial juridical person referred to in sub-clause (vii) of clause (31) of section 2 of the Income-tax Act, not being a case to which Sub-Paragraph II of this Paragraph or any other Paragraph of this Part applies,—

Rates of income-tax

- | | |
|--|---|
| (1) where the total income does not exceed | Nil; |
| Rs. 6,000 | |
| (2) where the total income exceeds Rs. 6,000 but does not exceed Rs. 10,000 | 12 per cent. of the amount by which the total income exceeds Rs. 6,000; |
| (3) where the total income exceeds Rs. 10,000 but does not exceed Rs. 15,000 | Rs. 480 plus 15 per cent. of the amount by which the total income exceeds Rs. 10,000; |
| (4) where the total income exceeds Rs. 15,000 but does not exceed Rs. 20,000 | Rs. 1,230 plus 20 per cent. of the amount by which the total income exceeds Rs. 15,000; |
| (5) where the total income exceeds Rs. 20,000 but does not exceed Rs. 25,000 | Rs. 2,230 plus 30 per cent. of the amount by which the total income exceeds Rs. 20,000; |
| (6) where the total income exceeds Rs. 25,000 but does not exceed Rs. 30,000 | Rs. 3,730 plus 40 per cent. of the amount by which the total income exceeds Rs. 25,000; |

JOURNAL SECTION

1975 September

"The Lawyer at the Cross Roads and his Role in the Society in the 1980s"

By

Hon'ble Mr. Justice H. R. Khanna

Judge, Supreme Court of India*

I deem it a privilege to have been asked to be present at the 18th Australian Legal Convention. Coming here as I am from India I feel absolutely at home in this distinguished gathering of the votaries of law. A common tie binds us all in the fraternity of law throughout the world. Although laws differ from land to land and each state has a plethora of them, a common spirit on the whole permeates them for the primary object of law is to subdue anti-social propensities and to provide a shield against the whims and caprices of the individual.

2. The kinship that is there in the fraternity of law is apparent from the fact that not infrequently cases from the Commonwealth of Australia are cited before us in India. In the great Fundamental Rights Case⁽¹⁾ relating to the power of Parliament to abridge and extinguish the fundamental rights which was heard by all the 13 Judges of the Supreme Court of India, three of the cases upon which counsel for one party or the other heavily relied were *McCawley v. The King* (1920 A C 691), *Attorney-General for New South Wales v. Trethowan* (1932 A C 526) and *The State of Victoria v. The Commonwealth* (45 Australian Law Journal Reports 251). Again, in a case relating to the rights of minorities to establish and administer educational institutions of their choice,⁽²⁾ which was heard by a Bench of 9 Judges of the Supreme Court, two of the cases upon which considerable reliance was placed were from Australia, namely, *James v. The Commonwealth* (1936 A C 578) and *Adelaide Co. of Jehovah's Witnesses Inc v. The Commonwealth* (1943.67 Comm L R 116). In

a recent case⁽³⁾ relating to estate duty, three cases, namely, *John Lang & Ors. v. Thomas Prout Webb* (13 C L R 503), *Clifford John Ohick & Anr v. Commissioner of Stamp Duties* (1953 A C 435) and *H. R. Munro & Ors. v. Commissioner of Stamp Duties* (1934 A C 61), upon which reliance was placed, were from Australia.

3. The rule of law today, Sir, is being subjected to great strain. A spirit of unrest is manifest everywhere. The established institutions have to face a serious challenge. A wind of iconoclasm sweeps the minds. The gods we worshipped and adored till yesterday are being dethroned from the minds of people one after the other. It is precisely in moments like these that the rule of law acquires added importance, for it is the rule of law upon which depends the existence and orderly progress of a stable society. Laws embody a code of conduct and self-discipline which a nation speaking through its representatives adopts for itself and enforces through the machinery of the Courts. Man, it has been said, may be a little lower than the angels, but he has not yet shaken off the brute. His passions, his thinking, his body carry their origins with them and he fails, if he vainly gloriously denies them. His path is strewn with carnage, the murderer lurks always not far beneath, to break out from time to time, peace resolutions to the contrary notwithstanding. Law is no more than the formal expression of the tolerable compromise that we call justice, without which the rule of the tooth and claw must prevail. It has accordingly been said by Learned Hand that despite its inconsistencies, its crudities, its delays and its weaknesses, law still embodies so much of the results of that disposition as we can collectively impose. Without it we cannot live; only with it can we insure the future which by right is ours. The best of man's hopes are

* Speech delivered by the Hon'ble Mr. Justice H. R. Khanna, Judge, Supreme Court of India at the concluding plenary session of the 18th Australian Legal Convention at Canberra held during the period from July 2 to 8, 1975.

1. See AIR 1973 S C 1461, *Kesavananda v. State of Kerala*.

2. See AIR 1974 S C 1339, *St. Xavier's College v. State of Gujarat*.

3. See AIR 1975 S C 435, *Controller of E. D. v. Parvati Ammal*.

enmeshed in its success; when it fails they must fail; the measure in which it can reconcile our passions, our wills, our conflicts, is the measure of our opportunity to find ourselves.

4. In view of the strain to which the rule of law is being subjected, a great responsibility devolves upon men of law and specially the legal profession. There can, in my opinion, be no doubt that in the final analysis law can live not in books but in the consciousness of the legal profession and the attitude of the general mass of people. Judges dressed with their brief authority may seem to speak more finally but it is only for the moment. Their pronouncements in a great measure reflect the industry and the expositions of law by the counsel appearing before them. What counts is the attitude and vigilance of the legal profession, for the bar is not merely the Judge of Judges, it is also the repository of the spirit that gives strength and sustenance to the rule of law and keeps aglow its torch. The contribution of the bar in the great task of the moulding and development of law is in no way less than that of the bench—indeed the role of one is complementary to that of the other. It is, therefore, in the fitness of things that the theme of this year's Convention is "The Lawyer at the Crossroads and his Role in the Society in the 1980s." In view of the diverse assaults on the rule of law and the challenge to the legal institutions, the members of the bar may have to play a dynamic role. It may perhaps become necessary for the leading members of the bar to come out of their ivory chambers and take a more active part in public life. The bar, it has been said, has so many organs of expression by which it can make vocal thoughts and sentiments that might otherwise be uncommunicated and hidden. There are the law journals, increasing year by year alike in number and power; there are the bar associations with their committees, their reports, their multifarious activities; and now, with developing importance, there are the banquets and luncheons and receptions of these associations. And above all there are the Conventions like the present. Through such media the members of the bar can nourish the rule of law and not merely create an awareness of its vital importance but also ensure its effective functioning.

5 I am glad that one of the topics discussed at the Convention is "The Role of the Government Lawyer in the Protection of Citizens' Rights." This is a very interesting topic, and I can say that the different facets of this matter have been dealt with in some depth. Although, broadly speaking, a Government lawyer has to represent and plead the Govern-

ment case, he should not adopt a partisan attitude in the sense the counsel of a private citizen might do. It is as much the duty of a Government lawyer as that of a private citizen's own counsel to see that such a citizen is not subjected to unnecessary harassment and there is no undue encroachment upon his rights.

6. Legal education which was another topic of discussion in the Convention conveys two concepts. It is a vocational training for legal practice, it is at the same time a fostering of intellectual discipline with the aim of evolving a well-ordered human society. For a considerable time the leading members of the bar carried the main burden of legal education. The law schools in the process came to be regarded for all intents and purposes as professional institutions. There was subsequently rethinking in the matter, and the view came to be accepted that though a university law school should not exclude vocational aim, it must not restrict itself to be merely a vocational school. "There is often," in the words of Sir Owen Dixon, "a professional protest against the time spent in universities on the theoretical at the expense of the practical. There is thus an inversion of functions: the dividing line between the academical and the professional is improperly drawn and the student sometimes loses the one chance he might ever have of learning how philosophical are the basic principles of the science he is about to apply as an art." The modern trend emphasises that legal education should be broad-based and not confined to merely vocational aims. It should represent a proper amalgamation and synthesis of academic scholarship and professional requirement. The endeavour should be to harmonise the scholastic approach with professional and utilitarian objective. It has been said that education of lawyers should enable them to have some understanding not only of what the law is but how the law is changed. Their vision has consequently to extend to a wider horizon and they must take note of the popular urges arising out of the inequities of the past. Justice Brandeis once remarked that a lawyer who has not studied economics and sociology is very apt to become a public enemy. With the passage of time our Lady of the law is growing more exacting. When people of my generation joined the Law Faculty many years ago, she was content with very little. The barest rudiments of law sufficed, in the words of Cardozo, "to give to the acolyte of those days the privilege to kiss the hem of her flowing and unspotted robe. But it is otherwise in this year of grace. Our Lady of the Common Law—I say it with the humility

that is due from an old and faithful servant -- has become insatiable in her demands. Not law alone, but almost every branch of human knowledge, has been brought within her ken, and so within the range of sacrifice exacted of her votaries. Those who would earn her best rewards must make their knowledge as deep as the science and as broad and universal as the culture of their day. She will not be satisfied with less."

7. One wonders sometimes if our brethren of the bar have been banished from the Elen in which they roamed once upon a time care-free and unafraid. Perhaps this is so and the reason for that has been the changing situation. We have the confusion caused by accumulated precedents. There is then the problem of law's delays and the backlog of arrears. Again, there is the question of unequal fight, irrespective of merit of case, between the party with ample resources and the indigent in dire need of but without adequate legal aid. The feeling is there that the cost of fighting a case, whatever might be the justice of the matter, is too exorbitant which most citizens can ill-afford to bear. This must necessarily make the average citizen sceptical of the judicial process. If our legal system is to prove effective and retain the faith and confidence of the average man, it must find an answer to the above mentioned problems. As in life so in law things are not static. Stagnation is the one thing we in law must be wary of. Law, if it is to satisfy human

needs and to meet the problems of life, must adapt itself to cope with new situations. It should in no case alienate itself from the facts of life. All this highlights the necessity of judicial reform and calls for a new philosophy of law and a new juristic method to bring order out of chaos. One feels tempted in the above context to refer to the words of Lord Brougham in the British Parliament. Said the noble Lord:

"It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be our sovereign's boast when he shall have it to say that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two edged sword of craft and oppression, left it the staff of honesty and the shield of innocence."

The above words spoken more than a century ago have, if anything, much greater relevance today.

8. Friends, I once again thank the organizers of the Convention for giving me an opportunity to be present here. I am sure the exchange of ideas here have shed further light on some of the problems which beset the administration of justice. I am also sure that the deliberations of the Convention would help us to devise effective ways and means to tackle those problems.

REVIEWS

PRINCIPLES OF LOCAL GOVERNMENT LAW. Fifth Edition. 1974. By C. A. Cross, M.A., LL.B., Bar-at-Law. Sweet and Maxwell. (Tripathi). Pp. lxxvi and 577. Price, £ 4 Net.

The book under review states the underlying principles of local government law and describes the powers and duties of local authorities with regard to the services they administer. The law relating to local government has greatly altered since the publication of the fourth edition in 1971. The Local Government Act, 1972 has wholly reshaped the structure of local authorities in England and consequently the division of functions among them, and it has affected to a greater or lesser degree the law with respect to all the services which local authorities provide. The Act recasts, modifies and in a somewhat simpler form, the law with respect to the administrative work of local authorities, almost entirely replacing the Local Govern-

ment Act, 1933 and incorporating the provisions of the London Government Act, 1963.

2. The book deals with the legal framework, acquisition of powers, local authorities areas and status, appropriation and development of land, and discusses the questions of contract, tort and criminal liability. Central Control, Judicial Control, and local elections. It is concerned with highways, housing, public health, education, health and social services, and planning development. It covers police, fire and civil defence services, food and drugs, water resources and water supply, and burials and cremation. The Appendices include notes on the system of local government prior to 1st April 1974, powers and duties of parish councils, Tribunals and Inquiries Act 1971, and list of principal by-law making powers. The volume carries tables of cases, statutes, and statutory rules, orders and instruments, and index.

3. The book was finished at the end of December 1973, the law stated being that in force at that time, but the statutory provisions expected to operate from 1st April, 1974 have been incorporated; they include the Local Government Act 1972, the Water Act, 1973 and the National Health Service Reorganisation Act 1973, and the Local Government Act 1973. The book should be useful to law students who have to reason out their answers, based on a working knowledge of relevant case law. With this in mind, leading cases have been treated fully and extracts from judgments given. It should be of practical use to local government officers concerned with the day-to-day administration as a guide to general principles. Most of the statutory provisions have grown out of earlier ones and no historical matter appears in the text except where it is necessary for understanding a topic. R.S.S.

CONFLICT OF LAWS (Private International Law). By R. H. Graveson, C.B.E., Q.C., LL.D., Ph.D. 7th Edition, 1974. Sweet and Maxwell Ltd., 11 New Fetter Lane, London (Tripathi). Pp. xxxix and 675. Price, £ 5.50 Net.

Since the sixth edition of this book appeared in 1969, there have been important changes in the conflict of laws, particularly in family law, the most notable being the conferment on the married woman of capacity for an independent domicile. Equally striking is the reform of jurisdiction in matrimonial causes following the Recognition of Divorces and Legal Separations Act 1971. There has been a general increase in legislation in what was hitherto a predominantly judge-made system. Further the accession of the U.K. to the E.E.C. has obliged her to negotiate Conventions on various topics relating to the conflict of laws, including those on bankruptcy and companies. The most important of these Conventions is that on Jurisdiction and the Enforcement of Judgments. If the U.K. remains within the E. E. C.—and the result of the latest referendum is a significant pointer—these Conventions will become part of U. K. law, and their likely effect when in force has been explained at appropriate places.

2. Some 300 pages of this edition have been wholly or partly re-written. Apart from general revision and some re-arrangement, there has been substantial re-writing on the domicile of married women and minors, adoption, the proper law of contract, the applicable law in tort, and jurisdiction in

matrimonial causes. A comparison has been made of the Recognition of Divorces and Legal Separations Act, 1971 with the Hague Convention of that name, while the transitional problem of the recognition of decrees of annulment of marriage has been reconsidered in the light of that Act. The law of E. E. C. on this subject has been discussed.

3. The book, which carries tables of cases and statutes, and an index, is divided into two parts, the first part, on general principles, dealing with classification, connecting factors and the doctrine of Renvoi, the general principles of jurisdiction, and the limits of application of foreign law. The second part, on the Rules of choice of law and of jurisdiction, deals with domicile, status, the contract and status of marriage, assignment of property on marriage, contracts, negotiable instruments and wills. It covers wills administration and succession, trusts, tort, and procedure. The English law has been stated as it stood on 1st July 1974, and so far as English law is concerned, may continue to stand if the U. K. ratifies the European Judgments Convention.

4. A leading authority with full coverage of the rules of conflict relating to each branch of the law, the book, which was originally written for students, has become a text of general use for those in practice, public office or commerce as well as those in universities and similar institutions. It is an authoritative account of an important branch of the law.

R. S. S.

FRENCH-ENGLISH GLOSSARY OF FRENCH LEGAL TERMS IN EUROPEAN TREATIES. Sweet and Maxwell (Tripathi). Pp. 64. Price £ 1.50 Net.

This is No. 12 in the European Glossary of Legal and Administrative Terminology, which has been created to facilitate the day-to-day work which is paving the way for a better understanding and co-operation between the nations of Europe and to provide a valuable linguistic aid in the many specialised fields of legal and administrative terminology.

2. This Glossary arose out of the fact that in 1961-62 serious consideration was being given in the U. K. to the possibility of that country joining the E. C. O. Translations into English were accordingly made of the legislative instruments of the E. C. O. In the process of translation the legal editors found many terms which required explanation for the benefit of readers not conversant with legal concepts mainly derived from French law. A glossary had therefore to be published, and it ran into a second edition in 1965. The

present Glossary is in effect a revised and amplified third edition, containing more terms and including references to Council of Europe documents. The French texts of European Community Treaties were chosen as basis because the translations were of those texts, and the explanations were related to French law to indicate the kind of background in which the terms concerned originated.

3. Each entry in the Glossary is in four parts viz. the French expression, the English expression, which has normally been adopted in a European Communities context and in a Council of Europe context, comments and identification of the document as published in French. The terms have been selected from the French texts of European Community Treaties, Conventions, Agreements and related documents, and of Council of Europe Conventions, Agreements and related documents and explained in the light of the law of France. The Glossary has been prepared under the auspices of the Council of Europe and published by H. M.'s stationery office, London. R.S.S.

R.S.S.

NO FAULT ON THE ROADS: A REPORT BY JUSTICE. 1974. Stevens (Tripathi). Pp. 59. Price, £ 1 Net.

JUSTICE is an all party association of lawyers concerned "to uphold and strengthen the principles of the Rule of Law in the territories for which the British Parliament is responsible; in particular, to assist in the administration of justice and in the preservation of the fundamental liberties of the individual". It also assists the International Commission of Jurists in its efforts to promote the observance of the Rule of Law throughout the world. In 1972 the Council of JUSTICE decided that the problem of compensation for victims of road traffic accidents should be investigated, and set up a committee to study the broad question of "no-fault insurance". When the British Government decided to set up a Royal Commission on Civil Liability and Compensation for Personal Injury, the Committee continued with their work and cast the conclusions of the Report in the form of a Memorandum of Evidence for submission to the Commission.

2. The Report is confined to compensation for personal injury suffered in road traffic accidents. It first considers accident compensation in general and follows with a brief outline of the present system and its defects. It next examines some of the "no-fault" systems which have been advocated and adopted abroad and the questions which arise in considering whether in England also they should

follow any of these precedents in whole or in part. The Report then sets out its own proposals for reform and examines the consequences which might be expected from them, and their relationship with the compensation of the victims of other kinds of accident.

3. The Report is confined to the consideration of compensation for damage suffered in accidents resulting from the use of vehicles on roads. The compensation of road traffic victims in the U. K. still depends on "fault" to a far more significant extent than compensation for any other kind of accident. The function of compensation for personal injury is to make good to the victim what he has lost or suffered by distributing his loss among those who are better able to bear it because it is diluted by being widely spread. A just system of compensation should allow for the award of compensation regardless of whether any person other than the victim is at "fault". A "No fault" system of compensation would avoid the delays, anomalies and injustice of the present system, but would not introduce any additional problems of its own.

REVENUE LAW by Barry Pinson, Q.C., LL.B. 8th Edition 1974. Sweet and Maxwell (Tripathi). Pp. lxxv and 668. Price, £ 6.50 Net.

This introductory book states the principles of Revenue law in as readable and intelligible a form as possible. It comprises Income Tax, Capital Gains Tax, Corporation Tax, Estate Duty, Stamp Duties, and Tax and Estate Planning, and includes a section on Value Added Tax by John Gardiner. This edition is devoted to the law as it applies in and from the year 1974-75, and it incorporates the changes in the law made by the Finance Act 1974 and by the judicial decisions since the seventh edition was prepared, including several decisions of V. A. T. tribunals which have clarified the provisions of the Finance Act 1972.

2. Among the important changes introduced by the Finance Act 1974 are the near abolition of the remittance basis of taxation on income derived from foreign traders, professions, vocations and employments, and new form of taxation on development gains from land by an extension of the capital gains taxation. The chapter dealing with capital gains tax is now in two parts; the first part summarising the general law relating to the taxation of capital gains and the second part dealing specifically with capital gains from land.

3. Several sections of the text of this edition have been re-written. As with the pre-

vious edition, the book is in five parts. Part I deals with taxes on income and capital gains and is in four divisions dealing respectively with the taxation of the income of non-corporate bodies; the taxation of companies; the taxation of capital gains; and administration, assessment and back duty. This Part leads on to Part 2 on Estate Duty. Part 3 states the principles of Stamp Duties. Part 4 deals with the value added tax. In the next Part some aspects of these subjects are considered in relation to problems of tax and estate planning; that is, the arranging of a person's affairs with a view to minimising the burden of taxation in its various forms. This Part offers the reader a glimpse of the kinds of problems which commonly arise in practice in connection with gifts, settlements, arrangements on separation and divorce, wills and pension schemes. Finally, there are tables of cases and statutes as well as an index. The law is stated as at 1st August 1974.

4. The book is a useful introduction to the study of Revenue law for the reader who has some knowledge of basic legal principles. Useful as a text book for examinations, it should be of value also to the practising lawyer or accountant for ready reference.

R.S.S.

A CASE BOOK ON CRIMINAL LAW.

By D. W. Elliott, LL.B. and J. C. Wood. LL. M 3rd Edition, 1974. Sweet and Maxwell (Tripathi). Pp. xxxiv & 550. Price. £ 6.50 net.

The third edition of this case book contains an extra hundred pages on the chapters dealing with offences of dishonesty. Scores of cases on larceny and kindred offences had been rendered obsolete by the Theft Act 1968, which, along with the Criminal Damage Act 1971, had greatly simplified the law relating to offences against property. The courts too have not confined their attention to those offences; almost every point of criminal law has been subjected to judicial exploration and development. It is believed that the House of Lords has been unusually active in this regard and room has had to be found for a large volume of material emanating from that source.

2. The recent decision of that House in *Hyam v. Director of Public Prosecutions* seems to have justifiably provoked the comment "If the appeal to the House of Lords in criminal cases is intended to settle points of law of general public importance and to bring clarity and certainty to the law, it seems in recent years to have failed conspicuously to achieve its object". Extensive extracts from the opi-

nions in *Hyam's* case are now reproduced, though it may take time to measure the effect of those opinions on the law of murder and concept of intention in criminal law. The chapter on *Mens Rea in Statutory Offences* has been re-written in the light of *Swiet v. Parsley*, as well as the chapter on Criminal damage. A brief reference is made to an important case on the Criminal Damage Act 1971 and *mens rea* generally, viz, *R. v. Smith* (1974) 2 W. L. R 20.

3. The book deals with the concept of crime, principle of legality, *Actus Reus*, variations in liability and degrees of responsibility. It is concerned with inchoate crimes, homicide, non-fatal offences against the person, theft and robbery, fraud, blackmail, burglary and forgery. New developments have taken place on the exclusion of *mens rea* in criminal offences, the liability of corporations, and self-defence and provocation in homicide cases.

4. The book, which includes tables of cases and statutes and an index, opens with an introductory note on the past and present courts of criminal jurisdiction in England, together with a note on appeals and such matters as representation by counsel and the use of witnesses. The Courts Act 1971 has thoroughly reorganised the superior courts, and sweeping changes in procedure have been made by the Children and Young Persons Act 1969, the Administration of Justice Act 1970, and the Attachment of Earnings Act 1971.

5. In general, anything published after 31st December 1973 has not been included in the present volume.

R.S.S.

THE INTERNATIONAL CIVIL ENGINEERING CONTRACT. By I. N. Duncan Wallace, Q. C., M. A. (Oxon). 1974. Sweet and Maxwell (Tripathi). Pp. viii and 197. Price, £ 9 Net.

The new book is a full commentary on the most widely used international standard form of contract for civil engineering and building projects, and is believed to be the first book to be published on the subject. The book assumes that the reader has some knowledge of the technical subject-matter and at least a superficial knowledge of the provisions and layout of the contract. The reader is not supposed to know any law on the subject or on the inter-relationship of the contractual provisions. Where relevant, legal propositions are indicated in terms that a layman can understand, but for a detailed study of the law in question reference is made to *Hudson on Building and Civil Engineering Contracts* (10th edition, 1970).

2. The contract under review in this book is the 1973 reprint of the "Conditions of Contract (International) for Works of Civil Engineering Construction", sometimes known as the "F. I. D. I. C." International Contract. This book is a commentary in similar style to the author's two previous books on Standard Forms of Contract in England published in 1969 and 1973 and reviewed in these pages. The "F. I. D. I. C." International Contract follows more or less the principal U. K. form of contract, but the author assists the non-U. K. reader by avoiding technical or legal language and by explaining the meaning of peculiarly U. K. concepts and phraseology in the contract. He points out the difficulties arising from the use in an international context of the traditional wording of the U. K. domestic forms. The practical consequences and policies which underlie the contractual provisions are constantly brought to the reader's attention. The book, which has a table of cases and an index, deals with the form of tender and form of agreement, the conditions of contract, and the conditions of particular application.

3. The book is designed to assist those concerned with the selection and drafting of a satisfactory contract at the pre-contract stage, or with its day-to-day administration or with the interpretation of the contract in the case of disputes. A reference work for the legal adviser as well as those without legal qualifications, it should easily find a place with Government departments, public authorities and employers. Whether or not the proper law of a particular contract is English law or any other law, the book should be highly useful also to contractors, consulting engineers and architects.

R.S.S.

LAW OF CONTRACT (TEXT & MATERIALS). By Derek Roebuck, Professor of Law, University of Tasmania. 1974. The Law Book Company Limited, Sydney (Tripathi). Pp. xx & 467.

In this case book on the law of contract is a useful basic collection of materials. In addition to tables of cases and statutes, there is also a useful index. There are twelve chapters, each with Notes and Questions at the end, dealing with negotiation, bargain, privity, form, capacity, contract, misrepresentation, fraud and undue influence, mistake, void and illegal contracts, termination of the contract, and remedies.

2. The basic subject of study of this book is the question "In what circumstances will the

court find that there is an enforceable promise and how will it enforce it?" The main purpose of the law of contract is to safeguard the realisation of reasonable expectations induced by promises. As the author says, a reasonable expectation is one which it is fair to have; which a fair promisor would expect he must fulfill, and a fair promisee would expect to be fulfilled. The reasonableness of the expectation will depend upon the facts of a particular case.

3. The inquiry which this book presents to the student should help him in situations where he has to make decisions about contracts. Whether to make a contract, with whom and on what terms, may have to be decided. This is the stage of negotiation in a contract, when the parties may have to work out a satisfactory relationship. As between lawyer and businessman, this book is intended to help the latter on the subject of contract. Other subjects with which this book is not specifically concerned, like sale of goods, negotiable instruments, suretyship insurance, partnership and hire purchase, may also be studied with profit by the business student.

4. This book is for Australian students, especially those not in the law faculties, and, as far as possible, it is made up of Australian materials. For the most part, case citations in judgments have been excluded after the first mention of the case. The Indian Courts, on the other hand have largely relied upon the English authorities in deciding cases and interpreting the Contract Act. *Ponnuwami and Puri* (Cases and Materials on Contract, Eastern Book Co., Lucknow, 1974) makes available a selection of cases almost entirely from Indian Courts, which can be used as a basis for class room discussion. Every aspect of the law of contract has been covered in this set of cases. A similar publication is *Smith and Thomas* (Case Book on Contract, Sweet and Maxwell, 1973).

R.S.S.

THE VALUATION OF COMPANY SHARES AND BUSINESSES. By A. V. Adamson, University of Adelaide. 5th Edition, 1975. The Law Book Company Ltd., Sydney (Tripathi). Pp. xiii & 207.

Here is an examination of the various theories regarding the valuation of shares which are not quoted on a stock exchange, tracing the growth of legislation and legal decisions on the subject, and highlighting the principles that emerge in the process. Many of the theories are conflicting, but taken along with the various decisions of the High Court

of Australia, some consistency of approach may be perceptible.

2. The book deals primarily with the valuation of company shares, but the general principles will apply in a similar way also to partnerships or businesses to be valued as going concerns. The considerations are somewhat different in connection with the valuation of businesses, partnership and professional practices and these are discussed separately. The book, which carries an index, table of cases, and bibliography, is in two Parts; Part I, on the theory of value, deals with the statutory and judicial definitions, effect of articles of association on share values, goodwill and methods of valuing it, methods of valuation, judicial methods, stock exchange quotations and interpretation of market values. The author commences with a brief survey of the various circumstances which may necessitate the placing of a value upon shares in companies or businesses.

3. Part II, on the practice of valuation, is concerned with the study of past earnings, adjustment of income and other taxes, maintainable profits, retention for reserves and tangible assets backing. It covers percentage return on yield, accumulated profits, preference shares and the final stage of valuation. Since the publication of the fourth edition of this book, there have been more judicial decisions to throw light on the problem of valuing shares and businesses, and the original text has had to be expanded to include these and also some practical examples which have been taken from actual valuation.

4. Opinions expressed in the book are given from the business or accounting point of view, and where legal decisions are discussed it is with the object of construing them in the light of recognised and practical accounting principles.

R.S.S.

FAMILY PROPERTY AND FINANCIAL PROVISION. By J. Gareth Miller, LL.M. (Wales), LL.M. (Cantab.) 1974. Sweet and Maxwell (Tripathi). Pp. xxxv & 310, Price, £6 Net.

Problems arise frequently in England as in India in relation to the ownership and enjoyment of property and obligations of financial support as between members of a family. In recent years many such problems have attracted the attention of the public and this has led to a growing volume of legislation. Attempts are now being made systematically to deal with the problems and the process is still going on. In the meantime the legal practitioner faces a complicated patchwork of

legislation and case law, and this book should assist him by providing a review of the law as it obtains at present.

2. The author considers the general principles of the law of property in relation to the acquisition and enjoyment of property by members of a family and the special provisions which have been made from time to time to deal with particular problems such as the Matrimonial Homes Act, 1967 and the Married Women's Property Act, 1964. He discusses methods by which financial provision can be obtained in matrimonial proceedings, in proceedings concerned with children, and under social welfare legislation. The new powers of the Court to order financial provision and adjust property rights in proceedings for divorce, nullity and judicial separation are fully examined together with provisions relating to taxation and enforcement. The devolution of property on the death of a member of a family and the powers of the Court to order financial provision for his dependants are finally considered.

3. The book deals with family property rather than simply with matrimonial property and with financial provision for members of a family in all kinds of proceedings. It also considers the position during marriage and on the termination of a marriage on the death of a spouse, together with other family relationship, legitimate as well as illegitimate, on questions of property and financial provision.

4. The author has tried to state the law as at 1st September 1973, except that he has anticipated the coming into operation of the Matrimonial Causes Act, 1973. He has also incorporated the amendment of section 27 of that Act by section 6 of the Domicile and Matrimonial Proceedings Act, 1973. He has tried to include the more important cases reported since 1st September 1973. An appendix sets out the relevant Budget Proposals for 1974-75. There are an index and tables of cases and statutes.

5. The book is unusually wide in scope and should greatly benefit practising lawyers and law students in universities and polytechnics.

R.S.S.

THE LAW OF EVIDENCE IN NIGERIA. (Law in Africa No. 22). By T. Akinola Aguda, LL.M., Ph.D. (London). 2nd Edition, 1974. Sweet and Maxwell (Tripathi). pp. xxxiv & 416. Price, £7.85 Net.

The law of evidence in Nigeria is to be found almost exclusively in the Evidence Act. As this Act has suffered but a few

amendments, the revision of the present work has been mainly in respect to judicial decisions. No fewer than 150 new decisions of the Nigerian Courts, both reported and unreported, have been incorporated into this edition. The book, which carries tables of cases and enactments and index and text of the Evidence Act in an appendix, deals respectively, with relevancy, proof, documents, production and effect of evidence, and witnesses.

2. The most important change effected by statute in the law of evidence since the publication of the last edition of this book concerns the abrogation of the old rule in *Russell v. Russell* as enacted by section 147 of the Evidence Act. That section was repealed and substituted by section 115 of the Matrimonial Causes Decree 1970, which also effected some modifications in the law relating to competence and compellability of spouses as witnesses. The author has had to re-write certain sections in order to clarify certain matters discussed in the first edition. These include the sections dealing with *res gestae*; the effect of wrongful admission of evidence; and the nature of corroboration. As a result of judicial decisions since the publication of the last edition certain other sections have had to be re-written. Among them we may refer to the sections dealing with affairs of State and the production of documents when privilege is claimed. Among other sections which have been re-written are the sections dealing with general custom or right and secondary evidence of bankers' books. Certain topics which were not discussed in the first edition are now included for the first time. These relate to the admissibility of evidence given at a preliminary inquiry, presumption of undue influence, weight of evidence, and documents communicated for limited and restricted purpose.

3. The author has tried to refer to all known decisions published or delivered before 2nd January 1975. B.S.S.

TUTORIALS IN CONTRACT, By John Collinge, B. Litt. (Oxon.), LL.B. (Auckland). 2nd Edition, 1974. The Law Book Company Ltd., Sydney. (Tripathi). Pp. xxiv & 314.

The purpose of the book before us is to enable students and tutors alike to make the best possible use of tutorials by providing a collection of materials to assist independent preparation for tutorial classes and to serve as a useful basis of discussion. It states in general terms the broad general terms of some of the major issues and principles of

law which have been framed to meet these issues. It illustrates the manner in which the courts have sought to resolve those issues or to explain the principles involved. The extracts have been chosen to illustrate the rationale of the legal principles involved.

2. This book should, in addition to providing source material, assist the student to analyse and understand for himself the issues and apply the principles to new situations. Rather than adopt a computer-like solution to legal problems, the emphasis has been placed upon the process of reasoning from fundamental principles. In preparing the text, the author has endeavoured to discuss the general principles of the law of contract and then proceeded from the general principles to the particular. It has not been possible to give a complete coverage of the application of all the particular principles, and only three of the most common contracts have been covered in any detail viz., contracts for the sale of goods, hire purchase agreements, and contracts of agency.

3. English, Australian and New Zealand materials together constitute the principal sources for this book; the law of contract in these jurisdictions is substantially identical. The modern law of contract even in Australia and New Zealand still derives its substance from the English decisions of the 19th century and by important modern developments in England.

4. There are a table of cases and index, and the book is divided into six Parts. The nature of the contract, formation of the contract, contents of the contract, parties to the contract, defective contracts, and termination of the contract, are the self-explanatory titles of the six parts. R.S.S.

A CASEBOOK ON TORT. By Tony Weir, Fellow of Trinity College, Cambridge, 3rd Edition, 1974. Sweet and Maxwell, 11 New Fetter Lane, London (Tripathi). Pp. xxiv & 476. Price, £4.50.

This third edition of the case book has become a valuable work of reference for teachers and students. As with earlier editions, the author has included selected case decisions, statutory material, and academic writings, as well as his own notes and commentary. Anybody who wants to master the law of tort in all its intricacies will have to familiarise himself with as many cases as possible. The most recent cases, including *Dutton* and *Herrington*, have been included in this edition. It is divided into nine separate parts dealing respectively with negligence,

liability through others, trespass, law between neighbors animals, torts to chattels, defamation, wrongfully causing loss, and damages. There are tables of cases, statutes, and articles, and an useful index, besides a general introduction and several sectional introductions.

2. In almost all the cases in this book the plaintiff is claiming money from the defendant; only occasionally does he ask the judge to stop the defendant doing something (injunctive). He claims this money as a compensation for the harm he has suffered; only rarely has the defendant to pay more, as a punishment. The plaintiff's claim is grounded on the argument that the defendant has in some sense committed a wrong, or acted improperly. The law of tort therefore determines when one person must pay compensation for harm wrongfully caused. A tort is a species of civil injury or wrong, but sometimes the same wrong is both civil and criminal.

3. The cases in the present book are almost all British and perfectly standard. As observed by the author, the best way to learn from cases is to study them and then read a note on them in one of the professional periodicals. The book is planned to be read straight through, but should not be read in isolation. A case book cannot contain everything, and this one in particular omits references to further reading. It may be necessary therefore to use a standard text book at the same time, like *Salmond on the Law of Tort* (16th Edition. Sweet & Maxwell) or *Ramswamy Iyer's Law of Torts* (7th Edition, 1975. Tripathi). The Law of Torts is a growing organism with unsuspected possibilities of development and a clear and authoritative statement of the law is contained in Ramswamy Iyer's treatise. It is an accurate and arranged summary of the principles of the law as developed by English Courts together with information as to the application of these principles in Indian Courts.

4. The blend of materials in this book offers to the student more than source material. It should facilitate an understanding of the development of the law in this important area of study.

R.S.S.

CASES ON TRUSTS. By H. A. J. Ford, S. J. D. (Harvard), LL.M. (Melb.). 3rd Edition, 1974. The Law Book Co. Ltd., 301-305, Kent Street, Sydney (Tripathi). Pp. xx & 824.

A trust is an equitable obligation which binds a person (trustee) to deal with some specific property (trust property) for the benefit of persons (beneficiaries) or for the advancement of some specific purpose. A trust

may be created by a person in his lifetime (trust *inter vivos*), or it may be created by will (testamentary trust). The creator of a trust *inter vivos* is a 'settlor'; the creator of a testamentary trust a 'testator'. The case book before us is designed to provide information about the law of trusts and to assist law students to develop the capacity for ordered thought and analysis. A case book is a collection of problem cases as well as leading cases, and most of the cases in the present collection are leading authorities.

2. This case book does not deal with every aspect of the law of trusts; it is concerned only with cases which exemplify the development of the broad principles operating in common law jurisdictions. Some topics, such as capacity to be a trustee, appointment of new trustees and the functions of Public Trustees, have not been included because they are matters essentially of local legislation, and the chapter on powers of trustees is for the same reason a mere outline. The text of some local legislation has been reproduced, particularly many of the provisions of the English Trustees Act 1925, as they are discussed in the cases. The text of some prototype legislation, like that of New Zealand should provide interesting material for comparison.

3. The cases contained in this book have been drawn from the law reports of England, Australia and New Zealand, and the general arrangement of the previous editions has been maintained and substantial extracts from eight new cases have been incorporated while some extracts from previous editions have had to be shortened for want of space. The major legislative changes since the last edition are the enactment of the Victorian Perpetuities and Accumulations Act 1968, its Queens and counterpart, and the Queensland Trusts Act 1973. These and other changes have been noted.

4. Among the topics covered are the constitution of trusts *inter vivos*, limitations on settlor's power of disposition, apportionment between successive interests, duties and powers of trustees and their rights. The book also deals with intention to establish trust, the rules as to the form in which such intention should be manifested, the objects of a trust, the subject-matter of a trust, consequences of breach of trust by the trustees, and trusts which arise without the necessity for showing any affirmative intention to create a trust and charitable trusts. Only a few pages are given to the subject of Constructive Trusts for many look upon it as a remedial device rather than a medium of disposition.

5. The index and tables of cases and statutes are useful.

R.S.S.

THE TRADE AND MERCHANDISE MARKS ACT, 1958 (With commentary, critical and exhaustive). By K. S. Shavaksha, B.A. (Oxon.) Bar-at-Law. Foreword by T. A. Blanco-White Q. C. 2nd Edition, 1974. Tripathi. Pp. xli & 470. Price, Rs. 40.

At common law the reputation of a business, symbolised through a name or label, can be protected by an action for passing off, but the procedure is cumbersome and the outcome rather uncertain. The Trade and Merchandise Marks Act 1940 was found not only ambiguous, but also too rigid to meet changing conditions and situations, so that many valuable trade marks were denied the benefits of registration owing to their inability to satisfy the requirement of distinctiveness as laid down in that Act. The Act of 1940 did not deal with criminal offences regarding trade marks and false trade descriptions, which were dealt with separately by the I. P. O. and the Indian Merchandise Marks Act 1889. But these were found inadequate to deal with certain types of false descriptions, and the Trade and Merchandise Marks Act 1938 removed these ambiguities and defects, suitably enlarges the description of "false trade marks" and increases the punishment for criminal offences. The registration of a trade mark under it confers on the proprietor certain extensive statutory rights and affords a convenient means of protecting them against infringement.

2. Of the 136 sections of the 1958 Act, sections 4 to 95, divided into nine chapters, deal with the Register and conditions of registration, assignment and transmission, use of trade marks and registered users, rectification and correction of the Register, special provisions for textile goods, and offences, penalties and procedure. The book before us, which contains an introduction, table of cases and index, presents the Act annotated and includes in the appendices Trade and Merchandise Marks Rules 1959, Notifications under S. 117, Rules of the Bombay, Calcutta and Madras High Courts, and digest of a few Indian cases.

3. Since the publication of the first edition of this book in 1961, many important questions of trade marks have been decided by the Courts. The late Mr. Shavaksha thought it desirable therefore to revise the book, but did not live to see its publication. This edition includes, for the first time an Appendix surveying, succinctly and completely, the law governing the protection of confidential industrial information or "know-how". There are few Indian cases on this subject, but the

possibilities deserve to be explored exhaustively. R.S.S.

ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW, Vols. B I & B II. European Community Treaties, General Editor K. R. Simmonds, M. A., D. Phil. (Oxon), Director of the British Institute of International and Comparative Law, 1974. Sweet & Maxwell (Tripathi).

The volume under review, published in two loose-leaf binders, contains the three constituent treaties of the ECSC, EEC and EURATOM, and their amending treaties known for short as the Merger, Budgetary and Accession Treaties, together with further treaties, protocols and agreements concluded among the Member States inter se and between the Member States and Non-Member States. Annotations have been added to these texts in order to help and guide the reader with illuminating comment.

2. The ECSC, EURATOM, Merger, Budgetary and Accession Treaties have been grouped together in binder B I, leaving B II entirely devoted to the EEC. The publishers have used the heading Community Texts as a convenient label under which to include the statutes of the Court of Justice of each Community and the Merger and Budgetary Treaties. Under the heading Accession Treaty are found the opinion of the Commission on the applications for accession, the annexes, protocols, and declarations. There is also a somewhat neutral heading labelled "*Other Interpretative Material*".

3. The publishers have included unannotated international agreements or arrangements entered into among the Member States of each Community, and agreements entered into by each Community with non-member States or international organisations. In the Member Treaties have been included not only formal treaties, but also informal agreements, in particular, decisions of the representatives of the Member States, which are generally considered international agreements in simplified form. The titles of these decisions differ from ordinary Council decisions in that they are expressed to be made or entered into between the Member States and are not merely acts of any of the Community institutions. Resolutions and declarations of Member States expressing a proposed course of action have also been included. Non-member States agreements are all nearly in treaty form. To help the reader find his way through this mass of material, a check list is provided; it lists in chronological order all the instruments printed in this volume. It will be kept up to

date with material containing further treatises and annual revisions of the annotations of the main treatises. R.S.S.

CASES AND STATUTES ON TORT (Concise College Case-notes). By Paul L. Bradbury, B. A. (Hons.), LL. M. Sweet & Maxwell (Tripathi). 1974. Pp. xvi & 174. Price, £ 2 Net.

In this case book on tort the various topics have been dealt with under appropriate headings. Relevant cases have been noted and commented upon. In all, over 350 cases have been dealt with along with many relevant statutes, e. g. Defamation Act 1952, Occupiers' Liability Act 1957, and the Animals Act 1971. One or two cases were reported too late for inclusion in the text. These are *Cook v. Alexander* (1973) 3 All E R 1037 (qualified privilege), *Southern Portland Cement v. Cooper* (1974) 1 All E R 87 (occupiers' liability towards trespassers, and *Horrocks v. Lowe* (1974) 1 All E R 662 (privilege).

2. After an introductory Part, the book deals with the invasion of personal and property rights (trespass to the person, trespass to goods, and trespass to land), the torts of nuisance and negligence (animals, breach of statutory duties, duty of care, remoteness and foreseeability, defences and contributory negligence), defamation, malicious prosecution, and damages and extinction of rights. The tables of cases, statutes and index are useful.

3. Tortious liability arises from a duty fixed by law, but the older criteria for establishing whether or not a duty arises in certain circumstances are no longer the sole criteria. Policy considerations are now often of overriding importance. Under the growing influence of the welfare State the duty owed by an employer to his employee is becoming increasingly governed by statute. However at common law the employer has always owed a special duty of care towards his employee. The Occupiers' Liability Act 1957 provides for a single common duty of care to be owed to all "visitors," and all statutory references in the book are to the 1957 Act. Regarding interference with contractual relations, the Trade Disputes Act 1906 and 1965 were repealed by the Industrial Relations Act 1971, but some of the cases in the book can be understood only by reference to the previous legislation. In the area of domestic relations, the Law Reform (Miscellaneous Provisions) Act 1970 abolishes the torts of enticement, seduction, harbouring of a child, enticement of a spouse and harbouring of a wife. The torts which survive relate to action for the loss of a child's ser-

VICES and the husband's action for the loss of his wife's consortium.

4. This is, in short, a straightforward introduction and revision aid for university students. R.S.S.

ADMINISTRATIVE PROCEDURES (Modern Legal Studies). By G. Ganz, LL.M. Sweet & Maxwell (Tripathi). 1974. Pp. xv & 118. Price, £ 2.00 Net.

The neat little book before us examines a number of recent developments in administrative procedure, namely conciliation, informal procedures including written representations and investigatory procedures used by various bodies including the Monopolies Commission and Parliamentary Commissioner for Administration, and adopted to some extent by tribunals and inquiries. It considers public participation procedures in both Central and local Government, including a discussion of neighbourhood councils and open government. It is not concerned with the rules of natural justice or the detailed rules of procedure for tribunals and inquiries.

2. Recent developments have shown a marked development away from the adversary process. These have taken different forms, depending on the type of case concerned, the most important development being the recognition that an administrative decision is not a narrow contest between two parties, but a determination of what ought to be done in the public interest in a public case. This has led to the decision-maker taking a more active part than courts in the gathering of material on which to reach a decision and also to a wider participation before the decision by persons who are not the immediate parties to the dispute.

3. An "across-the-table" conference is a fitting culmination to the whole process of participation, which has received statutory recognition in the case of development plans. It is now increasingly used in all areas of decision-making by Local and Central Government. The Courts have played no part in devising these procedures which are a departure from the adversary process. As procedural watch-dogs, however, they monitor the administrative process and their attitude has influenced Parliament. They have now been joined by the Parliamentary Commissioner for Administration and the Council on Tribunals, who use different methods for improving administrative procedures.

4. The book carries tables of cases, statutes, and orders, as well as an index.

R.S.S.

CASES AND STATUTES ON LAND LAW (Concise College Case-notes) By E. L. G. Tyler, M.A. (Oxon.), 1974. Sweet and Maxwell (Tripathi), Pp. xix & 259, Price, £ 4.00 Net.

English land law is highly complex because land lends itself to the creation of a diversity of concurrent and consecutive interest. The absolute ownership of land is in the Crown, and the subject enjoys land by tenure. He does not even hold the land as such but rather an estate in the land. Title to land is relative, not absolute, and English law is more concerned with possession rather than ownership.

2. Beginning from the Prescription Act, 1832, land legislation in England has extended right down to the Land Registration and Land Charges Act, 1971. Of the 1925 property legislation, which forms the basis of modern law, we may refer to the Settled Land Act, the Trustee Act, Law of Property Act, Land Charges Act and the Administration of Estates Act. Besides these Acts Sweet & Maxwell's *Property Statutes* (2nd Edition, 1972) contains other important statutes dealing with estates and interest in land, wills and intestacy, trusts and succession.

3. *Property Statutes* is also devoted to legislation concerning land registration, and the provisions of the landlord and tenant legislation concerning leases and tenancies in the Law of Property Act, 1925 and the Landlord and Tenant Act, 1927. Printed in chronological order, it includes, as amended up to date, the Powers of Attorney Act, 1971, the Administration of Estates Act, 1971, and the Land Registration and Land Charges Act.

4. The present book is concerned with land charges and registered land, proof of title to land and registered land, types of lease, covenants in lease, and enforcement of covenants. It covers mortgagor's right to redeem, leases by the mortgagor, and mortgagee's rights and remedies, legal and equitable easements, extent of easements and their extinguishment. Finally it deals with settlements and trusts for sale as well as with perpetuities. It carries tables of statutes and cases and an index.

5. Separate authoritative works have been published on almost each of the topics covered in this book, and they have all been reviewed in these columns. (See *Barnsley* on conveyancing law and practice, *Buoff* on land registration practice, *Buoff* and *Boper* on registered conveyancing *Hayton* on Registered land, *Woodfall* on Landlord and tenant law, *Gale* on Easements, *Fisher* and *Underwood* on law of mortgage, and *Megarry* on rent laws). In the present publication the author has set out some statutory material and given refer-

ences for further material. In the result there are 302 full notes on cases, 83 shorter notes or references to further cases, and 121 extracts of or notes on statutory provisions. R.S.S.

THE NIGERIAN LAW JOURNAL. Vol. 7, 1973. General Editor: T. O. Elias, Dean of Law, University of Lagos. Sweet & Maxwell (Tripathi). Price, £. 2.90 Net.

In addition to the usual book reviews and Notes and Comments section, this issue carries useful and interesting contributions on criminal law and procedure, company law, conflict of laws, international law, and land law. It is believed there is a tendency in Nigerian courts to follow English decisions even where the decisions are inappropriate, Nigerian case law with regard to the offence of assaulting a police officer while acting in the execution of his duty appears to have been influenced by English decisions, and some English cases are examined in the opening article in the issue. The offence, as defined in the Nigerian Penal Code does not contain any requirement of knowledge that the victim is a police officer in the execution of his duty.

2. There has for a long time been no uniform body of international rules concerning hijacking, or unlawful seizure of aircraft, or other offences committed on board aircraft, and some of the serious problems in international law which have arisen as a consequence are examined in the next article. The Nigerian experiment of having an International Observer Team with respect to the Nigerian Civil War may be regarded as an advance in the international law of warfare and as a peculiar gift to the international law of war, says another writer.

3. Another contribution examines the rule that "There is in Nigeria no law corresponding to the English rule of prescription for conferring a title to land", considers the effect on it of the Registration of Titles Act, and finally looks into the effect of adverse possession on registered title. That the rules of conflict of laws predicated on the experience of a unitary State like England does not work justly in most cases in a federal union like Nigeria is one writer's conclusion. Writing on the Nigerian law of evidence, another writer examines the nature of corroboration and when it is required, as well as the attitude of appellate courts to a misdirection on corroboration.

4. The rights and liabilities of a shareholder under the 1968 Nigerian Companies Decree have been discussed. Because local authorities are lacking, increased reliance is

being placed on English authorities, but in the light of local conditions in Nigeria, these should be treated with caution and relied on only as persuasive authorities. Dealing with the security of tenure of the East African public servant, one of the articles concludes that, alike in Uganda, Kenya, and Tanzania, disciplinary procedure, taken contrary to the regulations in force, resulting in any form of punishment, can be impugned in the courts. Finally, we have the article "Declaratory Judgment — A Legal or Equitable Remedy?" in which the writer emphasises that a declaration of right to land is an equitable relief which should be granted under the rule of court of the Western Nigerian High Court.

R.S.S.

A MAN OF HIS TIME. Lord President Tan Sri M Suffian: By J. Victor Morais., S. B. St. J. Foreword by Tun Sir James Thomson, K. BE., S. M. N., P. J. K., First Lord President of the Courts of Malaysia. Introduction by Tun Tan Siew Sin, S. M. N., J. P. Former Finance Minister, Malaysia, pp. 192. Price: De Luxe Edition \$15. Overseas US \$10. Paper Back \$10.

This is a biography of a leading personality of Malaysia of modern times, who has distinguished himself in more than one field. In fact, he is at the top in several walks of life not the least of which is law, as he is the Lord President of the Courts of Malaya and in that capacity is the supreme head of the judiciary in Malaysia.

The blurb on the jacket of this book opens with the following sentence: "From Kampung to Cambridge and from Cambridge to the topmost position of the Judicial Bench." This is reminiscent of the title of a biography of one of the heroes of the world 'Abraham Lincoln', "from Log Cabin to White House". This biography is therefore an inspiring book which cannot fail to win for Justice Suffian admirers all over the world who would be fired by his example to work out their destiny by dint of their hard work, character and ambition.

Justice Suffian was born in a remote little village community which in Malaya is known as Kampung, the meaning of which is given in the dictionary as a small village community of houses in Malaya-speaking lands. But from his boyhood Suffian was fired with high ideals and a lofty sense of mission, to serve his people and the nation in which he was born. But his patriotism is of a very broad based nature and his dedication to public service is not confined to any particular race or community but embraces all races

and creeds in Malaysia. In fact, his sympathies and spirit of service are world-wide.

He had a very bright scholastic career and is the First Malayan to win the Queen's scholarship. He proceeded after his High School career to Cambridge and distinguished himself in all the examinations there. After graduating in 1939, he was called to the Bar. He returned to Malaya only in 1948 as he was not able to do so earlier owing to the Second World War. On his return to Malaya he was appointed a Magistrate and entered the Judicial service of his mother country and by rapid promotion he became the holder of the highest judicial position in his country as Lord President of the Courts of Malaysia in May 1974.

He is a man of multifarious interests, chiefly, educational. He was the Pro Chancellor of the University of Malaya. His contribution to the advancement of education as the Pro Chancellor of the Malaya University and as Chairman of the Higher Education Advisory Council was unique. In fact, he has left his mark on nearly all the centres of higher learning in his country.

Sri Justice Suffian is still relatively young and can look forward to many years of useful and meritorious service in different fields not only to his own nation but to the world at large.

More remarkable than his intellectual gifts and achievements are the traits of his character which endear him to all those who know him or come into contact with him. He is most unassuming and, as one admirer has put it, 'he is an intellectual without intellectual arrogance.'

His career on the Bench has been exemplary. In fact he throws lustre on everything that he handles.

His is a multifaceted career and culturally he represents the best in the east and the west. He has an English wife who can speak Malayan fluently like a native. She has imbibed the Malayan culture completely and has identified herself with her husband's family and the society to which he belongs.

Although risen from humble origins, Suffian is highly refined in his tastes and loves to adorn his house and residence with tasteful furniture and pictures. He loves gardening and his wife is a full participant with him in his taste for gardening and flowers.

Suffian is also an author and proficient in Malayan and is the author of a Malayan translation of the Constitution of the Federation of Malaya. He is also the author of the book known as "Introduction to the Malaysian Constitution". He is an erudite legal scholar and writer of several books and articles on legal subjects. He has also prepared the Constitution of the State of Brunei.

But as an author and writer on Constitutional topics he refrains from committing himself to any particular view on problems of the Constitution because he says it will not be proper for him to do so in view of his official position as it is possible that the same questions may come before him for decision in his judicial capacity.

Suffian has a strong sense of humour. There is a short note in this book entitled "The Code I live by". In that he mentions that he and his wife had made a rule for their own guidance, which was never to get angry at the same time. He also says that his wife is blind and he is deaf and this leads considerably to domestic peace!

It is a noteworthy fact in Sri Suffian's life that, his multifarious activities included also service as a broadcaster on the B. B. C. and the All India Radio. He was also Chairman of the Salaries Commission in Malaya. He wrote: "I am only too happy to serve any organization in any way consistent with my duty as a member of the Judiciary".

As regards his views on socio-economic questions they are characterised by a note of pragmatism and moderation. He is not wedded to any extreme theory or doctrine. At the same time, he is not bound down to tradition and is not opposed to social and economic changes for improving the lot of the common man. To quote him: "while we cannot make everybody a millionaire, we should, with our knowledge of economics and central planning, be able to ensure that poverty is no longer pre-ordained, to ensure that everybody should earn enough to feed, clothe and educate his children, and thus repair the economic imbalance that plagues Malaysia, as it plagues many other countries in Afro-Asia."

As regards his views on religion, while he was a believing Muslim and had absolute faith in Islam and in the code of conduct enunciated in the Koran, he was not a ritualist nor looked upon himself as a saint.

When questioned about his faith it is said that he reminded the author of this book of the following words of S. Abdullah Ansari:

"The law of Life requires: Sincerity to God, severity to self; justice to all people; service to elders; kindness to the young; generosity to the poor.

Good counsel to friends; forbearance with enemies; indifference to fools; respect to the learned."

Justice Suffian can also be strict with his officers. He was once presiding over the meeting of the Salaries Commission and had asked the Registrars of the Courts to be present. One of the Registrars who was a European brought with him another man. Suffian asked him who he was. The Registrar replied that he was his chief clerk. Suffian immediately ordered "I only wanted the Registrars to be present and not their Chief Clerks. Ask your Chief Clerk to go out."

This book is a biography of a legal personality of a many-sided character. Naturally one thinks of similar books in India which have been recently published like Motilal Setalvad's "My Life and other things" and Chagla's "Roses in December." But these books are of an autobiographical nature while the book under review is a biography by a person who is frankly an admirer, who is very enthusiastic in his admiration. But the author is not totally uncritical. For instance, he points out that his hero was all praise for people about whom he spoke in approval and failed to point out their defects even when it would have been proper to do so, considering the occasion on which he was speaking.

We think considering that the book deals with the life of a person whose principal eminence lay in the legal and judicial field, it would have been better if the author had given some idea of the structure of the judiciary in Malaya as: it seems to be somewhat peculiar, in the sense that one does not commonly hear of "Lord President of the Courts (in plural) of Malaysia." We should have expected also something about the organization of the Bar in Malaya in such a book as this, at least as an introduction or an appendix. In the absence of these features we in India feel somewhat confused by a learned person being appointed a Magistrate to start with, then a member of civil service or administrative service, finally ending as Lord President of the Courts of Malaysia. We confess to a little sense of perplexity at this. Of course we are speaking only from the point of view of an Indian lawyer accustomed to our own institutions. But the book is very well written and all praise is due to the author for having brought out such a book. The book also contains several photographs which unquestionably are of very great interest. The book is very well printed and nicely got up. We wish the book numerous further editions in which we hope that the author would give some idea of the judicial and legal system in Malaya for the benefit of his foreign readers.

S.A.R.



The Hon'ble Mr. Justice
J. P. BAJPAI, *Judge.*
Madhya Pradesh High Court.

wrong rule in fixing the seniority of the officers. The relevant portion of Rule 13 is set out below:

"13. (1) The seniority of members of the Service shall be determined by the dates of their confirmation in the Services;

Provided that—

(a) in the case of—

(i) a member appointed by transfer from another branch of the service of the Crown, or of a member promoted either from the old service, or the subordinate engineering service, or recruited from temporary engineers, or

(ii) a member whose period of probation has been extended by Government under the provisions of sub-rule (3) of Rule 12,

seniority shall be determined by Government.

(b) x x x x

(2) x x x x

The Service, as defined in Rule 3 (m), means the Punjab Service of Engineers in the Buildings and Roads Branch."

The appellant, as would appear from the facts stated above, was confirmed several years before respondents 2, 3 and 4. So if, sub-rule (1) of Rule 13 applies the earlier order fixing seniority was correct and valid and cannot be disturbed. According to the impugned order the seniority should have been determined under proviso (a) (i) to Rule 13 (1). The case of the respondents is summed up as follows in the written statement filed on behalf of first respondent, State of Punjab:

"The seniority of respondents Nos. 2 to 4 was to be fixed under proviso (a) (i) of Rule 13 of 1942 Rules as they had been appointed to the Class I Service by transfer under Rule 9 read with Rule 6 (5) of 1942 Rules....."

It is necessary now to refer to the relevant rules of the Punjab Service of Engineers, Buildings and Roads Branch (Recruitment and Conditions of Service) Rules, 1942.

"4. Subject to any rules or order made by the Secretary of State or the Governor-General with reference to the prior claims of the members of the Indian Service of Engineers members of the service shall be eligible for appointment to all grades of the Service viz., Chief Engineer, Superintending Engineer, Executive Engineer and Assistant Executive Engineer:

Provided that—

(a) all first appointments to the Service, except as hereinafter provided, shall be to the post of Assistant Executive Engineer;

(b) x x x x

"5. No person shall be appointed to the Service who is not a male and unless, he—

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x x x x
(d) has, in the case of a candidate for direct appointment on the advice of the Commission passed such competitive examination or such other test as the Commissioner may prescribe for appointment to the service, and

x x x x
"6. Subject to provision of Rules 4 and 5 appointment to the service shall be made in India and in England, after consultation with the Commission, by any of the following methods:

(1) By direct appointment in India in accordance with Rule 7;

(2) From officers belonging to the old services and engineering subordinates, in accordance with Rule 8;

(3) from apprentice engineers appointed under the rules given in Appendix C on the advice of the Commission as suitable to serve an apprenticeship in the department and who have completed their practical training of not less than two years and are not less than 22 or more than 26 years of age on the 1st August immediately preceding the date on which the appointment is made;

(4) from temporary engineers who have held their appointments for not less than three years continuously before the date of appointment to the Service, and are not less than 26 years of age on the 1st August immediately preceding the date on which the appointment is made;

(5) by transfer or appointment in accordance with Rule 9 of an officer already in the service of the Crown;

(6) by direct appointment in England in accordance with Rule 10: provided that—

(a) no officer belonging to the old service, no engineering subordinate and no apprentice engineer or temporary engineer shall be appointed to the service unless he has been declared by the Chief Engineer to be fit for such appointment; and

(b) appointment for the service of officers belonging to the old service, or of engineering subordinates or of apprentice engineers or temporary engineers shall be made by selection and no such officer, subordinate apprentice engineer or temporary engineer shall be entitled to such appointment as of right."

The 'Old Service' referred to in Rule 6 (2) has been defined in Rule 3 (1) as meaning "the Punjab Service of Engineers (Old) in the Buildings and Roads Branch."

"9. Government may in special cases and after consulting the Commission, transfer an officer already in the service of the Crown, to the service."

"12. (a) Members of the Service promoted from the old Service will not be on probation.

(b) Members of the Service recruited from persons already serving the department (other than members of the old service) and such apprentice engineers as have had two years apprenticeship or more shall be on probation for one year or less.

(c) All other members recruited to the Service shall be on probation for two years.

(2) x x x x

(3) on the conclusion of the period of probation of any member, Government may confirm such member in his appointment, or if his work has in the opinion of Government, not been satisfactory Government may dispense with his services if recruited direct, or revert him to his former post if recruited otherwise, or may extend his period of probation by such period as it may deem fit, and on the expiry of such extended period of probation may pass such orders as it could have passed on the expiry of the first period of probation, provided the total period of probation shall not exceed three years.

(4) x x x x

The term 'department' occurring in R. 12 (1) (b) has been defined in Rule 2 (k) as: "the Buildings and Roads Branch of the Public Works Department of the Punjab Government."

7. The impugned order of August 28, 1969 is based on proviso (a) (i) to R. 13 (1). The question is whether on view of the facts stated earlier and the rules quoted above, respondents 2, 3 and 4 could be said to have been appointed by transfer from another Branch of the Service of the Crown. Rule 6 enumerates the various methods of appointment to the service; sub-rule (5) of Rule 6 mentions "transfer or appointment in accordance with Rule 9 of an officer already in the service of the Crown" as one of the methods. Rule 9 provides that the Government in special cases and after consulting the Commission can transfer an officer already in the service of the Crown to the 'service'. Rule 9 thus speaks of transfer of an officer already in the service of the Crown to the Punjab Service of Engineers in the Buildings and Roads Branch. It is plain that Rule 9 refers to the transfer of any officer employed in some service of the Crown other than the Punjab Service of Engineers in the Buildings and Roads Branch. Obviously an officer employed in the Buildings and Roads Branch of the Punjab Service of Engineers cannot be transferred to the same Branch where he is already working. Respondents 2 to 4 before they were appointed as Assistant Executive Engineers, Class I, had been employed as Assistant Engineers Class II, in the Build-

ings and Roads Branch. Clearly, their appointments to higher posts in the Buildings and Roads Branch could not have been by way of transfer as contemplated in Rule 9.

8. It appears that the Commission in their letter dated June 16, 1956 on the subject of the suitability of several officers including respondents 2 to 4 for appointment to Punjab Service of Engineers, Class I, in the Buildings and Roads Branch, pointed out referring to Rule 6 (5) that it could not apply to a case "which relates to the promotion of officers in the same line, i.e. from P. S. E. Class II to P. S. E. Class I in the Punjab P. W. D. B. & R. Branch." The Government in an earlier letter to the Commission dated May 4, 1956, had expressed the view that R. 9 read with R. 6 (5) of the 1942 Rules was "the most nearer applicable in these cases." This letter of the Government which possibly means that of the rules, Rule 9 read with Rule 6 (5) was the nearest applicable to such cases was really an admission that Rule 9 and R. 6 (5) did not apply to these cases. In any event we have found that Rule 9 or Rule 6 (5) has no application to the cases of respondents 2 to 4.

9. There is no alternative case that these appointments were by promotion, if Rule 9 was not applicable. Clearly, such a case could not be made because proviso (a) (i) to Rule 13 (1) is limited to appointments by promotion from the old service, or the subordinate engineering service or from temporary engineers. Respondents 2 to 4 belonged to none of these categories. Class II Service in the Buildings and Roads Branch of the Punjab Service of Engineers to which these respondents belonged, was brought into existence only in 1953 and naturally could not be mentioned in the 1942 Rules as one of the categories of service from which promotion as Assistant Executive Engineer, Class I, was permissible.

10. The proviso to Rule 13 (1), even assuming it applied, did not give the Government arbitrary powers to determine seniority in any manner it liked disregarding altogether the other rules. The Government had to exercise this power in a reasonable manner keeping in mind the guidelines supplied by the other rules. It was however contended on behalf of the respondents that the earlier order fixing the seniority of the officers concerned did not take into account the length of service and the experience of respondents 2 to 4 and this error was set right by the impugned order. We do not think that this claim is justified. It appears from the Judgment of the High Court that the previous seniority list was prepared on the basis of a note of

the then Chief Secretary to the Punjab Government, Shri Mangat Rai. In the High Court, and also before us both sides referred to this note dated April 1, 1959. Shri Mangat Rai in his note stated his conclusion on this matter as follows:

"Much heat and argument has been generated in this case in regard to giving these officers (including Rr. 2 to 4) benefit of previous service before their entry into class I It is unsupportable that these officers should be placed as senior to those who were taken in earlier recruitments when some and in fact most of them, were given a chance of selection but were not selected." Earlier in the note Shri Mangat Rai elaborated his views on this question:

"Rule 13 which deals with seniority makes it clear in its substantive provision that seniority shall be determined from the date of confirmation. Proviso (a) however states that (in case of) promoted officers, Government has the power to determine seniority ad hoc. Much controversy has raised around this rule, and most extreme claims can be made and have been made in regard to it. It is in the first place clear that such a proviso cannot give Government a complete free hand to fix seniority, but that such action must be based on reasonable ground and if possible sound convention. For example, theoretically it is possible under this rule to argue that Government may place a particular promoted officer as more senior than a most senior Chief Engineer, but this would obviously be an absurd and unsupportable position. In the present case, the particular issue where controversy has been extreme in regard to this point is whether a direct recruit may be put lower in seniority to a promoted officer, even if the latter is recruited after him and as is the case with most officers here even if the promoted officer has been considered along with the direct recruit and has not been selected. In this connection, one point has been considered already, namely that Rule 12 provides for weightage for promoted officer in regard to a shorter period of probation. This I have already conceded as sound under paragraph 6. Beyond this I am, however clear Government should not and cannot go If it was intended to give weightage to promoted officers in regard to seniority in such an important matter it is inconceivable that it would not have formed an integral part of one of the main rules of service, rather than that it should be covered under a general proviso such general proviso usually existing only to deal with marginal and difficult cases, in direct contrast is the question regarding probation, where weightage to be given to promoted officers has been

clearly, and most definitely stated Such selection by direct recruitment would in fact mean nothing, if promoted officers, subsequently selected and at the relevant time rejected, were put in seniority above the direct recruits. Government would thus be nullifying a clear policy decision that direct recruitment was necessary..... My categorical conclusion is that the proviso (a) to R. 13 does not justify a free hand to Government to place later personnel above earlier and as such position is self-destructing and indeed absurd, particularly in the circumstances of this case, where later promoted officers were in several cases definitely rejected at an earlier stage of selection."

The extracts from Shri Mangat Rai's note quoted above clearly show that in preparing the previous seniority list the length of service, experience and efficiency of the officers concerned were taken into account, and on the facts and the rules set out above, we are of opinion that the reasons stated in Shri Mangat Rai's note for not giving respondents 2, 3 and 4 precedence over the appellant are perfectly good and valid reasons.

11. Another contention, raised for the first time in this Court on behalf of the respondents, is that the case of the appellant himself was governed by proviso (a) (ii). The basis of this contention seems to be this. The appellant was appointed as Assistant Executive Engineer on July 3, 1951. In terms of Rule 12 (1) (c) his period of probation was two years. He appears to have been confirmed on January 14, 1954. In Shri Mangat Rai's note there is a reference to the appellant's date of confirmation in these words: "This officer was confirmed two and half years after his date of appointment on the ground that his period of probation was two years and that he had also spent six months in charge of Sub-Division under training." It further appears from Shri Mangat Rai's note that the appellant had successfully completed his period of probation and according to Shri Mangat Rai for the purpose of fixing seniority the appellant should be taken to have been confirmed immediately on the completion of his probation, on July 3, 1953. Proviso (a) (ii) to Rule 13 (1) refers to an officer whose period of probation has been extended by the Government under the provisions of sub-rule (3) of Rule 12. R. 12 (3) relates to an officer whose period of probation is extended because in the opinion of the Government his work has not been satisfactory. There is no material on record suggesting that the appellant's period of probation was extended under Rule 12 (3). The case of the appellant therefore could not attract proviso (a) (ii) to Rule 13 (1).

12. The impugned order revising the previous seniority list does not appear to be justified on the rules and seems to us unwarranted and arbitrary. We therefore allow the appeal and quash the order and the notification dated August 28, 1969. The appellant will be entitled to his costs throughout from respondent No. 1.

Appeal allowed.

AIR 1975 SUPREME COURT 1604

(From: Mysore)

A. N. RAY, C. J., Y. V. CHANDRACHUD, A. ALAGIRISWAMI AND A. C. GUPTA, JJ.

Civil Appeal No. 514 of 1970: International Cotton Corpn. (P) Ltd., Appellant v. Commercial Tax Officer, Hubli and others, Respondents. Civil Appeals Nos. 166-173, 181-243 of 1973: H. Basappa & Bros. etc. etc., Appellants v. Commercial Tax Officer and others, Respondents. Civil Appeal No. 2078 of 1970: Rallis India Ltd., Appellant v. Commercial Tax Officer and others, Respondents.

Civil Appeals Nos. 514 of 1970, 166-173, 181-243 of 1973 and 2078 of 1970, D/- 4-10-1974.

(A) Central Sales Tax Act (1956), Section 8 (2) (a) — Constitutional validity — Adoption by Parliament of rate of sales-tax in respect of intra-State sales to inter-State sales — Whether abdication of legislative function — (Constitution of India, Arts. 245 & 286).

The legislative policy laid down by Parliament in Section 8 (2) (a) is that inter-State trade should not be discriminated against.

(Para 3)

The adoption of the rate of local sales tax for the purpose of the Central Sales tax as applicable in a particular State does not show that the Parliament has in any way abdicated its legislative functions. The Parliament in making such a law cannot be said to have indulged in self-effacement. On the contrary, the Parliament by making such a law effectuates its legislative policy, according to which the rate of Central sales tax should in certain contingencies be not less than the rate of local sales tax

in the appropriate State. A law made by Parliament containing the above provision cannot be said to be suffering from the vice of excessive delegation of legislative function. On the contrary, the above law incorporates within itself the necessary provisions to carry out the objective of the Legislature, namely, to prevent evasion of payment of Central Sales tax and to plug possible loopholes. AIR 1974 SC 1660=1974 Tax LR 2017. Foll. (Para 3)

The rate applicable merely means the rate applicable at the relevant point of time and not the rate applicable when Section 8 (2) (a) was enacted. (Para 4)

(B) Central Sales Tax Act (1956) S. 6 (1A)—Central Sales Tax (Amendment) Act (1969), S. 10—Constitutional validity—Concession given to one set of tax payers denied to other set—Whether violative of Art. 14 of the Constitution in view of S. 10. (Constitution of India. Art. 14).

The argument was that while transactions between the 10th day of November, 1964, that is the date of judgment of the Supreme Court in Yaddalam's case AIR 1965 SC 1510 and the 9th day of June, 1969, that is the date on which the Central Sales Tax (Amendment) Ordinance 1969, which preceded and was subsequently replaced by the Central Sales Tax (Amendment) Act, 1969, was promulgated, were exempted in view of Section 10 of the Amendment Act of 1969 from the liability to pay tax, if in fact the tax in respect of those transactions had not been collected by the dealer, a similar concession had not been granted to dealers who were similarly situated, that is, who had not collected any tax on their sales prior to 10-11-1964 and that such concession should be available at least in the case of assessee who had not made any collection after the judgment of the Mysore High Court in Yaddalam's case, that is, 23rd January, 1962 = (reported in 1962-40 Mys LJ 577).

Held (negating the contention) that the fact that transactions of sales prior to the period before 10th November 1964 or at least the period between 23-1-1962 and 10-11-1964

were not given the same concession as the transactions between 10-11-1964 and 9-6-1969 did not mean that the latter concession was unconstitutional. A concession is not a matter of right. Where the legislature taking into consideration the hardships caused to a certain set of tax-payers gives them a certain concession it does not mean that that action is bad as another set of tax-payers similarly situated may not have been given a similar concession. It would not be proper to strike down the provision of law giving concession to the former on the ground that the latter are not given such concession. Nor is it possible for the Supreme Court to direct that the latter set should be given a similar concession. That would mean legislation by the Supreme Court and the Supreme Court has no legislative powers.

(Para 5)

Reading Section 6 (1A) and Section 8 (2A) together along with the Explanation the conclusion deducible would be this: where the intra-State sales of certain goods are liable to tax, even though only at one point, whether of purchase or of sale, a subsequent inter-State sale of the same commodity is liable to tax, but where that commodity is not liable to tax at all if it were an intra-State sale the inter-State sale of that commodity is also exempt from tax. Where an intra-State sale of a particular commodity is taxable at a lower rate than 3 per cent then the tax on the inter-State sale of that commodity will be at that lower rate. A sale or purchase of any goods shall not be exempt from tax in respect of inter-State sales of those commodities if as an intra-State sale the purchase or sale of those commodities is exempt only in specific circumstances or under specified conditions or is leviable on the sale or purchase at specified stages. On this interpretation Section 6 (1A) as well as S. 8 (2A) can stand together.

(Para 7)

(C) Central Sales Tax Act (1956), Sections 6 (1A), 8 (2A) — Central Sales Tax (Amendment) Act (1969), S. 10 — Power of Sales Tax Officers to rectify assessment orders after the coming into force of the

Amendment Act of 1969. (Constitution of India, Art. 226 — Error, apparent on face of the record).

The contention that the Sales Tax Officers had no power to rectify the assessment orders after the coming into force of the Central Sales Tax (Amendment) Act, 1969 on the ground that there was no error apparent on the face of the record cannot be accepted. This argument is based on the fact that in two decisions in *Mysore Silk House v. State of Mysore*, (1962) 13 STC 597 (Mys) and in *Pierce Leslie & Co. v. State of Mysore* (SRTP Nos. 63-64 of 1963) the Mysore High Court took the view that the inter-State transactions were not liable to tax and that view had been upheld by Yaddalam's case, AIR 1965 SC 1510 and the Supreme Court in its decision in *Joseph's case*, (1970) 25 STC 483 (SC) did not consider the effect of sub-s. (2A) of Section 8 and therefore when there is such difference of opinion it cannot be said to be a case of an error on the face of the record. It is incorrect to say that because the Supreme Court had not, in *Joseph's case* considered the argument put forward regarding the conflict between Section 6 (1A) and Section 8 (2A) there was no error apparent on the face of the record. Clearly when it said that the effect of the Central Sales Tax (Amendment) Act, 1969 is to supersede the judgment of the Supreme Court in Yaddalam's case AIR 1965 SC 1510 the Sales Tax Authorities were undoubtedly entitled to rectify their earlier rectification order which was made consequent on the decision in Yaddalam's case. After the Central Sales Tax (Amendment) Act, 1969 and the decision of the Supreme Court in *Joseph's case* there was no question about the error not being apparent on the face of the record.

(Para 8)

(D) Mysore Sales Tax Rules, R. 38 — "Any order" — Rectified order is included.

Where what was sought to be rectified was the assessment order rectified as a consequence of the Supreme Court's decision in Yaddalam's case, AIR 1965 SC 1510 the original assessment order after

such rectification was no longer in force and that was not the order sought to be rectified. Where it is admitted that all the rectification orders would be within time calculated from the original rectification order, there is no violation of Rule 38 in respect of time. Rule 38 itself speaks of "any order" and there is no doubt that the rectified order is also "any order" which can be rectified under R. 38.

(Para 9)

Cases Referred: Chronological Paras

AIR 1974 SC 1505 = 33 STC 200 =

1974 Tax LR 1995 3

AIR 1974 SC 1660 = 33 STC 219 =

1974 Tax LR 2017 3

AIR 1969 NSC 154 = 25 STC 483 8

AIR 1965 SC 1510 = 16 STC 231

1, 5, 7, 8, 9

(1963) STRP No. 63-64 of 1963 (Mys) 8

(1962) 40 Mys LJ 577 = 13 STC 583 5

(1962) 13 STC 597 = 40 Mys LJ 570 8

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— These appeals arise out of the judgment of the High Court of Mysore dismissing a batch of writ petitions filed by a number of dealers in the State of Mysore (now Karnataka) questioning the levy of sales tax under the Central Sales Tax Act on certain inter-State sales. The goods dealt with were all declared goods and under the Mysore Sales Tax Act they were taxable at the point of purchase at a single point. The assessment periods are prior to 10th November 1964. The importance of this date will become clear when we proceed to deal with the matter subsequently. The assessing authorities assessed all these transactions of inter-State sales to tax. This Court delivered its judgment in what is known as Yaddalam's case, 16 STC 231 = (AIR 1965 SC 1510) holding that where a certain transaction was not liable to sales tax if it were an intra-State sale under the Sales Tax Law of the appropriate State, it would not be liable to sales tax if it were an inter-State sale. Following this decision the assessment orders were rectified giving effect to the judgment. To set aside the effect of this decision sub-s. (1A) was inserted

in Section 6 and a consequential amendment was made in sub-s. (2A) of Section 8 of the Central Sales Tax Act. After this the assessing authorities again rectified the assessment orders and brought to tax the inter-State sales.

2. Before this Court the validity of Section 8 (2) (a) as well as Section 6 (1A) of the Central Sales Tax Act read with Section 10 of the Central Sales Tax (Amendment) Act, 1969 is questioned. In the alternative it is argued that even after the amendment these transactions are not liable to sales tax. The rectification orders are also impugned on the ground:

1. that there was no mistake apparent on the face of the record to justify the rectification under R. 38 of the Mysore Sales Tax Rules, and

2. that in any case such rectification is beyond the permitted period.

3. The first contention regarding the unconstitutionality of S. 8 (2) (a) is sought to be based on the decision of this Court in G. Rayon Silk Mfg. (Wvg.) Co. Ltd. v. Asst. Commr. 33 STC 219 = (AIR 1974 SC 1660 = 1974 Tax LR 2017) dealing with the constitutionality of Section 8 (2) (b). We consider that far from supporting the appellants that decision actually is against the contention put forward on behalf of the appellants. It is only necessary to set out what this Court said in that decision. It is hardly necessary to add anything more. In that case the majority while upholding the validity of Section 8 (2) (b) observed:

"It has been argued on behalf of the appellants that the fixation of rate of tax is a legislative function and as the Parliament has, under Section 8 (2) (b) of the Act, not fixed the rate of Central sales tax but has adopted the rate applicable to the sale or purchase of goods inside the appropriate State in case such rate exceeds 10 per cent, the Parliament has abdicated its legislative function. The above provision is consequently stated to be constitutionally invalid be-

cause of excessive delegation of legislative power. This contention, in our opinion, is not well founded. Section 8 (2) (b) of the Act has plainly been enacted with a view to prevent evasion of the payment of the Central sales tax. The Act prescribes a low rate of tax of 3 per cent in the case of inter-State sales only if the goods are sold to the Government or to a registered dealer other than the Government. In the case of such a registered dealer, it is essential that the goods should be of the description mentioned in sub-section (3) of Sec. 8 of the Act. In order, however, to avail of the benefit of such a low rate of tax under Section 8 (1) of the Act, it is also essential that the dealer selling the goods should furnish to the prescribed authority in the prescribed manner a declaration duly filled and signed by the registered dealer, to whom the goods are sold, containing the prescribed particulars in the prescribed form obtained from the prescribed authority, or if the goods are sold to the Government not being a registered dealer, a certificate in the prescribed form duly filled and signed by a duly authorised officer of the Government. In cases not falling under sub-section (1), the tax payable by any dealer in respect of inter-State sale of declared goods is the rate applicable to the sale or purchase of such goods inside the appropriate State: vide Section 8 (2) (a) of the Act. As regards goods other than the declared goods, Section 8 (2) (b) provides that the tax payable by any dealer on the sale of such goods in the course of inter-State trade or commerce shall be calculated at the rate of 10 per cent or at the rate applicable to the sale or purchase of such goods inside the appropriate State, whichever is higher.

The question with which we are concerned is whether the Parliament in not fixing the rate itself and in adopting the rate applicable to the sale or purchase of goods inside the appropriate State has not laid down any legislative policy and has abdicated its legislative function. In this connection we are of the view that a clear legislative policy can be found in the provisions of Section 8 (2) (b) of the Act. The policy of the law in

this respect is that in case the rate of local sales tax be less than 10 per cent, in such an event the dealer, if the case does not fall within S. 8 (1) of the Act, should pay Central Sales tax at the rate of 10 per cent. If however, the rate of local sales tax for the goods concerned be more than 10 per cent in that event the policy is that the rate of Central sales tax shall also be the same as that of the local sales tax for the said goods. The object of law thus is that the rate of Central sales tax shall in no event be less than the rate of local sales tax for the goods in question though it may exceed the local rate in case that rate be less than 10 per cent. For example, if the local rate of tax in the appropriate State for the non-declared goods be 6 per cent, in such an event a dealer, whose case is not covered by Section 8 (1) of the Act would have to pay Central sales tax at the rate of 10 per cent. In case, however, the rate of local sales tax for such goods be 12 per cent, the rate of Central sales tax would also be 12 per cent because otherwise, if the rate of Central sales tax were only 10 per cent, the unregistered dealer who purchases goods in the course of inter-State trade would be in a better position than an intra-State purchaser and there would be no disincentive to the dealers to desist from selling goods to unregistered purchasers in the course of inter-State trade. The object of the law apparently is to deter inter-State sales to unregistered dealers as such inter-State sales would facilitate evasion of tax. It is also not possible to fix the the maximum rate under Section 8 (2) (b) because the rate of local sales tax varies from State to State. The rate of local sales tax can also be changed by the State Legislatures from time to time. It is not within the competence of the Parliament to fix the maximum rate of local sales tax. The fixation of the rate of local sales tax is essentially a matter for the State Legislatures and the Parliament does not have any control in the matter. The Parliament has therefore necessarily, if it wants to prevent evasion of payment of Central sales tax, to tack the rate of such tax with

that of local sales tax, in case the rate of such local sales tax exceeds a particular limit."

... ..
 "The adoption of the rate of local sales tax for the purpose of the Central Sales tax as applicable in a particular State does not show that the Parliament has in any way abdicated its legislative function. Where a law of Parliament provides that the rate of Central sales tax should be 10 per cent or that of the local sales tax, whichever be higher, a definite legislative policy can be discerned in such a law, the policy being that the rate of Central sales tax should in no event be less than the rate of local sales tax. In such a case, it is, as already stated above, not possible to mention the precise figure of the maximum rate of Central sales tax in the law made by the Parliament because such a rate is linked with the rate of local sales tax which is prescribed by the State Legislatures. The Parliament in making such a law cannot be said to have indulged in self-effacement. On the contrary, the Parliament by making such a law effectuates its legislative policy, according to which the rate of Central sales tax should in certain contingencies be not less than the rate of local sales tax in the appropriate State. A law made by Parliament containing the above provision cannot be said to be suffering from the vice of excessive delegation of legislative function. On the contrary, the above law incorporates within itself the necessary provisions to carry out the objective of the Legislature, namely, to prevent evasion of payment of Central sales tax and to plug possible loopholes."

Mathew, J. speaking for himself and the learned Chief Justice held:

"We think that Parliament fixed the rate of tax on inter-State sales of the description specified in S. 8 (2) (b) of the Act at the rate fixed by the appropriate State Legislature in respect of intra-State sales with a purpose, namely, to check evasion of tax on inter-State sales and to prevent discrimination between residents in one State and those in other States. Parliament thought that unless the rate fixed by the States from time to time is adopted as the rate of tax

for inter-State sales of the kind specified in the sub-clause, there will be evasion of tax in inter-State sales as well as discrimination. We have already pointed out in our judgment in *State of Tamil Nadu v. Sitalakshmi Mills Ltd.* Civil Appeals Nos. 2547-2549 of 1969 and 105-106 of 1970 (since reported in 33 STC 200) = (AIR 1974 SC 1505 = 1974 Tax LR 1995) the objectives which Parliament wanted to achieve by adopting the rate of tax in the appropriate State for taxing the local sales. And for attaining these objectives Parliament could not have fixed the rate otherwise than by incorporating the rate to be fixed from time to time by the appropriate State Legislature in respect of local sales. It may be noted that in so far as inter-State sales are concerned, the Central Sales Tax Act, by Section 9 (2) has adopted the law of the appropriate State as regards the procedure for levy and collection of the tax as also for imposition of penalties."

It is only necessary to add that the legislative policy laid down by Parliament in Section 8 (2) (a) is that inter-State trade should not be discriminated against. If the argument of the appellants is accepted there will have to be unending series of amendments to this section every time one State or other alters its rate of tax.

4. It is next contended that as Section 8 (2) (a) states that the tax payable shall be calculated at the rate applicable to the sale or purchase of such goods inside the appropriate State, it is the rate that was prevalent when S. 8 (2) (a) was enacted that would be applicable and not any subsequent variations in this rate of tax. If this argument is accepted no question of unconstitutional delegation of the Parliament's legislative powers in favour of the State Legislatures would arise at all. It would be remembered that the ground for attacking the constitutionality of Section 8 (2) (a) is that Parliament if it is deemed to have permitted the application of rate of sales tax enacted by a State Legislature in respect of intra-State sales to inter-State sales also that would be impermissible de-

legation by Parliament of its legislative powers. We have already dealt with that question. All that is necessary now to add is that the rate applicable merely mean the rate applicable at the relevant point of time and not the rate applicable when Section 8 (2) (a) was enacted. The whole scheme of the Central Sales Tax Act is to adopt the machinery of the law relating to Sales Tax Acts of the various States, in cases where those states happen to be the appropriate States as also the rates prescribed by those Acts. Under Section 9 of the Act the tax payable by any dealer under the Central Sales Tax Act is to be levied and collected by the Government of India in accordance with the provisions of sub-section (2) of that section. Under sub-section (2) subject to the provisions of that Act and the rules made thereunder, the authorities for the time being empowered to assess, re-assess, collect and enforce payment of any tax under the general sales tax law of the appropriate State shall, on behalf of the Government of India, assess, re-assess, collect and enforce payment of tax, including any penalty payable by a dealer under this Act as if the tax or penalty payable by such a dealer under this Act is a tax or penalty payable under the general sales tax law of the State and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the State; and the provisions of such law, including provisions relating to returns, provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, refunds, rebates, penalties, compounding of offences and treatment of documents furnished by a dealer as confidential shall apply accordingly." Though the tax is levied and collected by the Government of India it is intended for the benefit of and is paid to the State

whose officers assess and collect the tax. The adoption of the machinery of and the rate of tax prevalent in the State is for the convenience of assessment as well as for the convenience of the parties so that they will not have to deal with two sets of officers and two sets of laws in addition to avoiding discrimination between intra-State and inter-State sales. The very purpose of the Act and its scheme would be defeated or at least considerably impeded if the rates of tax applicable in any State in respect of intra-State sales were not applicable to inter-State sales where that State is the appropriate State. We are satisfied that the rate applicable is the rate applicable at the relevant point of time. Only that interpretation is consistent with the legislative policy that inter-State trade should not be discriminated against.

5. It was also urged that sub-section (1A) of Section 6 violates Article 14 in view of Section 10 of the Central Sales Tax (Amendment) Act, 1969 which by Section 3 inserted sub-section (1A) in Section 6. Section 10 reads as follows:

"10. Exemption from liability to pay tax in certain cases:— (1) where any sale of goods in the course of inter-State trade or commerce has been effected during the period between the 10th day of November, 1964 and the 9th day of June, 1969, and the dealer effecting such sale has not collected any tax under the principal Act on the ground that no such tax could have been levied or collected in respect of such sale or any portion of the turnover relating to such sale and no such tax could have been levied or collected if the amendments made in the principal Act by this Act had not been made, then, notwithstanding anything contained in Section 9 or the said amendments, the dealer shall not be liable to pay any tax under the principal Act, as amended by this Act, in respect of such sale or such part of the turnover relating to such sale.

(2) For the purposes of sub-sec. (1), the burden of proving that no tax was collected under the principal Act in respect of any sale referred to in sub-section (1) or in respect of any portion of the turnover relating to

such sale shall be on the dealer effecting such sale."

The argument is that while transactions between the 10th day of November, 1964, that is the date of judgment of this Court in Yaddalam's case, 16 STC 231 = (AIR 1965 SC 1510) and the 9th day of June, 1969, that is the date on which the Central Sales Tax (Amendment) Ordinance, 1969, which preceded and was subsequently replaced by the Central Sales Tax (Amendment) Act, 1969, was promulgated, were exempted from the liability to pay tax, if in fact the tax in respect of these transactions had not been collected by the dealer, a similar concession had not been granted to dealers who were similarly situated, that is, who had not collected any tax on their sales prior to 10-11-1964 and that such concession should be available at least in the case of assesseees who had not made any collection after the judgment of the Mysore High Court in Yaddalam's case, that is, 23rd January, 1962 (reported in 1962-40 Mys LJ 577). There are two answers to this submission. Firstly, the fact that transactions of sale prior to the period before 10th November 1964 or at least the period between 23-1-1962 and 10-11-1964 were not given the same concession as the transactions between 10-11-1964 and 9-6-1969 does not mean that the latter concession is unconstitutional. A concession is not a matter of right. Where the Legislature taking into consideration the hardships caused to a certain set of tax-payers gives them a certain concession it does not mean that that action is bad as another set of tax-payers similarly situated may not have been given a similar concession. It would not be proper to strike down the provision of law giving concession to the former on the ground that the latter are not given such concession. Nor is it possible for this Court to direct that the latter set should be given a similar concession. That would mean legislation by this Court and this Court has no legislative powers.

6. We are not able to appreciate the suggestion on behalf of the appellants that Section 6 (1A) read with Section 10 of the Amendment Act should be declared unconstitutional in so far as it relates to the

period between 23-1-1962 and 10-11-1964 or how that is permissible. That means that the tax leviable under Section 6 (1A) cannot be levied during that period. That means even those who have collected the tax would escape. Secondly, in respect of that period also the dealers concerned might very often be the same set of persons and there can therefore be no question of discrimination.

7. The next submission on behalf of the appellants was that sub-section (2A) of Section 8, which was amended at the same time as sub-section (1A) was inserted in Section 6, has the effect of impliedly repealing sub-section (1A) of Section 6. We are unable to accept this contention. Firstly, such an intention cannot be imputed to Parliament which enacted both the provisions at the same time. Both the provisions should, therefore, be so read as not to nullify the effect of the one or the other. Indisputably sub-s. (1A) of Section 6 was inserted in order to get over the decision of this Court in Yaddalam's case, 16 STC 231 = (AIR 1965 SC 1510). Its effect is to bring to tax inter-State sales which would not be liable to tax if they were intra-State sales. The fact that this sub-section is also included in the non obstante clause of sub-section (2A) of Section 8 does not mean by itself that the effect of sub-section (1A) of Section 6 is obliterated. We will, therefore, have to look into the amended sub-s. (2A) of Section 8 and see what it means. The contention of the appellants primarily depends upon the words "the sale or, as the case may be, the purchase of which is, under the sales tax law of the appropriate State, exempt from tax". What is urged is that transactions of purchase are generally exempt from the tax whenever the goods are taxable at the point of sale and similarly the transactions of sale are exempt from tax generally whenever the goods are taxable at the point of purchase. The untenability of this argument would be apparent from the fact that this means that all sales and purchases are generally exempt from tax. This argument proceeds on the basis that the sale and purchase are different transactions. The Legislature might for the sake of conveni-

ence or from other considerations of policy make either a sale or a purchase taxable in respect of the sale of any particular goods. That does not mean that the sale and purchase in respect of the same transaction are two different transactions. They are two facets of the same transaction. Therefore when sub-section (2A) of Section 8 uses the words "the sale or, as the case may be, the purchase" it is merely referring to the fact that State Sales Tax Acts make either the sale or purchase taxable and not that where the sale is taxable the purchase is exempt from tax and where the purchase is taxable the sale is exempt from tax and therefore where one of them is exempt from tax in respect of an intra-State sale the inter-State sale is completely exempt from tax. We agree with the view of the Mysore High Court that the object of sub-section (2A) of section 8 is to exempt transaction of sale of any goods if they are wholly exempt from the tax under the sales tax law of the appropriate State and make the said sale chargeable at lower rates where under the Sales Tax Act of the State the sale transactions are chargeable to tax at a lower rate and it is not correct to say that where goods are taxable at the point of purchase or sale the transaction is exempt from tax generally. A sales tax has necessarily to be levied on a sale or purchase and this argument implies that all sales are exempt from tax. The plain meaning of the said sub-section is that if under the sales tax law of the appropriate State no tax is levied either at the point of sale or at the point of purchase at any stage the tax under the Act shall be nil. Reading S. 6 (1-A) and Sec. 8 (2-A) together along with the Explanation the conclusion deducible would be this: where the intra-State sales of certain goods are liable to tax, even though only at one point, whether of purchase or of sale, a subsequent inter-State sale of the same commodity is liable to tax, but where that commodity is not liable to tax at all if it were an intra-State sale the inter-State sale of that commodity is also exempt from tax. Where an intra-State sale of a particular commodity is taxable at a lower rate than 3 per

cent then the tax on the inter-State sale of that commodity will be at that lower rate. A sale or purchase of any goods shall not be exempt from tax in respect of inter-State sales of those commodities if as an intra-State sale the purchase or sale of those commodities is exempt only in specific circumstances or under specified conditions or is leviable on the sale or purchase at specified stages. On this interpretation Section 6 (1A) as well as Section 8 (2A) can stand together.

8. Nor are we able to accept the contention that the Sales Tax Officers had no power to rectify the assessment orders after the coming into force of the Central Sales Tax (Amendment) Act, 1969 on the ground that there was no error apparent on the face of the record. This argument is based on the fact that in two decisions in *Mysore Silk House v. State of Mysore*, (1962) 13 STC 597 (Mys) and in *Pierce Leslie & Co. v. State of Mysore* (SRTP Nos. 63-64 of 1963) the Mysore High Court had taken the view that the inter-State transactions were not liable to tax and that view had been upheld by *Yaddalam's case* 16 STC 231 = (AIR 1965 SC 1510) and this Court in its decision in *Joseph's case*, 25 STC 483 = (AIR 1969 NSC 154) did not consider the effect of sub-s. (2A) of Section 8 and therefore when there is such difference of opinion it cannot be said to be a case of an error on the face of the record. It is incorrect to say that because this Court had not, in *Joseph's case*, considered the argument now put forward regarding the conflict between Section 6 (1A) and Section 8 (2A) there was no error apparent on the face of the record. Clearly when it said that the effect of the Central Sales Tax (Amendment) Act, 1969 is to supersede the judgment of this Court in *Yaddalam's case* the Sales Tax Authorities were undoubtedly entitled to rectify their earlier rectification order which was made consequent on the decision in *Yaddalam's case*. After the Central Sales Tax (Amendment) Act, 1969 and the decision of this Court in *Joseph's case* there was no question about the error not being apparent on the face of the record. This attack on the rectification order, therefore, fails.

9. The other attack that the rectification order is beyond the point of time provided in Rule 38 of the Mysore Sales Tax Rules is also without substance. What was sought to be rectified was the assessment order rectified as a consequence of this Court's decision in Yaddalam's case, 16 STC 231 = (AIR 1965 SC 1510). After such rectification the original assessment order was no longer in force and that was not the order sought to be rectified. It is admitted that all the rectification orders would be within time calculated from the original rectification order. Rule 38 itself speaks of "any order" and there is no doubt that the rectified order is also "any order" which can be rectified under Rule 38.

10. The appeals are dismissed with costs. Costs one set.

Appeals dismissed.

AIR 1975 SUPREME COURT 1612

(From: Gauhati)*

(Note: The judgments are printed in the order in which they are given in the certified copy. The first judgment is not, therefore, necessarily the leading judgment.)

A. ALAGIRISWAMI, V. R. KRISHNA IYER AND R. S. SARKARIA, JJ.

Abdul Hussain Mir, Appellant v. Shamsul Huda and another, Respondents.

Civil Appeal No. 915 of 1974. D/- 20-12-1974.

(A) Representation of the People Act (1951), S. 123 — Corrupt practice — Proof — Benefit of doubt — When elections are challenged on grounds with a criminal taint, the benefit of doubt in testimonial matters belongs to returned candidate. (Evidence — Appreciation of). (Para 12)

(B) Representation of the People Act (1951), S. 123 (3) — Corrupt practice — Religious appeal — Inscription of name or caste suffix in posters or pamphlets is not religious appeal — Election Petition No. 2 of 1972 D/- 30-4-1973 (Gauhati), Reversed.

The candidature of a candidate is not imperilled by the inscription of

*(Election Petition No. 2 of 1972, D/- 30-4-1973 (Gauhati).)

his name or caste suffix in posters or pamphlets. Something more substantial, intentional and oblique is necessary. Similarly, mere reference to one's tribe, ancestry or genetic comingling may not be tainted with the legal vice of religious or communal appeal, exceptional situations apart. Election Petition No. 2 of 1972 D/- 30-4-1973 (Gauhati), Reversed.

To declare oneself an offspring of a religious renegade is not to appeal to religion. (Para 18)

(C) Representation of the People Act (1951), S. 123 (3) — Corrupt practice — Appeal on ground of community or religion — Appeal by a Muslim candidate that his mother is a Kachar Hindu and so he may be taken as a Hindu — Held not a religious or communal appeal — Election Petition No. 2 of 1972 D/- 30-4-1973 (Gauhati), Reversed.

An appeal by a candidate that he personifies Hindu-Muslim interplay does not cross the line of corrupt practice. The sharp edge of the appeal, not its elitist possibility or overnice implication, is the crucial, common-sense test. (Para 17)

Again, to claim to be an Assamese or Bengalee is not necessarily a communal appeal — may even be declaration of minority status of the group. In certain circumstances such a vote-catching technique may be violative of Art. 123 (3). It all depends on the over-all factors and setting. (Para 20)

An appeal to Hindus by a Muslim candidate on the ground of his religion is impossible. In the instant case it was held that there was no religious exploitation by the candidate of his religion or community, legally or factually. Tribalism may perhaps be stretched to embrace communalism but the accent in the evidence was on half-Hindu bias, not tribal identity. Election Petition No. 2 of 1972 D/- 30-4-1973 (Gauhati), Reversed.

(Paras 19, 34)

(D) Representation of the People Act (1951), S. 123 (3) — Religious or communal appeal — Calling rival candidate a "revolutionary communist" is not an appeal in the name of religion. (Para 20)

(E) Representation of the People Act (1951), S. 123 (2) — Undue influence — Threat — Proof.

Proof must be clinching, before grave charges can be made good. Oral evidence, ordinarily, is inadequate especially if it is of indifferent quality or easily procurable. (Para 37)

(In the instant case it was held that the charge of threat of torture or undue influence was too wide and vague and the election petitioner has failed to prove that charge.)

(Paras 37, 39, 46)

(F) Representation of the People Act (1951), S. 123 (1) — Corrupt practice — 'Bribery' — What constitutes — Payment or offer to an important person in an area to 'work' for a candidate is not covered. Election Petition No. 2 of 1972, D/- 30-4-1973 (Gauhati), Reversed.

To constitute 'bribery' a mere offer is enough, given the other ingredients. An attempt to commit crime is as bad as the commission, if proved infallibly. (Para 48)

What the law aims at is a blow on the purchase of the franchise by direct or indirect methods. You may buy influence of important persons which is bad in morality but not yet in law. You may over-spend to create enthusiasm in the workers which produces professional electioneers waiting for the season to fleece candidates and parties. This vitiates the smooth wheels of the democratic process but cannot be stanchied by the tourniquet of the law. The vice is the bargain for the ballot and what is obnoxious is the quid pro quo for the vote, however accomplished. AIR 1968 SC 1191 and AIR 1968 SC 1083, Rel. on.

(Para 50)

If the candidate pays money to a V.I.P. of the locality to use his good offices and canvass votes for him, it is a borderline case, but if the money is paid as consideration for votes promised to be secured by him using his sway, it is bribery even though indirectly exercised. If the Mulla (in the instant case) had been paid the money striking a bargain for getting the votes in his ambit of influence, it is electoral corruption. On the other hand, if it is money received for the purpose of organising effectively the election campaign by hiring workers, going round to places in car, meeting people and persuading them to vote for the candidate, it is proper election

expense. A mammoth election campaign cannot be carried on without engaging a number of workers of a hierarchical sort. Many of them may be men commanding influence through goodwill in the locality. Some of them may be village V.I.Ps. social or religious. The touchstone in all these cases of payment or gratification is to find out whether the money is paid in reasonable measure for work to be done or services to be rendered. The crucial point is the nexus between the gratification and the votes, one being the consideration for the other, direct or indirect. (Para 51)

(In the instant case the charge of bribery under Section 123 (1) was not established). Election Petition No. 2 of 1972, D/- 30-4-1973 (Gauhati), Reversed. (Paras 53, 55)

Cases Referred: Chronological Paras
AIR 1975 SC 290 = (1974) 2 SCC 660

15
AIR 1968 SC 1083 = (1968) 3 SCR 111 50

AIR 1968 SC 1191 = (1968) 3 SCR 102 50

AIR 1965 SC 141 = (1964) 7 SCR 790 15

AIR 1960 SC 200 = (1955-56) 11 Ele LR 448 24

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— I agree with the conclusions of our learned brother Krishna Iyer. But I think it necessary to say something on my own.

2. The appeal relates to the election to the Assam Legislative Assembly from Dhing constituency. The appellant was declared elected by a majority of 1185 votes. The respondent filed an election petition making three charges of corrupt practices against the appellant. The learned Judge of the Gauhati High Court held that the charges were made out and allowed the election petition. Hence this appeal.

3. The first charge was the offer of a bribe to P.W. 12. The second charge was that the appellant was guilty of a corrupt practice under Section 123 (3) of canvassing for votes on the basis of his religion. The third charge was that he exercised undue influence by holding out the threat that the people who voted for the

respondent would be identified and subjected to the same treatment as the people of Bangladesh by the Pakistanis.

4. Regarding the first charge all that is necessary to do is to refer to the evidence of P.Ws. 12 and 13. P.W. 12 stated that the appellant offered him Rs. 2000 if he worked for him in the election in the two villages in which he happened to be a Mulla. P.W. 13 stated that the appellant told him that he had offered Rs. 2000 to P.W. 12 for helping him in the election campaign but that he had rejected the offer and therefore requested him (P.W. 13) to collect the money and make it over to P.W. 12 and prevail upon him to work for him (appellant). Clearly this does not fall under Section 123 (1). I consider it, therefore, unnecessary to discuss whether if money is paid or offered as consideration for votes promised to be secured by a person using his influence it is bribery or not. It is a good policy not to discuss in a judgment questions which do not arise out of the facts of the case.

5. As far as the second charge is concerned, it is said that the appellant's mother was a 'Kachari', one of the tribes in Assam. But admittedly she was converted to Islam before she married the appellant's father. Some witnesses say that the appellant canvassed for votes claiming that he was a Hindu. Some others say that he claimed votes on the basis that his mother was a Kachari. All that is necessary to say about this part of the case is that apart from the fact that in a constituency where 80 per cent of the voters were Muslims it is not at all likely that the appellant would have canvassed the votes on any such basis, there is no doubt that the appellant being a Muslim he could not be said to have canvassed for votes on the basis of his religion, he not being a Hindu.

6. As regards the third charge, in spite of the three amendments made to the election petition material particulars were not given on the basis of which the evidence regarding this charge could have been admitted. I agree with the conclusions of my learned brother on the basis of the evidence which he has discussed that

the case of undue influence is not satisfactorily established.

7. I agree that the appeal should be allowed and the election petition dismissed with costs.

KRISHNA IYER, J.: 8. (on behalf of himself and Sarkaria, J.) In the current Indian socio-geographic context, with its delightfully and distressingly diverse, traditional and complex humanity, we have to appreciate the three grounds of corrupt practice levelled through this election appeal against the Congress candidate who secured a lead of 1185 votes but was allegedly guilty of several malpractices at the polls of which three have found favour with the High Court and have been challenged before us. Briefly, they are:

(a) that the petitioner offered Rs. 2,000/- to one Jabbar Munshi (PW 12) to collect votes for him which this righteous soul spurned and therefore the proffered payment did not materialise although the corrupt practice under S. 123 (1) was nevertheless committed;

(b) the petitioner, of the same Islamic faith as his opponent though, canvassed votes using the potency of a queer sort of mulatto religious or communal appeal, thus getting caught within the coils of Section 123 (3) of the Representation of the People Act (hereinafter called the Act, for short); and

(c) he exercised a kind of undue influence to which people of States of our country bordering on Pakistan and a sizeable Muslim population may perhaps be peculiarly susceptible, viz, subjection to the excruciating torture suffered by the East Pakistanis if perchance these voters dared to vote against the Congress thus violating the basic guarantee of free and fair elections contained in S. 123 (2) of the Act.

9. The High Court's holdings on these charges may, at the outset, be set out, to get a hang of the controversy in this appeal:

"According to the statement of Jabbar Munshi, which is reinforced by that of Sahed Ali, the respondent No. 1 had offered Rs. 2,000.00 to him for doing work for him in the election in the two villages of Rowmari and

Mariadhaj. Shri Choudhury laid emphasis on the word 'inducing' used in sub-clause (A) of Clause (1) of S. 123 and canvassed that we cannot spell out inducement by Jabbar Munshi vis-a-vis the voters putting up in Rowmari and Mariadhaj from his statement that he had been offered Rs. 2,000.00 to do work for the respondent No. 1 in the election in the said two villages. Here, again, it is not possible to agree with Sri Choudhury. If a priest of a village is pressed into service by a candidate, who has offered to pay him handsomely, to help him in the election work, it becomes patent that the priest is to use his influence as such in winning votes for the candidate who had approached him. Hence all the ingredients of sub-clause (A) of clause (1) of Section 123 are proved by the dependable testimony of Jabbar Mushi and Sahed Ali with the consequence that the corrupt practice of bribery attributed to respondent No. 1 is established."

x x x x x

"In view of the above discussion of the relevant evidence I conclude that Kanak Doimeri and Kahiram Deuri have spoken the truth with the consequence that the respondent No. 1 is proved to have solicited votes on the basis of his being the son of a Boro Kachari woman. This appeal was made by him in villages which were inhabited by tribals who may or may not be considered as Hindus but they are certainly not Muslims. Therefore, all the ingredients of Clause (3) of Section 123 are established."

x x x

"The statements of the relevant witnesses of the petitioner are that the respondent No. 1 had told them that he is half Hindu and half tribal because of his maternal lineage. I have already held the statements of those witnesses as acceptable. Nothing said by the respondent No. 1 in the witness box has the effect of robbing the statement of those witnesses of their quality as held by me, of being credible. Therefore, I hold that the allegations made in Section C(i), C(ii) of Part III of the Annexure are proved beyond reasonable doubt and as such the respondent No. 1 is guilty of the corrupt practice mentioned in clause (3) of Section 123 of the Act".

x x x x x x
 "It is mentioned in Section B that the respondent threatened the Muslim voters that in case they voted against the Congress, whose nominee he was, it would be possible this time in view of the new system of voting introduced, to detect that fact and that in such an event they shall be severely dealt with. According to the new voting system introduced in 1972, it may be stated, each elector, to whom a ballot paper was issued, had either to make his signature or place his thumb mark on the counter-foil of the ballot paper. That fact, it is mentioned in Section B, was prominently brought to the notice of the electors by respondent No. 1. The threat held out to them, besides that they shall be severely dealt with in case they voted against the Congress, was that they shall be considered and treated as Pakistanis and supporters of Yahya Khan and having worked against the Congress Government which meant and implied that they were voting against Srimati Indira Gandhi and as such were anti-national. In Section F of Part VI it was stated that the respondent No. 1 and the men working with him had propagated that if the electors voted in favour of a candidate other than that of the Congress 'the Congress would carry out torture amongst the Muslims as was done in suppression by Pakistan'".

x x x

"The up-shot of the discussion of the evidence of a large number of witnesses examined by the petitioner and the respondent No. 1 bearing on the allegations set out in Ss. B and F of Part VI is that those allegations are proved to the hilt."

10. Hearing this appeal, we realised that there was an endemic sensitivity to election propaganda and method in certain regions which would be wasted strategy elsewhere because human responses differ according to the socio-political conditioning of groups and communities. Here we are concerned with a tribal area of Assam, a border State with a heterogenous composition of tribesmen, vaguely Hindu by persuasion, plainsmen Hindus and a considerable number of Muslims. A mulla or muslim mini-priest may have sway over his ortho-

dox ~~lock~~ here while elsewhere his voice may be ignored. A threat of East Pakistan type terror or pro-Pakistan branding is prone to frighten many here while in Central India or the South such a bogey may have less minatory impact. Religious appeal or communal appetite in a bigoted and backward population is stronger than in an enlightened or indifferent or other area with a long tradition of peaceful co-existence of variegated religious groups or cosmopolitan people. It all depends on the socio-political pathology or sensibility of each province or constituency. We cannot dogmatise universally without being convicted of social inexperience or lack of political realism. Shri Mukherjea, counsel for the respondent, is right in stressing the interplay of divergent kinks making up the mores of the Dhing Assembly constituency. Before we can competently judge human nature we must educate ourselves about the behaviorism of the concerned group avowedly pluralist in this case. Law, after all, is a species of sociology.

11. Even so, certain basic legal, guidelines cannot be lost sight of while adjudging an election dispute. The verdict at the polls wears a protective mantle in a democratic polity. The Court will vacate such ballot count return only on proof beyond reasonable doubt of corrupt practices. Charges, such as have been imputed here, are viewed as quasi-criminal, carrying other penalties than losing a seat, and strong testimony is needed to subvert a Returning Officer's declaration. On the other side of the scales, findings reached by the trial Judge will not be reappraised and reversed in appeal unless palpable errors or misappreciation are writ large on them. Such being our broad perspective, let us come to grips with the facts and the law arising in this case.

12. We will first deal with the last charge — held proved by the High Court but hardly easy of solution in the legal connotation of the provision (S. 123 (3)) or the factual complex of forces — and it relates to what may naively be called 'religious appeal'. For an intelligent understanding of this translucent provision the best beginning is to reproduce the

sub-section and then search for the soul of this wholesome legal ban on communalism in elections — a bane of Indian politics which dies hard, defiant of law and our secularist creed. Likewise, the voluminous testimony in this case, bearing on the spectrum of appeals attributable to a variety of shades and hues from crude Islamic to plain ancestral kinship and tribal fellowship, baffles identification, being curiously psychic and sociological. In these areas of evidence judicial navigation, towards the port of truth is not so simple as the homing instinct or habitual test of judges whereby they break through false and doubtful depositions. Local obsessions and subjective exaggerations have to be kept in leash and objective touchstones and safe procedures relied on if we are not to get lost in mere bulk of evidence or cynical negation of good and bad. To judge is in part an esoteric art, not a rule of thumb and this case is a real challenge to our ability to feel our way to veracity through unveracity. When elections are challenged on grounds with a criminal taint, the benefit of doubt in testimonial matters belongs to the returned candidate.

13. Sec. 123 (3) of the Act reads:

"Corrupt practices. — The following shall be deemed to be corrupt practices for the purposes of this Act:

x x x x x

(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate."

The conscience of this clause — and the core of the legal inhibition — is to impart penal incarnation to the secular mandate commonly expressed in biblical language:

"Render therefore unto Caesar
the things which are Caesar's;
And unto God the things that are
God's."

The founding faith of our poll process is to ostracise the communal vice from the campaign, having suffered from this virus during the Raj. This great idea must brighten the legal phrases so that the purpose, the whole purpose and nothing but the purpose may be carried into effect.

14. The gravamen of the charge as covered by Sec. C (i) and C (ii) of the petition is that the 1st respondent sought support from tribals on the score that he was half-tribal, half-Muslim — his mother was of Kachari tribe — while the petitioner was unmitigated hundred-percent Muslim, and amongst Hindus settled from the plains he pleaded that he was after all half-Hindu and so, obviously, more acceptable than are undiluted Muslims like the petitioner. The facts of parentage are that the 1st respondent's mother was a tribal Hindu who was converted to Islam on the eve of marriage to a Muslim. The refutation by the respondent has taken two forms. Firstly, no such half-tribal or like propaganda was done and secondly, such a Hindu-Muslim hybridisation in parentage, even if urged tactically before the relevant communities, did not fall within the obnoxious provision regarding religious or communal appeal. At best it was a sentimental sop based on ancestry or kinship, religious rivalry in appeal being out of the ring since both candidates were apparently full-blooded Muslims. We are free to agree that, what with mixed marriages and change of religion and the gamut of beliefs and unbelief and like social phenomena, viewed against the backdrop of a dynamic policy of secularism and national integration, the correct construction of the sub-section is fraught with difficulties.

15. What is religion? What is communal or caste appeal? (We do not have to deal with the thorny problems relating to appeal to language, in this appeal). Some of the inherent confusion besetting 'appeal to religion' have been indicated by this Court in Rahim Khan's case (1974) 2 SCC 660 = (AIR 1975 SC 290). There are orthodox and heterodox wings in all religions schools, sects, protestant

groups and so on — more so in one like Hinduism with a hundred strands ranging from pantheism to atheism. We are here concerned not so much with theology as with sociology, not with intra-religious feuds as with the divisive use of religious faith by projecting them into and polluting politics and social life. Strangely enough, both the candidates are professing Muslims, speaking in formal terms, the petitioner being a revolutionary communist to boot. Judicial insight into practical politics, measuring the degree of contamination, through injection of religious, racial, caste or communal poison, of the blood-stream of healthy electoral processes is a socio-legal essay, as is discernible in this Court's ruling in Kultar Singh v. Mukhtiar Singh, AIR 1965 SC 141 that religious appeal can conceivably play even in a situation where both candidates swear by the same denomination or faith. Within the fold, variables operate and blurred areas exist. A fanatic may seek votes castigating his co-religionist rival with reforming zeal as a de facto apostate. But to delve meticulously into these dark mines of divergent opinions and clashing practices and hold that 'religious appeal' has been invoked is to overdo legality and hamper social advance. Without being obsessed by precedents and freeing ourselves from theological inhibitions we proceed to interpret Section 123 (3) of the Act in the social setting of this case. We cannot countenance, in the name of narrow law, a push back to movements blending of religions, races, castes and communities if it will homogenise the people into national unity, social solidarity and secular mentality. If the rule of law must run close to the rule of life, this sociological view-point stands vindicated since elections politically expose the social inside in the raw.

16. Taking this stance is to read legal realism into the expression 'religious appeal' used in the relevant provision. To exhort the masses — assuming the petitioner's facts to test the legal thrust of his argument — to vote for himself because his mother was a tribal or a Hindu, is perhaps prone to excite the

clan feeling in a vicarious way, though the appeal is by a Muslim. Does this sympathy potential of the appeal to the electorate vitiate the election as an appeal to religion to get votes? To sensitize the voting masses on every politically irrelevant appeal is bad but not yet illegal. Law lays down practical norms, not prohibitions of intangible injuries. In a pluralist society like ours, a certain irremovable residuum of 'minority complex' will haunt the polls, as it may, perhaps in a lesser measure, in the United States or even the United Kingdom. A Jew, a black, a Catholic or an Indian or woman will, without special appeals in that behalf, rouse prejudices for and against in some countries. Even in India, the religion or caste or community of the candidate may exude through his name, dress, profession or other external indicium. Does it mean that his candidature is imperilled by the inscription of his name or caste suffix in posters or pamphlets? Something more substantial, intentional and oblique is necessary. Similarly, mere reference to one's tribe, ancestry or genetic commingling may not be tainted with the legal vice of religious or communal appeal, exceptional situations apart. It may well be that a strong secularist candidate may plead with the electorate to be non-communal and therefore vote for him on the basis that he was an inter-caste or inter-racial or inter-religious product and as such a symbol of communal unity. Indeed, mixed marriages may accelerate national integration and a candidate cannot be warned off by the law from stressing this non-communal merit of his. That would be a perversion of the purpose of the provision.

17. The substance of the appeal, if at all, is — not the delicate, legal concoction for Court consumption — that being of Hindu and Muslim extraction he is a less communal Mussalman. If some mis-understand, the bulk understand and the masses have an uncanny political sense. Viewed from another angle, the hortative exercise is relatable to parentage, vaguely sounding in a sub-conscious clan feeling — too remote, too attenuated to be a plain, or even indirect

appeal on grounds of religion or community. Those who urge, in some roundabout manner 'Hindu Muslim Ek Ho' are doing no violence to law but promote its object. We disagree with any contrary reasoning or finical approach and hold that an appeal by a candidate that he personifies Hindu-Muslim inter-play does not cross the line of corrupt practice. The sharp edge of the appeal, not its elitist possibility or over-nice implication, is the crucial, commonsense test.

18. Now to the factual conclusion. Did the 1st respondent project a Hindu profile or, more plainly, did he articulate a Hindu communal appeal? Religious, it could not be. How could the son of a woman, who made pre-matrimonial switch from Iswara to Allah, appeal to his religion while himself wearing the Islamic inscription in his name? To declare oneself an offspring of a religious renegade is not to appeal to religion. It is unlikely because it does not socially pay. Even Hindu tribals may probe beneath the skin and politically discover he is not a Hindu. Moreover is it strategy in a fevered situation like a hotly contested election, to propagate, in one part of the constituency which is predominantly and backwardly Muslim, that one is a half-Hindu? You cannot insulate such appeals to specified villages as no iron curtain halts election campaigns. Counter-productive would have been the result. Whispers may have succeeded, not public meetings, if the object was discreetly to spread communal propaganda in a secluded area put prudently to prohibit its diffusion into other areas of the same constituency. But here the case is one of public meetings and drama stage with loudspeakers and other publicity and wedding gathering, not nocturnal sub silentia circulation of injurious facts appealing to communal feeling.

19. Before we proceed directly to deal with the evidence we shall refer to one more dimension of the law of corrupt practice based on communal and allied appeals. The vote must be sought by the candidate exploiting his religion. Here the 1st respondent is avowedly a Muslim. An appeal to Hindus by a Muslim can-

didate on the ground of his religion is impossible under the Indian Sun, things as they stand. Nor is there any religion or tribe for hybrids, something like 'Hinduslim'. The finer shades, minor tenets or avant garde movements present in all religions are not the target of the subsection which seeks to strike at the cruder, baser, divisive trends being fostered by casteism, communalism and the like. All great religions speak basically the same truth and converge towards the Religion of Man. Science itself is tending to be spiritual and religions are turning towards science. Man and his Maker are the profound theme of the major religions but some men pervert this deeper urge to make Gods go to war against each other by forming hostile camps. Indian history, particularly under the British, is tainted with godly blood of humans and the cunning manoeuvres of candidates to resurrect that spirit during electoral battles is anathema for the law. We have no hesitation in taking the view that here was no religious exploitation by the candidate of his religion or community, legally or factually. Tribalism may perhaps be stretched to embrace communalism but the accent in the evidence is on half-Hindu bias, not tribal identity. The ground fails and the clever twist in the evidence seems to be too sophisticated an attempt to pass muster.

20. It is not out of place to point out that if we stretch semantics out of context the appellant may, by calling his rival a revolutionary communist (which he claims to be), commit a corrupt practice because to be a communist, nearly means, as a good Marxist, to be a materialist disavowing all religious faiths. Such obviously cannot be the connotation. Words of wide and vague import, like appeal to religion, must receive restricted construction lest law run riot and upset accepted political standards. For, certain political parties — and therefore their candidates — have mild communal overtones and Courts must confine themselves to clear misdirection of voters grounded on plain religious or communal appeal. Again, to claim to be an Assamese or Bengalee is not necessarily a communal

appeal — may even be declaration of minority status of the group. In certain circumstances such a vote-catching technique may be violative of Article 123 (3). It all depends on the over-all factors and setting.

THE FACTS

21. If the appellant had placated the Hindus by a communally palatable version of his ancestry, the news of the meeting would have taken wings and the Muslim voters would have avenged themselves on him — a risk he was unlikely to take, the contest being close and damage by inflammatory recoil from the Islamic end being incalculable. We are inclined to think that the probabilities are against the alleged half-Hindu story.

22. Let us examine the oral evidence bearing on this issue. But since this branch of the case is built on lip testimony, judicial scepticism has to be activated before upholding this species of alleged corrupt practice. Witnesses may lie with counterfeit candour, and judicial hunch may not successfully X-ray the unveracity of apparently disinterested persons. While it may be hazardous to stake a conclusion on so serious and undetectable a matter as an election result because a single witness or more swear that way, no rule of thumb will work, since Courts weigh, not count, witnesses. Broad probabilities, corroboration, circumstantial or oral, the non-production of the best evidence and a host of like factors have to be taken note of, even if not elaborately documented in the judgment. The screening and testing processes will also give due weight to the trial Judge's sense of credence. Ultimately the appellate Court has to have an appraisal of the witnesses' truthfulness and accuracy, the Judge's experience of men and matters and careful reflection being the lie-detector.

23. The pleadings of the petitioner leave much to be desired from the point of view of precision and particularity, especially specification of persons and places so essential to fair-play in the legal process in such matters. Even if one winks at this blemish, there must be strict proof otherwise. The general criticisms made by Mr. Garg, counsel for

the appellant, have force and we will deal with them in the light of the explanation offered by Shri Chatterjee for the petitioner.

24. The appellant has denied having made any such Hindu or tribal appeal to the voters and the burden of proof rests on the respondent-petitioner. We may also discard the new case casually set up through some witnesses that the Congress candidate had declared himself a Hindu (not half but full) and asked at public meetings for support on that footing. Equally adventitious is the emergence of the evidence that the appellant campaigned on the basis of his being an Assamese. While absence of particulars does not stand in the way of the Court considering the evidence led on a ground of corrupt practice if such evidence had been admitted without objection and no prejudice has been caused (vide AIR 1960 SC 200) still a case, departing from the pleading has frail prospects of acceptance. The failure to plead is a blow to the credibility of after-thought testimony. In the present instance, although some witnesses have lent up support to the story that the appellant urged that he be regarded as Hindu and other P.Ws. that, being Assamese, the voters should back him, we do not give credit to such belated ipse dixit. Maybe, as earlier observed, the Assamese appeal, or tribal sentiment, may in certain situations savour of communal appeal and on other occasions be a request by a member of a weaker or backward or minority section to the people for voting help — a democratic gesture—we need not examine such possibilities here, the evidence on the point being naked assertions unfounded in pleadings and unconvincing on probabilities. The Hindus or Assamese or tribals were small numerically, about 80% of the voters being Muslims and the balance sheet would show more loss than gain if one took up a Hindu posture. Nor is there any force in the submission that witnesses R.Ws. 30, 8, 9 and 12 themselves had admitted the holding of the alleged meetings because they do not agree on the religious or communal appeal at all.

25. The heap of half-Hindu evidence may be analysed; not meti-

culously but applying commonsense tests. P.Ws. 53, 54, 55, 57, 65, 66, 67, 68, 79, 80 generally testify to the case of public appeal in tribal and non-Muslim areas that the petitioner has part-Hindu blood flowing in his veins and must be voted for on that basis. Impressive in numbers they are, but the phalanx breaks down on closer examination.

26. We will eschew the impressionistic approach to the credibility of witnesses but look out for interestedness, lack of corroboration and other unnatural features. By a similar token we will examine the half-tribal appeal. The learned trial Judge has generally chosen to believe these witnesses and we will have that in mind while appraising their testimonial worth. P.W. 53 testifies to the appellant's visit to a village library and asking for votes pleading that he may be taken as a Hindu 'because his mother is a Kachari Hindu'. He admits that the appellant is a Mohammadan and still states that 'nobody raised any objection to what he said'. From his evidence it is seen that there were three persons Puran, Padmaram and Dharani who were workers of the present respondent sitting in the library. Although they are interested witnesses their corroboration could have added some weight to the testimony of P.W. 53. Moreover the same witness deposes: 'A polling Officer was also sitting with us when respondent No. 1 talked'. Obviously the evidence of such a witness would have reinforced the credibility of P.W. 53. We are unable to take at its face value the testimony of this easy witness particularly because he goes beyond the half-Hindu theory trotted out in the pleadings.

27. P.W. 54 is no better. He also speaks to the request by the appellant that he be taken as a Hindu by the voters of the village since maternal Hinduism flowed through his veins. However, he agrees that the appellant bears a Muslim name and it is unlikely that he would have visited a Hindu wedding to claim himself a Hindu. The surprising thing about this witness is that he swears: 'I took the respondent No. 1 to be a

Hindu as well as a Muslim'. That a unanimous decision to vote for the election-petitioner was reversed un-animously the next day after the aforesaid appeal to vote on the basis of a Hindu maternity is liable to be rejected even by the gullible. We feel P.W. 54 is speaking with his tongue in his cheek.

28. P.W. 55 also fares ill although he apparently corroborates P.W. 54. Strangely enough this gentleman admits that notwithstanding the Hindu appeal 'the respondent No. 1 gave out his name as Abdul Hussain Mir which is a Muslim name and so we take him as a Muslim'. He proceeds to state that he met the candidate on a later occasion but 'on this last mentioned occasion, respondent No. 1 asked me to cast my vote in his favour and nothing more'. He hardly convinces us. It is significant that P.W.s. 54 and 55 do not speak of any corroborating persons apart from Sri Neog, the supporter of the appellant. A communal appeal made at a wedding party could easily have been corroborated by the bride's father or other important persons of the village. This is a lacuna and the story itself can easily be woven without fear of contradiction.

29. P.W. 57 repeats his predecessors, but the very appeal made is self-contradictory because the words attributed to the candidate are 'that though he is a Muslim.... his mother is a Kachari Hindu and so he may be taken as a Hindu'. He mentions the names of certain others who were present on the occasion as leading persons viz., 'Buddheswar, Bhog-ram and Baliram'. But they have not been examined, P.Ws. 67 and 68 depart from the type design by asserting that the appellant asked for votes as he happened to be an Assamese. The former continued: 'I joined issue with him for the reason that he bore a Muslim name' and went on to assert: 'I told the respondent No. 1 that he is a Bengalee and not an Assamese.. Today also I consider the respondent No. 1 as a Mymensinghia of East Bengal' that is, a Muslim, P.Ws. 67's evidence cannot carry conviction. Nor are we impressed with the testimony of P.W. 68. We have perused the de-

position of P.Ws. 79 and 80 and for the sake of brevity we may say that their testimony is weakened by improbabilities and such oral evidence, served in heapfuls, cannot help induce judicial certitude.

30. P.Ws. 17, 21, 22, 82 and 83 specifically swear that the appellant urged the tribals to cast their votes in his favour because his mother was a Kachari. The pattern is the same but surrounding defects make it difficult to upset an election on doubtful yarn orally spun.

31. There is a mix up regarding the communal appeal spoken to by P.W. 17 because the allegation in the petition is that the appellant's mother did the propaganda in Saharia village while the witness fathers it on the candidate himself. Of course, he is a polling agent of respondent-petitioner and is willing to swear as directed. Not only is there no corroboration but R.Ws. 7, 8 and 15 deny the imputation.

32. P.Ws. 21 and 22 speak to communal representation soliciting votes on the strength of maternal Hinduism, the propaganda being done in Batabari village. It would appear from their evidence that the candidate turned up when a drama show was on, persuaded the stoppage of the play and talked to them asking for votes because he belonged to them 'his mother being a Bora Kachari woman'. The evidence is vague, unlikely and denied by the appellant RW 1 and by RW 5 another man of the village. In this state of dubiety, it is a high risk to run to rely on the testimony of these two witnesses.

33. P.Ws. 82 and 85 speak to a similar propaganda in village Nij-dhing. Both of them go beyond the case in the pleadings and put forward the story that the appellant urged that the villagers 'should vote for him as he is a Hindu'. This evidence is contradicted by R.W. 8, the candidate. We are far from satisfied that such glib oath of casually picked up witnesses speaking to circumstances more ambitious than the pleading sets forth should form the basis for proof of corrupt practice.

34. To sum up, the ground of religious or communal appeal hardly

commends itself to us in the light of the evidence in the present case and we are constrained to reverse the finding of the High Court. We are inclined to observe that the learned Judge has been far too easily persuaded by unsatisfactory oral evidence each of which is of an ad hoc character, is uncorroborated by any testimony of compelling value and is contradicted by the party affected. Proof beyond reasonable doubt seems a forgotten criterion, although verbal homage is paid at the start by the Judge. The dictionary research into the meaning of religion, race, caste and community and the ethnic enquiry into tribal life launched by the trial Judge may be useful but not conclusive and is legally elusive. Myriad forms of rubbing home communal appeal exist but if intangible, has to be ignored in the work-a-day world, law being pragmatic, not perfect.

35. It is a matter for profound regret that political communalism far from being rooted out is foliating and flourishing largely because Parties and politicians have not the will, professions apart, to give up the chase for power through politicising communal awareness and religio-cultural identity. The Ram-Rahim ideal and the secular ideology are often the Indian politician's election haberdashery, not his soul-stuff. Micro-and-mini-communal fires are stoked by some candidates and leaders whose overpowering love for seats in the Legislature is stronger than sincere loyalty to secular electoral processes. Law can efficiently regulate and control if wider social legitimation is forthcoming. And this key factor is absent, so much so wrong methodology becomes rampant. Small wonder, even revolutionaries, imbued with realism, often prove 'boneless wonders' when pitted against communal politics in elections. Courts can act only if cogent proof is adduced. The charge fails.

36. We now move on to the terrorising tactic allegedly resorted to by the appellant. We have earlier noticed that the politics and practices of electioneering may vary from area to area and what is good in Tamil Nadu may be foolish in Nagaland, such being the cultural mosaic that

is India. We will transport ourselves to this constituency, respond to its sensitivity and seek the truth of the charge of threat of voters in that milieu.

37. The pleading in this behalf casts the net too wide and vague and the complaint of the appellant that particulars have not been forthcoming is not without force. The trial Court itself has negatived some of the grounds relied on by the petitioner under the broad head of undue influence, tabooed by S. 123 (2) of the Act. What has survived and has been upheld is all that falls for our consideration. The drift of the charge is that the Congress candidate who, undoubtedly, had the propaganda backing of even Central Ministers who landed in helicopters, that the voters were told about a change in the method of voting which required the affixture of signature or thumb impression on the ballot and the likelihood of detection of the identity of the votes cast, with reference to the voter. The next step in the threat is that if anyone was found to have voted for the communist-petitioner he would be subjected to the same torture the East Pakistanis suffered under the Pakistan regime. The macabre picture of the blood-bath in Bangladesh before it was born was perhaps the psychic content of the threat held out against anti-Congress electors. Making a margin for the ultra sensitive nature of the constituency to this grim threat we have to see whether this awesome propaganda has really been made. Proof must be clinching, before grave charges can be made good. Oral evidence, ordinarily, is inadequate especially if it is of indifferent quality or easily procurable.

38. P.Ws. 3, 5, 6, 7, 8, 9, 14 56 and 58 have been relied on by the petitioner to press home the charge of threat of torture or undue influence by that means. Of course, the villages assigned to the witnesses vary and the appellant has not only denied by his testimony but has pressed into service other witnesses to repudiate the intimidatory imputation. They are R.Ws. 23, 31 and 35 in regard to Sal-kathi Pather village; R.Ws. 30 and 35 in regard to Palastholi village;

R.Ws. 9, 12, and 33 relating to the alleged meeting at Rowman; R.W. 28 in regard to Palaswli Panbari village; R.W. 36 with reference to Jarabari and R.Ws. 38 and 42 negating the story in relation to Doomdoomia.

39. A brief and insightful survey of all this testimony may now be undertaken. P.W. 3 swears that the appellant visited his house on March 10, 1972 accompanied by R.Ws. 31 and 35 and others. When asked he mentioned that as before he intended to vote for the petitioner-respondent whereupon the appellant told him that according to the latest system of election 'my thumb mark shall be taken on the ballot paper and if it was found that I had voted for a candidate other than a nominee of the Congress, I shall be killed in the manner of East-Bengalees. I was also apprised that all those voting against the Congress nominee shall be set up in a line and killed in the way the East Bengalees had been done to death by the West Pakistanis'. This threat turned his vote towards the Congress candidate, says the witness. He had kept this terrible fact a secret till after the defeat of the election petitioner. The gruesome version is too terrifying to be true in the conditions prevailing in India in 1972. It must be remembered that the election-petitioner is a man of consequence being the President of the Managing Committee of a Madrasa in that area and former M.L.A. Of course, the substantial vote he has polled also shows the poor deterrence the alleged threat has had on the constituency. P.W. 5 encores this case of threat and mentions the names of R.Ws. 30 and 35 as having accompanied the appellant. The witness admits that at the 1967 General Elections he voted for the communist candidate, i.e., the election-petitioner, and that he never disclosed the present frightful threat having been made to him to anyone before the election. A perusal of the evidence of these witnesses just referred to in the light of the contradiction by the concerned P.Ws. makes us extremely hesitant to act on their deposition. Indeed we discount their credibility.

40. P.W. 6, the headman of a village and President of a Madrasa, de-

poses to a public meeting in the Madrasa compound at which the appellant and his supporter Shri Neog spoke. The theme was the same except the ruddy embroidery that if anyone voted for the communist candidate everything would be bloodied like the communist flag. There was reference also to Bangladesh brand of ill-treatment. In cross-examination the witness refers to Abdul Khalek and Abdul Quaddus as having been present, but neither of them is examined. It is surprising that till the poll was over this witness did not divulge the threat of violence for getting votes to any one and this strikes us as improbable remembering that the witness is a headman of a village. The appellant as well as Shri Neog have contradicted this version. R.Ws. 12 and 38 have also denied the holding of threats at that meeting. Of course, their evidence by itself may not be compelling.

41. P.W. 9 speaks in the same strain as P.W. 6. So also P.W. 14 who claims to be a Congressman while deposing anti-Congress, not a surprising phenomenon in election case evidence. It looks odd that this witness should say that "excepting Shri Neog aforementioned, no other Hindu participated in the meeting". Such an open threat is likely to be counter-productive in a predominantly Muslim area, particularly when we remember that the petitioner-respondent is also a man of considerable influence. There is reference by P.W. 14 to 'some bustle in the meeting', when the threat was uttered. 'But I cannot say whether it was one of approval or disapproval' says P.W. 14.

42. P.Ws. 7 and 8 have given evidence of domestic delivery of the threat. Both of them speak to the visit at night of the appellant and his revealing the change in the election rules which would require thumb impression or signature to be appended to the ballot paper and the further shock to those who voted for the communist party that they would be shot dead. The possible corroboration could have come only from one Abdul Ghani and Isamuddin Master neither of whom is examined by the petitioner but the latter figures as R.W. 28 to deny the story.

43. P.W. 56 refers to a similar threat held out in village Jarabari by the candidate himself and the possibility of detection of the candidate to whom the vote was cast. This Homeopathic Doctor owns the presence of Sahed and Anwar but neither of them has entered the witness box to corroborate this case.

44. P.W. 58 was not even mentioned in the witnesses' list although he repeats the true-to-type case of threat. The Gaon Sabha President Rupai Sailia and one Rabiram Bora were alleged to be present at the time of the talk but they have been examined by the appellant as R.Ws. 38 and 42 and have denied the whole case of threat.

45. We have to remember in assessing the evidence of these witnesses that the election petition has been blissfully vague in regard to the particulars in support of the averment of undue influence. More than one amendment was sought and still neither the names of the persons nor of the places so vital to induce credence and to show fairplay have been given. We need hardly emphasize that one cannot pick up witnesses en route and march them into the witness box without running the risk of their apparently consistent evidence from being disbelieved. After all we are dealing with a quasi-criminal charge with serious consequences and all necessary particulars have to be furnished in the election petition. This being absent and the entire case resting on shaky ipse dixit we are unable to go by the version tendered by the election petitioner. The upshot of the discussion is that we are far from satisfied about the conclusive veracity of the case of undue influence and have therefore to find against the election-petitioner respondent.

46. Before taking leave of this part of the case it is necessary to emphasise that the wisdom of the law of pleadings bearing on election petitions has set down strict provisions to ensure that fairness of opportunity is given in fastening corrupt practices on the successful candidate. Section 83 significantly insists on all material facts and full particulars being set forth at the earliest stage. To avoid

this duty is to play foul and we as umpires will not easily reckon the goal scored. The rules of the game, in this decisive democratic game where power corrupts even the techniques of proof, will be enforced in Court. Precedents are a profusion on this issue and the law is so settled that we do not cite case-law in support. Here, three amendments were sought and made, of the petition by the election petitioner and objection about bald, vague, twilight allegations were urged by the opposing party. And yet the election petition remains bereft of specificity on vital matters. The penalty will, in any case, be a stricter, more sceptical scrutiny of the testimony brought by the delinquent party. We frown on tactics of keeping material particulars up one's sleeves. That is neither cricket nor court process. The testimonial assessment exercised by us in the present case has been influenced by this blemish in the election petition and after.

47. The last surviving corrupt practice of bribery may now be examined from the legal and factual angle. The former, simplistic on the surface, is blurred and baffling in certain practical situations. Briefly, the charge is that the appellant offered to P.W. 12, Jabbar Munshi, a mulla or mosque functionary with religious influence over his fold, the expressed object being 'to collect votes' for him. In evidence, the mulla crystallised the case thus:

"The respondent no. 1 approached me and said that he wanted to have a talk with me. Then respondent No. 1 took me inside one of the rooms of Jahuruddin's house and there offered me Rs. 2,000/- if I worked for him in the election in the two villages of which I happened to be the Mulla. I turned down the proposal since it was unbecoming of me and then came out of the room." A critical appraisal of the evidence on this part of the case has led us to conclude that the facts deposed to are altogether untrustworthy. Facts failing, law becomes otiose. Even so, having regard to the importance of the subject and largely out of deference to the counsel who have addressed long arguments and highlighted the High Court's reasons on the point we

think it proper to express our opinion. For an incisive understanding of the import of Section 123 (1) we will assume the facts to be correct. Precision in thought being essential, we will set out the provision itself:

"123. Corrupt practices. — The following shall be deemed to be corrupt practices for the purpose of this Act:

(1) 'Bribery,' that is to say—

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person, whomsoever, with the object, directly or indirectly, of inducing—

(a) a person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate at an election, or

(b) an elector to vote or refrain from voting at an election, or as reward to—

(i) a person for having so stood or not stood, or for having withdrawn or not having withdrawn his candidature; or

(ii) an elector for having voted or refrained from voting;

(B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward—

(a) by a person for standing or not standing as, or for withdrawing or not withdrawing from being, a candidate; or

(b) by any person whomsoever for himself or any other person for voting or refraining from voting or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate to withdraw or not to withdraw his candidature.

Explanation.—For the purposes of this clause the term 'gratification' is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any election and duly entered in the account of election expenses referred to in section 78."

(emphasis. ours)

48. One thing is clear. A mere offer is enough, given the other ingredients. An attempt to commit crime is as bad as the commission, if proved infallibly. To pay money 'to work for him in the election' does it become illegal gratification of the corrupt species? We may slur over the minor gap between 'collecting' votes as pleaded and 'working' for the candidate, as deposed, since what counts is the evidence. A break-down of the sub-section yields the following components:

(i) An offer or promise by the candidate etc., of gratification to any person.

(ii) The object must be directly or indirectly to induce an elector to vote or not to vote at an election.

49. The purpose of the provision is to ensure poll purity and exclusion of pollution by money power. All elections involve expenses and that is why Section 77 sets a ceiling on such expenses and impliedly contemplates expenditure on election work. Such lay-out of money may be for legitimate items. Any offer or promise by a candidate (or other person specified in the section) to any person whosoever, of money is anathema for the law, if the object be to induce, directly or indirectly a voter to cast or refrain from casting his ballot. Here there is the offer by the candidate to a person viz., P.W. 12. What is the specific object? To make him work for the candidate, viz., to persuade voters to support the paying candidate. There is a legal line to be drawn here, which is fine but real. The payment or offer as the case may be, may be to any person, but it must be linked with the object predicated in the section. If the payment is to induce an elector to vote, be it direct or vicarious it is corrupt. If it is any other oblique object, it may be evil, not necessarily corrupt in the eye of the law. The language of the provision can be stretched wide to cover even payments to do propaganda or print posters or hire transport since they are calculated to induce voters to vote. A narrow connotation is conceivable where only payments to the voters is hit by the legal stick. A pragmatic construction, inhibiting corruption but permitting

electioneering expense is the right one, although many tricky projects may get through the legal meshes which law cannot help and only public vigilance can arrest.

50. Reading Section 77, dealing with the ceiling on election expenses and S. 123 (1) which strikes at bribery harmoniously and realistically, we reach a few well-defined semantic conclusions. To widen is to be idealistic and ineffectual. To shrink is to fail in the goal of the law. Mr. Garg rightly emphasised that in the light of the precedents of this Court what the law aims at is a blow on the purchase of the franchise by direct or indirect methods. You may buy influence of important persons which is bad in morality but not yet in law. You may over-spend to create enthusiasm in the workers which produces professional electioneers waiting for the season to fleece candidates and parties. This vitiates the smooth wheels of the democratic process but cannot be stanchd by the tourniquet of the law. The rulings in *Ghasi Ram v. Dal Singh*, (1968-3 SCR 102, 110) = (AIR 1968 SC 1191 at p. 1196) and the one at *Om Prabha Jain v. Abnash Chand* (1968-3 SCR 111, 116) = (AIR 1968 SC 1083 at p. 1086) have been cited at the bar and they make out that the vice is the bargain for the ballot and what is obnoxious is the quid pro quo for the vote, however accomplished.

51. If the candidate pays money to a V.I.P. of the locality to use his good offices and canvass votes for him, it is a borderline case, but if the money is paid as consideration for votes promised to be secured by him using his sway, it is bribery even though indirectly exercised. If the Mulla had been paid the money striking a bargain for getting the votes in his ambit of influence, it is electoral corruption. On the other hand, if it is money received for the purpose of organising effectively the election campaign by hiring workers, going round to places in car, meeting people and persuading them to vote for the candidate, it is proper election expense. In between these two extremes lies the case of a man who just receives a large sum of money,

pockets it himself and promises to use his good offices to secure votes. This is a gray area. We are not called upon to pronounce on it in this case. We have no doubt that a mammoth election campaign cannot be carried on without engaging a number of workers of a hierarchical sort. Many of them may be men commanding influence through goodwill in the locality. Some of them may be village V.I.Ps. social or religious, our country being still feudal in many rural areas. The touchstone in all these cases of payment or gratification is to find out whether the money is paid in reasonable measure for work to be done or services to be rendered. Secondly, whether the services so offered amount to a bargain for getting votes or merely to do propaganda or to persuade voters to vote for the candidate, it being left to the voters not to respond to the suasion. It is a plain case if a voter is paid for his vote. It is direct. It is equally plain if the payment is made to a close relation as inducement for the vote. The same is the case if it is paid to a local chief on the understanding that he will get polled the votes in his pocket borough, in consideration for the payment. The crucial point is the nexus between the gratification and the votes, one being the consideration for the other, direct or indirect. Such being the contours of the corrupt practice of bribery, let us consider the facts of the case bearing on this question.

52. The allegations are that the appellant and RW 33 called PW 12 the mulla to the house of RW 33 at Dhing Bazar on February 18, 1972 and offered to pay Rs. 2,000/- for collecting votes. PW 12 and PW 13 have been examined to affirm this case while the appellant as RW 8 and RW 33 have refuted this story, on oath. The version is inherently improbable as it is unlikely that such a corrupt offer would be made to a comparative stranger by one conversant with election proprieties. It is particularly noteworthy that RW 33 has no special influence over this mulla and his house need not have been the venue for the offer of bribe. Sahed Ali, P.W. 13 is also not shown to have any closeness to PW 12 and

why he should get mixed up with this matter is not easily understandable. PW 12 has sworn that he had neither worked nor canvassed for any candidate at any time and could not have been therefore pressured this time by the appellant who is likely to know the implications of this dangerous move himself being an Advocate. Before the poll, P.W. 12 did not mention this matter to anyone but it was divulged only a fortnight after the election. The graphic description of the appellant not producing the cash along with the offer but suggestively opening his long coat without showing the money is more dramatic than true. P.W. 13 who corroborates in part the mulla also is too virtuous to prevail upon Jabbar Munshi to work for the appellant, as requested by the latter, so his evidence runs. This witness would say that the occurrence was around 10.30 a.m., but we have the evidence of Shri Moinul Haque Choudhury who came in a helicopter to address a public meeting on behalf of the appellant that he and the appellant together landed in the place about mid-day. If really the appellant was keen on hiring the services of the mulla at a fancy price he would have put more pressure on PW 13 than is discernible in the indifferent answer of the witness:

"Respondent No. 1 asked me this much that I should prevail upon Jabbar Munshi to accept the money and work for him. He did not ask me anything more though he told me that he had offered Rs. 2000/- to Jabbar."

53. In this context it must be stated that in the original election petition the source of information regarding the allegations contained in Section G of Part I that bribery of Rs. 2,000/- was not mentioned. By an amendment, Kabir is mentioned as the source but in the affidavit filed in support of the amended election petition the informant is mentioned as Saikia and neither of them has been examined. Nor are we told how they came to know about the secret offer. The overall view of the evidence bearing on this aspect leaves us in grave doubt as to whether the mulla had met the appellant at all. We have already held that the facts as spoken to by the former, even if true do not

come within the relevant clause (Section 123 (1)).

54. The evidence is purely parol, the accusation one of reprehensible corruption and so, however attractive an offer of payment to a mulla for muslim voters being influenced may appear to be, the court has to be circumspect to a degree. In our country where marshy areas of religious fanaticism survive into late twentieth century politics and candidates, regardless of secular and even revolutionary faiths, succumb to methods of vote-catching inconsistent with democratic scruples, approaching mullas, priests and pujaris may not be unfamiliar. But this vicious proclivity cannot be combated by courts except when (a) clinching proof is adduced and (b) the facts come within the clutches of the legal definition. After all, poll purity is preserved not by law alone but by a critical electoral climate.

55. The mere word of the mulla, denied by the appellant, is altogether insufficient to bring home the guilt, corroborated though it is by P. W. 13.

56. Summing up our conclusions, we hold none of the grounds pressed have been proved to the point of judicial certitude. All that judges, fallible instruments, and cajoined by the record, can hold in all conscience is that by human insight and judicialised procedure, with all the limitations they in practice imply, the truth is what our lights tell us it is, no more.

57. The appeal is allowed and the election petition dismissed with costs throughout.

Appeal allowed.

AIR 1975 SUPREME COURT 1627

(From: Punjab and Haryana)*

M. H. BEG, A. ALAGIRISWAMI
AND N. L. UNTWALIA, JJ.

Jagir Singh and another, Appellants v. Jasdev Singh and others, Respondents.

Civil Appeal No. 737 of 1973, D/- 28-2-1975.

*(Ele. Petn. No. 38 of 1972, D/- 16-2-1973 — Punj. & Har.).

CS/CS/A942/75/VBB

(A) Representation of the People Act (1951), S. 123 (3) & (3A) — Election of R to Punjab Legislative Assembly challenged on ground of corrupt practice under S. 123 (3) and (3A) — Charge based on publication of offending pamphlet and poster — Printing and distribution of offending matter proved to have been done at the instance of successful candidate R — Election set aside — Ele. Petn. No. 38 of 1972, D/- 16-2-1973 (Punj. & Har.), Reversed. (Paras 7, 8)

Mr. G. B. Pai, Sr. Advocate (M/s. S. K. Bagga, I. K. Mehta, Mrs. S. Bagga and Miss Yash Bagga, Advocates, with him), for Appellants; M/s. Kapil Sibal, Jasdev Singh and Hardev Singh. Advocates (for No. 1) and M/s. Bhagwant Singh, B. D. Sharma, M. P. Varma, and S. R. Srivastava, Advocates (for No. 2), for Respondents.

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— The appellants are two voters of the Dakala constituency who challenged the election of the 1st respondent to the Punjab Legislative Assembly on many grounds out of which only the charge of corrupt practice under Ss. 123 (3) and 123 (3A) of the Representation of the People Act now survives for consideration. Respondents 2 and 3 are the unsuccessful candidates. The charge of corrupt practice is based on the publication of a pamphlet, about the nature of which there is no dispute and the contents of which are therefore unnecessary to be set out. It is admitted that if the publication of the pamphlet either by the successful candidate or his election agent or anyone else at the instance of either of them is proved the election has to be set aside.

2. The publication was sought to be proved by the evidence of C.W. 1. the proprietor of the printing press where it was printed, C.W. 2 in whose name it was printed as well as of P.W. 1. The evidence of R. W. 5 was relied upon to prove that the pamphlet was sent to the Sub-Divisional Magistrate as required under S. 127A of the Representation of the People Act and received by her on the 12th March. Ext. P.W. 1/4 was put forward by the appellants as the manuscript which was used for printing the pam-

phlet. This is purported to be signed by the successful candidate as well as C.W. 2, Jathedar Ram Singh, in whose name the pamphlet is published and P.W. 1, Bedi Raghbir Singh. On the other hand the printer, C.W. 1 produced another manuscript Ext. C.W. 1/1 as the one from which the pamphlet was printed. There is also a tape-recorded conversation between the 1st respondent and Bhagwant Singh, the husband of the 2nd respondent, who was also her counsel in the election petition, from which the 1st respondent tried to make out that he was wholly unaware of and surprised at his signature in Ext. P.W. 1/4. His main argument before this Court was that the whole thing has been brought about by collusion between the 2nd respondent, Bedi Raghbir Singh P.W. 1, Nichhatar Singh C.W. 1 and Jathedar Ram Singh C.W. 2. The learned Judge held:

(1) that he had no doubt that the pamphlet was printed from Ext. P.W. 1/4:

(2) that Ext. C.W. 1/1 had been manufactured for the purpose of this petition:

(3) that the figures

$$\frac{\text{"20} \times \text{30}}{4} = 5000''$$

on Ext. P.W. 1/4 are in the handwriting of Nichhatar Singh;

(4) that the signature of the successful candidate on Ext. P.W. 1/4 appears to be his:

(5) that the production of Ext. C.W. 1/1 by Nichhatar Singh and the tape-recorded conversation show an anxiety on the part of 1st respondent to steer clear of his signature on Ext. P.W. 1/4;

(6) that this anxiety could be because he had in fact signed such a poster as it was not his case that he ever signed any blank paper; and

(7) that he was not, however, sure of the existence of the poster.

We are of opinion that conclusions 1 to 6 of the learned Judge set out above are borne out by the evidence on record and do not therefore consider it necessary to set out at length the evidence to support those conclusions. Conclusion No. 7 is rather curious in view of his ear-

lier conclusions and his observation that from what he had stated earlier i.e. conclusions 1 to 6, he was clear in his mind that the poster was not printed before the poll is completely non sequitur. The learned Judge then goes on to say that the strongest reason for this conclusion is the absence of any complaint by respondent No. 2, and that the evidence as to the distribution of the poster is oral and untrustworthy. That is how he has disposed of the whole question regarding the printing of the poster. We are unable to agree that absence of complaint by respondent No. 2 necessarily leads to that conclusion. We are of opinion that the conclusion arrived at by the learned Judge is wholly unsustainable especially in view of his categorical findings recorded earlier.

3. The 1st respondent's case was one of complete denial of the allegations in the petition regarding the printing of the poster. He did not plead that the manuscript which was used for printing the poster, Ext. P.W. 1/4 was manufactured on a blank paper bearing his signature. He did not even plead that the pamphlet must or might have been brought into existence by the petitioners or the 2nd respondent after the date of the poll for the purpose of the election petition. There is very satisfactory evidence that the poster should have been printed on the 1st of March, 1972. Ext. C.W. 1/1, which, as the learned Judge himself holds, has been brought into existence for the purpose of this petition bears that date. After carefully going through the evidence of C.W. 1, Nichhatar Singh we are satisfied that he is a witness who is anxious to help the 1st respondent and has brought Ext. C.W. 1/1 into existence for the purpose of helping him. Answers favourable to the petitioners had to be extracted out of his unwilling mouth by cross-examination. Even he has put the date on Ext. C.W. 1/1 as 1st of March and his evidence is that it was printed on the 1st of March though he mentions only the name of C. W. 2, Ram Singh. He also says that he had sent a letter, Ext. R. W. 5/1, to the Sub-Divisional Magistrate. Whether that letter was sent on the 1st of March, as is spoken to by

him, or on the 5th of March, the date which it bears, does not affect the substance of the question. This letter has been received by the Sub-Divisional Magistrate, Miss Deol on 12th March. The learned Judge himself finds that it was received on 12th March. We have carefully scrutinized it and are satisfied that it has been signed by the Sub-Divisional Magistrate on the 12th of March. That has been entered in the office diary on the 16th of March. Though it is true that the date 6th has been struck out and 16th has been put in, the 6th seems to have been put in due to a mistake. Looking into the entries in the diary on the previous pages as well as subsequent pages we have no doubt that the 16th is the correct date. The entries on this date contain a number of documents received from various Government offices which bear the date 6th March. We have no reason at all to doubt the genuineness of the entries in this diary. If Ext. R.W. 5/1 was signed by the Sub-Divisional Magistrate on the 12th and entered in the diary on the 16th they probalilise the receipt of that document at least some days before the 12th. At no stage, except during the arguments before this Court, were the entries in this diary sought to be impugned. Indeed before the High Court it seems to have been urged on behalf of the 1st respondent that it was a diary maintained in the usual course of business. Taking therefore even Ext. C.W. 1/1 as well as the evidence of C.W. 1, Nichhatar Singh, into consideration we are satisfied that this pamphlet should have come into existence on the 1st of March. We have also compared the signature of the 1st respondent in Ext. P.W. 1/4 with many of his admitted signatures and are satisfied that that signature is his and that is confirmed by the expert evidence of Mr. Puri. There being no satisfactory explanation on the part of the 1st respondent regarding the presence of his signature on Ext. P.W. 1/4 it is to be concluded on the evidence of Nichhatar Singh and Jathedar Ram Singh taken together that the 1st respondent had come to C.W. 1's press and given Ext. P.W. 1/4 for printing. Conclusion No. 3 of the learned Judge also supports this find-

ing. We are not quite sure about the presence of Bedi Raghbir Singh at that point of time. But we can see no cogent reason for disbelieving the evidence of C.W. 1 whose deposition clearly shows that he was anxious to help the 1st respondent. But in order to deny that Ext. P.W. 1/4 was the manuscript which was used for printing the poster he also had to manufacture Ext. C.W. 1/1. That evidence even taken at its face value establishes that the printing of the pamphlet was on the 1st of March. If so it could have been done only at the instance of the 1st respondent. It was not even put to C.W. 1 that it was done after the poll. Why Ram Singh should have printed it if not at the instance of respondent No. 1 was never sought to be explained. Nor could respondent No. 2 have printed it.

4. We have bestowed our anxious consideration on how the 1st respondent came to sign Ext. P.W. 1/4. Though Jathedar Ram Singh tried to say that he did not know Nichhatar Singh C.W. 1 and therefore Nichhatar Singh wanted the 1st respondent to undertake the responsibility of paying for the printing of the poster, it is clear that Nichhatar Singh had known Jathedar Ram Singh for some time and there was no particular reason why even if the 1st respondent undertook to pay for the printing he should sign it. It is said that it was because the 1st respondent asked Nichhatar Singh to produce that paper in his office and get the payment. This reason does not seem to be a good enough one for the 1st respondent signing Ext. P.W. 1/4. Be that as it may we have no doubt that Ext. P.W. 1/4 bears 1st respondent's signature and the whole evidence establishes beyond doubt that the 1st respondent got the pamphlet printed. He probably did not expect that the manuscript would reach the hands of the 2nd respondent.

5. It is in this connection that it is necessary to refer to the tape-recorded conversation. The 1st respondent had stated before the High Court that the transcript of the tape-recorded conversation can be taken as correct in so far as what he had spoken was concerned. The other person concern-

ed in the tape-recorded conversation was Bhagwant Singh, the husband of the 2nd respondent, who was also her advocate before the High Court. Though he admitted his part in the conversation it would not be admissible in evidence because he was not examined as a witness. What he has stated there cannot be taken as an admission on behalf of the 2nd respondent. Such admission can only relate to matters in issue before the Court, admissions prejudicial to the case of the 2nd respondent. Leaving such questions aside for the moment one thing that is obvious is that Ext. P.W. 1/4 had reached the hands of the 2nd respondent during the course of the trial and the evidence of Bedi Raghbir Singh that Nichhatar Singh gave it to him to be produced in the Court is not true. This conversation was relied upon by the learned advocate appearing on behalf of the 1st respondent as establishing that the 1st respondent was surprised and bewildered at the fact that Ext. P.W. 1/4 bore his signature. We can see no such indication. It is to be remembered that when this conversation was being tape-recorded Bhagwant Singh was not aware of it and therefore was talking freely what was in his mind whereas the 1st respondent was quite conscious of what was going on and that he was merely laying a trap in order to trap Bhagwant Singh into saying something in his (1st respondent's) favour without being aware of it. The tape-recorded conversation is absolutely unhelpful to the 1st respondent's case.

6. Though there are certain suspicious features in this case which the learned advocate for the 1st respondent tried to magnify and blow out of all proportion so as to obscure the real picture, we are satisfied that the central point in the case as to the responsibility of the 1st respondent in getting the offending poster printed has been established beyond all reasonable doubt. Once that is done the question of distribution falls into its proper place.

7. According to the petitioners the posters were distributed in the villages Lalauchhi, Bakshiwal, Jhill, Dhanauri, Kutabanpur, Bhima Kheri,

Saidipur, Rajla, Khuda Dadpur, Bat-hoi Kalan and Chhitera. The distribution in Lalauchhi is spoken to by P.W. 2 an advocate, Mr. Balwant Singh. His evidence is attacked on behalf of the 1st respondent by saying that he was the junior under the 2nd respondent's husband but it is seen that that was some time ago and he had even appeared against the husband of the 2nd respondent in a personal case. So his evidence cannot be attacked on this basis. The 1st respondent examined two advocates to prove that on the particular day when he was said to have distributed the poster in Lalauchhi he was in Patiala. Their evidence has been rightly disbelieved by the learned Judge. The learned Judge has stated that both these advocates have merely lent themselves to prove a false plea of alibi. The only criticism which the learned Judge has made of the evidence of Mr. Balwant Singh is that he is an Akali and his testimony cannot be accepted at its face value as he would be the last person to support the Congress candidate. We are of opinion that this is the very reason why Mr. Balwant Singh's evidence should be accepted and not the contrary. We are therefore satisfied on evidence that the conclusion of the learned Judge on this point could not be accepted and the distribution in village Lalauchhi must be held to have been proved.

8. As regards the distribution in village Bakshiwalla, it is spoken to by P. W. 3, an employee of the C. I. D. Punjab. His father owns land in that village. The 1st respondent produced R.W. 19 to show that Sucha Singh, P. W. 3 did not come to him and in support of this he produced his register Ext. R. W. 19/1. The learned Judge's comment on this register is "The less said about this register the better". R.W. 19 also admitted that there was a scuffle in the village and Sucha Singh was injured. The learned Judge has held that R.W. 19's evidence is such that much reliance cannot be placed on him; R.W. 21 also admits about the injury to Sucha Singh. In this state of evidence the learned Judge has not recorded any finding about the distribution of the poster in village Bakshiwalla. We are of opinion

that the distribution has been satisfactorily established. We do not therefore feel it necessary to deal with the question of distribution in the other villages.

9. The 2nd respondent is a Hindu lady married to a Sikh gentleman. Such marriages between Hindus and Sikhs have been very common. Indeed it appears that till recent times the first son of most Hindu families in Punjab became a Sikh. Still politics has driven a wedge between brothers. It has led to unfortunate situations like the one in this case where because the 2nd respondent happens to be a Hindu lady it was sought to be taken advantage of by the 1st respondent for his election purposes, even though he and the 2nd respondent's husband would seem to have been good friends.

10. The appeal is allowed and the election of the 1st respondent is held void. The appellants will get their costs from the 1st respondent.
Appeal allowed.

AIR 1975 SUPREME COURT 1631

K. K. MATHEW AND P. N. BHAGWATI, JJ.

Samar Ali Miyan, Petitioner v. The State of West Bengal, Respondent.

Writ Petn. No. 307 of 1974, D/-9-1-1975.

(A) Maintenance of Internal Security Act (1971), Ss. 3 and 8—Detention — Grounds — Provisions of Act complied with, within prescribed time-limit—Grounds of detention supplied, clear and specific and containing detailed particulars and having clear nexus with object of detention, namely maintenance of public order — Detention held valid. (Para 1)

Mr. O. P. Sharma, Advocate, Amicus Curiae, for Petitioner; M/s. D. N. Mukherjee and G. S. Chatterjee, Advocates, for Respondent.

Judgment of the Court was delivered by

BHAGWATI, J.:— The petitioner challenges an order of detention dated 8th December, 1973 made by

BS/BS/A162/75/GMJ.

the District Magistrate, Darjeeling under sub-section (1) read with sub-section (2) of Section 3 of the Maintenance of Internal Security Act, 1971. We asked Mr. D. P. Sharma, learned counsel appearing on behalf of the petitioner amicus curiae as to what were the grounds on which the order of detention was being challenged but he was unable to formulate any grounds. He frankly, and in our opinion rightly, conceded that the order of detention did not appear to suffer from any vice and it was not possible for him to point out any defect in the order of detention. The affidavit in reply filed by the District Magistrate showed that the formalities required by the provisions of the Act had been complied with within the prescribed time limits and the grounds of detention supplied to the petitioner were clear and specific and contained the most detailed particulars in regard to the two incidents there set out and they had clear nexus with the object of detention, namely, maintenance of public order.

2. We, therefore, dismiss the petition and discharge the rule.

Petition dismissed.

AIR 1975 SUPREME COURT 1632

A. ALAGIRISWAMI, V. R. KRISHNA IYER AND R. S. SARKARIA, JJ.

Employers in relation to Monoharbahal Colliery Calcutta, Applicant v. K. N. Mishra and others, Opposite Party.

Civil Misc. Petn. No. 9193 of 1974, D/- 19-2-1975.

(A) Civil P. C. (1908), O. 3. R. 4 and O. 23, R. 3—Compromise of appeal by counsel — Memorandum of compromise on basis of which appeal was disposed of signed by Counsel of respondent — Counsel found to be duly authorised to appear on behalf of respondent — Compromise held was binding on the respondent.

(Para 3)

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— This is an application by the 1st respondent in the appeal to set aside the compro-

mise decree dated 7-2-1972. The Memorandum of Compromise on the basis of which the appeal was disposed of was signed by the counsel for the appellants as well as Mr. P. K. Mukherjee, advocate purporting to appear on behalf of the petitioner/respondent. The writ petition out of which this appeal arises was disposed of as early as 13-1-1966. The petitioner alleges that the appeal has been disposed of without even service of any notice on him and of any intimation of the lodgment of the appeal. He also alleges that he had not empowered any lawyer to act in this case.

2. It is obvious that his contention that no notice was even served on him cannot be accepted and it is also clear that Mr. Mukherjee had been engaged to appear on behalf of the petitioner. The High Court of Patna has sent a certificate that the notice of lodgment of petition of appeal was given to the advocate for the petitioner/respondent on 25-9-1967 and also to the General Secretary, Colliery Mazdoor Union, of which the petitioner is a member, on 26-9-67. Mr. Mukherjee entered appearance on behalf of both of them on 25-10-67. Ext. P-1, the copy of the telegram dated 5-2-72 sent to Mr. Mukherjee reading "Not agreed for four thousand: kindly do not proceed with settlement" itself shows that the petitioner was not unaware of the proposal for settlement and that his present case that he had not authorised Mr. Mukherjee to appear on his behalf is not correct. Ext. P-2 referring to an earlier telegram dated 27-1-72 reading "Proposal for settlement acceptable in principle: Kindly attempt to raise the amount and inform" further reinforces this fact. The secretary of the Colliery Mazdoor Union had executed a Vakalatnama in favour of Mr. Mukherjee in English and the same Vakalatnama purports to bear the petitioner's thumb mark. Ext. D-25 dated 7-3-69 addressed to Mr. Mukherjee also shows that Mr. Mukherjee was duly authorised to appear on behalf of the petitioner. To this letter Mr. Mukherjee had replied by Ext. D-24. It is therefore clear beyond doubt that Mr. Mukherjee was duly authorised to appear on behalf of the petitioner and

the petitioner knew that Mr. Mukherjee was his advocate. His present averment to the contrary shows the length to which he is prepared to go.

3. The next question is whether the compromise is binding on the petitioner. From what has been stated above it would be clear that the petitioner was not averse to the idea of compromise. He only wanted the amount to be paid to him to be raised above four thousand rupees which was originally suggested. It also appears that in pursuance of a stay order passed in this case the petitioner has been receiving half of his wages throughout. He does not specifically deny the receipt of a cheque for Rs. 4000/- sent by Mr. Mukherjee. It cannot therefore be accepted that he was under the impression, as he now tries to make out, that what he was receiving was arrears of past wages deposited in the Court in compliance with the Court's order. The advocate for the appellant had filed the statement of the case on 13-11-69. The petitioner/respondent had to file it by 17-12-69 but that was not filed and the appeal was therefore set down ex parte against the petitioner/respondent. In the circumstances and the idea of the compromise not being unacceptable to the petitioner it was the right and indeed the duty of his advocate Mr. Mukherjee to do the best for his client. We are not able to see any lack of authority in the action taken by Mr. Mukherjee. We are of opinion that there are absolutely no merits in this application and it is dismissed.

Application dismissed.

AIR 1975 SUPREME COURT 1633

(From: PUNJAB & HARYANA)

M. H. BEG AND A. ALAGIRISWAMI, JJ.
Criminal Appeal No. 95 of 1971:—

State of Punjab, Appellant v. M. L. Puri, Respondent.
Criminal Appeals Nos. 96 and 97 of 1971:—

State of Haryana, Appellant v. M. L. Puri, Respondent.

Criminal Appeals Nos. 95 to 97 of 1971, D/- 14-2-1975.

ES/ES/A902/75/CWM

1975 S. C./103 IX G-3

(A) Constitution of India, Article 166 — Conduct of business of the Government of a State — Sanction to prosecute — Validity — Case remanded to High Court in the absence of materials on record. (Criminal P. C. (1898), S. 197).

Where the State alleged that the Chief Minister had sanctioned the prosecution earlier after seeing the case and all that remained was a formal order embodying that decision and it was that order which had been signed by the Chief Secretary during the period when the State was under the President's rule.

Held, that the validity of the sanction would have to be decided both on the basis whether the Chief Minister had seen the case as also on the basis whether the Chief Secretary could be said to have made the sanction order. There being no materials on record to show whether the Chief Minister had seen the case the Supreme Court remanded the matter to the High Court for fresh disposal on merits. AIR 1974 SC 2192. Relied on.

(Para 1)

Cases Referred: Chronological Paras
AIR 1974 SC 2192 = (1974) 2 SCC 831 =
1974 Lab IC 1380 1

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— The appeal before it was disposed of by the Punjab and Haryana High Court solely on the ground that the sanction to prosecute the respondent was not given by the Governor. Since then this Court has decided in Shamsheer Singh's case (1974) 2 SCC 831 = (AIR 1974 SC 2192) that the Governor need not look into any matter personally if the Rules of Business made under Article 166 empower any officer of the Government to deal with the matter. All the same Mr. Sanghi appearing on behalf of the respondent urges that the question whether there was a valid sanction to prosecute the respondent should be gone into by this Court. He urges that during the period when the sanction was given the Haryana State was under President's rule and therefore Art. 166 was not in force and the Governor himself would have had to see the case and sanction it. On the other hand it is stated on behalf of the appellants that this case had been seen by the Chief Minister earlier and he had sanctioned the prosecution and all that remained was a formal order embodying that decision and it was that order which had been signed by the Chief Secretary during the period when Haryana was under President's rule. There are, however, no materials on record to show whether the Chief Minister had seen it because on the earlier occasion when the question of the validity of the sanction was at issue,

the matter was decided purely on the basis that the Governor had not seen it. In view of the decision in Shamsher Singh's case (supra), validity of the sanction will have to be decided both on the basis whether the Chief Minister had seen the case as also on the basis whether the Chief Secretary could be said to have made the sanction order. We say nothing as to whether the prosecution would be entitled to let in any fresh evidence as to whether the Chief Minister had sanctioned the prosecution originally. We therefore consider it proper that the High Court should consider all these matters and also deal with the case on merits and dispose of it afresh. There are three appeals before this Court: one by the Government of Punjab and the other by the Government of Haryana against the Judgment of the High Court holding that there was no valid sanction. There is also an appeal by the Haryana Government against the order of the High Court holding that the Haryana Government was not entitled to a certificate. In the view we are taking we do not think it necessary to decide that appeal. That appeal will therefore be dismissed.

Order accordingly.

AIR 1975 SUPREME COURT 1634

(From: Madhya Pradesh)*

A. ALAGIRISWAMI AND N. L. UNTWALIA, JJ.

Kalya Singh, Appellant v. Genda Lal and others. Respondents.

Civil Appeal No. 16 (NCE) of 1973, D/- 28-2-1975.

(A) Representation of the People Act (1951), S. 123 (1) (A) (a) and (b) — Money paid by one candidate to another candidate to retire from contest and for canvassing — S. 123 (1) (A) (a) not attracted — AIR 1974 SC 1218 held Overruled in AIR 1975 SC 43 — Person paying such money is not guilty of corrupt practice within S. 123 (1) (A) (b) — Ele. Petn. No. 22 of 1972 D/- 11-12-1972 (Madh Pra) Reversed. AIR 1975 SC 1612, Distinguished.

K. G and P were candidates in an election to State Legislative Assembly from a reserved constituency. Some time after expiry of withdrawal date, by paying Rs. 8000/- (Rs. 4000 in cash

*(Ele. Petn. No. 22 of 1972, D/- 11-12-1972 — Madh Pra).

and Rs. 4000/- by execution of promissory note) K made P to retire from the contest, support the candidature of K and publish a pamphlet to the effect that the electors should vote for K and not for P. Accordingly a pamphlet to that effect was published and distributed in a meeting in which the withdrawal from the contest of P was announced and the voters were asked to vote for K. In an election petition the question was whether the acts of the returned candidate K came within the purview of the definition of bribery in S. 123 (1) (A) (b).

Held (1) that the case was not covered by S. 123 (1) (A) (a) since P was not to withdraw from being a candidate at the election. To this extent only decision of High Court in Ele. Petn. No. 22 of 1972 D/- 11-12-1972 (Madh Pra) Affirmed. AIR 1975 SC 43 Followed. AIR 1974 SC 1218 held Overruled in AIR 1975 SC 43.

(Para 5)

(2) that K was not guilty of corrupt practice within the meaning of Section 123 (1) (A) (b). Money was not paid to P as a consideration for votes promised or as a bargain for getting votes. It was paid to him to retire from the contest and to canvass for K. The voters were left free not to respond to his persuasion. Decision of High Court in Ele. Petn. No. 22 of 1972 D/- 11-12-1972 (Madh Pra) Reversed. AIR 1975 SC 1612, Distinguished.

(Para 9)

Mere payment of any gratification to a third person (i.e. other than an elector) for securing or procuring some votes in favour of a particular candidate without the establishment of any nexus between the money and the inducement to the voter will not be sufficient to prove that the voter is indirectly induced on account of the payment of gratification to the third person. The gratification must have some connection or reflection, direct or indirect, in persuading the voter to vote or refrain from voting at an election. Payment of any gratification to any person to work or canvass at an election is outside the ambit of the definition. AIR 1968 SC 1191 and AIR 1968 SC 1083 Followed. (Paras. 6, 8)

(B) Interpretation of Statutes — Definition — Rule of construction.

The frame of any definition, more often than not, is capable of being made flexible. But the precision and certainty in law requires that it should not be made loose and kept tight as far as possible. (Para 6)

Cases Referred: Chronological Paras

AIR 1975 SC 43 = 1974 SCD 850 5, 9

AIR 1975 SC 1612 = Civil Appeal No.

915 of 1974, D/- 20-12-1974 4, 9

AIR 1974 SC 1218 = (1974) 4 SCC 854

5

AIR 1968 SC 1083 = (1968) 3 SCR 111

8

AIR 1968 SC 1191 = (1968) 3 SCR

102 8

Mr. G. L. Sanghi, Advocate, and Mr. D. N. Misra, Advocate of M/s. J. B. Dadachanji & Co., for Appellant; Mr. S. S. Khanduja, Advocate (for No. 1) and Mr. S. K. Gambhir, Advocate, (for No. 2) for Respondents.

Judgment of the Court was delivered by

UNTWALIA, J.:— There were three candidates to contest the election to the Legislative Assembly of Madhya Pradesh from the Bhainsdeshi Assembly (Reserved) Constituency in the last general elections. The appellant in this appeal under Sec. 116-A of the Representation of the People Act, 1951 — hereinafter referred to as the Act, was declared elected to the seat defeating the other two candidates who are respondents 2 and 3. Respondent no. 1 filed an Election Petition in the Madhya Pradesh High Court challenging the election of the the appellant on several grounds. The election of the appellant has been declared void by a learned single Judge of the High Court on one ground only. It has been held that he indulged in a corrupt practice within the meaning of Section 123 (1) (A) (b) of the Act. We shall confine the statement of facts in this case to the only ground on which the appellant's election has been set aside.

2. Respondent no. 1 stated in paragraph 6 of his election petition:

"(iv) That after the date of withdrawal the respondent no. 1 himself and through his aforesaid agents and workers with his consent was vehemently trying to induce the respondent no. 3 to support the candidature

of the respondent no. 1, and declare that the electors, should not vote for the respondent no. 3, but should vote for the respondent no. 1.

(v) That the respondent no. 1, and his aforesaid agents and workers having failed in their attempt in inducing the respondent no. 3 from either standing, withdrawing or declaring to support the candidature of the respondent no. 1, and the respondent no. 3, having started his election campaign in full swing, the respondent no. 1 apprehended that if respondent no. 3, remains in contest then, he had no chance of success. Therefore he made determined efforts, to see that the respondent no. 3 makes an appeal to the electors of the constituency to the effect that the electors should vote for the respondent no. 1 and should refrain from voting in favour of the respondent no. 3, and withdraws from the contest.....

(vii) That on 22-2-1972 at Paratwada respondent no. 1 himself in the company of his agents and workers Shri N. K. P. Salve, Shiv Bux Singh and Baboolal Pathak induced the respondent no. 3 to support the candidature of the respondent no. 1 and offered to pay compensation to respondent no. 3. The respondent no. 3 agreed to support the candidature of the respondent no. 1, and to publish a pamphlet to the effect that the electors should vote for the respondent no. 1 and should refrain from voting the respondent no. 3. The respondent no. 1 offered a sum of Rs. 8000/- to the respondent no. 3 as compensation, which he had incurred in his election campaign."

3. On appreciation of evidence adduced before the High Court, on the relevant issues it recorded the following findings:

"ISSUE NO. 1 (a)

The respondent no. 1 (Kalya Singh) asked respondent no. 3 (Patiram) on the night intervening 22nd and 23-2-1972 at Paratwada to withdraw from the contest and to support respondent no. 1. Respondent no. 1 also offered to pay Rs. 8,000/- as compensation to respondent no. 3 for the election expenses till then incurred by him.

ISSUE No. 1 (b)

The respondent no. 3 agreed to support respondent no. 1 and to issue a pamphlet requesting the voters to vote for respondent no. 1.

ISSUE No. 1 (c)

A sum of Rs. 4,000/- was paid in cash on 23rd February, 1972 by respondent no. 1 to respondent no. 3. A pronote for Rs. 4,000/- (Ex. P-3) executed by respondent no. 1 in favour of Shiv Darshan Singh was also handed over by respondent no. 1 to respondent no. 3. It was also agreed that in case the balance amount of Rupees 4,000/- was not paid by respondent no. 1 respondent no. 3 will hand over the pronote to Shiv Darshan Singh who will recover the amount from Respondent no. 1 and pay to respondent no. 3.

ISSUE No. 1 (d)

In the meeting held at Bhainsdesi on 23rd February, 1972 it was announced by respondent no. 3 that he now supports the Congress. The said meeting was also addressed by respondent no. 1, Shivbux Singh and Kawadkar. They also announced the withdrawal from the contest of respondent no. 3, and asked the electors to vote for respondent no. 1.

ISSUE No. 1 (e)

The pamphlet (Ex. P-11) was distributed in the meeting of 23rd February, 1972."

4. Mr. G. L. Sanghi, learned counsel for the appellant in the first instance submitted that on the face of the pleadings in the Election Petition as also on the findings of fact recorded by the High Court it has gone wrong in law in holding that the appellant was guilty of having indulged in corrupt practice within the meaning of Section 123 (1) (A) (b) of the Act. He reserved his right to assail the findings by taking us through the evidence in case his contention in law were not found to be sound. Mr. S. S. Khanduja combated the argument put forward on behalf of the appellant and relied upon a decision of this Court in Abdul Hussain Mir v. Shamsul Huda, Civil Appeal No. 915 of 1974 decided on 20-12-1974 (reported in AIR 1975 SC 1612) to which one of us (A. Alagiriswami, J.) was a party. Mr. S. K. Gambhir appearing

for respondent no. 3 asked us, in the event of the appellant's success in the appeal, to exonerate the said respondent of the charge of having indulged in a corrupt practice within the meaning of Section 123 (1) (B) (b) of the Act as found by the High Court. Since the point of law urged on behalf of the appellant was found to be sound, we did not proceed to examine the evidence in the case.

5. We may state in a condensed form the findings recorded by the High Court against the appellant in the background of what was pleaded in the Election Petition. The appellant by paying a sum of Rs. 4,000/- in cash and promising payment of another sum of Rs. 4,000/- by execution of a promissory note made respondent no. 3 to retire from the contest, support the candidature of the appellant and publish a pamphlet to the effect that the electors should vote for him and not for respondent no. 3. Accordingly a pamphlet to that effect was published and distributed in a meeting held on 23rd February, 72 at Bhainsdesi in which meeting the withdrawal from contest of respondent no. 3 was announced and the voters were asked to vote for respondent no. 1. The question for consideration is whether the findings aforesaid fit in the frame of definition of "Bribery" in Section 123 (1) (A) (b) of the Act. The High Court has rightly pointed out that the case was not covered by sub-clause (a) of Clause (A) as respondent no. 3 was not made to withdraw from being a candidate at the election. This view of the High Court is now squarely supported by the decision of this Court in Shri Umed v. Raj Singh, AIR 1975 SC 43 which had over-turned a contrary view taken in the case of Mohd. Yunus Saleem v. Shivkumar Shastri, AIR 1974 SC 1218. We now proceed to read in full Section 123 (1) (A) of the Act.

"(1) 'Bribery', that is to say —

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing —

(a) a person to stand or not to stand as, or to withdraw or not to

withdraw from being a candidate at an election, or

(b) an elector to vote or refrain from voting at an election or as a reward to—

(i) a person for having so stood or not stood, or for having withdrawn or not having withdrawn his candidature; or

(ii) an elector for having voted or refrained from voting;"

6. We shall discuss the relevant law shorn of the addenda and the qualifying words in the above extract. Payment of any gratification by a candidate to any person not necessarily a person mentioned in sub-clause (a) or an elector mentioned in sub-clause (b) with the object of directly or indirectly inducing the person or an elector mentioned in those sub-clauses will make it a bribery within the meaning of the said word. It is significant to note from sub-clauses (i) and (ii) of clause (A) that post-facto payment of any gratification as a reward will be bribery only if it is paid to the person or the elector mentioned in these sub-clauses. But does it lead to the conclusion that payment of any gratification to any person other than an elector in all circumstances would be deemed to be with the object of indirectly inducing an elector to vote or refrain from voting at an election? If money is paid to an elector to vote for a particular candidate undoubtedly it is a direct inducement to him to vote at an election. If money is paid to a third person in which payment of money an elector has got any direct or indirect interest and which induces him to vote at an election in favour of a particular candidate then also the inducement is brought about as a result of the payment of the gratification. But the point of difficulty may arise where any gratification is paid by or on behalf of a candidate to a third person for procuring some votes of some electors who may be under his (third person's) influence. Whether in such a case the payment has got any indirect inducement to an elector to vote at an election: we are inclined to think that mere payment of any gratification to a third person for securing or procuring some votes in favour of a particular candidate with-

out the establishment of any nexus between the money and the inducement to the voter will not be sufficient to prove that the voter is indirectly induced on account of the payment of gratification to the third person. The dictionary meaning of the word "induce" is to "prevail on, persuade". The gratification must have some connection or reflection, direct or indirect, in persuading the voter to vote or refrain from voting at an election. If the inducement to the voter is not caused by the payment of the gratification to a third person but by the persuasion or influence (not undue influence) of such third person it will not be possible to say that the gratification had any indirect inducement to the voter. Payment of any gratification to any person to work or canvass at an election is outside the ambit of the definition. It will make little difference if the worker or the canvasser on payment of gratification promises or indulges in tall-talk of securing or procuring some votes for a particular candidate. If the inducement to the voter is free from the shade or colour of the gratification paid to the third person, then it will not be bribery. If, however, the inducement in a given case is coloured or shaded by the payment of the gratification to a third person then it would be an indirect inducement to the voter himself within the frame of the definition. In other words it is the fact of payment to the third person that must induce the voter. It is not enough that the third person induces the voter. The frame of any definition, more often than not, is capable of being made flexible. But the precision and certainty in law requires that it should not be made loose and kept tight as far as possible.

7. On the facts found in this case, respondent No. 3 after having retired from the contest merely canvassed to the voters some of whom may be his so called voters, to vote for the appellant. Distribution of the pamphlet and announcement in the meeting held on the 23rd February, 72 to that end did not transgress the limit and make the act an indirect inducement to the voters to cast vote for the appellant on account of pay-

ment of the gratification by him to the third respondent.

8. In *Ghasi Ram v. Dal Singh*, (1968) 3 SCR 102 = (AIR 1968 SC 1191), followed in *Om Prabha Jain v. Abnash Chand*, (1968) 3 SCR 111 = (AIR 1968 SC 1083) another decision in the same Volume at page 111, it was pointed out by Hidayatullah J, as he then was, at p. 110 (of SCR) = (at p. 1196 of AIR), "The money was not distributed among the voters directly but was given to Panchayats and the public at large. It was to be used for the good of those for and those against the candidate. No doubt they had the effect of pushing forward his claims but that was inevitable even if no money was spent, but good administration changed the people's condition. We cannot, therefore, hold that there was any corrupt practice. If there was good evidence that the Minister bargained directly or indirectly for votes, the result might have been different but there was no such evidence." It would thus be noticed that there must be a bargain for votes either directly with the voters or indirectly through someone else. The voter may not be a direct party in the bargain but must be shown to have an indirect interest, in it.

9. In *Abdul Hussain's case* (Civil Appeal No. 915 of 1974) = (reported in AIR 1975 SC 1612) Krishna Iyer J., in his judgment delivered on his and on behalf of Sarkaria J, did not find the fact proved in that case to bring it within the ambit of S. 123 (1) (A) (b). The third learned Judge (A. Alagiriswami J.) did not record any finding to the contrary. Even so while interpreting the scope and ambit of S. 123 (1) of the Act, certain observations were made in the majority judgment which were pressed into service by respondent no. 1 while the others were relied on by the appellant. Accepting the argument of Mr. Garg (vide page 1995 of the cyclostyled copy issued by the Supreme Court Bar Association) AIR 1975 SC 1612 it was said "what the law aims at is a blow on the purchase of the franchise by direct or indirect methods. You may buy influence of important persons which is bad in morality but not yet in law." Another passage (vide

page 1996 of the cyclostyled copy) AIR 1975 SC 1612 which occurs in that judgment runs thus: "The crucial point is the nexus between the gratification and the voters, one being the consideration for the other, direct or indirect." The two passages extracted above squarely supported the contention of the appellant. While a few others which are being quoted below were pressed into service by learned counsel for respondent no. 1. The said passages at page 1995 are:

"If the candidate pays money to a V.I.P. of the locality to use his good offices and canvass votes for him, it is a borderline case, but if the money is paid as consideration for votes promised to be secured by him using his sway, it is bribery even though indirectly exercised. If the Mulla had been paid the money striking a bargain for getting the votes in his ambit of influence, it is electoral corruption. On the other hand, if it is money received for the purpose of organising effectively the election campaign by hiring workers, going round the places in car, meeting people and persuading them to vote for the candidate, it is proper election expense. In between these two extremes lies the case of a man who just receives a large sum of money, pockets it himself and promises to use his good offices to secure votes. This is a gray area. We are not called upon to pronounce on it in this case.....

.....The touchstone in all these cases of payment of gratification is to find out whether the money is paid in reasonable measure for work to be done or services to be rendered. Secondly, whether the services as offered amount to a bargain for getting votes or merely to do propaganda or to persuade voters to vote for the candidate, it being left to the voters not to respond to the persuasion. It is a plain case if a voter is paid for his vote. It is direct. It is equally plain if the payment is made to a close relation as inducement for the vote. The same is the case if it is paid to a local chief on the understanding that he will get plead the votes in his pocket borough in consideration for the payment."

The third learned Judge in his separate note did not join in the views express-

ed in the passages just extracted above from the majority decision and said "I consider it, therefore, unnecessary to discuss whether if money is paid or offered as consideration for votes promised to be secured by a person using his influence it is bribery or not. It is a good policy not to discuss in a judgment questions which do not arise out of the facts of the case." The observations of Krishna Iyer J, which were relied on on behalf of respondent no. 1 may occasion a debate or dispute if in a given case the facts so warrant. But it will be a futile exercise to do so in this case as the findings recorded against the appellant by the High Court are clearly outside the observations relied on by respondent no. 1. It was not a case where money was paid to respondent no. 3 as consideration for votes promised or as a bargain for getting votes. It was a money paid to him to retire from the contest and to do propaganda and persuade the voters to vote for the appellant. In spite of the propaganda and the appeal of respondent no. 3 the voters were left free not to respond to his persuasion. In no view of the matter, therefore, it is possible to sustain the judgment of the High Court holding the appellant guilty of corrupt practice within the meaning of S. 123 (1) (A) (b) of the Act. That being so, it is plain that respondent no. 3 also must be exonerated of the charge levelled and found against him of bribery within the meaning of Section 123 (1) (B) (b).

10. In the result the appeal is allowed with costs payable by respondent no. 1 and the judgment and order of the High Court are set aside.

Appeal allowed.

AIR 1975 SUPREME COURT 1639
(From: Award of Industrial Tribunal West Bengal)*

P. N. BHAGWATI AND P. K. GOSWAMI, JJ.

The Central Inland Water Transport Corporation Ltd., Appellants v. Their Workmen, Respondents.

Civil Appeals Nos. 179-180 of 1973, D/- 2-5-1975.

(A) Payment of Bonus Act (1965), S. 16 (1) — New Establishment — Tests — Central Inland Water Transport Corporation set up and properties of River Steam Navigation Company transferred to it — Rajabagan Dockyard owned by company coming into hands of corporation on transfer — Dockyard held was not a new establishment.

The question whether the Corporation took over the business of Rajabagan Dockyard as a going concern from the Company and was a successor-in-interest of the company in respect of such business was not a relevant question for the purpose of determining the applicability of Section 16. An establishment may not be newly set up; it may be an existing establishment of which merely the ownership has changed. But the new owner may not necessarily be the successor-in-interest of the old in respect of the business carried on in the establishment. The two concepts are entirely different. One may acquire the ownership of an establishment without taking over the business as a going concern and becoming a successor-in-interest in respect of it. The word 'establishment' is also found used in Section 3 and that section clearly indicates that an establishment may consist of different departments or undertakings and it is, therefore, not synonymous with 'undertaking'. 'Establishment' therefore means the whole trading, business or manufacturing apparatus with a separate identifiable existence. This apparatus which is used for the purpose of carrying on trade, business or undertaking may change hands and pass from

*(Case No. VIII-51 of 1972, D/- 28-7-1972 (Industrial Tribunal W. B.)).

one owner to another. The workers operating this apparatus and working in it may change; new workers may take the place of old or come as additional workers. When the ownership of the establishment, which is nothing but another name for this apparatus, is transferred from one person to another, the establishment remains the same: merely its ownership is changed and it cannot be said to be a new establishment in the hands of the transferee. Now, though the transferee may become the owner of the establishment, he would not necessarily be a successor-in-interest of the transferor in respect of the business carried on in the establishment. The question as to whether he can be held to be a successor-in-interest of the transferor, would depend on consideration of several relevant facts. AIR 1968 SC 554, Rel. on. (Para 8)

The River Steam Navigation Co. Ltd. was a limited liability company incorporated in England. It owned a fleet of vessels which it plied in inland water for carrying passengers and cargo. It also owned a dock called Rajabagan dockyard at Calcutta. The Government of India incorporated the Central Inland Water Transport Corporation wholly owned by it and the properties and assets of the Company were transferred to it. The Rajabagan Dockyard was also transferred.

Held, that the establishment of Rajabagan Dockyard in the hands of the Corporation was not a new establishment. It was the same establishment — the same manufacturing apparatus which was operated by the company prior to its taking over by the Corporation. It is true that the Corporation purchased and installed new plant and machinery in substitution as also in addition and also added six new industrial sheds within the premises of the Rajabagan Dockyard but that does not mean that it became a newly set up establishment. The establishment went by the same name of Rajabagan Dockyard; its address remained the same and some of the old plant and machinery also continued to be used by the Corporation. The Registration number of the establishment under the Factories Act also remained the same. Section 16 (1) was, therefore, not attracted and the Cor-

poration was not entitled to claim immunity from payment of bonus for the year in question. (Para 10)

Cases Referred: Chronological Paras
AIR 1968 SC 554 = (1968) 1 SCR 742

8
AIR 1963 SC 1489 = 1963 Supp (1) SCR 730 8

Judgment of the Court was delivered by

BHAGWATI, J.:— These two appeals, by special leave, arise out of an industrial dispute between the Central Inland Water Transport Corporation Ltd. (hereinafter referred to as the Corporation) and its workmen in regard to payment of bonus for the years 1967-68 and 1968-69 under the Payment of Bonus Act, 1965. The industrial dispute was referred to the Industrial Tribunal for adjudication under Section 10 of the Industrial Disputes Act, 1947. The Corporation raised three preliminary objections, one of which was — and that is the only preliminary objection with which we are concerned in the present appeals — that the establishment of the Corporation in which the workmen were employed was newly set up since 5th June, 1967 and the workmen were, therefore, by reason of Section 16 of the Payment of Bonus Act, 1965, not entitled to payment of bonus for the years 1967-68 and 1968-69. The Industrial Tribunal by an award dated 2nd March, 1971 rejected these preliminary objections and held inter alia that the Corporation was not entitled to claim immunity from payment of bonus under S. 16 and directed that the hearing of the reference should proceed on merits. The reference was then heard on the question of quantification of the amount of bonus and by an award dated 28th July, 1972, the Industrial Tribunal held that each workman was entitled to bonus at the rate of 4 per cent of the wage earned by him during each year or Rs. 40/- whichever is higher. This second and final award is challenged in appeal No. 179 of 1973, while the first preliminary award is challenged in appeal No. 180 of 1973. It is not disputed on behalf of the Corporation that if its liability to pay bonus is established and its claim to immunity is negatived, the quantum of bonus payable to the

workmen would be what has been awarded by the Industrial Tribunal. The only question which, therefore arises for consideration in these two appeals is as to the liability of the Corporation to pay bonus under the Payment of Bonus Act, 1965. The Corporation claims to be free from liability to pay bonus by virtue of the provisions of S. 16. Is this claim well founded? To answer this question it is necessary to set out a few facts.

2. The River Steam Navigation Co. Ltd. (hereinafter referred to as the Company) was a limited liability company incorporated in England in 1914. It owned a fleet of vessels which it plied in inland waters for carrying passengers and cargo from Calcutta to different places in Assam and vice versa along rivers flowing through what was then East Pakistan. It also owned a dock called Rajabagan Dockyard at 42, Garden Reach, Calcutta where it carried out repairs to its own vessels. A majority of shares of the Company were purchased by the Government of India and considerable financial assistance was given by the Government of India from time to time in view of the great strategic importance of keeping the river routes to Assam open, but even so, the Company incurred losses in carrying on its operations. The climax came with the armed conflict between India and Pakistan towards the end of 1965 when river transport service had to be closed because the river routes passed through what was then East Pakistan and in fact, forty vessels belonging to the Company were seized by the Pakistan Government. This brought about total cessation of the principal business activity of the Company and in consequence, its financial position became so precarious that on 21st June, 1966 an application for winding up of the Company was made by one of its creditors in the High Court of Calcutta. It was realised by the Government of India that it was impossible to save the company as its total liabilities amounted to over Rs. 8 crores, the main creditors being the Government of India in the sum of about Rs. 6.19 crores, the State Bank of India in the sum of Rs. 1.50 crores and the Chartered Bank in the sum of Rs. 1.60 crores. The Govern-

ment of India, therefore, put forward a Scheme of Arrangement and Compromise under Ss. 391 and 394 of the Companies Act, 1956 and made an application to the High Court in the winding up petition for sanction of such scheme. In anticipation of sanction, the Government of India incorporated, on 22nd February, 1967, the Corporation — a company wholly owned by it — for effectuating the Scheme of Arrangement and Compromise (hereinafter referred to as the Scheme).

3. The Scheme was sanctioned with some modifications by a Single Judge of the High Court by an order dated 3rd May, 1967. It may be pointed out that when the Scheme was before the learned Single Judge, the Inland Steam Navigation Workers Union appeared and made its submissions with a view to safeguarding the interests of the workers and it was after hearing the Union, that the learned Single Judge made the order sanctioning the scheme with certain modifications. The Union was aggrieved by the order sanctioning the Scheme and it preferred an appeal before a Division Bench of the High Court. The Division Bench, however, by an order dated 14th July, 1967, confirmed the order of the learned Single Judge sanctioning the Scheme.

4. It is not necessary for the purpose of the present appeals to reproduce the provisions of the Scheme in extenso. Suffice it to state that the Scheme provided inter alia that all the properties and assets of the Company shall stand transferred to and vest in the Corporation, but so far as the liabilities were concerned, only some of them shall be transferred to and become the liabilities of the Corporation and the rest shall be discharged by the Company in the manner set out in the Scheme out of funds provided by the Government of India. It was also provided in the Scheme that the Corporation shall take as many of the existing employees as possible and as can be reasonably taken over, but as to exactly how many can be employed was left entirely to the discretion of the Corporation. The Scheme also contained a provision that those employees who

cannot be taken over by the Corporation shall be paid "all legitimate and legal compensations" by the Company and monies for the same shall be provided by the Government of India. Lastly, it was stipulated that upon the approval of the Scheme, the Company shall be closed and on payment of all creditors, it shall stand dissolved without winding up.

5. The Scheme, as already pointed out, was sanctioned by the order dated 3rd May, 1967 and pursuant to the Scheme, the Company issued a notice on the same day stating that the entire undertaking of the Company will be closed with immediate effect. There were at that time about 8000 employees in the various establishments of the Company and out of them, about 5173 were given fresh appointments by the Corporation on new terms and conditions from and after 5th June, 1967. The Corporation did not carry on any business activity though it took over the assets of the Company from 3rd May, 1967 and it was only on 5th June, 1967 that it opened the Rajabagan Dockyard and started operating it with workers who were formerly employees of the Company but given fresh employment by the Corporation as aforesaid.

6. When the Rajabagan Dockyard was owned by the Company, the main purpose for which it was used was maintenance and repairs of the large fleet of vessels belonging to the Company. It did very little work for outside parties. The result was that when hostilities broke out between India and Pakistan and it became impossible to run river transport service and in fact a part of the fleet was seized by Pakistan Government, the Rajabagan Dockyard was paralysed and it became an establishment without any work and in consequence, a large number of workers working in the Rajabagan Dockyard had to be laid off. The operational result of the working of the Rajabagan Dockyard from and after the commencement of the hostilities showed considerable loss, as the work was completely at standstill. On taking over the Rajabagan Dockyard, the Corporation, as pointed out above, started operating it again from 5th June, 1967, but the

nature and volume of the activities were changed. The Corporation embarked on ship building and ship repairs, general engineering works and deep sea ship repairs and more than 80 per cent of these activities were carried out by the Corporation for outside parties. It was found that the machinery taken over from the Company was largely obsolete and antiquated and much of it was not usable and the Corporation could put to use only a part of the machinery worth about Rs. 13 lacs. The nature of the work having changed and its volume increased, the Corporation found it difficult to cope with the work with the existing plant and machinery and soon felt the need of purchasing new plant and machinery both by way of replacement and addition. In the meantime, a Development Committee was appointed by the Government of India to examine various questions relating to development of Rajabagan Dockyard and this Committee submitted its report in June 1968 making various recommendations which involved an outlay of about Rs. 3 crores in constructing new sheds and purchasing and installing new plant and machinery. It seems that the recommendations of the Development Committee were accepted by the Government of India and the necessary funds were made available according to a phased programme. The Corporation accordingly started construction of six industrial sheds in the premises of Rajabagan Dockyard and also purchased and installed new plant and machinery worth about Rs. 50 lacs. The Rajabagan Dockyard, however, continued to work at a loss and during the years 1967-68 and 1968-69, these being the years with which we are concerned in the present appeals, the losses of the Corporation from the operation of the Rajabagan Dockyard continued to mount. Vide the First and Second Annual Reports of the Corporation for the years 1967-68 and 1968-69.

7. We are concerned in the present appeals with the workers in the Rajabagan Dockyard. They are represented by two unions, namely, Central Inland Water Transport Corporation Ltd. Mazdoor Sabha and Egra and Rajabagan Dockyard Wor-

kers Union. These two unions made a demand for payment of bonus for the years 1967-68 and 1968-69 under the Payment of Bonus Act, 1965. The Corporation rejected the demand mainly on the ground that the establishment of Rajabagan Dockyard, as operated by it, was newly set up since 5th June, 1967 and no profit was derived by the Corporation from this establishment during the years 1967-68 and 1968-69, and therefore, the workers were not entitled to payment of bonus by reason of S. 16 of the Act. This led to the making of a reference by the Government of West Bengal under Section 10 of the Industrial Disputes Act, 1947. The Industrial Tribunal, as already pointed out above, tried the issue as to the claim of the Corporation to exemption from payment of bonus under S. 16 of the Act, as a preliminary issue. The Corporation examined three witnesses on its behalf, namely, Krishnaswami Srinivasan, Joydev Basak and Girdharilal Makhija, while the workers examined only the Joint Secretary of one of the two unions, namely, Ashgar Husain. Some documentary evidence was also produced on behalf of the parties. The Industrial Tribunal, on a consideration of the oral as well as documentary evidence, came to the conclusion that the Corporation was the successor-in-interest of the Company in regard to the business of Rajabagan Dockyard which was taken over by it as a going concern and the establishment of Rajabagan Dockyard could not, therefore, be said to be newly set up so as to attract the applicability of Section 16 of the Act. The Industrial Tribunal, on this view, rejected the contention of the Corporation and by its preliminary award dated 2nd March, 1971 held that the Corporation was liable to pay bonus to the workers. This was followed by the final award dated 28th July, 1972 quantifying the amount of bonus. The Corporation challenges the correctness of the view taken by the Industrial Tribunal and contends that, on the facts and circumstances of the case, as appearing from the evidence, the establishment of Rajabagan Dockyard, as operated by it, is newly set up and it is accordingly not liable to pay bonus to the workers.

8. It would be convenient at this stage to refer to the provisions of Section 16 of the Act in order to appreciate the true nature and scope of the inquiry before us. Sub-sec. (1) of Section 16 which is the only material sub-section provides:

"16. (1) Where an establishment is newly set up whether before or after the commencement of this Act, the employees of such establishment shall be entitled to be paid bonus under this Act only—

(a) from the accounting year in which the employer derives profit from such establishments; or

(b) from the sixth accounting year following the accounting year in which the employer sells the goods produced or manufactured by him or renders services, as the case may be from such establishments, whichever is earlier."

Now it is obvious that if the establishment of Rajabagan Dockyard could be said to be newly set up from 5th June, 1967, the workers would not be entitled to payment of bonus for the years 1967-68 and 1968-69, because the Corporation admittedly did not derive any profit from such establishment till then. The question, which, therefore, arises for determination is whether the Rajabagan Dockyard in the hands of the Corporation could be said to be an establishment newly set up since 5-6-1967. On looking at the award of the Industrial Tribunal, however, we find that the Industrial Tribunal addressed itself to a wholly different question, namely, whether the Corporation took over the business of Rajabagan Dockyard as a going concern from the Company and was a successor-in-interest of the Company in respect of such business. That was not a relevant question for the purpose of determining the applicability of Section 16. An establishment may not be newly set up; it may be an existing establishment of which merely the ownership has changed. But the new owner may not necessarily be the successor-in-interest of the old in respect of the business carried on in the establishment. The two concepts are entirely different. One may acquire the ownership of an establishment, without taking over the busi-

ness as a going concern and becoming a successor-in-interest in respect of it. The word 'establishment' is also found used in Section 3 and that section clearly indicates that an establishment may consist of different departments or undertakings and it is, therefore, not synonymous with 'undertaking' which has been defined, though in a different context, by this Court in *Gymkhana Club Union v. Management*, (1968) 1 SCR 742 = (AIR 1968 SC 554) to mean "any business or any work or any project which one engages in or attempts as an enterprise analogous to business or trade". The dictionary meaning of 'establishment' as given in Webster's International Dictionary includes inter alia "an institution or place of business, with its fixtures and organised staff; as, large establishment, a manufacturing establishment." 'Establishment' therefore means the whole trading, business or manufacturing apparatus with a separate identifiable existence. This apparatus which is used for the purpose of carrying on trade, business or undertaking may change hands and pass from one owner to another. The workers operating this apparatus and working in it may change; new workers may take the place of old or come as additional workers. When the ownership of the establishment, which is nothing but another name for this apparatus, is transferred from one person to another, the establishment remains the same: merely its ownership is changed and it cannot be said to be a new establishment in the hands of the transferee. Now, though the transferee may become the owner of the establishment, he would not necessarily be a successor-in-interest of the transferor in respect of the business carried on in the establishment. The question as to whether he can be held to be a successor-in-interest of the transferor would depend on consideration of several relevant facts. What should be the relevant facts to be taken into account in determining this question was explained by Gajendragadkar, J., in the following words:

"Did the purchaser purchase the whole of the business? Was the business purchased as a going concern at the time of the sale

transaction? Is the business purchased carried on at the same place as before? Is the business carried on without a substantial break in time? Is the business carried on by the purchaser the same or similar to the business in the hands of the vendor? If there has been a break in the continuity of the business, what is the nature of the break and what were the reasons responsible for it? What is the length of the break? Has goodwill been purchased? Is the purchase only of some parts and the purchaser having purchased the said parts purchased some other new parts and started a business of his own which is not the same as the old business but is similar to it? These and all other relevant factors have to be borne in mind in deciding the question as to whether the purchaser can be said to be successor-in-interest of the vendor for the purpose of industrial adjudication. It is hardly necessary to emphasise in this connection that though illustrations are relevant, it would be unreasonable to exaggerate the importance of any one of these facts or to adopt the inflexible rule that the presence or absence of any of them is decisive of the matter one way or the other. The decision of the question must ultimately depend upon the evaluation of all the relevant factors and it cannot be reached by treating any one of them as of overriding or conclusive significance." *Vide Anakapalle Co-operative Agricultural and Industrial Society Ltd. v. Workmen*, 1963 Supp (1) SCR 730 = (AIR 1963 SC 1489).

9. Now in the present case the Industrial Tribunal concentrated only on the question as to whether the Corporation had become the successor-in-interest of the company in respect of the business carried on in the establishment of Rajabagan Dockyard and answered this question in the affirmative. We do not think that this was a correct line of enquiry pursued by the Industrial Tribunal. The only limited question before the Industrial Tribunal was whether the establishment of Rajabagan Dockyard in the hands of the Corporation was a new establishment or it was the same old establishment which was owned by the company prior to its taking over

by the Corporation. We shall presently turn to consider this question, but before we do so, we may point out that *prima facie* even in the view taken by it as regards the question whether the Corporation was the successor-in-interest of the Company, the Industrial Tribunal appears to have overlooked the following important and relevant considerations. The entire undertaking of the company including the business carried on in the Rajabagan Dockyard had to be closed down owing to heavy losses. The Rajabagan Dockyard in fact became idle on the commencement of the hostilities between India and Pakistan and the workers employed in the Rajabagan Dockyard had to be laid off. The notice of closure was put up by the company on 3rd May, 1967 pursuant to the order made by the High Court of Calcutta sanctioning the Scheme. There was, therefore, no business which was being carried on in the Rajabagan Dockyard as a going concern when the Rajabagan Dockyard was taken over by the Corporation in terms of the Scheme. So far as the workers in the Rajabagan Dockyard were concerned, it was specifically provided in the Scheme after hearing the Union that the Corporation shall take as many of the existing employees as possible and as can be reasonably taken over but as to exactly how many can be employed was left entirely to the discretion of the Corporation. There was thus no obligation on the Corporation to take over or absorb all the workers who were previously working in the Rajabagan Dockyard under the Company. Though the Corporation took over the Rajabagan Dockyard on 3rd May, 1967 under the Scheme, the Corporation did not start operating it until 5th June, 1967. There was thus a fairly long break from the commencement of the hostilities between India and Pakistan upto 5th June, 1967 before the Rajabagan Dockyard started functioning again. Then again the business which was started by the Corporation in the Rajabagan Dockyard was to a large extent different in character from that carried on by the Company. The principal activity which the Company carried on in the Rajabagan Dockyard was maintenance and repairs of its own fleet of vessels

but the Corporation commenced not only ship building and ship repairing work but also general engineering work such as structural fabrication work, forging, casting and machining and also deep sea ship repairing and general engineering work comprised more than 80 per cent of the total work as against only a negligible fraction in the time of the Company and more over a very substantial part of the work was done for outside parties. It was also provided in the Scheme that the workers who were not taken over by the Corporation would be paid "all legitimate and legal compensation." The workers who were taken over by the Corporation were given fresh appointments from and after 5th June, 1967 with different scales of pay and different conditions of service and there was a break in their continuity of service. The Industrial Tribunal observed that fresh letters of appointment were accepted by the workers under compulsion and duress arising on account of economic necessity but that is not the kind of compulsion or duress which deprives an action of its voluntary character and introduces an infirmity in it. It is indeed unfortunate that in our country there is so much poverty and there are so few job opportunities that the spectre of unemployment and economic want haunts our underprivileged segments of society and corrodes their freedom and choice of action and reduces them to a position where they can be easily dominated and exploited. But the remedy for this state of affairs is not in the hands of the Court, unless an industrial dispute is raised and the Court gets an opportunity of bringing about social justice through the machinery of industrial adjudication. Here, as the matter stands, there can be no doubt that the workers who were taken over by the Corporation were given fresh employment on different scales of pay and different terms and conditions than those enjoyed by them under the Company and they suffered a break of more than a month in their continuity of service. One observation, however, we cannot fail to make and it is that, though the entire undertaking of the Company was closed on 3rd May, 1967, it is strange

that no provision was made in the Scheme for payment of closure compensation to those workers who might subsequently be taken over by the Corporation. If continuity of service was to be denied to these workers, then surely they should be entitled to closure compensation under Section 25FFF or at any rate compensation under Section 25FF of the Industrial Disputes Act, 1947. We hope and trust that, though no such provision is made in the Scheme, the Government of India will consider this aspect of payment of compensation under Section 25FF or Section 25FFF vis-à-vis those workers who were fortunate enough to be taken over by the Corporation but whose continuity of service was interrupted. That apart, these were some of the important and relevant considerations which ought to have been taken into account by the Industrial Tribunal but which the Industrial Tribunal apparently failed to do. How far this would vitiate the finding of the Industrial Tribunal on this question is a matter on which we do not wish to express any final opinion, as it is not necessary to do so for the purpose of the present appeals. We leave the question open for adjudication as and when occasion may arise in future.

10. One thing is however clear that the establishment of Rajabagan Dockyard in the hands of the Corporation was not a new establishment. It was the same establishment — the same manufacturing apparatus — which was operated by the Company prior to its taking over by the Corporation. It is true that the Corporation purchased and installed new plant and machinery in substitution as also in addition and also added six new industrial sheds within the premises of the Rajabagan Dockyard but that does not mean that it became a newly set up establishment. The establishment went by the same name of Rajabagan Dockyard; its address remained the same and some of the old plant and machinery also continued to be used by the Corporation. The Registration number of the establishment under the Factories Act also remained the same. It is however not necessary to discuss this aspect of the case any further, as it was almost

conceded by Mr. Jagdish Swaroop, learned counsel appearing on behalf of the Corporation that Rajabagan Dockyard could not be said to be an establishment newly set up by the Corporation within the meaning of S. 16. His real grievance was against the finding of the Industrial Tribunal that the Corporation was the successor-in-interest of the Company in respect of the business carried on in the Rajabagan Dockyard. That finding however cannot have any binding effect because, as already pointed out by us, it was wholly unnecessary for the decision of the present question and moreover it failed to take into account diverse important and relevant considerations. So far as concerns the question which is directly before us for consideration, we take the view that the Rajabagan Dockyard was not an establishment newly set up by the Corporation from 5th June, 1967 as claimed by it, but was the same establishment as was owned by the Company prior to 3rd May, 1967. Section 16, sub-s. (1) was, therefore, not attracted and the Corporation was not entitled to claim immunity from payment of bonus under that provision.

11. We, therefore, uphold the claim of the workers for payment of bonus for the years 1967-68 and 1968-69 as awarded by the Industrial Tribunal and dismiss the appeals with costs.

Appeals dismissed.

AIR 1975 SUPREME COURT 1646

(From: Mysore)*

A. N. RAY, C. J., K. K. MATHEW,
V. R. KRISHNA IYER, A. C.
GUPTA, JJ.

N. Lakshmana Rao and others etc.,
Appellants v. State of Karnataka and
others etc., Respondents.

Civil Appeals Nos. 1919-1931, 1932-34, 1959-84, 85, 86, 1987-89, 1991-2007 and 2043 of 1974, D/- 29-4-1975.

*(W.P. Nos. 1019, 865, 1118, 1157, 1197, 2522, 2584, 2904, 3576, 4029, 5662, 1170 and 3204 of 1974, D/- 18-10-1974 — Mys.)

GS/GS/B927/75/KSB

(A) Karnataka State Civil Services (Age of Compulsory Retirement) Rules (1974) Rules 1 and 2—Rules are constitutional and valid — (Constitution of India, Arts. 309, 310 (1) and 311).

The Karnataka State Civil Services (Age of Compulsory Retirement) Rules, 1974, which were framed under the Proviso to Art. 309 of the Constitution and which by R. 2 fixed the age of compulsory retirement of the six categories of Government servants referred to in R. 2 (4) at 55 years with effect from 1-4-1974 are constitutionally valid. There is no constitutional limitation to reduce the age of retirement. A Government servant enjoys the status of a Government servant. He cannot be removed and his services cannot be terminated except in accordance with the provisions of the Constitution. Fixing an age of retirement does not amount to removal or termination within the meaning of Art. 311. AIR 1965 SC 1567 and AIR 1964 SC 1585 Rel. on. (Paras 26, 30)

The teachers of local bodies became Government servants as a result of exercise of their option to be absorbed in Government service in pursuance of the State Government Order dated 30-4-1971. The term in the agreement between the Government and the Local Body that the conditions of service will not be varied to the disadvantage of the teachers would mean that they would be, like all other Government servants, subject to Article 310 (1) of the Constitution. This would mean that under the law these teachers would be entitled to continue in service upto the age of superannuation. The exercise of option does not mean that there was a contract whereby a limitation was put on prescribing an age of superannuation. The teachers who exercised the form of option were subject to change in the conditions of service framed under Art. 309.

(Paras 20, 22)

(B) Mysore Compulsory Primary Education Amendment and Miscellaneous Provisions Act (18 of 1969), S. 14 (b) — Scope — Teachers of primary school — Age of retirement if can be altered by Governor by rules made under Art. 309 — (Constitution of India, Article 309).

The contention that the terms of service of the primary teachers were continued by the Mysore Primary Compulsory Education Act and that, therefore, their age of retirement could not be altered by rules made by the Governor under Art. 309 cannot be accepted as correct.

Section 14 (b) is a temporary and transitional provision which continues until other provision is made. The words "until other provision is made" mean provision which can be made by the legislature or by the Governor or the executive. Section 14 (b) is not a law regulating recruitment and conditions of service under Art. 309. Even assuming that it is such law it is open to the appropriate legislature to make under Art. 309 provision prescribing recruitment and conditions of service. The power of the Governor under the proviso to Art. 309 is co-extensive with the power under the main part of Art. 309. The Governor could in the absence of any enactment by the Legislature alter the age of retirement. AIR 1969 SC 118 Rel. on. (Paras 27 to 29)

Cases Referred: Chronological Paras

AIR 1969 SC 118 = (1968) 3 SCR 575	
= 1969 Lab IC 100	23, 28, 29
AIR 1967 SC 1889 = (1968) 1 SCR 185	21
AIR 1966 SC 602 = (1966) 1 SCR 994	5
AIR 1965 SC 1567 = (1965) 1 SCR 693	25
AIR 1964 SC 1585 = (1964) 7 SCR 587	24

Mr. A. K. Sen, Senior Advocate, (In C.A. No. 1919 of 1974), Mr. Rama Jois, Advocate, (In CAs. Nos. 1919-31/1974) & (W.P. No. 249/74), Mr. P. R. Ramasesh, Advocate, (In CAs. Nos. 1919-31) & Mr. R. B. Datar, Advocate, for Appellants; (In CAs. Nos. 1919-31, 1987, 1988, 1991-2007 & 2043 of 74) for Petitioner (In W.P. No. 249 of 1974). Mr. S. Lakshminarasu, Advocate, for Petitioners (In CAs. Nos. 1932-34). M/s. Rama Jois & S. S. Khanduja, Advocates, for Appellants (In CAs. Nos. 1959-84/74). Mr. Narayan Netter, Advocate, for Appellants. (In CAs. Nos. 1985-86/74). Mr. V. J. Francis, Advocate, for Respondents Nos. 4-8 & 10 (In C.A. No. 1983/74). Mr. F. S. Nariman, Addi-

tional Solicitor-General, (In CA. No. 1919/74), (M/s. K. S. Puttaswamy, Govt. Pleader, (In CA. No. 1919/74) & (In W.P. No. 249/74) & Mr. M. Veerappa, Advocates. with him). for State of Karnataka in all the Matters. N. D. Kulkarni, (In W.P. No. 21 of 1975: Mr. A. R. Somnath Iyer, Senior Advocate, (M/s. Rama Jois & R. B. Datar, Advocates, with him). for Applicant/Intervener/Writ Petitioner.

Judgment of the Court was delivered by

RAY, C. J.:— These appeals by certificate turn on the question as to whether the Karnataka State Civil Services (Age of Compulsory Retirement) Rules, 1974 are valid.

2. These cases may be broadly classified into three categories. One group consists of primary and secondary school teachers in Government schools of the former State of Mysore. The second group consists of teachers in the schools belonging to various local authorities situate in the area of the former State of Mysore. These teachers were absorbed in Government service of the new State of Mysore when the said schools were taken over by the Government. The third group consists of teachers in the schools of the School Boards in the Bombay area and the Madras area of the new State. They were absorbed in Government service under the Mysore Compulsory Primary Education Act, 1969.

3. The new State of Mysore came into existence on 1 November, 1956 consequent upon the reorganisation of States brought about by the States Reorganisation Act, 1956. The reorganised new State consisted of the former State of Mysore, part of the former State of Bombay, part of the former State of Hyderabad, part of the former State of Madras and the centrally administered territory of Coorg.

4. Sections 114 and 115 of the States Reorganisation Act deal with allotment and transfer of State Services of the merged parts of the new State.

5. The School teachers of the former State of Mysore were allotted to the new State of Mysore with effect from 1 January, 1956. Their age

of retirement under the Mysore Services Regulations was 58 years. Some time in the year 1957 the State Government reduced their age of retirement to 55 years. The teachers challenged the reduced age of retirement. This Court in *State of Mysore v. Padmanabhacharya* (1966) 1 SCR 994 = (AIR 1966 SC 602) upheld the contention of the teachers that the age of retirement as fixed by the State was illegal. It may be stated here that the State did not obtain the prior approval of the Central Government under Section 115 (7) of the States Reorganisation Act in regard to the reduction of the age of compulsory retirement.

6. By notification dated 14 April, 1966 the age of retirement of primary and secondary school teachers in the new State was fixed at 58 years with effect from 5 April, 1966. The age of retirement of teachers who were allotted from other integrated areas was 55 years. By notification dated 15 April, 1966 a uniform treatment was given to all the Primary and Secondary School Teachers of the new State of Mysore by fixing their age of retirement at 58 years.

7. By notification dated 10 July, 1970 the age of retirement of teachers in the Collegiate and Technical Education Department was raised to 58 years.

8. By notification dated 6 May, 1971 the retirement age of teaching staff of the Medical and Dental Colleges and other colleges under the Department of Health and Family Planning Services was raised to 58 years.

9. By another notification dated 24 June, 1971 the age of retirement of the members of the teaching staff of the Law Colleges was raised to 58 years.

10. By another notification dated 5 August, 1972 the age of retirement of the members of the Judicial Service was raised to 58 years.

11. The Karnataka Civil Services (Twenty-Second Amendment) Rules, 1973 provided the age of retirement of all teachers in all the Departments except Ex-Mysore Primary and Secondary School Teachers at 55 years.

12. The teachers of the erstwhile local authorities were not covered by the Karnataka Civil Services (Twenty-Second Amendment) Rules, 1973 as they were governed either by contract or by special laws. Their age of retirement was 58 years. They were asked to retire on attaining 55 years. They filed writ petition challenging the reduction in age of retirement.

13. The Mysore Service (Amendment) Regulations 1974 were promulgated on 21 January, 1974 reducing the age of retirement of Ex-Mysore teachers from 58 to 55 years.

14. The Mysore Civil Service Regulations 1974 were made in exercise of powers conferred by the proviso to Article 309 of the Constitution and with the previous approval of the Central Government under the proviso to sub-section (7) of Sec. 115 of the States Reorganisation Act. These Mysore Civil Service Regulations 1974 provided that every Government servant governed by the provisions of note 4 below clause (c) of Article 294 of the Mysore Civil Service Regulations would retire on attaining the age of 55 years and those who were continued in service after attaining the age of 55 years on the date of the Regulations would retire on attaining the age of 58 years or 1 March, 1974 whichever is earlier.

15. The Mysore Civil Service (Amendment) Regulations, 1974 thus reduced the age of retirement of Ex-Mysore teachers also to 55 years.

16. On 24 February, 1974 the the Karnataka State Civil Services (Age of Compulsory Retirement) Rules, 1974 came into existence in exercise of powers under Article 309 of the Constitution. The Karnataka State Civil Services (Age of Compulsory Retirement) Rules, 1974 provided that notwithstanding anything to the contrary contained in any law, rule, notification, order or agreement every Government servant referred to in sub-rule (4) (sic) whose age of compulsory retirement is 58 years shall retire on attaining the age of 55 years. It was also provided by those Rules that those who continued in service after attaining the age of 55 years on the date of the promulgation of the Rules would retire on the date on which they attained the

age of 58 years or 1 April, 1974 whichever is earlier. It is also stated that those who will attain the age of 55 years after the commencement of these Rules but on or before 1 April, 1974 would retire on 1 April, 1974. Those who will attain 55 years after 1 April, 1974 shall retire on attaining the age of 55 years. The Government servant was defined in, 1974 Age of Compulsory Retirement Rules, to mean six classes of Government servants. The three categories of teachers who are parties to these appeals are all covered by the Karnataka State Civil Services (Age of Compulsory Retirement) Rules, 1974 which are referred to as the impugned Rules.

17. The Ex-Mysore primary and secondary school teachers contend that they had their age of retirement at 58 years and they were protected under the proviso to sub-section (7) of Section 115 of the States Reorganisation Act. The teachers of Ex-Municipal High School taken over under orders of the Government and agreements made by the Government dated 30 April, 1971 contend that their age of retirement which was applicable to the Municipal High School teachers before the date of take over was 50 years, and, therefore, they were protected under the agreements. The teachers of elementary schools which were under the management of local bodies and which were taken over by the State Government contended that their age of retirement was 58 years before the schools were taken over by the State Government under the provisions of Karnataka Compulsory Primary Education (Amendment and Miscellaneous Provisions) Act, 1969 and their conditions could continue until other condition was made.

18. The teachers of the Municipal and Taluk Development Board High Schools which were taken over by the State Government under written agreements made by the relevant local body contended that they became Government servants by the exercise of option form accepting the terms and conditions offered by the Government in their order dated 30 April, 1971. These teachers also contended that the option was incorporated

in the agreement between the State Government and the relevant local body under whom they were employed. The principal contention of these teachers was that the condition which was offered by the Government and accepted by these teachers of the relevant local body was that the conditions of service of these teachers "shall not be altered to their disadvantage". One of their conditions of service before the schools were taken over by the State Government was the age of retirement of teachers at 58 years. Under the impugned Rules these teachers were required to retire at the age of 55 years notwithstanding the fact that their age of retirement under the agreement was 58 years.

19. The Government Order dated 30 April, 1971 stated that all employees of the Local Authorities would become Government servants with effect from the date of transfer and their conditions of service would not be varied to their disadvantage consequent on their transfer to Government control. The Government order dated 30 April, 1971 further provided that the employees of local bodies and Secondary schools would be absorbed in Government service only if they agreed in writing to the forms. By the form is meant the form of option. The form of option contained two forms. One was whereby the teachers agreed to be absorbed in Government service and the other where the teachers did not agree to be absorbed in Government service. Those who agreed to be absorbed in Government service stated that the terms and conditions laid down by Government regarding absorption of the members of the staff of local body in Government service consequent on the take over of the local body to the control of Government were gone through and they agreed to be absorbed in Government service. The agreement between the Government and the relevant school of the local body provided that the service conditions of teaching and non-teaching employees of the local bodies shall not be varied to their disadvantage consequent on their transfer to Government control.

20. As a result of the exercise of option by the teachers of the local bodies they became Government servants. The term that the service conditions would not be varied to their disadvantage would mean that they would be like all other Government servants subject to Article 310 (1) of the Constitution. This could mean that under the law these teachers would be entitled to continue in service up to the age of superannuation. The exercise of option does not mean that there was a contract whereby a limitation was put on prescribing an age of superannuation. It has been held by this Court that prescribing an age of superannuation does not amount to an action under Article 311 of the Constitution. Article 309 confers legislative power to provide conditions of service. The Legislature can regulate conditions of service by law which can impair conditions or terms of service.

21. This Court in *Roshan Lal Tandon v. Union of India*, (1968) 1 SCR 185 = (AIR 1967 SC 1889) said that there is no vested contractual right in regard to the terms of service. The legal position of a Government servant is one of status than of contract. The duties of status are fixed by law. The terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee.

22. The form of option is the contract. This exercise of option is itself the contract. The option is to be absorbed or not to be absorbed. The contractual term is that the teacher will be absorbed as a Government servant. The term in the agreement between the Government and the Local Body that the conditions of service will not be varied to the disadvantage of the teachers has been read by all teachers who exercised the option to be absorbed. The conditions of service referred to therein are the conditions of service of the State of Mysore.

23. In *B. S. Vadera v. Union of India* (1968) 3 SCR 575 = (AIR 1969 SC 118) this Court held that if an appropriate legislature has passed an Act under Article 309 the Rules

framed under the proviso to Article 309 would have effect subject to that Act. In the absence of any Act of the appropriate legislature the Rules made by the President or such person as he may direct, are to have full effect.

24. There is legislative power under Entry 41, List II to legislate for State public services. There is no fetter on the legislative power to legislate with regard to service or with regard to any other matter mentioned in the Legislative List. In *Gurdev Singh Sidhu v. State of Punjab* (1964) 7 SCR 587 = (AIR 1964 SC 1585) this Court stated that there were two exceptions to the protection afforded by Article 311. One is where a permanent public servant is asked to retire on the ground that he has reached the age of superannuation which is reasonably fixed. The other is where a public servant is compulsorily retired under the Rules which prescribe the normal age of superannuation and provide reasonably long period of qualified service after which compulsory retirement could be valid. It is only when a rule is framed prescribing a proper age of superannuation and another rule is framed giving power to the State to retire a permanent public servant compulsorily at the end of 10 years of his service that this Court has apprehended such cases to be not within the protection of Article 311.

25. The question of retirement age was considered by this Court in *Bishun Narain Misra v. State of Uttar Pradesh*, (1965) 1 SCR 693 = (AIR 1965 SC 1567). The State Government in that case raised the age of superannuation from 55 to 58 years and again reduced the age to 55 years. It was held that there is no provision which takes away power of the Government to increase or reduce the age of superannuation. When the rule only deals with the age of superannuation and the Government servant had to retire because of the reduction in the age of superannuation it cannot be said that the termination of the service amounts to removal within the meaning of Article 311.

26. It, therefore, follows that teachers who exercised the form of

option were subject to the conditions of service framed under Article 309 and constitutional limitation of age of retirement. A Government servant enjoys the status of a Government servant. He cannot be terminated and his services cannot be terminated except in accordance with the provisions of the Constitution. Fixing an age of retirement does not amount to removal or termination.

27. The teachers of primary schools contended that their terms of service were continued by Mysore Compulsory Primary Education Act, 1969, and, therefore, their age of retirement could not be altered by rules made by the Governor under Article 309. The 1969 Act provided in Section 14 transfer of primary schools managed by the municipal councils and panchayats in the Madras area and Bellary District before the appointed day. Teachers of those schools became employees of the State Government. The crucial words in S. 14 (b) of the 1969 Act on which the teachers relied are these: "All primary school teachers . . . shall, until other provision is made, receive the salary and allowances and be subject to the condition of service to which they were entitled immediately before the appointed day". The words "other provision is made" were construed by the teachers to mean an act of legislature.

28. The provision contained in Section 14 (b) of the 1969 Act is a temporary and transitional provision which continues until other provision is made. The Legislature does not say until other provision is made because the Legislature is always free to legislate. The words "until other provision is made" mean provision which can be made by the legislature or by the Governor or the executive. The words "until other provision is made" do not exclusively limit to legislate. If the legislature has occupied the field the Governor has co-equal power. The power of the Governor is co-extensive with the legislative power. (See *B. S. Vadera's case*, (1968) 3 SCR 575 (supra) at page 583) = (AIR 1969 SC 118 at p. 123).

29. Section 14 (b) of the 1969 Act is not a law regulating recruit-

conditions of service under Article 309. Assuming it is, Art. 309 preclude the legislature from making provision for prescribing conditions of recruitment and conditions of service by Rules. The proviso to Article 309 contemplates that Rules regulating conditions of service may be made under an enactment. Just as it is open to the appropriate legislature to provide for rules to be framed for regulating recruitment and conditions of service under Article 309, it is equally open to the legislature to provide that in certain conditions the Governor acting under the proviso may make appropriate rules. The power under the proviso is co-extensive with the power under the main part. (See *B. S. Vadera's case*, (1968) 3 SCR 575 (supra) at pp. 585-586) = (AIR 1969 SC 118 at pp. 124-125).

30. For these reasons, the contentions of the teachers fail. The impugned legislation is constitutionally valid. The appeals are dismissed. Parties will pay and bear their own costs.

Appeals dismissed.

AIR 1975 SUPREME COURT 1652

(From: Punjab & Haryana)*

V. R. KRISHNA IYER, R. S. SARKARIA AND A. C. GUPTA, JJ.

State of Punjab (now Haryana) and another, Appellants v. M/s. New Rajasthan Mineral Syndicate, Respondents.

Civil Appeals Nos. 1883-1885 of 1970, D/- 29-4-1975.

(A) Constitution of India, Art. 286 (1) (b) — Central Sales Tax Act (1956), S. 5 (1) — Sale in the course of the export — State Trading Corporation nominated N. & Co. to procure iron-ore for the purpose of export — N. & Co. entered into agreement with assessee firm for procuring iron-ore — Sales by assessee held were not sales effected in the course of export and as such were not exempt from imposition of sales tax under Art. 286 (1) (b).

*(L.P.A. Nos. 53-55 of 1965, D/- 18-11-1969 (P. & H.).

L.P.A. Nos. 53-55 of 1965, D/- 18-11-1969 (Punj & Har), Reversed.

The State Trading Corporation, which was authorised by the Government of India as the sole authority for the purpose of exporting iron-ore to other countries, nominated N. & Co. to procure the iron-ore for the purpose of export. N. & Co. accordingly entered into agreements with the assessee firm for procuring the iron-ore from the assessee. According to the terms of agreement the assessee was entitled to payment even before shipment, if the goods were weighed and approved by the S.T.C. at the Port.

Held, after considering the agreements that the sales in question made by the assessee were not sales effected in the course of export of goods out of the territory of India and as such were not exempt from imposition of sales tax under Art. 286 (1) (b) of the Constitution. There was no privity of contract between the assessee and the foreign buyer. The agreement was between the assessee and N. & Co. Thus the export sale made by the S.T.C. to the foreign buyers was preceded by two separate sales, namely, the first made by the assessee to N. & Co. and the second made by N. & Co. to S.T.C. AIR 1975 SC 1564 Applied; L. P. As. Nos. 53-55 of 1965 D/- 18-11-1969 (Punj & Har), Reversed.

(Paras 4, 23, 24)

Cases Referred: Chronological Paras

AIR 1975 SC 1564 = Civil Appeals

Nos. 697-703 of 1973 17, 23, 24

AIR 1974 SC 1510 = (1974) 1 SCC 459 12, 21

(1974) 34 STC 553 (Mys) 12

AIR 1971 SC 870 = (1970) 3 SCR 147 12, 15, 21

AIR 1971 SC 2277 = (1971) 3 SCC 143

= 1971 Tax LR 1526 14

(1969) 23 STC 258 = ILR (1973) 1

Cal 30 14

AIR 1966 SC 142 = (1965) 3 SCR 71 12

AIR 1964 SC 1752 = 15 STC 753 14

AIR 1961 SC 311 = 11 STC 757 14

AIR 1960 SC 595 = 11 STC 186 14

M/s. N. N. Goswami and R. N. Sachthey, Advocates for Appellants;

M/s. G. C. Sharma Sr. Advocate (M/s.

C. P. Dua, P. K. Mukherjee, Anoop

Sharma & V. Kumeria Advocates

with him), for Respondents.

Judgment of the Court was delivered by:

SARKARIA, J.:— The common question of law that arises in these appeals by the same assessee, is whether the sales in question made by the assessee were sales effected in the course of export of goods out of the territory of India and as such were exempt from imposition of Sales-Tax under Art. 286 (1) (b), of the Constitution.

2. The relevant assessment years are 1957-58, 1958-59 and 1959-1960. The assessee, the New Rajasthan Mineral Syndicate is registered as a dealer under the Punjab General Sales Tax Act 1948. It is not registered under the Central Sales Act, 1956, (for short called the Act). The assessee carries on the business of quarry contractors. In the relevant years, it held a licence from the then Punjab State to quarry iron ore at Nizampur, District Mohindergarh.

3. During the assessment year in question, the Sales-tax Officer assessed the assessee-firm to tax under Section 9 of the Act on a turnover of Rs. 3,18,757/6, Rs. 3,99,948/93 and Rs. 5 lakhs, respectively. The last assessment was made on the best judgment basis.

4. To impugn these assessment orders, the assessee filed three writ petitions in the High Court of Punjab under Art. 226 of the Constitution. It was averred in the petitions that the export of iron-ore had been nationalised by the Central Government and no such export could be made by any private dealer like the assessee. The Government of India had authorised like the State Trading Corporation (to be hereinafter referred to as S.T.C.) as the sole authority for the purpose of exporting iron-ore to other countries, including Japan. The S.T.C. had further nominated Sri Narayan & Co. (to be called for short N. & Co.) to procure the iron-ore for the purpose of export. N & Co. accordingly entered into agreements with the assessee firm for procuring the iron-ore from the assessee. Excepting the quantity to be supplied, the basic terms of the agreements were the same. The material part of one such agreement, reads as follows:

"Agreement made on this day, the 1st April, 1957, between Messrs. Shri Narayan Company, Mine Owners Exporters & Importers 174 Mahatma Gandhi Road, Calcutta-7 hereinafter called Buyers and Messrs. Rajasthan Mineral Syndicate Maonda, Rajasthan hereinafter called Sellers, on the following terms and conditions:

Quantity: $\begin{matrix} x & x & x & x & x \end{matrix}$ 25,000 (twenty-five thousand) tons of Hamoitite Iron Ore of their Dhanota Dhancholi Mines Railway Station, Nizampur.

Specification: $\begin{matrix} x & x & x \end{matrix}$

Price Rs. 14/8/- plus actual Rly. Freight Nizampur to Kendai Port, per ton 2240 Lbs. F.O.R. Kandi Port.

Delivery: $\begin{matrix} x & x & x \end{matrix}$

Sampling and analysis: The sellers agree to stock the ore at the Railway siding or sidings and the buyers have the right to reject any ore or cancel at any stage before the same is loaded into wagons, the Buyers have the option to appoint any good analytical and consulting Chemist and their findings shall be binding on both the buyers and sellers.

Payment: Rs. 25,000/- (Twenty-five thousand) will be arranged for payment to the sellers after the acceptance of Re. 1/- (Rupee one) per ton for the aggregate quantity of 25,000 tons contract for supply. The balance amount shall be paid to the sellers against actual weight of Iron Ore loaded by the sellers when Iron Ore is either weighed at Kandla Port or by draft weight of the ship at the time of shipment to the Foreign countries as per bargain by the Buyer or by the State Trading Corporation of India.

$\begin{matrix} x & x & x & x & x \end{matrix}$ 3. The amount of Railway Freight shall be paid directly by the buyer at Kandla Port on the To pay R/Rs. and the sellers shall be held

responsible for shortage and excess of weight if any.

4. The account shall be finally settled when the shipment is made and satisfactory report is received from the Foreign Buyers or the State Trading Corporation approves the material for foreign countries where Iron is extracted out of it.

x x x

5. Then there is a letter dated 2-9-1957 from N. & Co. addressed to the assessee-firm. It reads as under:

"We are in receipt of your letter and noted your comments regarding the price schedule mentioned in your agreement referred to above which runs as under:

Rs. 14/8/ plus actual railway freight from Nizampur to Kandla Port for ton of 2240 f.o.r. Kandla Port in this connection we have to clear our position as under:

1. It is clear to all and you, that the Government of India is dealing with foreign countries on Government level in the export as of iron ore;

2. The State Trading Corporation of India, New Delhi is the business organization on Government level and we work as the brokers;

3. Whatever term or terms they dictate to us we pass on to you;

4. Your iron ore is be shipped to Japan and you are solely responsible for the quantity and quality till the material is delivered to Japanese firms.

5. They test the material for extracting of iron, before they pass the pay order.

6. As such we get approximately Re: 1/- (Rupee one) per ton, which is in fact our brokerage, otherwise in fact you are the sellers and Japanese Firm are the buyers, through State Trading Corporation. The following details will clear your doubt.

Selling price to S.T.C. Rs. 47/- per ton f.o.b. t. Kandla Port;
Our approximate price per ton;

1. Cost of iron ore payable to you Rs. 14-8-0

2. Railway freight Nizampur to Kandla port Rs. 24-8-0

3. Port charges unloading of Wagons, Plot rent Agents commission, shipment. Re: 1-0-0

4. Our Brokerage and Misc. expenses

Re 1-0-0
Hope you are satisfied that the price fixed is in your interest Please continue railment without any hesitation."

6. Before the assessing authority, it was contended by the assessee that he was exporting the iron ore outside India and is not liable to tax under the Central Sales Tax Act, 1956. He also produced copies of the agreement and other letters in support of his contention." It was further contended that no inter-State tax was leviable in view of the exemption in Section 5 (1) of the Act and Art. 286 (1) (b) of the Constitution as the sale was in the course of export of goods outside the territory of India: the sale having occasioned the export. The assessing authority negatived the assessee's claim to the exemption, in these terms.

"The dealer has no privity of contract between the foreign buyers and plea taken by him that he exported the goods outside the State of Punjab holds no ground. It appears to me that the State Trading Corporation of India enters into contract with the foreign buyers for the suppliers of iron ore. In order to meet their obligations, the State Trading Corporation of India appoints certain procuring agents such as M/s. Shri Narayan & Co., as intermediaries. These intermediaries enter into contract with the quarries who extract iron ore charge their commission and pass on this iron ore to the State Trading Corporation. The agreement entered into between the New Rajasthan Mineral Syndicate and M/s. Shri Narayan & Co. leaves no doubt that the former is the seller and the latter is the buyer. In view of the ambiguous position stipulated in the agreement, the dealer sold iron ore in the course of inter-State trade and commerce. It is further evident that M/s New Rajasthan Mineral Syndicate are not the direct exporters of iron ore because they did not enter into contract between the foreign buyers. The inter-State tax is therefore, leviable on the dealer viz. M/s. Narayan Rajasthan Mineral Syndicate."

7. The learned Single Judge of the High Court allowed the writ

petitions and quashed the assessment orders with holding that "the petitioner was engaged in the export of the iron ore to Japan through the S.T.C. which in turn, for its facility, had appointed N. & Co. a broker and that at no point of time the property in goods passed either to N. & Co., or to S.T.C."

8. The Letters Patent Bench of the High Court dismissed the appeal preferred by the Revenue. Mehr Singh C. J. who delivered the opinion of the Bench observed:

"These facts prove beyond controversy that the sale of iron-ore by the assessee-firm to the Japanese buyers through the State Trading Corporation and with the aid of the nominee of that Corporation leading to export of the iron ore from the country, and this export, is a single unbroken transaction or activity. Between the sale or supply of iron-ore, its transportation to the port of shipment its shipment at that port, and its export to Japan, there intervenes no independent transaction not directly connected with the export of iron-ore from this country to Japan. No completed and independent transaction of sale occurs between the assessee firm and any other party before the iron-ore leaves the port of this country. The whole is one and the same transaction.....The intervention of the State Trading Corporation or its nominee, as Shree Narayana & Company, is not as buyers, of iron-ore from the assessee firm, but merely as intermediaries facilitating the export of iron-ore by the assessee firm so that in regard to foreign exchange earned by such export what is earned is available to the nation without any questionable handling of the same. This manner and method of export of iron-ore through the State Trading Corporation as an intermediary does not bring about any contractual relation between the assessee firm and the Corporation so that a conclusion can be drawn that there has first been a sale of iron-ore by the assessee firm to the Corporation and thereafter the latter has been responsible for the export of the same."

9. Article 286 of the Constitution, so far as it is material for our purpose, reads thus:

"286 (1). No law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place.

(a) outside the State or

(b) in the course of import of the goods into or export of the goods out of the territory of India:

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1)."

Pursuant to cl. (2) of Art. 286 Parliament has enacted S. 5 in the Central Sales Tax Act, 1956 sub-section (1) which runs thus:

"A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India."

10. In view of the tests prescribed by this sub-section, the points to be considered are: Did the sales in question made by the assessee occasion the export? Were these sales effected by a transfer of documents of title of the goods after the goods had crossed the customs frontiers of India? If the answer to either of these questions is in the affirmative, the sales would be deemed to have taken place in the course of export of the goods out of the territory of India. If neither of these tests is satisfied the sales would be sales in the course of inter-State trade and taxable as such.

11. Learned counsel for the appellant has pressed these points into argument:

(1) The sales in question neither occasioned the export nor were they effected by transfer of documents of title after the goods crossed the customs frontiers of India. These Sales, at best, could be said to be for export and not in the course of export;

(2) The sales in question did not occasion the export because:

(a) the movement of the goods was the result of the agreement between the assessee and N. & Co., and was not caused by any agreement en-

tered into by the assessee with the foreign buyers and

(b) There was no privity of contract between the assessee and the foreign buyers.

(3) there is no room for two or more sales "in the course of export" within the contemplation of Article 286 (1) (b). That constitutional provision is not attracted in the present case because there have been more than one sale, namely, one by the assessee in favour of N & Co. S.T.C. and another by the STC in favour of the foreign buyer.

12. Reference has been made to this Court's decisions in *Coffee Board Bangalore v. Joint Commercial Tax Officer Madras*, (1970) 3 SCR 147 = (AIR 1971 SC 870); *Binani Bros. v. Union of India*, (1974) 1 SCC 459 = (AIR 1974 SC 1510); *Dalmia Cement (Bharat) Ltd. v. The Commissioner of Commercial Taxes Bangalore*, (1974) 34 STC 553 (Mys); *Sales Tax Officer, Jodhpur v. Shiv Ratan G. Mohatta*, (1965) 3 SCR 71 = (AIR 1966 SC 142).

13. At the outset the learned counsel tried to contend that the authenticity of the agreement and the letter dt. 2-9-1957 was doubtful and that the High Court was in error in basing its findings on these documents but subsequently he did not press this contention.

14. Mr. Sharma, learned Counsel for the assessee, has advanced these contentions:

(1) That the property in the goods, according to the agreement read with letter, dated 2-9-1957, never passed to the buyer before the goods had crossed the customs frontiers of India. It is stressed that the contract between the assessee and the nominee of the S.T.C. was an f.o.b.t. (fee on board trim). The point sought to be made out is that the sales in question were effected by transfer of documents of title to the goods after the goods had crossed the customs frontiers of India, and therefore, they had taken place "in the course of export" within the meaning of sub-sec. (5) (1). Reliance has been placed on this Court's decision in *National Tractors Hubli v. Commissioner of Commercial Taxes, Bangalore*, (1971) 3 SCC 143 = (AIR 1971 SC 2277) and *B. K. Wade-*

yer v. Daulatram Rameshwar Lal, 11 STC 757 = (AIR 1961 SC 311).

(2) The sales in question had directly occasioned the movements of the goods for export. The whole process that is the despatch of the iron ore from the quarry till it was handed over to the common carrier i.e. the shipper constituted one integrated transaction, N & Co., and S.T.C. being merely conduits in this course of export. Reference has also been made to *Serajuddin & Co. v. Commercial Tax Officer Sealdah Charge*, (1969) 23 STC 258 (Cal); *J. V. Gokal & Co. (Pvt.) Ltd. v. The Asstt. Collector of Sales-tax (Inspection)*, 11 STC 186 = (AIR 1960 SC 595) and *Ben Gorm Nilgiri Plantations Co. v. The Sales Tax Officer, Special Circle Ernakulam*, 15 STC 753 = (AIR 1964 SC 1752).

15. Mr. Sharma further tried to distinguish the decision of this Court in *Coffee Board's case*, (AIR 1971 SC 870) (supra) on the ground that there the auction sale by itself did not occasion the export. It is maintained that privity of contract between the indigenous seller and the foreign buyer is not an indispensable aspect to bring the sale within the ratio of *Nilgiri Plantations' case* (supra).

16. As factual premises for his contentions, Mr. Sharma relied on these facts which are apparent from the agreement between the assessee and N. & Co. and the said letter dated 2-9-1957:

(a) The iron ore was meant for export:

(b) The assessee was a licensee from the Government authorised to quarry the ore.

(c) The Government of India had appointed S.T.C. as the only authority competent to export iron ore out of India.

(d) The goods were liable to be rejected even by the foreign importer and any shortage or loss according to the agreement had to be recovered from the assessee.

(e) N. & Co. were merely brokers nominated by S.T.C. They were entitled only to brokerage.

(f) The bulk of the price was to be paid against actual weight of the ore sold by the assessee when either it

was weighed at Kandla or weighed on ship.

(g) The documents of title of the goods were prepared after the ore was tested at the port and thereafter the price was collected by N & Co. from the S.T.C. and passed on to the assessee.

17. Towards the far end of the arguments, it was brought to our notice that these very points which are in issue before us, were pending consideration by the Constitution Bench of this Court in Civil Appeals Nos. 697-703 of 1973 (Mohd. Serajuddin v. State of Orissa. Judgment in Civil Appeals Nos. 697-703 of 1973 has since been delivered (reported in AIR 1975 SC 1564).) The facts of that case were very similar, if not on all fours with the one before us. There, the assessee had entered into two contracts with S.T.C. for the supply of mineral ore (chrome concentrates). The S.T.C. entered into contract with the foreign buyers for sale of identical goods purchased by it from the assessee. Counsel for the assessee, in this Court, contended as follows:

"The contract in each case between the appellant and the Corporation is inextricably bound up with the export. The sale between the appellant and the corporation and the export by the Corporation to foreign buyers constituted one integrated transaction. Second, the Corporation has been interposed by the statute for a limited purpose between the appellant and the foreign buyer. Export cannot be made except by the Corporation. The inextricable link is not broken by the Corporation. The Corporation could not have diverted the goods to a buyer in India without violating export and import control order. Therefore, the sale is in the course of export. Third, the contract between the appellant and the corporation being on F.O.B. basis, the property in the goods passed only on shipment when the goods are in the stream of export. There is thus no sale in the taxable territory. Fourth, even if it is held that the appellant did not have any contract with the foreign buyer and that privity is essential, the rigid rule of privity of the contract should be relaxed in consideration of equity and justice and a

realistic approach should be adopted. The nature of the entering into contracts through the channel of the Corporation raises in reality a presumption of the Corporation being an agent of the appellant in the integrated transaction."

18. The clauses of the agreement executed between the assessee and the S.T.C. were similar to the terms of the agreement between the assessee and N & Co. in the present case. The price was expressed in U. S. Dollars per long ton. F.O.B. Ocean Liner Vessel. Calcutta. Under that agreement sampling and moisture determination had to be made at the time of unloading at the port of discharge by Far East Superintendence Company or U. S. Consultants and their certificate was to be final binding on both the buyer and the seller. Final weights as ascertained by Far East Superintendence Co. Ltd. or U. S. Consultants at the port of discharge was to be final and binding on both parties. The terms as to payment were these:

"90% against shipping documents as described in buyers corresponding sale contract. Buyers will assign the relevant foreign letter of credit which is to be opened in their name by their foreign buyers Messrs. Associated Metals and Minerals Corporation on receipt from the sellers of a Bank draft for difference between buyers FOB purchase value and FOB sale value, i.e. 1.00 (Rs. 4.75) per troy long ton for a Bank Guarantee from a Scheduled Bank. Guaranteeing that sellers will pay buyers F.O.B. purchase value shown in the contract and buyers FOB sale value as shown in the Foreign letter of credit and the buyers will endorse the bills of lading and deliver the same to sellers to negotiate against the abovementioned letter of credit. Balance after destination weight and analysis on the basis of documents mentioned in the Corporation's corresponding sale contract with buyers. If the balance 10% is insufficient to cover short fall in weight and analysis at destination or any penalty imposed by the Corporation foreign buyer the additional amount shall be payable by sellers to buyers on demand."

19. There were two other clauses of contract:

"(i) Unless otherwise agreed upon, the sellers agree that the contract shall be deemed as cancelled if for any reasons whatsoever M/s Associated Metals and Minerals Corporation, cancel their corresponding purchase contract with the buyers for supply of chrome ore.

(ii) The term and conditions of the buyers corresponding sale contract with M/s. Associated Metals and Minerals Corporation will apply to this contract also except to the extent specified in this purchase contract.

(iii) A true copy of buyers sale contract with M/s. Associated Metals and Minerals Corporation is attached."

20. It was further argued on behalf of the assessee that the commodity could not be exported directly by him in view of the restrictions imposed by law; that he entered into negotiations with the foreign purchasers and settled all the conditions of the contract; the Corporation thereafter entered into a F.O.B. contract with the assessee and with the foreign buyers on identical terms that the Corporation was interested only in the commission of one Dollar per long ton from the assessee; that all necessary steps including payment of customs duty for the shipment and export had been taken by the assessee and that the contract between the assessee and the Corporation being on f.o.b. basis, the property in the goods passed only on shipment when the goods were in the course of export.

21. Almost all the relevant rulings which have been cited before us were noticed in that case. Following the ratio of the Coffee Board's case (AIR 1971 SC 870) (supra) and Binani Brothers' case, (AIR 1974 SC 1510) (supra) the learned Chief Justice who delivered the opinion of the majority negatived the contentions of the assessee in these terms:

"The Coffee Board case as well as the case of Binani Bros. (supra) clearly indicates that the distinction between sales for export and sales in the course of export is never to be lost sight of. The features which point with unerring accuracy to the con-

tract between the appellant and the Corporation on the one hand and the contract between the Corporation and the foreign buyer on the other as two separate and independent contracts or sale within the ruling in the Coffee Board case (supra) and the Binani Brothers case, are these. The Corporation entered on the scene and entered into a direct contract with the foreign buyers to export the goods. The Corporation alone agreed to sell the goods to the foreign buyer. The corporation was the exporter of the goods. There was no privity of the contract between the appellant and the foreign buyer the privity of contract is between the Corporation and the foreign buyer. The immediate cause of the movement of goods and export was the contract between the foreign buyer who was the importer and the Corporation who was the exporter and shipper of the goods. All relevant documents were in the name of the Corporation whose contract of sale was the occasion of the export. The expression "occasions" in Section 5 of the Act means the immediate and direct cause. But for the contract between the Corporation and the foreign buyer, there was no occasion for export. Therefore, the export was occasioned by the contract of sale between the Corporation and the foreign buyer and not by the contract of sale between the corporation and the appellant.

The appellant sold the goods directly to the Corporation. The circumstances that the appellant did so to facilitate the performance of the contract between the Corporation and the foreign buyer on terms which were similar did not make the contract between the appellant and the Corporation the immediate cause of the export. The Corporation in regard to its contract with the foreign buyer entered into a contract with the appellant to procure the goods. Such contracts for procurement of goods for export are described in commercial parlance as back to back contracts. In export trade it is not unnatural to find a string of contracts for export of goods. It is only the contract which occasions the export of goods which will be entitled to exemption. The appellant was under no

contractual obligation to the foreign buyer either directly or indirectly. The rights of the appellants were against the Corporation. Similarly the obligations of the appellant were to the Corporation. The foreign buyer could not claim any right against the appellant nor did the appellant have any obligation to the foreign buyer. All acts done by the appellant were in performance of the appellant's obligation under the contract with the Corporation and not in performance of the obligations of the Corporation to the foreign buyer."

22. With regard to the contention that the contracts between the assessee and the Corporation were F.O.B. contracts, the learned Chief Justice said:

"In the present case, the mention of F.O.B. price in the contracts between the appellant and the Corporation does not render the contracts F.O.B. contracts with the foreign buyer. The Corporation entered into independent contracts with the foreign buyers on F.O.B. basis. The appellants were required under the contracts between the appellant and the Corporation to bring the goods to the ship named by the Corporation. The shipment of the goods by the Corporation to the foreign buyers is the F.O.B. contract to which the appellants are not the parties. The course of export in the export stream is possible in direct contracts between the Indian seller and the foreign buyer. The Corporation purchased goods from the appellants in order to fulfil the contracts with the foreign buyer. The only scope of the deeming provision in the Act is to find out the contract of sale which is the direct cause or which occasions the export. . . .

The directions given by the Corporation to the appellant to place the goods on board the ship are pursuant to the contract of sale between the appellant and the Corporation. These directions are not in the course of export, because the export sale is an independent one between the Corporation and the foreign buyer. The taking of the goods from the appellant's place to the ship is completely separate from the transit pursuant to the export sale.

The fact that the exports can be made only through the State Trading Corporation does not have the effect of making the appellants the exporter where there is direct contract between the Corporation and the foreign buyer."

23. The above observations, reproduced in extenso, furnish a complete and effective answer to all the arguments advanced on behalf of the assessee, in the instant case, to support the judgment of the High Court. Indeed, the factual premises on which Mr. Sharma's contentions are based, are weaker and less favourable to the assessee than those in Serajuddin's case (AIR 1975 SC 1564) (supra). Here there is no direct agreement between the assessee and the S.T.C. the agreement is between the assessee and N. & Co. Here is thus room for argument that the export sale made by the S.T.C. to the foreign buyers was preceded by two separate sales, namely, the first made by the assessee to N & Co. and the second made by N & Co. to S.T.C. Further, in the case before us, the assessee was entitled to payment even before shipment, if the goods were weighed and approved by S.T.C. at Kandla Port.

24. Be that as it may, the basic features of the case in hand are the same as those in Serajuddin's case (AIR 1975 SC 1564) (supra). Respectfully following the ratio and reasoning of this Court in the above quoted observations in Serajuddin's case by which we are bound we accept the contentions canvassed on behalf of the appellant and negative those advanced by the assessee.

25. In the result we allow these appeals, set aside the judgment of the High Court, and dismiss the writ petitions filed by the assessee. We further direct that in the circumstances of the case, that the parties to bear their own costs.

Appeals allowed.

AIR 1975 SUPREME COURT 1660

(From: Ind. Tri. Maharashtra)*

A. ALAGIRISWAMI, P. N. BHAGWATI AND P. K. GOSWAMI, JJ.

Chemicals & Fibres of India Ltd., Appellant v. D. G. Bhoir and others, Respondents.

Civil Appeals Nos. 1633-1644 of 1973, D/- 2-5-1975.

(A) Industrial Disputes Act (1947), Ss. 2A and 23 — Implication of Section 2-A — Interpretation of S. 23— Pendency of dispute between an individual workman as such and employer does not attract S. 23.

A limited application is to be given to the fact of introduction of S. 2A in the Act. The pendency of a dispute between an individual workman as such and the employer does not attract the provisions of S. 23.

(Para 7)

In enacting Section 2A the intention of the legislature was that an individual workman who was discharged, dismissed or retrenched or whose services were otherwise terminated should be given relief without its being necessary for the relationship between the employer and the whole body of employees being attracted to that dispute and the dispute becoming a generalised one between labour on the one hand the employer on the other.

(Para 2)

The ban on strikes is subject to certain limitations. There is no doubt that the Act recognises strikes as a legitimate weapon in the matter of industrial relations.

(Para 5)

The prohibition of strikes during the pendency of proceedings under S. 23 was, in the Act as originally enacted, confined only to disputes between the employer and the general body of employees and not to individual workman. It is in that context that S. 23 should be interpreted. In the case of an industrial dispute between an individual workman and the employer the whole elaborate machinery of the Industrial Disputes Act may not be

necessary lest it would be like using a sledge-hammer to kill a flea. While there is justification for preventing a strike when a dispute between the employer and the general body of workmen is pending adjudication or resolution, it would be too much to expect that the legislature intended that a lid should be put on all strikes just because the case of a single workman was pending. That the general body of labour should be prevented from resorting to strike where they had chosen to espouse the cause of a single workman is understandable and reasonable. If the employer and workmen are parties to a reference, the decision therein binds them even though they may have said they were not interested in it. AIR 1972 SC 1216 = 1972 Lab IC 659 Ref. (Para 5)

But if strikes are to be prohibited merely because the case of an individual workman was pending, whose case had not been espoused by the general body of the workmen, there can never be any strike even for justifiable grounds.

(Para 5)

The propriety or legality of an order passed by an employer under the standing orders very often might refer to an individual workman and that should not be made the reason for preventing labour from giving vent to its legitimate grievances in a legitimate way.

(Para 5)

Even in respect of clause (b) of Section 23 some limitation should be read confining it to the parties to the proceedings either actually or constructively, as in the case of a union espousing the cause of an individual workman.

(Para 6)

Held, that the Tribunal was correct in rejecting the applications for approval of the action of the appellant Company in discharging about 312 of its employees on the ground of strike during the pendency of a dispute between an individual workman as such and the appellant.

(Paras 7, 8)

(B) Industrial Disputes Act (1947), S. 23 — Proceedings relating to certain matters pending before Labour Court — There cannot be strike or lockout even in relation to matters other than those which are pending

* (Appln. No. (I.T.) 316 of 1972, D/- 30-8-1973 — (Ind. Tri. — Maharashtra)

before Labour Court AIR 1950 Cal 116 and AIR 1958 Pat. 51 Approved.

(Para 2)

Cases Referred: Chronological Paras

AIR 1972 SC 1216 = (1972) 3 SCR

805 = 1972 Lab IC 659 5

AIR 1963 SC 318 = (1962) 3 SCR 893

6

AIR 1959 SC 352 = 1959 Supp (1)

SCR 394 3

AIR 1958 Pat 51 = 1958 Cri LJ 81 2

AIR 1958 SC 353 = 1958 SCR 1156 6

1952 AC 109 = (1951) 2 All ER 587 3

AIR 1950 Cal 116 = 51 Cri LJ 520 2

M/s. Y. S. Chitale & A. K. Sen, Senior Advocate (M/s. Y. Damania & D. R. Agarwala, Advocates, with them) for Appellant; M/s. V. S. Desai & S. T. Desai, Senior Advocates, (M/s. Naunit Lal & D. H. Buch, & Miss Lalita Kohli with them) for Respondents.

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— The question that arises in these appeals is the implication of Section 2A of the Industrial Disputes Act. On 14th August, 1972 the Government of Maharashtra made a reference to the Labour Court under Section 10 (1) (c) of the Industrial Disputes Act in respect of the dismissal by the appellant of one of its employees M. S. Bobhate. On 25th August 1972 the appellant dismissed three other workers, Dastoor, Shome and Soman after an enquiry and this led to a strike in the appellant's factory. Towards the end of October 1972 the Company discharged about 312 of its employees and filed 12 applications before the Industrial Tribunal for approval of such discharge on the ground that a reference was pending before it. The appellant pleaded before the Tribunal that the strike was illegal as a reference was pending in respect of Bobhate and therefore the discharge of its workers by the appellant was in order and approval should be granted. On August 30, 1973 the Tribunal rejected all the applications for approval and these appeals have been filed in pursuance of a Special Leave granted by this Court.

2. Though reference was made to the repeated calls on behalf of the employer to the strikers to return to

work and the refusal of the workmen to return to work, the sole point for determination is whether when a reference is pending before the Labour Court in respect of a matter falling under Section 2A any strike by the other workers would be illegal. That is the only ground on which Special Leave has been granted. Under Section 24 of the Industrial Disputes Act, in so far as it is relevant for the purposes of this case, a strike shall be illegal if it is commenced or declared in contravention of Section 22 or Section 23. We are not concerned with Section 22 in this case though, at one stage that seems to have been one of the grounds for contending that the strike was illegal. Section 23, insofar as it is relevant for the purposes of this case, reads as follows:

"23. No workman who is employed in any industrial establishment shall go on strike in breach of contract and no employer of any such workman shall declare a lock-out

(a)

(b) during the pendency of proceedings before a Labour Court, Tribunal or National Tribunal and two months after the conclusion of such proceedings:

(bb)

(c) during any period in which a settlement or award is in operation in respect of any of the matters covered by the settlement or award." The important words are "during the pendency of proceedings". Undoubtedly a proceeding was pending before the Labour Court and that was in respect of the dismissal of Bobhate. Did this make the strike by the workmen of the appellant illegal though at least in its origin the strike had nothing to do with Bobhate's case? It was common ground that even though the dispute between the employer and the employees might relate to a case of a single workman the provisions of Section 23 (b) would apply if the single workman's cause has been espoused by a labour union which need not necessarily comprise of all the employees of the concerned employer. The decisions of some High Courts establish that even though the proceedings pending before the Labour Court, Tribunal, or National Tribunal

might relate to certain matters only, there cannot be a strike or lock-out even in relation to matters other than those which are pending before the Labour Court, Tribunal or National Tribunal (see *Provat Kumar v. W. T. C. Parkar*, AIR 1950 Cal 116, and *State of Bihar v. Deodar Jha*, AIR 1958 Pat 51). We express our agreement with this view. But the question is: does the fact that a proceeding is pending before a Labour Court in respect of an individual workman bar the other workers from resorting to a strike? Section 2A of the Industrial Disputes Act, which came into effect on 1-12-1965 reads as follows:

"2A. Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute."

An industrial dispute is defined in Section 2 (k) as follows:

"(k) 'industrial dispute' means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or with the conditions of labour, of any person."

It is in interpreting this clause that it has been held that even where the dispute relates to a single workman it is an industrial dispute if that dispute is espoused by the general body of the employees. Before the introduction of Section 2A an individual workman who was discharged, dismissed or retrenched or whose services were otherwise terminated and whose case was not espoused by any labour union or by a substantial number of workmen had no remedy. It was to deal with that contingency that Section 2A was enacted. We would therefore be justified in concluding that in enacting Section 2A the intention of the legislature was that an individual workman who was discharged, dismissed or retrenched

or whose services were otherwise terminated should be given relief without its being necessary for the relationship between the employer and the whole body of employees being attracted to that dispute and the dispute becoming a generalised one between labour on the one hand and the employer on the other. If this point of view is kept clear in mind, the solution of the problem before us becomes simple.

3. In the Statement of Objects and Reasons of the Bill which resulted in the enactment of Section 2A it is stated:

"In construing the scope of industrial dispute, Courts have taken the view that a dispute between an employer and an individual workman cannot per se be an industrial dispute, but it may become one if it is taken up by a union or a number of workmen making a common cause with the aggrieved individual workman. In view of this, cases of individual dismissals and discharges cannot be taken up for conciliation or arbitration or referred to adjudication under the Industrial Disputes Act, unless they are sponsored by a union or a number of workmen. It is now proposed to make the machinery under the Act available in such cases."

This is relied upon by the employer to contend that the whole of the machinery under the Industrial Disputes Act is available even in the case of a reference relating to an individual workman. On the other hand it is urged on behalf of the workmen that if the intention was to make the whole of the machinery of the Industrial Disputes Act available even in the case of pendency of the case of an individual workman before a Labour Court or a Tribunal what would have been done is to add the words "and includes any dispute or difference between a workman and his employer connected with or arising out of the discharge, dismissal, retrenchment or termination of the services of that workman notwithstanding that no other workman nor any union of workmen is a party to the dispute" to clause (k) of Section 2. It is further contended that the dispute or difference between the individual workman and his employer is only

deemed to be an industrial dispute and that it is not in fact an industrial dispute. It is contended on behalf of the employer that once something which is not an industrial dispute is deemed to be an industrial dispute all the necessary implications of such a deeming provision should be given effect to and the mind should not be allowed to boggle in working out such implications (see *East End Dwellings Co. Ltd v. Finsbury Borough Council*, 1952 AC 109 at p. 132 and *Commr. of Income-tax v. Teja Singh*, 1959 Supp. (1) SCR 394 = (AIR 1959 SC 352).) On the other hand it is urged on behalf of the workmen that in the case of a deeming provision no greater effect should be given to it than is necessary for the purpose for which it is enacted. Both these contentions are amply supported by authority and the duty of this Court is to see what exactly are the necessary implications of the deeming provision. We should say, however, that it does not make any difference to the decision of this question whether the deeming provision is in the form of a separate section like Section 2A as in the present case or is part of the definition of the industrial dispute itself as is suggested it should be on behalf of the workmen.

4. We should first of all have a broad idea of the scheme of the Act. The Act as framed originally was not enacted to deal with the case of individual dispute. It was intended to deal with the problems arising between the employers on the one hand and the general body of workmen on the other though not necessarily the majority of the workmen. Section 3 of the Act provides for the constitution of a Works Committee to promote measures for securing and preserving amity and good relations between the employer and workmen. Section 4 provides for appointment of conciliation officers charged with the duty of mediating in and promoting the settlement of industrial disputes (the definition of 'industrial dispute' in Section 2 (k) may be here kept in mind). Section 5 provides for the constitution of Boards of Conciliation for promoting the settlement of industrial disputes. Section 6 provides for constitution of Courts of Inquiry for

inquiring into any matter appearing to be connected with or relevant to an industrial dispute. Section 7 provides for constitution of Labour Courts for the adjudication of industrial disputes. Section 7A provides for constitution of Industrial Tribunals for the adjudication of industrial disputes relating to any matter specified in the Second and Third Schedules to the Act. Section 7B provides for constitution of National Industrial Tribunals for the adjudication of industrial disputes involving questions of national importance or in which industrial establishments situated in more than one State are likely to be interested in or affected by. Section 10 provides for reference of industrial disputes whether they exist or are apprehended to Boards of Conciliation for promoting a settlement, or to a Labour Court or to an Industrial Tribunal for adjudication or even to a National Tribunal. It also provides for parties to an industrial dispute applying whether jointly or separately for a reference of the dispute to a Conciliation Board, Court of Inquiry, Labour Court, Tribunal or National Tribunal. Where a dispute has been so referred the appropriate Government is enabled to prohibit the continuance of any strike or lock-out. Section 10A provides for employers and workmen agreeing to refer their disputes to arbitration before a dispute has been referred under Section 10 to a Labour Court, Tribunal or National Tribunal. Section 12 provides for the duties of Conciliation Officers. Section 13 provides for the duties of Boards of Conciliation, Section 14 for the duties of the Court of Inquiry and Section 15 for the duties of Labour Courts, Tribunals and National Tribunals. Section 18 (1) says that a settlement arrived at by agreement between the employer and the workmen otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement. Section 18 (3) says that a settlement arrived at in the course of conciliation proceedings shall be binding on:

(a) all parties to the industrial dispute;

(b) all other parties summoned to appear in the proceedings as par-

ties to the dispute, unless the Board, arbitrator, Labour Court, Tribunal or National Tribunal as the case may be, records the opinion that they were so summoned without proper cause;

(c) where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates.

(d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part." Section 22 provides that there shall be no strike or lock-out in a public utility service. Section 23 bars a strike or lock-out during the pendency of conciliation proceedings before a Board, pendency of proceedings before a Labour Court, Tribunal or National Tribunal and during the pendency of arbitration proceedings before an arbitrator as also during any period in which a settlement or award is in operation. Section 24 provides that a strike or lock-out shall be illegal if it is commenced in contravention of S. 22 or S. 23 or in contravention of an order made under sub-sec. (3) of Section 10 or sub-section (4A) of Section 10A.

5. These provisions bring out the elaborate nature of the proceedings relating to conciliation, arbitration, settlement, inquiry and award. The intention behind all these provisions is to avoid strikes and lock-outs as far as possible not only by bringing the parties together but also by referring points of dispute between them, either voluntarily or otherwise, for decision by Labour Courts, Tribunals and National Tribunals. Strikes are not banned even in the case of public utility services. The ban on strikes is subject to certain limitations. There is no doubt that the Act recognises strikes as a legitimate weapon in the matter of industrial relations. We need not concern ourselves about aberrations like gheraos or go-slow. The prohibition of strikes during the pendency of proceedings before a La-

bour Court, Tribunal or National Tribunal under Section 23 was, in the Act as originally enacted, confined only to disputes between the employer and the general body of employees and not to individual workman. It is in that context that Section 23 should be interpreted. In the case of an industrial dispute between an individual workman and the employer the whole elaborate machinery earlier set forth of the Industrial Disputes Act may not be necessary lest it would be like using a sledge-hammer to kill a flea. While there is justification for preventing a strike when a dispute between the employer and the general body of workmen is pending adjudication or resolution, it would be too much to expect that the legislature intended that a lid should be put on all strikes just because the case of a single workman was pending. That the general body of labour should be prevented from resorting to strike where they had chosen to espouse the cause of a single workman is understandable and reasonable. It has even been held that if the employer and workmen are parties to a reference the decision therein binds them even though they may have said they were not interested in it (*Balarpur Collieries v. Presiding Officer*, (1972) 3 SCR 805 = (AIR 1972 SC 1216) = (1972 Lab IC 659).). But if strikes are to be prohibited merely because the case of an individual workman was pending, whose case had not been espoused by the general body of the workmen, there can never be any strike even for justifiable grounds. A strike is a necessary safety valve in industrial relations when properly resorted to. To accede to the contention of the employer in this case could be in effect acceding to a contention that there should never be a strike. While we realise the importance of the maintenance of industrial peace, it cannot be secured by putting a lid on the legitimate grievances of the general body of labour because the dispute relating to an individual workman under Section 2A is pending. That might mean that the boiling Cauldron might burst. In that case the general body of workmen would be legitimately aggrieved that they are prevented from striking because

an individual's case was pending with which they were not concerned. It is not enough in this situation to say that it is always open to the Government to make a reference under Section 10. It may or may not happen. Furthermore, the matters that could be pending before a Labour Court under Section 23 under Second Schedule are:

1. The propriety or legality of an order passed by an employer under the standing orders;

2. The application and interpretation of standing orders;

3. Discharge or dismissal of workmen including reinstatement of, or grant of relief to, workmen wrongfully dismissed;

4. Withdrawal of any customary concession or privilege;

5. Illegality or otherwise of a strike or lock-out; and

6. All matters other than those specified in the Third Schedule.

The propriety or legality of an order passed by an employer under the standing orders very often might refer to an individual workman and that should not be made the reason for preventing labour from giving vent to its legitimate grievances in a legitimate way.

6. Our attention is drawn to the contrast between clauses (c) and (b) of Section 23 and it is argued that while under clause (c) there is a limitation in respect of matters in relation to which there cannot be a strike, there is no such limitation under cl. (b) and therefore clause (b) provides a blanket ban on strikes if proceedings are pending. It is not possible to give such an extended meaning to that provision. As we have pointed out, even in respect of cl. (b) some limitation should be read, confining it to the parties to the proceedings either actually or constructively, as in the case of a union espousing the cause of an individual workman. Nobody, for instance, can argue that because proceedings are pending in relation to one industrial establishment owned by an employer, there can be no strike in another industrial establishment owned by that employer because there are no words of limitation in clause (b). See *Workmen of*

Dimakuchi Tea Estate v. The Management of Dimakuchi Tea Estate, 1958 SCR 1156 = (AIR 1958 SC 353) where it was held that the words 'any person' cannot be given their ordinary meaning. See also *The Bombay Union of Journalists v. The 'Hindu' Bombay*, (1962) 3 SCR 893 = (AIR 1963 SC 318).

7. We are therefore of opinion that the proper point of view from which to look at the problem is to give limited application to the fact of the introduction of Section 2A in the Industrial Disputes Act and to hold that the pendency of a dispute between an individual workman as such and the employer does not attract the provisions of Section 23.

8. The appeals are therefore dismissed with costs.

Appeals dismissed:

AIR 1975 SUPREME COURT 1665

(From: Bombay)*

V. R. KRISHNA IYER AND

R. S. SARKARIA, JJ.

State of Maharashtra, Appellant
v. Sindhi alias Raman, Respondent.

Criminal Appeal No. 158 of 1971,
D/- 19-2-1975.

(A) Criminal P. C. (1898), Ss. 465 and 374 — Proceedings for confirmation of death sentence in murder trial — Unsoundness of mind of accused and his consequent incapacity to defend himself — S. 465 applies and proceedings must be postponed under that section — Word "trial" in S. 465 includes reference under S. 374.

So far as an accused person sentenced to death is concerned, his trial does not conclude with the termination of the proceedings in the Court of Session. The reason is that the death sentence passed by the Court of Session is subject to confirmation by the High Court. A trial cannot be deemed to have concluded till an executable sentence is passed by the competent court. Viewed from that stand-point, the confirmation proceedings under Sections 374, 375 and 376, Chapter XXVII of the Code of 1898, are in

* (Confirmation Case No. 20 of 1969,
D/- 3-7-1970 — Bom.)

substance a continuation of the trial. Nor is it correct to say that in such confirmation proceedings the High Court can arbitrarily refuse to hear the accused either in person or through Counsel or other agent. The expression "at his trial" occurring in S. 465 has to be liberally construed in a manner which is not repugnant to the fundamental principle of natural justice conveyed by the maxim *audi alteram partem, audiatur et altera pars*. (Paras 13, 14, 16)

(B) Criminal P.C. (1898), S. 465—Issue as to unsoundness of mind and consequent incapacity of accused to defend himself — Reference of issue to medical Board — Legality — The doctors concerned examined in Court as Court witnesses and the Court itself meticulously considering their evidence and finding that accused was of unsound mind and was consequently incapable of defending himself — Court cannot be said to have delegated to the doctors the decision of the issue instead of itself deciding it — Proceeding not vitiated. (Para 19)

Cases Referred: Chronological Paras
AIR 1969 NSC 119 = (1969) 3 SCC 176 8
1969 SCWR 1229 11
(1959) 3 All ER 418 = (1960) 1 QB 325 18
AIR 1957 SC 469 = 1957 Cri LJ 586 10
AIR 1921 Sind 84 (2) = 15 Sind LR 103 (FB) 6

Mr. D. V. Patel, Sr. Advocate (Mr. M. N. Shroff, Advocate, with him), for Appellant; B. R. Agarwala, Advocate, Amicus Curiae, for Respondent.

The Judgment of the Court was delivered by

SAEKARIA, J.:— The principal question raised in this appeal by special leave is: Whether Section 465 of the Code of Criminal Procedure 1898, is applicable to proceedings in reference under S. 374 pending before the High Court for confirmation of the death sentence awarded to an accused by the Court of Session?

2. It arises out of these circumstances. Sindhi alias Raman was tried, convicted and sentenced to death on 13-8-1969 by the Additional Sessions Judge, Greater Bombay for the

double murder of two brothers, Lal Chand Jagannath Yadav and Dullar Jaggi Yadav in Chinchavali Farm at Malad on the night between the 25th and 26th of August, 1968. Sindhi did not appeal against the order of his conviction. But the trial Judge made a reference under S. 374 of the Code to the High Court for confirmation of the death sentence. The reference came up for hearing towards the end of 1969.

3. On 22-10-1969, the prisoner expressed a desire to be present at the hearing of his case before the High Court. Two Advocates, namely Shri D. H. Rane with Shri Mengde as the Senior, were appointed as *amicus curiae* to defend the condemned prisoner in the High Court. After interviewing the prisoner in Jail on 8-1-1970 and 9-1-1970, the Advocate reported to the High Court that the accused was not able to communicate with them intelligently and rationally as he appeared to be insane. Counsel submitted an application to the High Court requesting that the accused be got examined by a Board of psychiatrists in order to determine as to whether he was or was not of unsound mind. The application was opposed on behalf of the State *inter alia* on the ground that Section 465 applies only to a trial before a Court of Session. The High Court rejected this contention, and by its order, dated, 14th January '70, directed the Surgeon General, Bombay to constitute a Special Medical Board of three psychiatrists on the lines indicated in R. 850 of the Bombay Jail Manual, to examine the accused and "determine whether the accused is of unsound mind, and, secondly whether in consequence of his unsoundness of mind, he is incapable of making his defence in the proceedings before us". The Board was accordingly constituted. The Board deputed Dr. Balakrishna Laxman Chandorkar, Superintendent of the Mental Hospital to interview the accused. Dr. Chandorkar consequently had fourteen interviews with the accused and also examined the latter physically. The accused was sent, under Dr. Chandorkar's directions, to several hospitals for special examinations. Dr. Chandorkar gathered the past history of the accused,

also in so far as it was relevant to determine the issue referred to him. The conclusion reached by Dr. Chandorkar, which he reported to the Board on 28-2-1970, was that the accused was suffering from Paranoid Schizophrenia and was of unsound mind and, in consequence, he was incapable of making his defence. On receiving the report of Dr. Chandorkar, the Special Medical Board also examined and interviewed the accused on five occasions. Their conclusion, as communicated to the High Court, was:

"(1). Sindhi Dalwai alias Raman Raghav (Prisoner) is of unsound mind. He is suffering from a psychosis called chronic paranoid schizophrenia or paraphrenia, the latter being an old term for chronic paranoid schizophrenia plus auditory hallucinations. He is dangerous to the society and hence certifiably insane.

(2) Sindhi knew the nature of the act i.e. he knew that he was killing human beings.

(3) He did know that what he did was wrong and contrary to the law of the land but he firmly believed that what he was doing was right and in tune with the law of "kanoon" whose law according to him was obligatory for him to follow.

(4) There is such a degree of unsoundness of mind resulting in such a degree of defect of reason, that he is incapable of co-operating with and instructing his defence counsel in the conduct of the trial and court proceedings and he is incapable of making his defence in the proceedings before the High Court. The reasons for this incapability are:

(a) complete lack of insight into his illness;

(b) firm and unshakable delusions that only the law of "Kanoon" matters and the law of this world does not apply to him and hence his inability to participate in the court proceedings;

(c) his complete lack of realization of the gravity of the crime and the seriousness of his death sentence;

(d) his judgment is so much influenced by his delusions and hallucinations that he is incapable of rational thinking and behaviour."

4. After examining Dr. Marfatia, the Chairman of the Board and Dr. Chandorkar, the Mental Specialist, as court witnesses, the High Court held:

"The prisoner is clearly of unsound mind and in consequence thereof he is unable to make his defence. Therefore proceedings in the confirmation case will have to be postponed and in the meantime it will be necessary to direct that the State Government do detain the prisoner in safe custody in Yeravda Central Prison."

5. It is against this order, dated 3-7-1970, that the State has come in appeal before this Court.

6. Mr. Patel, learned Counsel for the appellant, assails the order of the High Court, postponing the proceedings under Section 465, Criminal Procedure Code on these grounds:

(i) The operation of Section 465, is, in terms, confined to the trial stage. The section does not apply to proceedings before the High Court, on reference under S. 374, as the same are post-trial proceedings;

(ii) The question as to whether the accused person has the mental capacity to defend himself or not, arises only at the pre-conviction stage before the Committal Court or the trial court, because it is only at that stage the accused person has a right to be heard and lead evidence in defence. But in proceedings on reference under Section 374, the accused person has no right of audience before the High Court, not even where the High Court directs a further enquiry or the taking of additional evidence under Section 375, nor where any appeal of the accused filed through the jailor under S. 420, comes up for hearing along with the reference. It is another matter that the High Court has the power, even in such proceedings to hear the accused. For this argument support has been sought from certain observations of Madgaonkar A. J. C. in *Gul v. Emperor*, AIR 1921 Sind 84 (2) (FB).

7. In this connection learned Counsel has pointed out that at the commencement of the trial before the Court of Session, also, a question was raised as to the mental capacity of the accused and thereupon, the trial Judge, after making a due enquiry in

accordance with the provisions of Section 465, recorded a clear-cut finding that the accused was then of sound mind and capable of understanding the nature of the proceedings and making a defence. This finding of the trial Judge, it is stressed, was not assailed before the High Court, and still stands unchallenged.

8. Learned Counsel also tried to distinguish the decision of this Court in *Vivian Rodrick v. State of West Bengal*, (1969) 3 SCC 176 = (AIR, 1969 NSC 119) on the ground that, in that case the convict had preferred an appeal against the order of his conviction, and, consequently, the observations of this Court in regard to the applicability of S. 465 Cr.P.C. to proceedings in reference are merely obiter. In the alternative, it is submitted that those observations need reconsideration in the light of the arguments now advanced before us.

9. Section 465 of the Code of Criminal Procedure, 1898, runs thus:

"1) If any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the jury, or the Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the jury or Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect and shall postpone further proceedings in the case and the jury, if any, shall be discharged.

2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court."

10. It will be seen that Section 465, in terms, relates to unsoundness of accused's mind and his consequent incapacity to make defence, at the time of trial only. The question, therefore, is: Does the trial on a murder charge end with the conviction and pronouncement of death sentence on the accused by the Court of Session? Or, does it continue till the reference under S. 374, is disposed of by the High Court? Answer to this question was given by this Court, speaking through Govinda Menon J.,

as far back as 1956, in *Jumman v. State of Punjab*, AIR 1957 SC 469 = (1957 Cri LJ 586) in a telling passage, thus:

"It is clear from a perusal of these provisions (Ss. 374, 375, 376 and 377, Cr.P.C.) that in such circumstances the entire case is before the High Court and in fact it is a continuation of the trial of the accused on the same evidence and any additional evidence and that is why the High Court is given power to take fresh evidence if it so desires. . . . but there is a difference when a reference is made under S. 374, Criminal Procedure Code, and when disposing of an appeal under S. 423, Criminal Procedure Code, and that is that the High Court has to satisfy itself as to whether a case beyond reasonable doubt has been made out against the accused persons for the infliction of the penalty of death. In fact the proceedings before the High Court are a re-appraisal and the reassessment of the entire facts and law in order, that the High Court should be satisfied on the materials about the guilt or innocence of the accused persons. Such being the case, it is the duty of the High Court to consider the proceedings in all their aspects and come to an independent conclusion on the materials, apart from the view expressed by the Sessions Judge."

(emphasis supplied)

11. The same position was reiterated with emphasis by this Court in *Surjit Singh v. State of Punjab*, Criminal Appeal No. 77 of 1968 D/-15-10-1968 = (reported in (1969) 1 SCWR 1229).

12. Even in *Gul v. Emperor* (supra), cited by Mr. Patel, Madgonkar A.J.C., expressed himself in a similar strain. What he said more than half a century back still retains its freshness and relevance, and may be extracted:

"The worth and sanctity of human life are a test and mark of civilised societies and are increasingly reflected in the criminal jurisprudence of England and of India. In India, the Legislature has provided in confirmation proceedings a final safeguard. . . . This may perhaps increase our responsibilities and add to our labours; but no one would shirk the

one or grudge the other even in a case where the liberty, much more where the life, of the subject is concerned. This duty of judgment is, however, laid in the first instance upon the Jury and the Trial Judge. . . . But equally and with all this weight, this Court in confirmation must finally weigh for itself the whole evidence in the light of all the arguments and confirm or otherwise according to its own final conclusion on the guilt or innocence of the sentenced person in the discharge of the duty laid upon it by law."

13. From the above conspectus, it emerges clear that so far as an accused person sentenced to death is concerned his trial does not conclude with the termination of the proceedings in the Court of Session. The reason is that the death sentence passed by the Court of Session is subject to confirmation by the High Court. A trial cannot be deemed to have concluded till an executable sentence is passed by the competent court. Viewed from that stand-point, the confirmation proceedings under Ss. 374, 375 and 376, Chapter XXVII of the Code of 1898, are in substance a continuation of the trial.

14. Nor is it correct to say that in such confirmation proceedings the High Court can arbitrarily refuse to hear the accused either in person or through Counsel or other agent.

15. In Vivian Rodrick's case (supra), the appellant was convicted under S. 302, Penal Code by the Court of Session and sentenced to death. The Sessions Judge made a reference under Section 374 for confirmation of the death sentence. The convict appealed against the order of his conviction and sentence. The High Court dismissed the appeal, accepted the reference, and confirmed the conviction and the sentence. In an appeal by special leave brought before this Court, it was inter alia contended that the proceedings taken in the appeal before the High Court were void for non-compliance of Section 465. What this Court said in repelling that contention, being equally applicable to what has been canvassed before us on behalf of the appellant, may usefully be extracted:

"We are of the view that it is not necessary for us, in this case, to express any opinion on the applicability, or otherwise, of the provisions of Section 465, Cr.P.C. to appeals. For, on the facts of the case, we are inclined to accept the alternative contention of Mr. Rana that in the face of the medical evidence and in view of the fact that the appellant was contesting his conviction for murder and the sentence of death imposed on him, it would have been proper if the Division Bench which heard his appeal had postponed the hearing of the appeal till such time as the appellant was declared fit to contest his appeal. . . . Whatever may be the legal position regarding the applicability of Section 465 Cr.P.C. to appeals, we are not inclined to agree with the proposition enunciated by the learned Judges that there is no bar to hearing and disposing of an appeal, even if the accused-appellant is of unsound mind or even insane at the time when the appeal is taken up for hearing. . . . In our opinion, when the report is that an accused appellant is of unsound mind, it is reasonable to infer that he is incapable of making his defence. The Court, in the circumstances is bound to afford him the same protection to which he would be entitled had he been of unsound mind at the time of the trial."

16. In the present case no appeal was filed by the prisoner before the High Court. It is therefore unnecessary for us to examine whether the provisions of S. 465, in terms, or, in principle, apply, to an appeal by the condemned prisoner before the High Court. Suffice it to say that the expression "at his trial" occurring in S. 465 has to be liberally construed in a manner which is not repugnant to the fundamental principle of natural justice conveyed by the maxim *audi alteram partem*, *audiatur et altera pars*.

17. In the light of what has been said above we negative the legal contentions raised by the appellant-State.

18. The next contention of Mr. Patel is that the High Court left the decision of both the points viz., (1) whether the accused was of unsound mind and (2) whether in consequence,

he was incapable of making his defence, almost entirely to the medical Board. Such delegation which gives the proceeding the colour of trial by Doctors is not permissible under the law. Reference on this point has been made to *R. v. Podold* (1959) 3 All ER 418. On merits also, it is maintained, the findings on the aforesaid issues, are wrong, as the accused fully knew that he had been tried and sentenced to death for the murders in question. Emphasis has been laid on the fact that the accused had on 18-12-1969 expressed in writing through the Jailor, his desire to be present in the High Court at the time of the hearing of his case. Counsel has referred extensively to the statements of Doctor Chandorkar and Dr. Marfatia and contended that everything about the mental condition of the accused even according to these medical experts was normal excepting that he was suffering from the delusion that he had been ordained by some higher "Kanoon" to commit these murders. According to Mr. Patel, insanity judged by clinical standards is different from insanity determined by legal standards. It is urged that since the accused fully knew the nature of the criminal acts he had committed and the proceedings against him, it could not be said that he was incapable of making his defence.

19. It is true that the High Court had by its order dated 14-1-1970, referred both the issues in regard to the mental capacity of the accused to the medical Board, and has given due weight to their opinion. But it is not correct to say that the High Court accepted the ipse dixit of the medical experts. It examined Dr. Marfatia and Dr. Chandorkar as court witnesses. These experts gave detailed and cogent reasons in support of their opinion. The High Court meticulously considered their evidence and thereafter recorded its own findings on the crucial issues. We have ourselves examined the evidence rendered by these two mental experts in the High Court. We are satisfied that the conclusion arrived at by the High Court in regard to the mental capacity of the accused on the basis of this evidence is correct.

20. In the result the appeal fails and is dismissed.

Appeal dismissed.

AIR 1975 SUPREME COURT 1670

(From: Madras)*

V. R. KRISHNA IYER, R. S. SARKARIA AND A. C. GUPTA, JJ.

The Dollar Company, Madras, Appellant v. Collector of Madras, Respondent.

Civil Appeal No. 667 of 1968, D/- 1-5-1975.

(A) Land Acquisition Act (1894), Ss. 23 and 54 — Compensation — Determination of—Appeal to Supreme Court — Powers of appellate Court.

In an appeal from an award granting compensation the Supreme Court will not interfere unless there is something to show not merely that on the balance of evidence it is possible to reach a different conclusion but that the judgment cannot be supported by reason of a wrong application of principle or because some important point affecting valuation has been overlooked or misapplied. Moreover, there is a prudent condition to which the appellate power, generally speaking, is subject. A court of appeal interferes not when the judgment under attack is not right but only when it is shown to be wrong.

(Para 4)

Compensation for compulsory acquisition, as governed by Section 23, gives high priority to the market value of the land at the date of the publication of the notification under Section 4, sub-section (1). The main criterion to determine the market value is what a willing purchaser would pay a willing vendor. An actual transaction with respect to the specific land of recent date is a guide-book that courts may not neglect when called upon to fix the precise compensation. The best evidence of the value of property is the sale of the very property to which the claimant is a party. If the sale is of recent date, then all that need normal-

*(Appeal No. 412 of 1962, D/- 31-1-1967. (Mad.)

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ly be proved is that the sale was between a willing purchaser and a willing seller, that there has not been any appreciable rise or fall since and that nothing has been done on the land during the short interval to raise its value. Price paid by the owner recently represents an expression of market value, as bona fide evidence of value, subject to such matters as (a) the relationship of the parties; (b) the market conditions and the terms of sale and (c) the date of sale. It may not end the enquiry but goes a long way to solve the problem.

(Paras 5, 6, 7)

In the instant case it cannot be said that the High Court was in error in making out of the totality of materials available, a best judgment assessment of the market value. No serious flaw in principle, no omission to consider important material or like infirmity has been pointed out to fault the judges on the appraisal.

(Paras 10, 14)

Cases Referred: Chronological Paras
AIR 1959 SC 429 = 1959 Supp (1)
SCR 404 7

Mr. M. Natesan, Sr. Advocate (M/s. K. Jayaram and R. Chandrasekhar, Advocates, with him), for Appellant; Mr. Govind Swaminathan, Advocate General (M/s. N. S. Sivam, A. V. Rangan and Miss A. Subbhashini, Advocates with him), for Respondent.

The Judgment of the Court was delivered by

KRISHNA IYER, J.:— This is a pedestrian appeal by a land-owner whose property, having been acquired compulsorily by the State, asks for more compensation, probably appetised by increases over the Collector's award granted by the City Civil Court and the High Court. The grounds urged are conventional, based on comparison of prices shown in land sales in the neighbourhood and the general escalation of urban land values in the country.

2. 127 odd 'grounds' (a ground is around 5 1/2 cents; actually 2,400 sq. ft) were acquired in 1959 for the construction of a Housing Colony for the Madras Port Trust employees by the then Madras State. They comprise R.S. No. 4032/1 and other items with which we are not concerned, since

the owners of those items have not come up in appeal to this Court. The relevant notification under S. 4 (1) was made on August 12, 1959 and so the compensation has to be pegged to the market value as on that date. Of course, 16 years have rolled by since, thanks to delay which has come to stay in the administrative and forensic processes of our land. That is by the way. The Land Acquisition Officer awarded Rs. 800/- per ground. The City Civil Court, approaching the problem of valuation plot-wise, as for a housing colony, made the necessary deductions involved in that process and awarded at the rate of Rs. 1,000/- per ground. The High Court, on appeal, made an upward revision, discarding the trial court's approach and awarded Rs. 1,800/- per ground. The State has not come up in appeal, but the unquenched claimant asks for more in appeal, demanding, at least Rs. 2,200/- per ground.

3. Generally speaking, a cardinal component in the escalation of prices of urban realty which does not find sufficient expression in the ancient Land Acquisition Act, 1894, is the developmental operations inevitable in a rapidly industrialising society for which the individual owner makes no social contribution. Be that as it may, courts have to apply the legislation as extant, it being left to the law-makers to harmonize social justice with individual rights by appropriate reforms. We have to proceed to determine the compensation according to the canons crystallized in S. 23 of the Act.

4. At the outset, we must warn ourselves of the broad guideline that in an appeal from an award granting compensation this Court will not interfere unless there is something to show not merely that on the balance of evidence it is possible to reach a different conclusion but that the judgment cannot be supported by reason of a wrong application of principle or because some important point affecting valuation has been overlooked or misapplied. Moreover, there is a prudent condition to which the appellate power, generally speaking, is subject. A court of appeal interferes not when the judgment under attack is not right but only when it

is shown to be wrong. These twin principles serve as backdrop to our approach to the rival contentions in the case.

5. It is true that compensation for compulsory acquisition, as governed by Section 23, gives high priority to the market value of the land at the date of the publication of the notification under S. 4, sub-s: (1). But what is market value? It is a common place of this branch of jurisprudence that the main criterion is what a willing purchaser would pay a willing vendor. Ordinarily a party will be entitled to get the amount that he actually and willingly paid for a particular property, provided the transaction be bona fide and entered into with due regard to the prevalent market conditions and is proximate in time to the relevant date under S. 23. We may even say that the best evidence of the value of property is the sale of the very property to which the claimant is a party. If the sale is of recent date, then all that need normally be proved is that the sale was between a willing purchaser and a willing seller, that there has not been any appreciable rise or fall since and that nothing has been done on the land during the short interval to raise its value (See Parks 'Principles & Practice of Valuations' P. 29 — Eastern Law House, Calcutta — IV Edition, 1970). But if the sale was long ago, may be the Court would examine more recent sales of comparable lands as throwing better light on current land value. We emphasize this facet because the appellant himself purchased the land in question just ten months before the notification under S. 4 (1), at a price of Rs. 410/- per ground. There was a pond in the plot, the filling up of which is alleged to have cost some extra money according to the appellant, but he gave no evidence before the court on this matter with the result that we are left with the estimate made by the Public Works Department for the filling up of the pond which works out at a much lesser figure. In short, less than a year before the date of commencement of acquisition proceedings, the appellant himself had purchased this land at a price around Rs. 450/- (making allowance for the pond which he

had filled up) and he has been awarded Rs. 1,800/- per ground by the High Court. Instead of wandering around neighbouring lands or guessing as to what the price of the disputed land might have been, we have before us the actual purchase of the suit property by the appellant himself and he has not set up any case of special features or circumstances depressing the land value or affecting the particular transaction so that one could ignore that sale as the product of artificial circumstances. We have thus a situation where the law should express a judgment from the experience of the appellant himself as against a judgment from speculation based on other transactions.

6. Clinching evidence to correct uncertain prophesy is furnished here by the claimant's conduct. An actual transaction with respect to the specific land of recent date is a guide-book that courts may not neglect when called upon to fix the precise compensation. Viewed from a slightly different aspect, it is but fair that compulsory land-acquisition while assuring a just equivalent should not be converted into an avaricious wind-fall. Can an owner who bought the land at Rs. 400/- per ground and laid out a little more money on it, grouse on the score of inadequate or unjust recompense, if within a year after his own purchase he is paid by the State 400% of what he spent for the identical land? Neither morality nor legality is violated in such a case; for even a black-marketeer's bosom may not be uneasy at the prospect of such a fortune which he could not have bargained for when he became the owner of the land some months before. 'It is the duty of the State or federal government, in the conduct of the inquest by which Compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it' (See 27 Am Jur 2d paragraph 66, p. 53 of Vol. 27). All things considered, the appellant stands self-condemned by his own deed of purchase.

7. Property valuation as a practised art is greatly influenced by legal and economic constraints. But,

in this case, we do not have any complex considerations since helpful indicators are available. Price paid by the owner recently represents an expression of market value, as bona fide evidence of value, subject to such matters as (a) the relationship of the parties; (b) the market conditions and the terms of sale and (c) the date of sale. It may not end the enquiry but goes a long way to solve the problem. In this connection it may be useful to refer to the decision of this Court in *S.L.A. Officer v. T. A. Setty*, AIR 1959 SC 429 where it was observed:

"It is not disputed that the function of the court in awarding compensation under the Act is to ascertain the market value of the land at the date of the notification under Section 4 (1) and the methods of valuation may be (1) opinion of experts, (2) the price paid within a reasonable time in bona fide transactions of purchase of the lands acquired or the lands adjacent to the lands acquired and possessing similar advantages and (3) a number of years purchase of the actual or immediately prospective profits of the lands acquired." (p. 432, para 9—Emphasis, ours)

8. Appreciating this lethal consequence, Sri Natesan, learned counsel, suggested rather obscurely that there might have been peculiar possibilities why this land was sold to his client at a low price. But the reasoning breaks down because the claimant has not even hinted in his pleading or cared to testify what special circumstances played upon the transaction by which he got this identical land at the price he paid. We cannot be swayed by surmises floating in mid-air, particularly where the party who urges these feathery likelihoods stood mute at the trial stage. He failed to speak only to become a martyr for silence.

9. Sri Natesan switched on to the prices of other lands in the locality to overcome the self-created obstacle of his client's purchase. This is specious logic. When decisive evidence of the market value of the land compulsorily acquired is unavailable you seek light from comparable neighbourhood. Such is not the case here. Even so, we travelled with counsel

on to other lands, to gather whether any grave error had crept into the High Court's assessment. The discovery made was that lands in the near neighbourhood were sold sometime earlier at prices ranging from Rs. 300/- to Rs. 400/- and in one case Rs. 900/- (Exs. R2 to R7) while distant neighbours like that covered by Ex. C11 were valued by court at around Rs. 2,200/- or Rs. 2,400/- per ground. This wide disparity may be a trifle mystifying. Even so, we go by lands close by and not by one a mile-and-half away as Ex. C11 plot. In an industrial area, land prices are sensitive to an intricate variety of factors.

10. Propinquity to highway or ports and many industrial and social imponderables enter the verdict of evaluation. So much so we cannot automatically assert, with reference to a piece of land a mile-and-half away, that it serves as a guide for fixing the price of the suit plot. What the High Court has done is to have at the back of its mind the various sales, Exhibits R2 to R7, which fall far below the value demanded by the claimant and the high prices awarded by the same High Court in regard to other lands distances away, have regard to the then growing industrial potential and make an intelligent guess. Maybe as the learned Advocate General has pointed out, in the light of evidence regarding the precise land and the particular owner, there was no justification for awarding such a high price as has been done but the State has not bothered to come up in appeal and we cannot hold that the High Court was in error in making out of the totality of materials available, a best judgment assessment of the market value. No serious flaw in principle, no omission to consider important material or like infirmity has been pointed out to fault the judges on the appraisal.

11. Nevertheless, Sri Natesan contended strenuously that the sales showing low prices were not reliable for two reasons. They were 'distress' sales and prices had gone up from the dates of those deeds which were of 1949-50. Neither argument is conclusive. True, a few of the sales suggest some pressure inducing the vendors

to dispose of their land. But there are other deeds which are unblemished by any such depressant. Having gone through the documents in question we are satisfied that none of the sales bear marks of throw away prices.

12. The other argument that prices must have inexorably risen from 1949 to 1959 is no axiomatic proposition. True, generally speaking, there has been an inflationary spiral in India which has not spared realty. But there is evidence in the present case to show that between 1949 and 1952 lands in this very area stood stationary in their prices. Various geo-economic factors have affected land prices, some to boost them, others to slump them. Therefore we cannot be persuaded to hold that a relentless rise in land prices has come to stay. Take but one example: If a land adjoins a factory which needs to be expanded further, a higher price may be offered by that factory owner. Likewise, if a heavy tax on construction of buildings or ceiling on vacant urban land is in the offing, prices of building sites may come down. It may even be said that such a factor as the application of the MISA to smugglers may depress prices of many items, including land and foreign cars, in certain places. Another exotic example. In some American cities the influx of certain coloured races into the downtown area brings down the market value of real estate, under current social conditions.

13. While it is true that the area we are concerned with is an industrial belt, we cannot forget that there are housing colonies also as adjuncts so that some lands may be less suitable for industrial buildings but may still be useful for workers' houses. It is in evidence that the plots acquired here had ponds, the appellant himself having filled up the pond in his plot. This shows incidentally that high-rising constructions may require pile-driving at high cost. We need not guess at the various chancy factors except to state that having due regard to the conspectus of circumstances, including the appellant's own cost price, the Court has made a sound judgment. In this view, we do not think there is need for further discussion of the facts pressed before

us by the appellant. We agree with him that the purpose for which the land is acquired has no bearing on the value to be determined by the Court but our conclusion remains unaltered.

14. We see no reason, no law nor justice, to interfere with the judgment under appeal. Maybe, the appellant is aggrieved that slightly inferior lands acquired simultaneously and adjoining his plot have been given the same value as has been awarded to him. It may also be that each court he has approached has improved upon the price awarded by the earlier one and therefore he might have obtained certificate hopefully. And looking at his lost land now, years later, when real estate has risen in price much more, he may sigh at what is fixed and strive to get more. But a closer examination has disclosed no error in principle in the High Court's judgment nor has any of the limited grounds on which this Court's jurisdiction can be legitimately exercised been made out.

15. The appeal is dismissed but, in the circumstances, without costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 1674

(From: Punjab & Haryana)*

N. L. UNTWALIA AND S. MURTAZA FAZL ALI, JJ.

Puran Singh and others, Appellants v. The State of Punjab, Respondent.

Criminal Appeal No. 266 of 1971, D/- 25-4-1975.

(A) Penal Code (1860), S. 97 — Right of Private defence of person and property — Trespasser in possession — Nature of possession required for exercising right against others including true owner — Expression 'settled possession' used in AIR 1968 SC 702=1968 Cri LJ 806, Explained — Cr A. 1034 of 1969 D/- 10-2-1971 (Punj & Har), Reversed.

*(Criminal Appeal No. 1034 of 1969, D/- 10-2-1971 (Punj & Har)).

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The nature of possession which may entitle a trespasser to exercise the right of private defence of property and person should contain the following attributes:

(i) the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) the possession must be to the knowledge either express or implied of the owner or without any attempt at concealment and which contains an element of animus possidendi. The nature of possession of the trespasser would however be a matter to be decided on facts and circumstances of each case;

(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced in by the true owner; and

(iv) one of the usual tests to determine the quality of settled possession, in the case of cultivable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession, in which case the trespasser will have a right of private defence and the true owner will have no right of private defence.

(Para 11)

The expression 'settled possession' has been used in AIR 1968 SC 702 = 1968 Cri LJ 806 to mean such clear and effective possession of a person, even if he is a trespasser, who gets the right under the criminal law to defend his property against attack even by the true owner. (Para 11)

Where the accused persons after having forcibly taken possession of the disputed land a month before the occurrence had grown wheat crop on it and the complainant party tried to re-enter the land and destroy the crops grown by the accused.

Held that the finding of the High Court that the accused were not in settled possession of the land in order to give them a right of private defence was erroneous in law. Cr. A. No. 1034 of 1969 D/- 10-2-1971 (Punjab & Har). Reversed. AIR 1968 SC 702 = 1968 Cri LJ 806, Explained, AIR 1959

Punjab 570 = 1959 Cri LJ 1358 and AIR 1949 All 564 = 50 Cri LJ 863 and ILR (1955) Hyd 406 and AIR 1943 Mad 590 = 44 Cri LJ 783, Approved.

(B) Penal Code (1860), Ss. 96, 97, 99 and 100 — Right of private defence of person and property — Limitations on exercise of — When extends to causing of death — Right held not exceeded.

The right of private defence of person or property is to be exercised under the following limitations:

(i) that if there is sufficient time for recourse to the public authorities the right is not available;

(ii) that more harm than necessary should not be caused.

(iii) that there must be a reasonable apprehension of death or of grievous hurt to the person or damage to the property concerned. (Para 20)

It is not the law that a person when called upon to face an assault must run away to the police station and not protect himself or when his property has been the subject-matter of trespass and mischief he should allow the aggressor to take possession of the property while he should run to the Public authorities. Where there is an element of invasion or aggression on the property by a person who has no right to possession, then there is obviously no room to have recourse to the public authorities and the accused has the undoubted right to resist the attack and use even force if necessary. The right of private defence of property or person, where there is real apprehension that the aggressor might cause death or grievous hurt to the victim, could extend to the causing of death also, and it is not necessary that death or grievous hurt should actually be caused before the right could be exercised. A mere reasonable apprehension is enough to put the right of private defence into operation. AIR 1963 SC 612 = 1963-1 Cri LJ 495 and AIR 1952 SC 165 = 1952 Cri LJ 848, Rel. on. (Para 18)

The question whether a person having a right of private defence has used more force than is necessary would depend on the facts and circumstances of a particular case.

(Para 18)

The prosecution party was the aggressor in the sense that they went

armed with gun and deadly weapons on the disputed land in possession of the accused who had grown wheat crop thereon, with the devout object of destroying the wheat crop and taking back possession of the land forcibly from the accused party who were similarly armed, with the result that a mutual fight ensued in which two of the accused received injuries and two persons of the prosecution party died and others were injured. The prosecution however did not explain how the accused persons received the injuries.

Held on the facts and circumstances of the case the accused were fully justified in causing the death of two persons from the complainant's party and had not in any event exceeded the right of private defence of person and property. They were therefore protected by the right of private defence. If the prosecution did not come out with the true version of the nature and origin of the occurrence, they cannot blame the Court if the entire version presented by them is rejected. In any event, the prosecution case had not been proved beyond reasonable doubt. AIR 1975 SC 1478 = 1975 Cri LJ 1079, Applied. Cr. A. 1034 of 1969 D/- 10-2-1971 (Punj & Har), Reversed. (Paras 19, 21)

Cases Referred: Chronological Paras

AIR 1975 SC 1478 = Criminal Appeal No. 67 of 1971 D/- 19-3-1975 = 1975 Cri LJ 1079 19, 20
 AIR 1968 SC 702 = (1968) 2 SCR 455 = 1968 Cri LJ 806 4, 5, 10, 11, 13, 15, 16
 AIR 1963 SC 612 = (1963) 3 SCR 489 = (1963) 1 Cri LJ 495 18
 AIR 1959 Punj 570 = 1959 Cri LJ 1358 15
 ILR (1955) Hyd 406 13
 AIR 1954 All 35 = 1954 Cri LJ 54 15
 AIR 1952 SC 165 = 1952 SCR 567 = 1952 Cri LJ 848 18
 AIR 1949 All 564 = 50 Cri LJ 868 12
 AIR 1943 Mad 590 = 44 Cri LJ 783 14
 AIR 1927 Lah 705 = 28 Cri LJ 848 14

M/s. R. K. Garg S. C. Agarwal and V. J. Francis Advocates of M/s. Ramamurthy and Co., for Appellants; M/s. O. P. Sharma and M. S. Dhillon, Advocates, for Respondents.

The Judgment of the Court was delivered by

FAZL ALI, J.:— The appellants Puran Singh, Piara Singh, Bakshish Singh, Bohar Singh and Balkar Singh have been convicted under Ss. 302/149 I.P.C. and sentenced to life imprisonment and a fine of Rs. 200 each and in default six months' rigorous imprisonment and under Ss. 326/149 I.P.C. to one year rigorous imprisonment and under Section 148 I.P.C. to one year rigorous imprisonment. The learned Sessions Judge who tried the present case had also convicted one Pargat Singh the brother of Bakshish Singh and son of Charan Singh but this accused has been acquitted by the High Court of Punjab and Haryana — hereinafter referred to as 'the High Court'. The High Court has, however, affirmed the conviction and sentences of the five appellants and dismissed the appeal filed by the appellants before it hence this appeal to this Court by special leave.

2. It is not necessary for us to detail the facts of this case, because the decision of the matter lies within a very narrow compass. Mr. R. K. Garg appearing for the appellants has raised a few questions of law and according to his submissions the appeal should succeed on the question of law on the basis of the findings given by the High Court. The unfortunate incident in the present case which led to the loss of two valuable lives appears to be the result of chronic land dispute between the parties and a competitive race for taking possession of the land by the prosecution or the accused. The story opens with a usufructury mortgage which was executed by Hari Singh the original owner in respect of 29 Kanals 14 Marlas of land in favour of the appellants Puran Singh and Piara Singh and one Nisham Singh for a sum of Rs. 3000/-. Soon thereafter the mortgagees sold their mortgage rights to Makhan Singh father of Dilbagh Singh of the prosecution party. On July 28, 1966 the appellants Puran Singh and Piara Singh and one Smt. Chandra daughter of the appellant Bakshish Singh purchased the equity of redemption in the said land from Hari Singh for a sum of Rs. 20,000/- and undertook to

liquidate the mortgage debt. According to the defence the mortgage debt was actually discharged on May 30, 1967 and a few months later mutation was sanctioned in favour of the accused on July 13, 1967. Having, however, failed to take possession of the mortgage property after having redeemed the mortgage, the purchasers of the equity of redemption, namely, the party of the appellants filed a suit for possession against Dilbagh Singh in the Court of the Subordinate Judge, Hoshiarpur on October 4, 1967. One of the dates fixed in this suit was October 27, 1968 when, according to the prosecution, Puran Singh, Piara Singh, Bakshish Singh, Pargat Singh and Chandra Singh entered the land in dispute and demolished the kothas of the complainant. A complaint was filed by Dilbagh Singh on October 30, 1968 against the accused and Ajmer Singh Sub-Inspector of Police alleging that the accused had entered the land and demolished the kothas belonging to the complainant with the active aid of the police. In this complaint although the complainant did not admit in so many words that the accused had taken forcible possession of the land and demolished the kothas, yet from the facts and circumstances proved in this case there was no doubt that it was a fact that the complainant in spite of his best attempts was dispossessed by the party of the accused. While the complaint was being enquired into, the suit filed by Puran Singh and others was dismissed on November 21, 1968 on the ground that the suit was not maintainable and the plaint was returned to the plaintiffs for presentation to the proper authorities, namely, Revenue Courts. Emboldened by this success in a civil suit, it appears that the complainant Dilbagh Singh along with Sohan Singh, Bachan Singh, Sulakhan Singh, Baj Singh and others went to the field in question and started ploughing it and sowing Sarson. We might mention here that the definite case of the accused has been that after taking possession of the land in question from the complainant the appellants had grown wheat in the land and on the date of occurrence the complainant party tried to destroy the crop which

led to mutual fight between the accused and the complainant party resulting in the death of the two deceased persons of the prosecution party and according to the defence injuries on Mohan Singh and Bohar Singh who were on the side of the accused.

3. According to the prosecution while the prosecution party was busy ploughing the land and sowing Sarson crop in the field all the appellants variously armed with gun, barchhas, kirpans, gandasis and axes entered upon the land and Pargat Singh fired his gun as a result of which Dilbagh Singh and Bachan Singh fled away leaving the two deceased persons and Sohan Singh behind. Thereafter the accused Puran Singh and Piara Singh surrounded Sulakhan Singh and inflicted various injuries on his body with kirpans, while Bakshish Singh gave spear blows in the thigh and abdomen of Sulakhan Singh. The appellants Balkar Singh, Puran Singh and Piara Singh inflicted with their respective weapons blows on Baj Singh. Sohan Singh P.W. 9 who tried to rescue his brother was also assaulted by Balkar Singh, Bohar Singh and Bakshish Singh. Puran Singh and Piara Singh are also alleged to have assaulted Sohan Singh with their weapons. The victims then fell down on the ground and then the accused made good their escape. The three injured persons were removed to the civil hospital at Hoshiarpur but Sulakhan Singh succumbed to his injuries on the way while Baj Singh and Sohan Singh were admitted in the hospital. The F.I.R. was lodged on November 27, 1968 by Baj Singh one of the injured persons on the basis of which the present case started and after usual investigation a charge-sheet was submitted against the accused which resulted in their ultimate conviction and sentences as mentioned above.

4. The defence of the appellants was that they had redeemed the mortgage debt and thereafter the mortgagee had himself delivered possession of the land to the appellants some time in 1968, and since then the appellants were in peaceful possession of the land and had grown wheat

crop therein. Dilbagh Singh being dissatisfied with his having to part with the possession of the property filed a false complaint against the appellants and thereafter tried to take forcible possession of the land from the appellants with the show of force. According to the defence, the prosecution party was also armed with gun, axe, kirpans and other deadly weapons and the accused tried to resist their being dispossessed and assaulted the prosecution party purely in the exercise of their right of private defence of person and property. According to the defence two persons on their side were injured one of them Mohan Singh had received gun-shot injury, whereas Bohar Singh had also received gunshot injuries. The High Court after discussing the evidence appears to have given a finding in favour of the accused so far as the question of possession of the land is concerned, but in view of the decision of this Court in *Munshi Ram v. Delhi Administration*, (1968) 2 SCR 455 = (AIR 1968 SC 702 = 1968 Cri LJ 806) on its own interpretation, held that as the appellants were not in settled possession of the land and were rank trespassers they could not have any right of private defence.

5. Appearing for the appellants Mr. Garg submitted that the High Court had taken an erroneous view of the law and had misinterpreted the judgment of this Court in *Munshi Ram's case* (supra). Before, however, coming to the judgment we would like to extract the findings of fact arrived at by the High Court on the question of possession which forms the basis of the right of private defence claimed by the accused. In this connection the High Court found as follows:

"Certain admissions wrung out from the prosecution witness in cross-examination, however, do show that about one month or so prior to the occurrence, the vendee-appellants had somehow entered upon the disputed land and taken its physical possession, and had possibly sown wheat crop in it.

After some prevarication, witness admitted that on the day of occurrence Dilbagh Singh had told him that they should go and plough the field

and take its possession. Witness thereupon took the kulhari from the house of Dilbagh Singh and proceeded to the place of occurrence with the deceased persons. Sohan Singh does not say a word that they had sowed or were sowing wheat crop at the time of occurrence in this field. He stated that at about 5 P.M. they were busy sowing sarson in the field.

Dilbagh Singh, P.W. 12, in examination-in-chief stated that about one month before the occurrence, all the accused, excepting Bohar Singh and Balkar Singh, had demolished his kothas in the disputed field with the help of the Police. Though in this complaint it is not specifically alleged that Puran Singh, Piara Singh etc., had taken forcible possession of the land, yet the same read with the admission made by P.W. Sohan Singh already referred to above, shows that Dilbagh Singh had been ousted from possession of the land on the 27th October, 1968, and thereafter the appellants continued in its actual possession till the occurrence took place. In Rabi 1968, as has been deposed to by Patwari Behari Lal, P.W. 14, wheat crop was standing in the disputed Khasra 17/2 when he inspected the harvest at the spot in April 7, 1969.

In the visual site-plan, Exhibit PZ, which, according to A.S.I. Kartar Singh, was prepared by him on November 27, 1968, it is mentioned that the field was under wheat cultivation. It is unfortunate that no question was put to the A.S.I. in cross-examination to show as to what was the size of the wheat crop.

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If at the time of occurrence, sprouted wheat crop was in the field and if, as has been deposed to by P.W. Sohan Singh, the complainant party had gone there armed to take back the possession from the accused party, this wheat crop might have been sown by the vendee-appellants some days prior to the occurrence. Though the facts elicited in the cross-examination of the prosecution witnesses or otherwise brought on record fall short of positive proof of this wheat crop having been sown by Piara Singh and Puran Singh ap-

pellants, yet the possibility of that being a fact cannot be ruled out.

Thus, even if the view most favourable to the accused, of the evidence on record is taken, then also the possession of the appellants, which commenced about one month prior to the occurrence, was little better than that of a trespasser. It is now settled law that even a person rightfully entitled to immediate actual possession has no right to oust a trespasser by force if that trespasser is in settled possession of the land. Such a trespasser in established possession is entitled unless he is rejected in due course of law — to defend his possession even against the rightful tenure-holder or owner. This is what was laid down by their Lordships of the Supreme Court in *Munshi Ram v. Delhi Administration*, AIR 1968 SC 702 = (1968 Cri LJ 806)."

6. From these findings of the High Court, which are based on the admissions of some of the prosecution witnesses and are corroborated by the circumstances proved by the prosecution, it is quite clear that the party of the appellants had undoubtedly taken possession of the land in dispute to the knowledge of the complainant Dilbagh Singh at least a month before the occurrence and had sown wheat crop on the land in question. In fact this finding is based on very cogent material because it would appear that P.W. Sohan Singh one of the eye witnesses clearly stated in his evidence that about a month before the occurrence Puran Singh and Piara Singh took possession of the land with the help of the police. This witness further admitted as follows:

"Dilbagh Singh did tell me that we should go and plough the field and take its possession. I had taken the Kulhari from the house of Dilbagh Singh in the field."

He further admitted in his evidence that after the Kothas were demolished, Dilbagh Singh used to live in the village. This also corroborates the fact that the complainant's party was dispossessed on October 27, 1968, when the accused had taken forcible possession of the land and since then the complainant Dibragh Singh had started living with Sohan Singh in the village.

7. Similarly another eye witness P.W. 10 Jagtar Singh admitted that he did state to the police that the appellant Puran Singh had taken forcible possession of the land about one month earlier. P.W. 12 Dilbagh Singh, the complainant himself deposed that he had stated before the police that they had sown Sarson as well as wheat in the field and when he was confronted with his previous statement before the police, he merely mentioned the fact that he and his companions had ploughed the field and were preparing the furrows for sowing Sarson. The witness further admitted in his evidence that most of the crop was, however, wheat.

8. P.W. 14 Behari Lal, Patwari, has stated that he effected the Girdawari on April 7, 1969 and found wheat crop standing in Khasra No. 16/2 and 16/9 which was shown to be in possession of Puran Singh. The evidence of this witness fully corroborates the evidence of the prosecution witnesses that the accused party had dispossessed the complainant from the land in dispute as far back as October 27, 1968 which led to the filing of the complaint by Dilbagh Singh and thereafter it was the accused party and not the prosecution party which had sown wheat crop on the land.

9. Finally, even in the F.I.R. it appears that the informant had admitted in categorical terms that the accused Piara Singh and Puran Singh had taken forcible possession of the land. This statement runs thus:

"Dilbagh Singh had been in possession of this land, but some days after the Dewali, Piara Singh and Puran Singh took forcible possession of this land. Now, some days ago, both the above mentioned cases were decided in favour of Dilbagh Singh. So, yesterday the 26th November, 1968 at about 4 P.M., Dilbagh Singh along with his brother Gurbachan Singh, having taken myself (Baj Singh) and both of my brothers Sulakhan Singh and Sohan Singh with him, ploughed this land."

10. On a consideration of the admissions of the prosecution witnesses and the findings arrived at by the

High Court, the following propositions of fact emerge:

(1) That although the accused had purchased the equity of redemption, yet there is no reliable evidence to show that they had paid off the mortgage debt and taken possession from the mortgagee in spite of the fact that mutation was sanctioned in favour of the appellants in 1967. The High Court has rightly pointed out that if the appellants party had taken possession as far back as in 1967 there would be no occasion for them to file a civil suit for possession on October 4, 1967 against the mortgagee, Dilbagh Singh and others;

(2) That on October 27, 1968 the appellants undoubtedly entered the field and took forcible possession of the land from the complainants who were unable to resist the entry of the accused as a result of which Dilbagh Singh filed a complaint on October 30, 1968. It is not necessary for us to say anything regarding the allegation about demolishing of the Kothas;

(3) The complainant knew fully well that he had been dispossessed by the appellants at least a month before the occurrence and that the appellants had sown wheat crop and in spite of his knowledge he deliberately went there with the avowed object of taking forcible possession from the appellants.

(4) That on the date of occurrence the prosecution party undoubtedly went to the field armed with the gun and axe. It would appear from the injuries on Bohar Singh and Mohan Singh on the side of the accused that the present occurrence took place as a result of mutual fight over the land; and

(5) that although the defence has proved beyond reasonable doubt that both Mohan Singh and Bohar Singh had received injuries on their person, the prosecution has given no explanation for the same.

The question that arises for consideration is whether in view of these findings of fact it can be said that the accused had no right of private defence or that the prosecution party in entering upon the land was protected by the right of private defence of property. This brings us to

the consideration of the decision of this Court AIR 1968 SC 702 = (1968 Cri LJ 806) on which great reliance has been placed by the High Court, where this Court observed as follows:

"It is true that no one including the true owner has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in due course of law, he is entitled to defend his possession even against the rightful owner. But stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be a settled possession extending over a sufficiently long period and acquiesced in by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and reinstate himself provided he does not use more force than necessary. Such entry will be viewed only as a resistance to an intrusion upon possession which has never been lost. The persons in possession by a stray act of trespass, a possession which has not matured into settled possession, constitute an unlawful assembly, giving right to the true owner, though not in actual possession at the time, to remove the obstruction even by using necessary force."

11. In this case there was a concurrent finding of fact that Jamma was in effective possession of the field on the date of occurrence and the prosecution had alleged that P.Ws. 17 and 19 had taken possession of the property but the finding of the Court was that P.Ws. 17 and 19 had not been put in possession by virtue of the delivery of possession given by the Court. It was against this context that the observations referred to above were made. This Court clearly pointed out that where a trespasser was in settled possession of the land he is not entitled to be evicted except in due course of law and he is further entitled to resist or defend his possession even against the rightful owner who tries to dispossess him. The only condition laid down by this Court was that the pos-

session of the trespasser must be settled possession. The Court explained that the settled possession must be extended over a sufficiently long period and acquiesced in by the true owner. This particular expression has persuaded the High Court to hold that since the possession of the appellants party in this case was only a month old, it cannot be deemed to be a settled possession. We, however, think that this is not what this Court meant in defining the nature of the settled possession. It is indeed difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into a settled possession. But what this Court really meant was that the possession of a trespasser must be effective, undisturbed and to the knowledge of the owner or without any attempt at concealment. For instance a stray or a casual act of possession would not amount to settled possession. There is no special charm or magic in the words 'settled possession' nor is it a ritualistic formula which can be confined in a strait-jacket but it has been used to mean such clear and effective possession of a person, even if he is a trespasser, who gets the right under the criminal law to defend his property against attack even by the true owner. Similarly an occupation of the property by a person as an agent or a servant at the instance of the owner will not amount to actual physical possession. Thus in our opinion the nature of possession in such cases which may entitle a trespasser to exercise the right of private defence of property and person should contain the following attributes:

i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

ii) that the possession must be to the knowledge either express or implied of the owner or without any attempt at concealment and which contains an element of *animus possidendi*. The nature of possession of the trespasser would however be a matter to be decided on facts and circumstances of each case;

iii) the process of dispossession of the true owner by the trespasser must

be complete and final and must be acquiesced in by the true owner; and

iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession, in which case the trespasser will have a right of private defence and the true owner will have no right of private defence. These principles logically flow from a long catena of cases decided by this Court as well as other High Courts some of which have been referred to in the judgment of this Court in *Munshi Ram's case*, AIR 1968 SC 702 = (1968 Cri LJ 806) (supra).

12. In the case of *Horam v. Rex*, AIR 1949 All 564 at p. 567 = (50 Cri LJ 868 at p. 871) which was relied upon by this Court in *Munshi Ram's case*, AIR 1968 SC 702 = (1968 Cri LJ 806) (supra) the Division Bench of the Allahabad High Court observed as follows:

"Where a trespasser enters upon the land of another, the person in whom the right of possession is vested, while the trespasser is in the process of acquiring possession, may turn the trespasser out of the land by force and if in doing so he inflicts such injuries on the trespasser as are warranted by the situation, he commits no offence. His action would be covered by the principle of self-defence embodied in Sections 96 to 105, Penal Code. If, on the other hand, the trespasser had already accomplished or completed his possession and the person with the right of possession has acquiesced in this accomplishment, it is not open to the latter to avail himself of the doctrine of self-defence and by inflicting injuries on the trespasser to re-acquire possession of his land."

It may be noted that in this case the accused had remained in possession for ten days and had sown the field and this was held to be sufficient possession to enable the trespasser to resist the entry of the true owner. In fact this case appears to be on all fours with the facts of the present

case where also the appellants party after having taken possession of the land in dispute a month before the occurrence had grown wheat crop on it and the complainant party tried to re-enter the land and destroy the crop grown by the accused.

13. Another decision to which reference has been made by this Court in Munshi Ram's case AIR 1968 SC 702 = (1968 Cri LJ 806) (supra) is Sangappa v. State, ILR (1955) Hyd 406 where a Division Bench of the Hyderabad High Court observed as follows:

"If somebody enters on his land during his absence and he does not acquiesce in the trespass, he would still retain possession of the land and as the possessor of the land, he is entitled to that possession.....If a person acquiesces in his dispossession and subsequently under claim of title comes again to dispossess his opponents then he and his friends would be members of unlawful assembly." This case also fully covers the facts of the present case which falls under the second category laid down by the Court.

14. A similar view was taken in In re, Mooka Nadar AIR 1943 Mad 590 = (44 Cri LJ 783) where Horwill, J., observed as follows:

"It seems to be true that the party of P.W. 2 were on the field first on the morning on which this offence happened; but that does not necessarily mean that they were then in possession of the field. A person does not lose possession of a field by going home to have a meal, or to sleep. If somebody enters on his land during his absence and he does not acquiesce in the trespass, he would still retain possession of the land; and as the possessor of the land he is entitled to defend that possession.....If a person acquiesces in his dispossession and subsequently under claim of title comes again to dispossess his opponents, then he and his friends would be members of an unlawful assembly and guilty of rioting."

15. These were the cases referred to in the judgment of this Court in Munshi Ram's case AIR 1968 SC 702 = (1968 Cri LJ 806) and it would appear from all these cases that the case of the appellants is fully

covered by these decisions. Apart from that in the case of Hazara Singh v. The State, AIR 1959 Punj 570 = (1959 Cri LJ 1358) it was held that the accused was protected by the right of private defence having cultivated and sown Bajra in the field. In this connection, Chopra, J., observed as follows:

"When once Resham Singh had taken possession of, cultivated and sown bajra in the field and had remained in possession of it for a couple of months, Hazara Singh even though he was the owner was not entitled to take the law into his own hands and use force in ousting the trespasser. He had had ample time to have recourse to the protection of public authorities. He was himself liable for committing criminal trespass and mischief by taking forcible possession of the land and uprooting the crop and would not therefore be entitled to the right of private defence of property."

The learned Judge relied on two judgments one of the Allahabad High Court in Bhartu v. State, AIR 1954 All 35 = 1954 Cri LJ 54 and the other of Lahore High Court in Phula Singh v. Emperor, AIR 1927 Lah 705 = 28 Cri LJ 848.

16. In view of these decisions it is, therefore, manifest that the finding of the High Court on the facts of the present case that the appellants were not in settled possession of the land is legally erroneous and cannot be allowed to stand. The ratio of the judgment of this Court in Munshi Ram's case, AIR 1968 SC 702 = (1968 Cri LJ 806) (supra) has not been correctly applied by the High Court.

17. The second point that falls for determination is as to what is the extent of right of private defence which the accused can claim in this case? In this connection, the High Court has given a finding that since the prosecution party had entered the land in possession of the accused and were trying to plough it, the appellants should have taken recourse to the public authorities instead of indulging in free fight with the prosecution. In other words, the High Court found that the right of private defence available to the accused was

under the limitations provided for in Sections 99 to 102 of the Indian Penal Code and these limitations apply to the facts of the present case, and the accused cannot claim any right of private defence. With respect we find ourselves unable to agree with this somewhat broad statement of the law. It is true that the right of private defence of person or property is to be exercised under the following limitations:

i) that if there is sufficient time for recourse to the public authorities the right is not available;

ii) that more harm than necessary should not be caused;

iii) that there must be a reasonable apprehension of death or of grievous hurt to the person or damage to the property concerned.

18. The first limitation obviously does not apply to this case. In the first place the accused after having dispossessed the complainant to his knowledge were in conscious and peaceful possession of the land and had grown wheat crop therein. The complainant had already filed a complaint and thereafter it was not open to the complainant to take the law in his own hands and to try to dispossess the accused by show of force. That the complainant had entered the land in question along with other persons variously armed with gandasis and a gun cannot be disputed, because this is the finding of the Court which is supported by the injuries on the person of Mohan Singh and Bohar Singh for which the prosecution has given no explanation whatsoever. It is not the law that a person when called upon to face an assault must run away to the police station and not protect himself or when his property has been the subject-matter of trespass and mischief he should allow the aggressor to take possession of the property while he should run to the public authorities. Where there is an element of invasion or aggression on the property by a person who has no right to possession, then there is obviously no room to have recourse to the public authorities and the accused has the undoubted right to resist the attack and use even force if necessary. The right of private defence of

property or person, where there is real apprehension that the aggressor might cause death or grievous hurt to the victim, could extend to the causing of death also, and it is not necessary that death or grievous hurt should actually be caused before the right could be exercised. A mere reasonable apprehension is enough to put the right of private defence into operation. We are fortified in this view by the decision of this Court in *Jai Dev v. The State of Punjab*, (1963) 3 SCR 489 = (AIR 1963 SC 612) = ((1963) 1 Cri LJ 495) where this Court observed as follows:

"This, however, does not mean that a person suddenly called upon to face an assault must run away and thus protect himself. He is entitled to resist the attack and defend himself. The same is the position if he has to meet an attack on his property. In other words, where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual citizen is entitled to protect himself and his property....."

There can be no doubt that in judging the conduct of a person who proves that he had a right of private defence, allowance has necessarily to be made for his feelings at the relevant time. He is faced with an assault which causes a reasonable apprehension of death or grievous hurt and that inevitably creates in his mind some excitement and confusion. At such a moment, the uppermost feeling in his mind would be to ward off the danger and to save himself or his property, and so, he would naturally be anxious to strike a decisive blow in exercise of his right."

In this very case, while adverting to the question as to whether the force used should not be more than what is necessary, the Court observed:

"But in dealing with the question as to whether more force is used than is necessary or than was justified by the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity which would be so natural in a court room, for instance, long after the incident has taken place. That is why in some judicial

decisions it has been observed that the means which a threatened person adopts of the force which he uses should not be weighed in golden scales."

To the same effect is the decision of this Court in *Amjad Khan v. The State*, 1952 SCR 567 = (AIR 1952 SC 165 = 1952 Cri LJ 848) where it was observed:

"It was impossible for him to know whether his shop would or would not suffer the same fate if he waited, and on the findings it was reasonable for him to apprehend death or grievous hurt to himself and his family once they broke in, for he would then have had the right to protect and indeed would have been bound to do what he could to protect his family. The threat to break in was implicit in the conduct of the mob and with it the threat to kill or cause grievous hurt to the inmates; The circumstances in which he was placed were amply sufficient to give him a right of private defence of the body even to the extent of causing death. These things cannot be weighed in too fine a set of scales or, as some learned Judges have expressed it, in golden scales."

Thus the question whether the appellants used more force than was necessary would determine on the facts and circumstances of this case. We are satisfied that in the present case it cannot be said that the appellants, although two persons have lost their lives, had exceeded the right of their private defence. To begin with, the appellants were undoubtedly in possession of the land and had grown wheat crop and that the prosecution party had tried to destroy the wheat crop. The appellants were, therefore, entitled to resist the invasion to their right by the prosecution party. The High Court has also found that the probabilities are that the prosecution party were also armed with gun and Gandasis. Mohan Singh one of the persons on the side of the accused had received a gun-shot injury which has been proved by the Injury Report (Ext. D.D.) which shows that Mohan Singh received as many as four injuries one of them under the right eye. Similarly the accused Bohar Singh who was examined by

P.W. 5 Dr. Pritpal Singh, had two injuries which according to the Doctor were gun-shot injuries having been caused by a gun. This Doctor also says that after examining the injuries of Mohan Singh he was of the opinion that they were also gunshot injuries. The Sub-Inspector of Police also found pellets at the place of occurrence which confirms the fact that the complainant must have fired from his gun. The High Court has also pointed out that the complainant Dilbagh Singh was prosecuted for having been in possession of an unlicensed gun and has since been absconding. These facts, therefore, clearly establish that the prosecution party was undoubtedly armed with lethal weapons and that a gun was also fired. The High Court has also found that the prosecution party was the aggressor in the sense that they were bent upon destroying the crop of the appellants and taking back possession of the land forcibly. This is also supported by the fact that the injuries on the person of the accused have not been explained by the prosecution and in fact Mohan Singh was deliberately kept back from being made an accused so that the prosecution may be absolved from the duty to explain the injuries on him.

19. In *State of Gujarat v. Bai Fatima*, Criminal Appeal No. 67 of 1971 decided on March 19, 1975 = (reported in AIR 1975 SC 1478 = 1975 Cri LJ 1079) one of us (Untwalia, J.) speaking for the Court, observed as follows:

"In a situation like this when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow:

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self defence.

(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all."

The facts of the present case clearly fall within the four corners of either

of the first two principles laid down by this judgment. In the instant case, either the accused were fully justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the deceased the entire prosecution case is doubtful and the genesis of the occurrence is shrouded in deep mystery, which is sufficient to demolish the entire prosecution case.

20. It was, however, contended by counsel appearing for the State that on the allegations made by the prosecution the accused had mercilessly assaulted the prosecution party including Sulakhan Singh and Baj Singh and, therefore, even if they had the right of private defence they had exceeded the same. We are, however, unable to accept this contention. In the first place as the prosecution has deliberately suppressed the very material part of the origin of occurrence, we do not know as to how the occurrence started. Secondly when two persons on the side of the accused were injured by gun-fire it was not possible for the appellants to weigh their blows in golden scales in order to assault the prosecution party. As held by us this was a case where the appellants were fully entitled to the exercise of the right of self defence of their property and person both because their persons had been attacked and their property had been trespassed upon and damaged. It is manifest that after the two persons on the side of the accused received gun-shot injuries as found by the High Court and by us, the accused party would have undoubtedly a reasonable apprehension that either death or grievous hurt could be caused to the appellants or one of them. This being the position they were fully justified in causing the death of the deceased persons in the exercise of their right of private defence of person. Such an apprehension could not be said to be hypersensitive or based on no ground and it will be idle to contend that the accused should have waited until one of their party members would have died or received serious injuries before acting on the spur of moment, nor can one expect a person who is attacked by an aggressor

to modulate his blows in accordance with the injuries he receives. In these circumstances, therefore, it cannot be said that the accused had in any event exceeded their right of private defence. If the prosecution did not come out with the true version of the nature and origin of the occurrence, they cannot blame the Court if the entire version presented by them is rejected, as held in the recent judgment of this Court in (AIR 1975 SC 1478 = 1975 Cri LJ 1079). For these reasons, therefore, we are clearly of the opinion that the accused are protected by the right of private defence of their property and person and the prosecution case against the appellants must fail. In any event, the prosecution case has not been proved beyond reasonable doubt.

21. The appeal is, therefore, allowed, the conviction of and the sentences passed on the appellants are set aside and the appellants are directed to be set at liberty forthwith. Appeal allowed.

AIR 1975 SUPREME COURT 1685

(From: Bombay)*

N. L. UNTWALIA AND S. MURTAZA FAZL ALI, JJ.

Dattatraya Narayan Patil, Appellant v. The State of Maharashtra, Respondent.

Criminal Appeal No. 257 of 1972; D/- 16-4-1975.

(A) Penal Code (1860), S. 21—Public servant — Minister to preside over meetings of District Advisory Committee under Governmental Notification — While presiding over a meeting Minister was executing or discharging his duty as a public servant — (Ibid Ss. 353 and 355) — (Criminal P.C. (1898), S. 251-A) — Decision of Bombay High Court in Crl. Revn. Appln. No. 1129 of 1971 D/- 19-6-1972, Affirmed.

The duty assigned to a public servant by his master, be it under a statute or by an executive order, will

*(Criminal Revn. Appln. No. 1129 of 1971 D/- 19-6-1972 (Bom).)

GS/GS/B714/75/VSS

assume the character of public duty provided the duty assigned is not illegal or against public policy. It will not make any difference in the case of a Minister. It is not disputed that a Minister is a public servant.

Where in accordance with the executive instructions issued by the Government by notification D/- 5-8-1964 he was to preside over the meetings of the District Advisory Committee constituted thereunder, he was doing so as a Minister and in execution and discharge of his duty as such a public servant. AIR 1961 SC 218 = 1961-1 Cri LJ 322 and AIR 1973 SC 330 = 1972 Cri LJ 1247 Distinguished.

Any person who was not a public servant appointed as a Chairman of the Committee may not be a public servant because the office of the Chairman of the Advisory Committee is not such that would make him a public servant. But the matter is different when a public servant under the instructions issued by the Government in exercise of its executive power which is co-extensive with the legislative power of the State, is appointed the Chairman of the Committee.

(Paras 7, 8)

Held, that the Bombay High Court was correct in directing the framing of a charge under Ss. 353 and 355 of the Penal Code in respect of an incident which according to prosecution amounted to an assault or use of criminal force to a Minister while he was acting as Chairman of a meeting of the District Advisory Committee. Decision of Bombay High Court in Cri. Revn. Appln. No. 1129 of 1971 D/- 19-6-1972, Affirmed.

(Para 10)

Cases Referred: Chronological Paras
 AIR 1973 SC 330 = (1973) 1 SCR 313
 = 1972 Cri LJ 1247 9
 AIR 1961 SC 218 = (1961) 1 SCR 884
 = (1961) 1 Cri LJ 322 9

M. C. Bhandare, Sr. Advocate, (R. Nagaratnam and Miss Manju Jaitley Advocates with him), for Appellant; H. R. Khanna Advocate, for Respondent.

Judgment of the Court was delivered by

UNTWALIA, J.:— This is an appeal by special leave. The question which falls for determination is whe-

ther a charge could be legally and validly framed on the facts alleged by the prosecution against the appellant under Section 353 of the Indian Penal Code — hereinafter called the Code.

2. An incident is said to have taken place in a meeting of the District Advisory Committee of Kolaba District held on the 22nd of August, 1970 at about 3.00 p.m. in a pandal near the Nehru Hall at Alibag under the Chairmanship of Shri A. R. Antulay—a Minister of the Government of Maharashtra. The appellant was a member of the Legislative Assembly and his brother was the Sabhapati of the Building Department of the Zilla Parishad. Both of them attended the meeting. Certain incidents took place in that meeting, which according to the prosecution, amounted to assault or use of criminal force by the appellant to the Minister — a public servant — in the execution of his duty as such public servant within the meaning of Section 353 of the Code. It was further alleged that the action of both the brothers also amounted to assault or use of criminal force to Shri Antulay intending thereby to dishonour him, otherwise than on grave and sudden provocation given by that person, within the meaning of Section 355. A complaint of the incident was lodged with the police. Investigation was made and Charge-Sheet was submitted in the court of the Judicial Magistrate at Alibag against both the accused for offences alleged to have been committed by them under Sections 353 and 355 read with Section 34 of the Code. On perusal of the papers in accordance with Section 251A of the Code of Criminal Procedure, 1898 and after hearing the arguments the Magistrate found that Shri Antulay, being a Minister, was a public servant. In that capacity he was presiding over the meeting of the District Advisory Committee of Kolaba District. He, however, held that the meeting of the Committee was illegal because it was not convened at the instance of the Commissioner of the Division as required by the Rules. He also held that, the appellant who was accused no. 1, at the most, had prepared to assault the Minister and not actually assaulted or used criminal

force. The appellant was discharged by the Magistrate in relation to the charge under Section 353, but a charge under Section 355 read with Sec. 511 was framed against him. His brother, accused no. 2, was however completely exonerated and discharged.

3. Two revisions were filed before the Sessions Judge, Kolaba — one by the State and the other by the appellant. The State wanted charges to be framed against the appellant under Sections 353 and 355 and also against accused no. 2. The appellant, however, wanted the Sessions Judge to quash the charge framed against him under Section 355/511 of the Code. The learned Sessions Judge allowed the revision filed by the State in part and dismissed the one filed by the appellant. He directed the framing of charges against the appellant under both the Sections, viz. 353 and 355 of the Code. The discharge of accused no. 2 was, however, maintained. The matter was taken further in revision before the Bombay High Court by the appellant only. The High Court has directed the framing of the charge against the appellant both under Sections 353 and 355 of the Code. Hence this appeal by special leave.

4. Learned counsel for the appellant did not canvass before us the justification of the discharge of the appellant for the offence under Section 353 of the Code on the ground of the allegedly illegal convening of the meeting of the Advisory Committee. We are, therefore, not called upon to express any opinion of ours in this judgment in that regard. Nor should we be deemed to have expressed any opinion, even by implication, as to the truth or falsehood of the allegations made against the appellant, or, whether the prosecution by its evidence will be able to prove the charge against the appellant. We confine our judgment to the decision of the only question which falls for our determination.

5. Learned counsel for the appellant submitted:

(1) That the District Advisory Committee is not a Statutory Committee. It was constituted under an administrative order of the Govern-

ment. It exercised no Governmental authority. Its function is only to make recommendations to the Government.

(2) The Chairman presiding at a meeting of the Committee is not acting as a public servant.

(3) When an assault was made or criminal force was used against the Chairman as alleged by the prosecution at such a meeting it was directed against the person presiding at the meeting and not against a public servant.

(4) A Minister may be a public servant but while presiding over a meeting of the Advisory Committee he was not functioning as a Minister but as a Chairman.

(5) That the Judicial Magistrate committed an error of law in treating the charge-sheet as a complaint and framing the charge against the appellant for a non-cognizable offence under Section 355/511 of the Code.

6. The decision on the last point urged on behalf of the appellant would have been necessitated provided the argument advanced on his behalf in relation to the charge of the cognizable offence under S. 353 of the Code would have been well founded and correct; otherwise not. Since in our opinion it is not so we do not deal with the last point and take up the discussion of the first four points together, as really speaking, they are all off-shoots of one and one point only, namely, whether while presiding over the meeting of the Advisory Committee the Minister was executing or discharging his duty as a public servant.

7. As stated in the judgment of the High Court the District Advisory Committee was constituted by a notification of the Government of Maharashtra, Co-operation and Rural Development Department dated 5-8-1964 for the purpose of reviewing the work of Zilla Parishads and Panchayat Samitis. The circular Ext.-15 issued by the Maharashtra Government on 5-8-1964 was obviously not in exercise of any statutory power. It was in exercise of the executive power which is co-extensive with the legislative power of the State. In the circular it is stated:

"For quite some time Government has had in view the question of

reviewing the working of Zilla Parishads and Panchayat Samitis (Plan and Development Works) in the State as a regular feature. It is, therefore felt that this object in view can be substantially achieved by holding six-monthly meetings of Regional Officers, District Officers, Office-Bearers of Zilla Parishads and Panchayat Samitis and M. Ps., M. L. Cs., and M. L. As., under the Chairmanship of the Minister-in-charge of the District. Government has, therefore, decided that such meetings should be convened twice a year in each of the Districts in the Revenue Division by the Divisional Commissioner in consultation with the Minister in charge of the District. The meetings should be held at the Headquarters of the District concerned. The Deputy Commissioner (Development) of the Division concerned should work as the Secretary of the Committee. The work pertaining to these meetings should be carried out by the Development Branch of the Commissioner's Office and various actions to be taken as a result of deliberations in these meetings should be pursued by the Deputy Commissioner (Development) under the guidance and supervision of the Divisional Commissioner."

The terms of reference for the working of the Committee as also its composition were indicated in the subsequent part of the circular.

8. Under the orders of the Government, therefore, its officers including the Minister of the District were to carry out certain public duties in connection with the reviewing of the working of Zilla Parishads and Panchayat Samitis which, of course, were constituted under the statutes. The Minister, a public servant, was to be the Chairman of the Committee. The Divisional Commissioner was to be the convener of the meeting. The Deputy Commissioner (Development) of the Division concerned was to act as the Secretary. They were all public servants. Is it possible to take the view that the Divisional Commissioner or the Deputy Commissioner while performing the functions aforesaid under orders of the Government conveyed in the circular dated 5-8-1964 were performing any private functions and not public duty? Obvi-

ously it was a part of the public duty assigned to them by the Government. The duty assigned to a public servant by his master, be it under a statute or by an executive order, will assume the character of public duty, provided the duty assigned is not illegal or against public policy. Will it make any difference in the case of a Minister? In our judgment, not. The Minister is a public servant — not disputed. In accordance with the instructions issued by the Government he was to preside over the meetings of the Advisory Committee. He was doing so as a Minister and in execution and discharge of his duty as such public servant. It is no doubt true that non-official office bearers and members of the Committee could not be public servants. Non-officials appointed to a Committee constituted under a statute may, under certain circumstances, become public servants within the meaning of Section 21 of the Code; but surely non-official members of the Committee in question could not be so. Yet it is wrong to say that the officials and persons who were public servants discharging their duties as office-bearers and members of the Advisory Committee were not performing any duty as such public servants. Any person who was not a public servant appointed as a Chairman of the Committee may not be a public servant because the office of the Chairman of the Advisory Committee is not such that would make him a public servant. But the matter is different when a public servant, under the executive instructions of the Government, is appointed the Chairman of the Committee.

9. Learned counsel for the appellant in support of his submissions placed reliance upon two decisions of this Court viz. Padam Sen v. State of Uttar Pradesh, (1961) 1 SCR 884 = (AIR 1961 SC 218 = 1961-1 Cri LJ 322) and The State of Gujarat v. Manshankar Prabhasankar Dwivedi, (1973) 1 SCR 313 = (AIR 1973 SC 330 = 1972 Cri LJ 1247). Neither of them is apposite and helps the appellant. In the case of Padam Sen the appointment of the Commissioner by the Additional Munsif was found to be null and void; yet it was argued with the aid of Explanation 2 to Section 21 of

the Code that he was a public servant. This argument was repelled by Raghubar Dayal, J. delivering the judgment on behalf of the Court at p. 890 (of SCR) = (at p. 220 of AIR) thus:

"We do not agree with this contention, and are of opinion that the Explanation applies only when there be a post in existence. The Explanation does not apply when there is no pre-existing post or when the person appointing has no authority to appoint."

In the case of (AIR 1973 SC 330 = 1972 Cri LJ 1247) the question arose in relation to an offence said to have been committed by the respondent under Section 161 of the Code and Section 5 (2) read with Section 5 (1) (d) of the Prevention of Corruption Act, 1947. Dwivedi was a senior lecturer at a Government College. In that capacity, undoubtedly, he was a public servant. He is alleged to have accepted the gratification of Rs. 500/- other than legal remuneration for showing favour to a candidate in his capacity as Examiner for Physics Practical in the examination held by the Gujarat University. He was appointed an examiner by the University and not by the Government. In such circumstances it was held that Dwivedi as an examiner of the University was not a public servant as it had no connection with his being a Government servant.

10. For the reasons stated above we hold that no interference is called for by this Court in the framing of the charge against the appellant as per the directions of the High Court. The appeal is, therefore, dismissed.

Appeal dismissed.

AIR 1975 SUPREME COURT 1689

(From: Award of the Industrial Tribunal (I) U. P., Allahabad)*

A. ALAGIRISWAMI, P. N. BHAGWATI AND P. K. GOSWAMI, JJ.

M/s. Lakmirattan Cotton Mills Co. Ltd., Appellant v. Its Workmen, Respondents.

Civil Appeal No. 1868 of 1973, D/- 2-5-1975.

(A) U. P. Industrial Disputes Act (28 of 1947), Ss. 6-S (e) and 6-T — Illegal strike — Strike between the commencement and conclusion of proceedings before the Tribunal.

Where a reference of the dispute was made on 8-6-1971 and the award though signed by the Tribunal on 14-8-1971 was published under S. 6 on 7-10-1972 and it became enforceable in view of S. 6A (1) on 6-11-1972, the strike commenced and continued between 8-6-1971 and 6-11-1972, by the workmen who were concerned in the dispute, was illegal under Cl. (e) of Section 6-S read with S. 6-T. The proceedings before the Tribunal must in the circumstances be deemed to have commenced on 8-6-1971 when the reference was made and be deemed to have concluded on 6-11-1972 when the award became enforceable.

(Para 8)

(B) Industrial Employment (Standing Orders) Act (1946), Sch. Item 9—Lakshmi Cotton Mills (Kanpur) Standing Orders, Standing Order 26 (c) — Dismissal for misconduct — Domestic enquiry — Show cause notice — Notice must give a reasonable opportunity to the workmen — (Natural justice — Principles of).

Clause (c) of Standing Order 26 clearly contemplates a notice to be given to the workman for the purpose of enabling him to show cause within a specified period as to why the proposed punishment of dismissal should not be inflicted on him. The notice is required to be given not as a mere idle formality; it has a meaning and a purpose. It is intended to provide an opportunity to the workman to show cause against the proposed punishment of dismissal. The work-

* (Reference No. 167 of 1973, D/- 8-9-1973 — Ind. Tri. — All.)

man may show that the findings of the enquiring officer are not justified on the evidence on record or that even if the findings are justified, they do not warrant the extreme penalty of dismissal from service having regard to the nature or gravity of the misconduct, the past record of the workman and any other extenuating circumstances. The notice must, therefore, give a reasonable opportunity to the workman. That is a condition precedent which must be satisfied before an order of dismissal can be validly passed by the employer.

(Para 9)

In the instant case from the material on record it was clear that the show cause notice after the domestic enquiry could have been issued at the earliest not before 10.30 P.M. on 21-10-1972. No attempt was made to serve the show cause notices on the delinquent workmen who were on the alleged illegal strike and the only mode in which service was purported to be effected was by pasting the show cause notices on the notice Board of the Mill and the time specified in the notices within which the workmen were required to show cause against the proposed punishment of dismissal was 10 A.M. on 23-10-1972. 22-10-1972 happened to be a closed day for the Mill. It was held that there was not only non-compliance with the requirements of Cl. (c) of Standing Order 26 but also infraction of the principles of natural justice. The order of dismissal passed against the workmen could not, in the circumstances, be justified on the basis of the domestic enquiry. The earliest that the workmen could possibly come to know of the show cause notices would have been the next day, that is 22nd October, 1972, but that day happened to be a closed day for the mill and none of these workmen could, therefore, be expected to be present and was in fact present at the mill, so that he could come to know about the show cause notices by looking at the notice board. These workmen could not in the circumstances, have looked at the notice board earlier than 23rd October, 1972 when they came to the mill in the morning for the purpose of their sit-in-strike. That would mean that they

had hardly a couple of hours within which to show cause against the action proposed to be taken against them. (Para 10)

(C) Industrial Disputes Act (1947), S. 15 and Sch. 2, Item 3 — Jurisdiction of Industrial Tribunal — Power to interfere with action taken by management — Dismissal for misconduct — Tribunal's duty to give opportunity to produce satisfactory evidence and proving misconduct. (U. P. Industrial Disputes Act (28 of 1947), Sch. 1 Item 3).

Even where it is found that the domestic enquiry held by the employer is due to some omission or deficiency, not valid, the employer can none-the-less support the order of dismissal by producing satisfactory evidence and proving misconduct, when the dispute arising out of the order of dismissal is referred for industrial adjudication. In such cases "the evidence which is produced to substantiate and justify the action taken against the workmen is not as stringent as that which is required in a Court of Law". What is required is "that the evidence should be such as would satisfy the Tribunal that the order of termination is proper". AIR 1972 SC 277 and AIR 1972 SC 1031, Foll.

(Para 11)

Where in a reference against the dismissal of workmen for misconduct the employer made an application before the Industrial Tribunal praying that if for any reason the Industrial Tribunal was inclined to take the view that the domestic enquiry held by the appellant (employer) was improper or not according to law, the appellant should be given an opportunity to prove its case on merits and for that purpose file and prove additional documents, the Industrial Tribunal should have either declined to try the issue as to validity of the domestic enquiry as a preliminary issue and directed the employer to lead its evidence simultaneously on the issue as to the validity of the domestic enquiry as also in regard to the misconduct of the workmen so as to justify its action or decided to deal with the validity of the domestic enquiry as a preliminary issue and if the finding on the preliminary issue.

went against the employer then to give an opportunity to the employer to adduce additional evidence to justify its action. Strangely enough, however, the Industrial Tribunal refused to give either of these two directions on the application of the employer and merely passed an order that on the application "orders would be passed at the appropriate time". But that "appropriate time" never arrived, because in fact no order was made on the application by the Industrial Tribunal at any time and without passing such an order the award was made. The award made by the Industrial Tribunal without giving an opportunity to the employer to lead additional evidence to establish that the workmen were guilty of misconduct and that the action of the employer in dismissing them was justified, cannot, therefore, be sustained.

(Para 11)

Cases Referred: Chronological Paras
AIR 1972 SC 277 = (1972) 1 SCR 490 = 1972 Lab IC 157 11
AIR 1972 SC 1031 = (1972) 3 SCR 29 = 1972 Lab IC 573 11

M/s. J. P. Goyal and D. P. Mukherjee, Advocates, for Appellant; Mrs. Urmila Kapoor, for Respondents.

Judgment of the Court was delivered by

BHAGWATI, J.:— The appellant is a limited liability company carrying on business of running a cotton textile mill in Kanpur. The workmen employed by the appellant are affiliated to two unions, some to Lakshmi Rattan Mazdoor Panchayat and others to Lakshmi Rattan Shramik Union. We are concerned in this appeal with Lakshmi Rattan Mazdoor Panchayat (hereinafter referred to as the Mazdoor Panchayat) as that is the union which has the majority membership of the workmen.

2. It appears that there were disputes between the appellant and its workmen in regard to various industrial matters and these disputes were settled by an agreement dated 25th November, 1971 made between the appellant and the Mazdoor Panchayat and registered under S. 6-B of the U. P. Industrial Disputes Act, 1947 (hereinafter referred to as the U. P. Act). Clause (2) of the Agree-

ment provided that "the Union will not give any notice for strike for one year from today's date". There were other clauses in the Agreement which imposed obligations on the appellant, but in the view we are taking, it is not necessary to spend any time in referring to them. Suffice it to state that the dispute between the parties in regard to bonus for the years 1963-64, 1964-65 and 1965-66 was left to the decision of Mohd. Ahsan, Deputy Labour Commissioner, Kanpur. But then dispute again arose between the parties as regards payment of bonus for the years 1967-68, 1968-69 and 1969-70 and this dispute was referred for adjudication to the Industrial Tribunal under S. 6 (3) of the U. P. Act by an order dated 8-6-1971. The Reference was numbered Adjudication Case No. 82 of 1971. On or about 29th June, 1972, it seems, there were negotiations between the parties at the intervention of the Labour Minister and a formula was evolved for payment of bonus for the years 1967-68, 1968-69 and 1969-70. In view of this arrangement, the Mazdoor Panchayat made an application to the Industrial Tribunal on 25th July, 1972 stating that the Union did not want to proceed with the dispute because the matter had been discussed between the parties in the presence of the State Minister on 29th June, 1972 and during these discussions the State Minister had advised the management to pay four per cent bonus to the workmen for each of the three years. Since the workmen were not prepared to pursue the Reference, the Industrial Tribunal made an award dated 14th August, 1972 holding that the workmen were not entitled to any bonus for the years in question. Though the award was signed on 14th August, 1972, it was not published in the Gazette until 7th October, 1972.

3. Even so, the Mazdoor Panchayat gave a notice dated 18th August, 1972 stating that the workmen would go on strike from 11th September, 1972 unless their demands were satisfied. The appellant repeatedly explained to the President and the Secretary of the Mazdoor Panchayat that the contemplated strike would be illegal and advised them to refrain from it, but that had no effect and

as threatened in the notice, the workmen commenced the strike on 11th September, 1972. The modus operandi followed by the workmen was that they came to the mill and entered the working shed every day during their shift hours, but did not do any work and instead, held meetings and demonstrations, shouted slogans and threatened the supervisory and management staff. The strike was, according to the appellant, illegal for two reasons. One was that the strike was commenced during the pendency of adjudication Case No. 82 of 1971 before the Industrial Tribunal and the other was that the strike was in breach of cl. (2) of the Agreement dated 25th November, 1971 which was still in operation. All the workmen participated in the illegal strike, but out of them, there were fifty-three who, according to the appellant, led and incited the illegal strike and some out of these fifty-three, held meetings inside the mill premises without the previous written permission of the appellant and also shouted slogans and made demonstrations inside the mill premises. These acts amounted to misconduct within the meaning of cls. (ii), (xv) and (xx) of Standing Order 25 (1) (A).

4. The appellant, therefore, issued chargesheets against these fifty-three workmen charging all of them with misconduct under cl. (ii) of Standing Order 25 (1) (A) and some of them also with misconduct under Clauses (xv) and (xx) of that Standing Order and calling upon them to appear on 3rd October, 1972 to offer their explanation as to why they should not be punished. These chargesheets were issued on 25th September, 1972 and they were sought to be served personally, but since these fifty-three workmen refused to accept them, they had to be served by registered post and copies were pasted on the notice board of the mill. None of these fifty-three work-

men submitted individual explanation in answer to the charge-sheet issued against him, but a common explanation was furnished by the President and the Secretary of the Mazdoor Panchayat and it was signed by all the fifty-three workmen. It appears that before this common explanation

was submitted by the President and the Secretary of the Mazdoor Panchayat, the Labour Commissioner had already filed criminal cases against some of the workmen in the Court of the City Magistrate, Kanpur charging them with the offence of going on illegal strike. The President and the Secretary of the Mazdoor Panchayat, therefore, in the common explanation submitted by them on behalf of these fifty-three workmen, requested the appellant that the domestic enquiry instituted by the service of the chargesheets should be kept in abeyance until the Court gave its decision on the question whether the strike was illegal. The charges levelled against these fifty-three workmen were also denied in the common explanation furnished by the President and the Secretary of the Mazdoor Panchayat. The appellant, however, declined to adjourn the hearing of the domestic enquiry and by an endorsement dated 14th October, 1972, appointed the Labour Officer to hold the domestic enquiry and requested him to submit his report as early as possible. The illegal strike of the workmen was a sit-in strike and these fifty-three workmen who had struck work were sitting inside the working sheds throughout their hours of shifts. The Labour Officer, therefore, sent for them in order to inform them that he had tentatively fixed the hearing of the domestic enquiry on 18th October, 1972, but they refused to come. The Labour Officer consequently on 19th October, 1972 fixed another date for the domestic enquiry, namely, 21st October, 1972 and again sent a word to these fifty-three workmen to come and "know the date and timings fixed for each of them". They, however, refused to come, though they were inside the working sheds. The Labour Officer was ultimately constrained to put up a notice on the notice board of the mill on 19th October, 1972 intimating the different timings at which the domestic enquiry would be held against different groups of persons on 21st October, 1972. This notice was also published in the daily newspaper Dainik Jagran on 20th October, 1972. The Management of the appellant also passed orders on the same day suspending these fifty-three

workmen with effect from 20th October, 1972 pending the domestic enquiry. The domestic enquiry was thereafter commenced by the Labour Officer at the appointed timings on 21st October, 1972, but none of these fifty-three workmen attended for the purpose of the domestic enquiry and the domestic enquiry was accordingly held ex parte. Whilst the domestic enquiry against one of the groups of workmen was in progress, at about 11.30 a.m. three workmen attended the office of the Labour Officer and gave him a letter of the Secretary of the Mazdoor Panchayat and at about 12.30 p.m. one other workman also came and handed over another letter addressed by the Secretary of the Mazdoor Panchayat to the Labour Officer. On the view we are taking, it is not necessary to refer to the contents of these two letters. Suffice it to state that the principal complaint made in these two letters was that the chargesheets issued by the appellant did not mention the names of the witnesses proposed to be examined on behalf of the appellant, nor did they set out the statements of the witnesses or the documentary evidence proposed to be relied upon on behalf of the appellant and the chargesheets were, therefore, illegal and invalid. The Management of the appellant took the view that the complaint in these two letters was unfounded and passed appropriate orders. The domestic enquiry continued and ultimately, after the conclusion of the domestic enquiry, the Labour Officer submitted to the Management separate reports in respect of each group of workmen finding them guilty of the misconduct charged against them. The Management agreed with the findings recorded in the reports of the Labour Officer and on the same day, that is 21st October, 1972 issued notices to these fifty-three workmen calling upon them to show cause by 10 a.m. on 23rd October, 1972 as to why they should not be dismissed from service. These notices along with the relevant reports of the domestic enquiry were pasted on the notice board of the mill on the same day, namely, 21st October, 1972. None of these fifty-three workmen submitted an explanation showing cause against

the proposed punishment of dismissal and the appellant accordingly passed orders on 23rd October, 1972 dismissing these fifty-three workmen from service.

5. It appears that in the evening of 23rd October, 1972 a meeting took place between the representatives of the Mazdoor Panchayat and the appellant in the presence of the Chief Minister of Uttar Pradesh and in the course of this meeting, it was decided by way of settlement that the workmen should withdraw the strike unconditionally from 24th October, 1972 and the appellant should pay to the workmen eight days' deducted wages and one year's old bonus before Diwali, that is 4th November, 1972, and as regards other matters of dispute including dismissal of these fifty-three workmen, the Chief Minister should give his decision which would be binding on the parties. The strike was accordingly withdrawn on 24th October, 1972. On 1st November, 1972 the Chief Minister gave his decision directing that thirty-one out of these fifty-three workmen who had been dismissed from service should be reinstated and that so far as the remaining twenty-two workmen were concerned, their case should be referred to the Industrial Tribunal for adjudication. One of these twenty-two workmen, however, settled the dispute and accepted his dues in full and final settlement of his claim against the appellant. That left only twenty-one workmen and with regard to them, a reference was made to the Industrial Tribunal on 28th November, 1972 for adjudication of the dispute whether the appellant had terminated their services in an improper or illegal way from 24th October, 1972 and if so, to what benefit/compensation they were entitled.

6. Whilst this reference was pending before the Industrial Tribunal and before the recording of the evidence commenced, an application dated 12th March, 1973 was made by the appellant to the Industrial Tribunal that if for any reason the Industrial Tribunal came to the conclusion that the domestic enquiry culminating in the dismissal of these twenty-one workmen was improper or was

not in accordance with law, the appellant should be given an opportunity to prove its case on merits before the Industrial Tribunal and in that event it may be allowed to file and prove additional documents. The Industrial Tribunal passed on the same day the following order on this application:

"Both the parties present. They filed their documents. An application was presented by the Employers on which orders would be passed at appropriate time. 10-4-73 is fixed for final hearing on which date both parties would produce their witnesses." Both the parties thereafter led evidence on the question whether the strike was illegal and the domestic enquiry held by the Labour Officer was in compliance with the principles of natural justice and in conformity with the requirements of the Standing Orders. Since it was stated by the Industrial Tribunal that an order would be passed on the application dated 12th March, 1973 at the appropriate time, the appellant preferred to wait until the passing of the order on that application and did not lead any evidence to show that, in any event, these twenty-one workmen were guilty of the misconduct charged against them and their dismissal was, therefore, justified. The Industrial Tribunal, however, failed to pass any order on this application and proceeded to make its award dated 8th September, 1973 disposing of the Reference.

7. The Industrial Tribunal, by its award, held that the strike of the workmen was not illegal on either of the two grounds on which it was claimed to be so. It was not illegal under cl. (e) of Section 65 of the U.P. Act because it was commenced after the proceeding in Adjudication Case No. 82 of 1971 had concluded by the making of the award on 14th August, 1972, nor was it illegal under cl. (f) of that section because, though cl. (2) of the Agreement dated 25th November, 1971 provided that the Union will not give any notice for strike for one year, the workmen could not be held to this clause, when the appellant itself had committed breaches of its obligations under that Agreement. So

far as the domestic enquiry leading to the dismissal of these twenty-one workmen was concerned, the Industrial Tribunal held that it was invalid, first, because it did not afford a proper and adequate opportunity to these twenty-one workmen to repel the charges of misconduct levelled against them; secondly, because the chargesheets issued against these twenty-one workmen were not in conformity with the requirements of cl. (a) of Standing Order 26 and thirdly, because the notices issued to these twenty-one workmen after receipt of reports of the enquiry from the Labour Officer were not served upon them, nor were they given a reasonable opportunity to show cause against the proposed punishment of dismissal. The Industrial Tribunal also observed that when, out of fifty-three workmen, who were dismissed from service, thirty one were reinstated by the appellant pursuant to the decision of the Chief Minister, there was no reason for discriminating against these twenty-one workmen and they were also, therefore, entitled to be reinstated. The Industrial Tribunal accordingly held that the action of the appellant in terminating the services of these twenty-one workmen was improper and illegal and directed that these twenty-one workmen should be reinstated with effect from the date of their suspension and should "be paid full wages for the period of suspension and from the date of dismissal to the date of their resuming duty." The appellant thereupon brought the present appeal against the award of the Industrial Tribunal by special leave obtained from this Court.

8. The first question that arises for consideration is whether the strike which was commenced by the workman from 11th September, 1972 and in which the twenty-one workmen concerned in this appeal admittedly participated was an illegal strike. Section 6-T of the U.P. Act declares inter alia that a strike shall be illegal if it is commenced in contravention of Section 6-S. Section 6-S in its various clauses sets out the circumstances in which a workman is prohibited from going on strike.

Clauses (e) and (f) of Section 6-S are material as these are the clauses on which reliance was placed on behalf of the appellant in support of its contention that the strike was illegal. We will first refer to cl. (e). That clause, so far as material, provides that no person employed in an industrial establishment shall go on strike between the commencement and conclusion of the proceeding before a Tribunal, if he is concerned in the dispute which is the subject-matter of such proceeding. The workmen went on strike from 11th September, 1972, and therefore, in order to attract the inhibition of cl. (e), it would have to be shown by the appellant that on 11th September, 1972 and subsequent dates on which the strike continued, a proceeding was pending before the Industrial Tribunal in respect of a dispute in which the striking workmen were concerned. The appellant contended that the proceeding in Adjudication Case No. 82 of 1971 commenced on 8th June, 1971 when the Reference was made and continued until 6th November, 1972 when the award disposing it of became enforceable, and therefore, the strike which commenced on 11th September, 1972 and continued thereafter was illegal. The view taken by the Industrial Tribunal, however, was that since the award was signed on 14th August, 1972, the proceeding in Adjudication Case No. 82 of 1971 came to an end on that day and thereafter there could be no impediment in the way of the workmen in going on strike on the ground of pendency of proceeding in the Industrial Tribunal. We cannot assent to this view which found favour with the Industrial Tribunal. We think that the contention of the appellant is correct and must be accepted. Section 6-D lays down when a proceeding before a Tribunal shall be deemed to have commenced and when it shall be deemed to have concluded. It says that a proceeding before a Tribunal shall be deemed to have commenced on the date of reference of a dispute to adjudication and such proceeding shall be deemed to have concluded on the date on which the award becomes enforceable under Section 6A. Sub-section (1) of Section 6A provides that an award shall

become enforceable on the expiry of thirty days from the date of its publication under Section 6. Here, the award in Adjudication Case No. 82 of 1971 was published under Section 6 on 7th October, 1972 and it, therefore, became enforceable on 6th November, 1972. The proceeding in Adjudication Case No. 82 of 1971 must in the circumstances be deemed to have commenced on 8th June, 1971 when the Reference was made and be deemed to have concluded on 6th November, 1972 when the award became enforceable. The strike was commenced and continued between these two dates and the striking workmen were admittedly concerned in the dispute which formed the subject-matter of this proceeding. The strike must, therefore, necessarily be held to be illegal under cl. (e) of Section 6-S read with S. 6-T. Indeed, it must be said in fairness to Mrs. Kapur, learned counsel on behalf of the workmen, that she rightly did not dispute this position. On this view, it becomes unnecessary to consider whether the action of the workmen in going on strike was in contravention also of cl. (f) of S. 6-S and we need not state the facts bearing on that clause nor enter upon a discussion of that question.

9. We must then proceed to consider whether the domestic enquiry held by the appellant culminating in the dismissal of these twenty-one workmen was a proper enquiry conducted in accordance with the principles of natural justice and in conformity with Standing Order 26. If the domestic enquiry was in breach of the requirements of Standing Order 26 or in violation of the principles of natural justice, it would be vitiated and the dismissal of these twenty-one workmen consequent upon it would be invalid. The Industrial Tribunal, as already pointed out, found, in the main, three infirmities in the domestic enquiry. We need not discuss the first two infirmities — whether the view of the Industrial Tribunal in regard to them was correct or not—as we find that the Industrial Tribunal was right in holding that the third infirmity vitiated the domestic enquiry. The view taken by the Industrial Tribunal was that the domestic enquiry was invalidated because the notices

issued by the appellant to these twenty-one workmen after receipt of reports of the Labour Officer finding them guilty of the misconduct charged against them, were not served on them, nor were they given a proper and adequate opportunity to show cause why the punishment of dismissal should not be imposed on them. The learned counsel appearing on behalf of the appellant made a heroic attempt to assail the correctness of this view, but we are afraid this attempt cannot succeed. Clause (c) of Standing Order 26 provides that where it is proposed to inflict the punishment of dismissal for any misconduct, the workman shall be given notice in writing to show cause within a specified period why the proposed punishment may not be awarded and along with such notice he shall be given a copy of the findings of the enquiring officer on the charge or charges. This clause clearly contemplates a notice to be given to the workman for the purpose of enabling him to show cause within a specified period as to why the proposed punishment of dismissal should not be inflicted on him. The notice is required to be given not as a mere idle formality; it has a meaning and a purpose. It is intended to provide an opportunity to the workman to show cause against the proposed punishment of dismissal. The workman may show that the findings of the enquiring officer are not justified on the evidence on record or that even if the findings are justified, they do not warrant the extreme penalty of dismissal from service having regard to the nature or gravity of the misconduct, the past record of the workman and any other extenuating circumstances. The notice must, therefore, give a reasonable opportunity to the workman. That is a condition precedent which must be satisfied before an order of dismissal can be validly passed by the employer.

10. Here in the present case, it is obvious from the various timings notified to the erring workmen at which the domestic enquiry would be held against different groups of workmen, that the domestic enquiry against the first group of workmen must have commenced at 10 a.m. and against the

last group of workmen, it must have ended not earlier than 9.15 p.m. on 21st October, 1972. The Labour Officer must then have prepared his reports setting out the conclusions reached by him on the evidence recorded at the domestic enquiry and these reports must thereafter have been forwarded by the Labour Officer to the Manager of the appellant. The Manager of the appellant, on receipt of these reports from the Labour Officer, must have considered the cases of these different groups of workmen in the light of these reports and the evidence recorded at the domestic enquiry for the purpose of satisfying himself prima facie that the workmen were guilty of the misconduct charged against them, before issuing notices calling upon them to show cause why they should not be dismissed from service. This whole procedure must have taken a certain amount of time and the show cause notices inter alia to the twenty-one workmen concerned in this appeal, could, therefore, have been issued at the earliest not before 10.30 p.m. on 21st October, 1972. Now admittedly, no attempt was made to serve the show cause notices on any of these twenty-one workmen and the only mode in which service was purported to be effected was by pasting the show cause notices on the notice board of the mill. We may point out that this mode of service adopted by the appellant was wholly unjustified and that in itself introduces a serious infirmity in the domestic enquiry, unless it can be shown by the appellant that these twenty-one workmen were otherwise aware of the contents of the show cause notices and no prejudice was occasioned to them by reason of non-service of the show cause notices. Of that, however, there is no evidence, as there is nothing to show that these twenty-one workmen read the show cause notices on the notice board of the mill. It must be remembered that almost all the workmen of the appellant, including these twenty-one workmen, were on strike and no presumption can, therefore, be drawn that they would look at the notice board and read the show cause notices pasted on it. But even if we assume in favour of the appellant that

these twenty-one workmen must have looked at the notice board and seen what was pasted there, it is clear from what is stated above that the show cause notices could not have been pasted on the notice board before 10.30 p.m. on 21st October, 1972. If that be so, the earliest that these twenty-one workmen could possibly come to know of the show cause notices would have been the next day, that is 22nd October, 1972, but that day happened to be a closed day for the mill and none of these twenty-one workmen could, therefore, be expected to be present and was in fact present at the mill, so that he could come to know about the show cause notices by looking at the notice board. These twenty-one workmen could not, in the circumstances, have looked at the notice board earlier than 23rd October, 1972 when they came to the mill in the morning for the purpose of their sit-in-strike. But the time specified in the notices within which these twenty-one workmen were required to show cause against the proposed punishment of dismissal was 10 a.m. on 23rd October, 1972 and that would mean that they had hardly a couple of hours within which to show cause against the action proposed to be taken against them. It does not need much argument to come to the conclusion that this could hardly be regarded as affording a reasonable opportunity to these twenty-one workmen to show cause against the proposed punishment of dismissal. There can, therefore, be no doubt that there was not only non-compliance with the requirements of cl. (c) of Standing Order 26 but also infraction of the principles of natural justice. The orders of dismissal passed against these twenty-one workmen could not, in the circumstances, be justified on the basis of the domestic enquiry held by the appellant.

11. But that does not mean that the workmen are entitled to succeed in the Reference. It is now well settled as a result of several decisions of this Court, of which we may mention only two, namely, *Oriental Textile Finishing Mills, Amritsar v. Labour Court, Jullundur*, (1972) 1 SCR 490 = (AIR, 1972 SC 277 = 1972 Lab IC 157) and *Delhi Cloth & General*

Mills Co. v. Ludh Budh Singh, (1972) 3 SCR 29 = (AIR 1972 SC 1031 = 1972 Lab IC 573) that even where it is found that the domestic enquiry held by the employer is due to some omission or deficiency, not valid, the employer can none-the-less support the order of dismissal by producing satisfactory evidence and proving misconduct, when the dispute arising out of the order of dismissal is referred for industrial adjudication. This Court pointed out in *Oriental Textile Finisher's case* (AIR 1972 SC 277 = 1972 Lab IC 157) (supra) that in such cases "the evidence which is produced to substantiate and justify the action taken against the workmen is not as stringent as that which is required in a Court of Law". What is required is "that the evidence should be such as would satisfy the Tribunal that the order of termination is proper". It was for this reason that in the present case the appellant made the application dated 12th March, 1973 praying that if for any reason the Industrial Tribunal was inclined to take the view that the domestic enquiry held by the appellant was improper or not according to law, the appellant should be given an opportunity to prove its case on merits and for that purpose file and prove additional documents. This was clearly a request to the Industrial Tribunal to try the issue as to the validity of the domestic enquiry as a preliminary issue and if the finding on this preliminary issue was against the appellant, to give an opportunity to the appellant to adduce evidence for the purpose of establishing that the orders of dismissal were justified. Now, the question as to what is the procedure to be followed by the Industrial Tribunal when such a request is made by the employer, came up for consideration before this Court in *Delhi Cloth & General Mill's case* (AIR 1972 SC 1031 = 1972 Lab IC 573) (supra). This Court, after discussing the previous decisions on the subject, culled out certain principles which, according to it, emerged from a consideration of these decisions. These principles were formulated in the form of seven propositions and of them, the fourth and fifth propositions are material for our purpose:

"(4) When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management. However elaborate and cumbersome the procedure may be, under such circumstances, it is open to the Tribunal to deal, in the first instance, as a preliminary issue the validity of the domestic enquiry. If its finding on the preliminary issue is in favour of the management, then no additional evidence need be cited by the management. But, if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the Tribunal during the course of the proceedings and before the trial has come to an end. When the preliminary issue is decided against the management and the latter leads evidence before the Tribunal, the position, under such circumstances, will be, that the management is deprived of the benefit of having the finding of the domestic Tribunal being accepted as prima facie proof of the alleged misconduct. On the other hand, the management will have to prove, by adducing proper evidence, that the workman is guilty of misconduct and that the action taken by it is proper. It will not be just and fair either to the management or to the workman that the Tribunal should refuse to take evidence and thereby ask the management to make a further application, after holding a proper enquiry, and deprive the workman of the benefit of the Tribunal itself being satisfied, on evidence adduced before it, that he was not guilty of the alleged misconduct.

(5) The management has got a right to attempt to sustain its order by adducing independent evidence before the Tribunal. But the management should avail itself of the said

opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been availed of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the Tribunal did not provide such an opportunity. The Tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper."

It will, therefore, be seen that when the application dated 12th March, 1973 was made by the appellant, the Industrial Tribunal should have either declined to try the issue as to the validity of the domestic enquiry as a preliminary issue and directed the appellant to lead its evidence simultaneously on the issue as to the validity of the domestic enquiry as also in regard to the misconduct of the workmen so as to justify its action, or decided to deal with the validity of the domestic enquiry as a preliminary issue and if the finding on the preliminary issue went against the appellant, then to give an opportunity to the appellant to adduce additional evidence to justify its action. Strangely enough, however, the Industrial Tribunal refused to give either of these two directions on the application of the appellant and merely passed an order that on the application "orders would be passed at the appropriate time". We fail to see what "appropriate time" the Industrial Tribunal had in mind. It seems that "appropriate time" never arrived, because in fact no order was made on the application by the Industrial Tribunal at any time and without passing such an order the award was made. It would be perfectly intelligible if the Industrial Tribunal did not pass an order on the application immediately, but there can be little doubt that it should have passed the appropriate order on the application sufficiently before the recording of the evidence commenced. The cryptic remark made by the Industrial Tribunal that it would pass an order on the application at "appropriate time" could well lead the appellant to believe that the Industrial Tribunal would first decide the issue

as to the validity of the domestic enquiry and if its finding went against the appellant, it would give an opportunity to the appellant to lead further evidence. The award made by the Industrial Tribunal without giving an opportunity to the appellant to lead additional evidence to establish that the workmen were guilty of misconduct and that the action of the appellant in dismissing them was justified, cannot, therefore, be sustained.

12. It may be pointed out that one of the contentions which appealed to the Industrial Tribunal in setting aside the orders of dismissal against these twenty-one workmen was that originally orders of dismissal were passed against fifty-three workmen, but out of them, thirty-one were reinstated and there was no reason why these twenty-one workmen, whose cases were identical, should be treated differently and denied reinstatement. We do not think there is any force in this contention. Out of fifty-three workmen against whom orders of dismissal were passed, thirty-one had to be reinstated by the appellant because of the decision of the Chief Minister which, it was agreed by way of settlement, would be binding on both the parties. But that could not be a ground for reinstatement of these twenty-one workmen whose cases were differentiated by the Chief Minister himself and in regard to whom Reference was made for industrial adjudication. There would have been no need for making Reference for industrial adjudication in case of these twenty-one workmen, if they were to be treated, straightway, without any further enquiry into their respective cases, on a par with the thirty-one workmen who were directed to be reinstated.

13. We, therefore, allow the appeal, set aside the award made by the Industrial Tribunal and remand the matter to the Industrial Tribunal with a direction to allow the appellant and the workmen to lead such additional evidence as may be relevant on the question whether these twenty-one workmen were guilty of the misconduct charged against them and the orders of dismissal passed against them were justified. Mrs. Kapoor on behalf of the workmen appeal-

ed to us that even though the award of the Industrial Tribunal is being set aside by us, we should give a direction to the appellant to continue these twenty-one workmen, who have been reinstated recently pursuant to the award of the Industrial Tribunal. But we are afraid we cannot do so. It would indeed be beyond our jurisdiction to give any such direction when the award under which these twenty-one workmen are reinstated is set aside by us. So far as the question of costs of this appeal is concerned, we think that a fair and proper order of costs would be that each party should bear and pay its own costs of the appeal.

Appeal allowed.

AIR 1975 SUPREME COURT 1699

(From: Delhi)*

A. N. RAY, C. J., K. K. MATHEW,
M. H. BEG AND Y. V. CHANDRACHUD, JJ.

Smt. Ratni Devi and another, Appellants v. Chief Commissioner, Delhi and others, Respondents.

Writ Petns. Nos. 332 and 333 of 1971 and Civil Appeals Nos. 608 and 609 of 1972, D/- 30-4-1975.

(A) Constitution of India, Art. 31 (5) — Land Acquisition Act (1894) S. 23 — Validity of, questioned on ground that provision in Section 23 that compensation is to be paid on the basis of the market value of the land at the date of the preliminary notification under S. 4 (and not at the date of taking possession of the land) is an "unreasonable restriction" on the right to hold land under Art. 19 (1) (f) read with Cl. 5 of the Article—Contention held precluded by Art. 31 (5), of the Constitution, the Land Acquisition Act (1894) being an "existing law" within the meaning of that clause. AIR 1974 SC 2077 Followed.

(Para 9)

(B) Constitution of India, Art. 19 (1) (f) and (5) — "Reasonable restrictions" — Compulsory acquisition of land — Where acquisition is for pu-

* (L.P.A. Nos. 125 and 126 of 1970, D/- 13-8-1970 — Delhi)

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blic purpose, reasonableness is presumed for such public purpose.

(Para 4)

(C) Constitution of India, Art. 19 (1) (f) and (5) — Compulsory acquisition of land — Acquisition for public purpose — "Reasonableness" of acquisition may be presumed — Challenge to validity of acquisition to be restricted to procedural reasonableness. (AIR 1970 SC 564 Followed.) (Para 4)

(D) Constitution of India, Art. 19 (1) (f) and (5) — Land Acquisition Act (1894), S. 23 (1) (firstly) — Land Acquisition Amendment and Validation Act (1967), S. 4 (3) — Interest at 6 per cent payable on market value from expiry of three years after preliminary notification under S. 4 of the original Act — [This was mentioned to meet the argument that compensation based on the market value of the land as on the date of the preliminary notice under Sec. 4 instead of on the date of taking possession was an unreasonable restriction on the right to hold the property — Ed.] (Para 9)

(E) Land Acquisition Act (1894), Section 24 (Seventhly) — Outlay or improvement made with the sanction of the Collector after the date of the preliminary notification under S. 4 will be taken into consideration in awarding compensation — [This was another argument relied on to show that the provision in Section 23 (firstly) that the compensation is to be based on the market value of the land as on the date of the preliminary notice under Section 4 and not as on the date of taking possession was not an "unreasonable restriction" within the meaning of Art. 19 (5) of the Constitution on the right to hold property under Art. 19 (1) (f) — Ed.] (Para 9)

[Editorial Note: This decision (See Pts. (C), (D) and (E)), illustrates the point laid down in the Bank Nationalization case (AIR 1970 SC 564) that Articles 19 and 31 of the Constitution are not mutually exclusive and that the power under Art. 31 is subject to the provisions of Art. 19 — See AIR Commentary on The Constitution of India, 2nd Edition, Art. 31 N 4 (C).]

(F) Constitution of India, Art. 19 (1) (f) and (5) — Right to hold pro-

perty — Power of State to impose by law "reasonable restrictions" on the exercise of the right — "Reasonable restrictions", meaning of — Procedural restrictions must also pass test of reasonableness — Land Acquisition Act (1894), S. 23 (under which compensation is to be based on the market value of the land at the date of the preliminary notice under Sec. 4 of the Act and not the date of taking possession is not bad for procedural unreasonableness [Being an "existing law" challenge to the validity of the section as contravening Art. 31 (2) is also barred under Art. 31 (5): See Pt. (A). — Ed.] (Para 10)

(G) Constitution of India, Art. 19 (1) (f) and (5) — "Reasonable restrictions" on exercise of right — Reasonability can be questioned even in regard to procedural matters: See Pt. (C) — Law for compulsory acquisition of land — Tribunal for determining compensation authorised to do so without hearing the owner — Provision would be unreasonable and the law for acquisition would be invalid. (Para 10)

[Editorial Note: Section 23 of the Land Acquisition Act, 1894 making compensation payable on basis of market value at date of preliminary notice under Section 4 of the Act (instead of at date of taking possession) does not deal with procedure and hence not open to challenge on the ground of unreasonableness in regard to procedure. Objection to its validity otherwise (under Art. 31 (2)) is barred by Art. 31 (5) it being an "existing law". (See Pt. (A))]

(H) Land Acquisition Act (1894), S. 6 — "Public purpose" — Meaning — "Planned Development of Delhi" — Declaration under S. 6 stating that the specified land is needed for the "planned development of Delhi" is not bad for vagueness — "Planned development of Delhi" is a "public purpose". (Para 11)

(I) Land Acquisition Act (1894), Ss. 4 and 6 — Valid notification under Section 4 is a sine qua non for initiation of proceedings for acquisition of property — Acquisition proceedings allowed to be completed on the basis that notification under S. 4 and declaration under Section 6 were valid — Writ petition attacking Notification

thereafter on grounds available at time when notification was published — Undue delay — Writ petition held not maintainable — AIR 1974 SC 2077 Followed.—Constitution of India, Arts. 32 and 226. [See AIR Commentary on Constitution of India, Arts. 32 and 226 Note 185.] (Para 12)

Cases Referred: Chronological Paras
AIR 1974 SC 2077 = 1974 UJ (SC) 765 2, 11, 12

AIR 1970 SC 564 = (1970) 3 SCR 530 4, 10

AIR 1968 SC 1138 = (1968) 3 SCR 41 3

AIR 1966 SC 1593 = (1966) 3 SCR 557 3

Mr. D. P. Singh, Sr. Advocate in W.P. No. 333 of 1971 and C.A. No 609 of 1972) M/s. R. K. Garg, S. C. Agarwal and V. J. Francis, Advocates of M/s. Ramamurthi & Co. with him, for Petitioners in WPs. and for Appellants in Appeals. M/s. S. N. Prasad and R. N. Sachthey, Advocates for Respondents Nos. 1-3 in W.Ps. and for Respondents in Appeals.

Judgment of the Court was delivered by

RAY, C. J.:— There are two principal questions in these writ petitions and civil appeals. First, is compensation which is related to the date of notification under Section 4 of the Land Acquisition Act referred to as the Act bad? Second, is planned development of Delhi bad and vague?

2. This Court in *Aflatoon v. Governor of Delhi*, AIR 1974 SC 2077 held that the notification dated 13 November, 1959 under Section 4 of the Act which is also being challenged in these writ petitions and appeals is beyond challenge now.

3. Piecemeal acquisition which was held to be bad in *State of Madhya Pradesh v. Vishnu Prasad Sharma* (1966) 3 SCR 557 = (AIR 1966 SC 1593) was validated by the Land Acquisition Amendment and Validation Act with retrospective effect. The validity of the Amending Act has been upheld by this Court in *Udai Ram Sharma v. Union of India* (1968) 3 S. C. R. 41 (AIR 1968 SC 1138) and reaffirmed in *Aflatoon's* case (supra).

4. The contention that piecemeal acquisition under Notification

dated 13 November, 1969 under Section 4 of the Act is bad is really a challenge to the adequacy of compensation under Section 23 of the Act. The Act is protected under Article 31 (5) of the Constitution. Where acquisition is for public purpose reasonableness is presumed for such public purpose. The challenge under Art. 19 of the Constitution which, according to the petitioners and the appellants, is directed as a result of the Bank Nationalisation case (1970) 3 SCR 530 = (AIR 1970 SC 564), can be restricted to procedural reasonableness.

5. The Government set up the Town Planning Organisation in 1955 which prepared an interim general plan in 1956 for Delhi. The influx of displaced persons after the partition of the country, the growth of slums, the problems of over crowding, insanitation, traffic hazards, sub-standard construction and lack of proper civic amenities led the Government to take effective measures to ensure the orderly and planned development of the city. This planning is to provide for different classes of people who have to live and work in the city of Delhi.

6. The plan has to provide for bona fide requirements of the public for residential, industrial and commercial purposes, and to ensure healthy and properly planned development of Delhi, on the basis of the studies made by the Town Planning experts. The Government decided to acquire 34070 acres of land in and around the city, develop and then lease out the same on a no-profit no-loss basis. With this public purpose the Government issued a notification on 13 November, 1959 under Sec. 4 of the Act.

7. The Draft Master Plan giving the detailed rules and regulations in respect of the "land use" and allied matters, was published in July, 1960. In order to meet the requirements of the plan, the Government issued another notification for a further acquisition of about 16000 acres in October, 1961.

8. On 22 October, 1960 the Government of India issued a notification under Section 6 of the Act. The declaration was that specified land

was required to be taken at public expense for a public purpose, viz., the Planned Development of Delhi.

9. The main contention of the petitioners and the appellants is that compensation which is to be paid with reference to the value of the property on the date of the notification is an unreasonable restriction to hold and dispose of property. It was submitted that compensation should be paid with reference to the value of the property on the date possession of the property was taken. This question has been answered in the judgment in Aflatoon's case (supra). Mathew, J. speaking for the Court said that Article 31 (5) precludes such a challenge. Further, Section 4 (3) of the Land Acquisition Amendment and Validation Act, 1967 provided for payment of interest at 6 per cent of the market value after the expiry of three years from the date of the notification under Section 4 to the date of payment of compensation. Again, Section 24 of the Act provides that any outlay or improvement on, or disposal of, the land acquired, commenced, made or affected without the sanction of the Collector after the date of the publication of the notification shall not be taken into consideration by the Court in awarding compensation. Therefore, any outlay or improvement made with the sanction of the Collector after the date of the notification will be taken into consideration in awarding compensation.

10. In the Bank Nationalisation case, (AIR 1970 SC 564) (supra) the acquisition of property was required to pass the test of Article 19 (5) on the question of procedural reasonableness. If for instance a Tribunal is authorised to determine compensation without hearing the owner it would be exposed to vice. Section 23 of the Act does not deal with procedure, and, therefore, is not exposed to any challenge on the ground of procedural unreasonableness.

11. Declaration under Sec. 6 of the Act pursuant to the notification under Section 4 of the Act have been held by this Court to be valid for acquiring the notified land for the planned development of Delhi. In

Aflatoon's case, (AIR 1974 SC 2077) (supra) this Court held that the planned development of Delhi is a public purpose. In Aflatoon's case (supra) it was held that in the case of an acquisition of a large area of land comprising several plots belonging to different persons, the specification of the purpose can only be with reference to the acquisition of the whole area. The notification which was for the acquisition of over 30,000 acres of land in the very nature of things could not specify each particular purpose, and, therefore, the planned development of Delhi was of sufficient particularity.

12. In Aflatoon's case, (AIR 1974 SC 2077) (supra) public purpose with regard to the planned development of Delhi has been upheld. In Aflatoon's case (supra) the petitions which were filed in the year 1972 were held to be dilatory. The reason is that a valid notification under Section 4 is a sine qua non for initiation of proceedings for acquisition of property. In the present case, Section 4 notification in the year 1959 was followed by notification under Sec. 6 of the Act in July, 1960 and again in October, 1961. In Aflatoon's case (supra) it was said that "to have sat on the fence and allowed the Government to complete the acquisition proceedings on the basis that the notification under Section 4 and the declaration under Section 6 were valid and then to attack the notification on grounds which were available to them at the time when the notification was published would be putting a premium on dilatory tactics."

13. For these reasons, the petitions and the appeals are dismissed. Parties will pay and bear their own costs.

Petitions and appeals
dismissed.

AIR 1975 SUPREME COURT 1703

(From: Allahabad)*

N. L. UNTWALIA AND S. MURTAZA
FAZL ALI, JJ.Gajendra Singh, Appellant v.
State of U. P., Respondent.Criminal Appeal No. 137 of 1974,
D/- 25-4-1975.(A) Criminal P. C. (1898), S. 423—
Appeal against conviction — Discussion of defence case before prosecution case by High Court — Approach wrong.

Where the High Court in appeal against conviction proceeds to deal with the defence case even before giving its finding on the truth or otherwise of the prosecution case against the accused, the High Court has made a completely wrong approach to the case. (But as the wrong approach had not resulted in any material prejudice to the accused, the error was held to be not of any consequence.) (Para 3)

(B) Evidence Act (1872), S. 114
Illus. (g) — Non-examination of the most material evidence to prove the defence version in a criminal case is the strongest possible circumstance to discredit the defence version.(C) Evidence Act (1872), S. 3 —
Appreciation of evidence — Criminal case — Murder case — Quarrel between two parties leading to firing of gun and resulting in death of Member — Prosecution failing to explain injuries on the person of the mother of the accused — Held in the facts and circumstances of the case that it did not affect the prosecution case at all: AIR 1975 SC 1478, Rel. on.(D) Criminal P. C. (1898), S. 161
— Cross cases — Statement made under S. 161 during investigation of cross case — Not at all admissible in the instant case. (Para 10)(E) Constitution of India, Art. 136
— Appeal by special leave — Questions of fact — Concurrent findings by Courts below — No interference by Supreme Court.

Where two courts of fact have dealt with a particular aspect on essen-

tially pure questions of fact and have come to a certain concurrent conclusion, the Supreme Court in an appeal by special leave will not upset the conclusion of the High Court and re-appraise the evidence for itself.

(F) Penal Code (1860), S. 302 —
Sentence — No brutality or dastardliness about crime committed by accused — No premeditation — Accused getting excited at the spot and firing at deceased — Held it was not a fit case in which sentence of death was called for. (Sentence of death commuted to one of life imprisonment.) (Para 13)(Para 14)
Cases Referred: Chronological Paras
AIR 1975 SC 1478 = 1975 Cri LJ 1079
6, 9M/s. R. K. Garg, S. C. Agarwal
and V. J. Francis, Advocates, for Appellant; Mr. O. P. Rana, Advocate, for Respondent.

Judgment of the Court was delivered by

FAZL ALI, J:— The appellant Gajendra Singh has been convicted under Section 302 and sentenced to death as also under Section 307 I.P.C. and sentenced to ten years' rigorous imprisonment. The High Court on appeal has affirmed the conviction and sentence passed on the appellant Gajendra Singh. Accused Raj Bahadur Singh father of the appellant who was convicted by the Sessions Judge under Section 302/34 has been acquitted of that charge but his conviction under Section 323 and sentence for one year's rigorous imprisonment has been affirmed by the High Court. There was the third accused before the Court of Session, namely, Bisharam Singh who has been acquitted because the prosecution produced no evidence against him. The appellant has filed the present appeal by special leave against the order of the High Court affirming the conviction and sentence passed on him.

2. Briefly put the prosecution case is that on August 10, 1971 some time about the noon the deceased Badam Singh who was accompanied by his cousin Shyampal Singh found that the accused were grazing their she-buffaloes in his field at Abrewala where Jawar had been grown and the crop was being damaged by the

* (Cri. Appeal No. 16 of 1973 and Ref. No. 3 of 1973 D/- 21-9-1973 — All.)

she-buffaloes belonging to the accused. The deceased Badam Singh protested against the highhanded act of the accused in trying to damage his crop which fell on the deaf ears and the accused continued to graze their she-buffaloes in the field in spite of the remonstrance by the deceased. Being fed up with the unwanted conduct of the accused in persisting with the mischief Badam Singh and Shyampal Singh rounded up the she-buffaloes and proceeded to take them to the cattle-pound. The path to the cattle-pound, it appears, passed in front of the house of the accused Raj Bahadur Singh. The prosecution case is that while deceased Badam Singh and Shyampal Singh were passing in front of the house of Raj Bahadur Singh, Raj Bahadur Singh gave a lathi blow on the head of Badam Singh and the appellant Gajendra Singh ran inside the house and brought out a gun. Thereafter Raj Bahadur Singh ordered his son Gajendra Singh to kill Badam Singh and Shyampal Singh, for having had the courage to take the she-buffaloes to the cattle-pound. On his exhortation Gajendra Singh is alleged to have fired twice on Badam Singh and Shyampal Singh causing serious injuries to their person. Attracted by the altercation at the spot, Hari Ram, Sukhendra Singh and Anangpal Singh eye-witnesses reached the scene of offence and witnessed the murderous assault. Sukhendra Singh, the father of P.W. Shyampal Singh and uncle of Badam Singh, lodged a written report of the incident at police out-post Amritpur of Police Station Rajeypur, and a case against the accused was registered by the police at 6 P.M. During the incident Smt. Rambeti, wife of Raj Bahadur Singh and the mother of the appellant Gajendra Singh, was also found to have received gun-shot injuries and a counter-report appears to have been lodged at the police out-post Amritpur at 5 P.M. an hour earlier than the F.I.R. lodged by Sukhendra Singh. This counter F.I.R. forms the subject-matter of the cross case which ended in the acquittal of the accused persons in that case, namely, the prosecution party here. After the report was lodged the two injured persons, namely,

Badam Singh and Shyampal Singh were sent for medical examination to District Hospital, Fatehgarh, but Badam Singh succumbed to his injuries before he could reach the hospital and died on August 11, 1971. Thereafter the dead body of Badam Singh and the injured Shyampal Singh were taken to the District Hospital, Fatehgarh where Dr. R. P. Chaudhary examined Shyampal Singh and performed autopsy of the deceased Badam Singh. After usual investigations the police submitted charge-sheet which ended in the ultimate conviction of the accused as indicated above. The gist of the F.I.R. lodged by Bisram Singh in the counter-case forms the main part of defence in this case. It was alleged by the accused that in fact Sukhendra Singh, Nanku, Badam Singh and Shyampal Singh entered the house of Raj Bahadur Singh, hurling filthy abuses on him and chased Raj Bahadur Singh who ran to his house. It was further alleged that Sukhendra Singh and Nanku were armed with Lathis, whereas Badam Singh had a rifle and Shyampal Singh had a double-barrel breach loading gun. It was also alleged that a single barrel breach loading gun of Virpal Singh son of Bisram Singh which was hanging on a peg under the tin shed was picked up by Shyampal Singh and handed over to Nanku. Smt. Rambeti the mother of the appellant Gajendra Singh protested on which Shyampal Singh fired at her which resulted in serious injuries on her person and she fell on the ground. A report of this incident was lodged by Bisram Singh at the police out-post Amritpur at 5 P.M.

3. The learned Sessions Judge as well as the High Court of Allahabad after full consideration and detailed discussion of the evidence and circumstances of the case came to the conclusion that the prosecution case against the accused was fully proved and the High Court accordingly affirmed the conviction and sentences passed on the accused. The High Court, however, did not believe the allegations of the prosecution that Raj Bahadur Singh had given the orders to the appellant Gajendra Singh to kill the deceased and accord-

ingly Raj Bahadur Singh was given the benefit of doubt of the charge under Section 302/34 I.P.C. It seems to us that the High Court lured by the attractive, ingenious, daring and dexterous defence taken by the accused proceeded to deal with the defence case even before giving its finding on the truth or otherwise of the prosecution case against the accused. Such an inter-twined approach appears to have provided sufficient material for argument by learned counsel for the appellant that the High Court had made a completely wrong approach to the case put forward by the prosecution in the instant appeal. After going through the judgment of the High Court we are, however, satisfied that the discussion of the defence case before the prosecution case has not resulted in any material prejudice to the accused and therefore although the High Court should have dealt with the prosecution case before touching the defence version, the error committed by the High Court is not of any consequence.

4. The central evidence in the case consists of the testimony of three eye-witnesses, namely, Sukhendra Singh, Hari Ram and Anangpal Singh. Sukhendra Singh was no doubt to some extent interested inasmuch as he was a relation of the deceased but the other two witnesses Hari Ram and Anangpal Singh were independent witnesses and no animus against these witnesses has been proved by the accused. The only comment regarding Anangpal Singh made by counsel for the appellant was that he was a chance witness and had come from another village after covering a distance of 40 miles. The witness, however, has fully explained the reasons why he had gone to the village to see his ailing sister and has stated that while he was returning to the village where the offence took place he happened to be present near the field where the incident took place and thereafter he has given a complete narrative of the prosecution case leading to the murderous assault on the deceased by the appellant Gajendra Singh. In the F.I.R. which was lodged by Sukhendra Singh at 6 P.M. the names of all these witnesses have been clearly mentioned. There, however, cannot be

any doubt regarding the presence of Shyampal Singh and Sukhendra Singh at the spot because even according to the defence version they had participated in the occurrence and Shyampal Singh is alleged to have shot Smt. Ranibeti. Moreover being close relations of the deceased they were only natural witnesses to see the occurrence which took place in front of the house of the parties. The High Court has dealt with the evidence of the eye witnesses on merits and has pointed out that there is absolutely no reason to distrust their testimony.

5. Mr. R. K. Garg learned counsel for the appellant has submitted four points in support of his contention that the High Court should have found that the prosecution has miserably failed to prove their case against the accused.

1) Firstly it was submitted that although Smt. Ranibeti has been proved to have sustained gun-shot injuries the prosecution has failed to give any convincing explanation for the presence of these injuries on her person.

2) That the defence version is more probable than that of the prosecution case because it came to light before the F.I.R. was lodged by the prosecution and it should, therefore, have been believed.

3) That as the Investigating Officer did not find any blood at the place where according to the prosecution the occurrence took place, but found blood in the Angan inside the house of the accused, the prosecution has changed the place of occurrence and the finding of the blood in the house of the accused lends a ring of truth to the defence version.

4) That at any rate this was not a case in which the extreme penalty of death should have been awarded to the appellant Gajendra Singh.

6. Taking the first contention regarding the non-explanation of the injuries on Smt. Ranibeti, the learned counsel for the appellant relied on a recent decision of this Court in State of Gujarat v. Sai Fatima, Cri Appeal No. 67 of 1971 decided on 19-3-1975, = (AIR 1975 SC 1478 = 1975 Cri LJ 1079) where one of us (Untwalia, J.), observed as follows:

"In a situation like this when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow:

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self defence.

"(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all".

As regards the contention the matter has been dealt with elaborately by the High Court which has pointed out that the prosecution had given sufficient explanation for injuries on the person of the accused, or at any rate as the eye witnesses did not appear to have noticed the injuries on the person of Smt. Rambeti there was no question of giving any explanation for her injuries. The High Court has pointed out that what really happened in this case was that Smt. Rambeti on hearing the alarm left her Baithak and arrived near the scene of offence and while Gajendra Singh was firing at the deceased Badam Singh some of the pellets accidentally hit her. This is corroborated by a crucial circumstance, namely, that the size of the injuries suffered by Smt. Rambeti was $1/8'' \times 1/8''$ completely coincides with the injuries received by the deceased in the abdomen. In these circumstances the possibility that some of the pellets bypassed the deceased and hit Smt. Rambeti cannot be excluded. Indeed if this was so, then it would be difficult for the witnesses to have noticed any injuries on Smt. Rambeti and that explains why no explanation was given at all for the injuries sustained by Smt. Rambeti. The High Court has also laid great emphasis on the fact that all the injuries received by Smt. Rambeti were inside the umbilicus and would not be visible unless the clothes she was wearing were taken off and this may be enough reason why the eye witnesses failed to notice the injuries on the person of Smt. Rambeti. We find ourselves in complete

agreement with this line of reasoning adopted by the High Court.

7. The High Court further points out that Smt. Rambeti who is said to have been hit by a gun-shot fired by Shyampal Singh was the most material witness to prove the defence version and yet she has not been examined and no explanation for her non-examination has been given by the defence. Mr. Garg suggested that as she was a woman so the defence could not take the risk of examining her. We are, however, not impressed with the reasoning put forward by the counsel for the appellant. In our opinion, the non-examination of Smt. Rambeti is the strongest possible circumstance to discredit the defence version, because she alone could have been in the best position to explain whether the injuries were caused as a result of the shot fired by Shyampal Singh or just accidentally.

8. Thirdly it was pointed out by the High Court that the definite case of the defence being that it was Shyampal Singh who had fired at Smt. Rambeti, yet when Shyampal Singh was examined as a witness for the prosecution, the accused gave no suggestion to him at all whether he was armed with a gun and had fired a shot at Smt. Rambeti. In fact the evidence of the prosecution clearly shows that the entire prosecution party was absolutely unarmed and none of them had either a lathi or a gun. Therefore, the question of hitting Smt. Rambeti with a gun does not arise at all.

9. We have given our anxious consideration to the reasons set forth by the High Court and we feel ourselves in complete agreement with the same. We are clearly of the opinion that in the circumstances of the present case the defence version was not at all proved, nor was it even probable. The prosecution has given sufficient explanation for the injuries received by Smt. Rambeti. Even assuming it had not, it was a case which falls within the third category of the principles laid down by the judgment of this Court in *State of Gujarat v. Sai Fatima* (AIR 1975 SC 1478 = 1975 Cri LJ 1079) (supra).

10. Mr. Garg drew our attention to the statement of P.W. 13 the Investigating Officer Jagdish Prasad, where he stated that while investigating the cross-case State v. Sukhendra Singh, he had made inquiries from the witnesses Shyampal Singh, Sukhendra Singh and Kanku as to how Rambeti received injuries but they had showed their ignorance. It was argued on the basis of this statement that the prosecution had deliberately suppressed the manner in which Smt. Rambeti sustained injuries. In the first place this statement is absolutely inadmissible because it was a statement made under Section 161 of the Code of Criminal Procedure during investigation of the cross case which was not at all admissible in the present case. Secondly, before the attention of Jagdish Prasad could be drawn to the statement it should have been put to the witness Shyampal Singh in this case which was not done. In these circumstances, therefore, this statement must be excluded from consideration. Even if we take this statement of Jagdish Prasad into consideration, that does not put the prosecution case out of court, because we have already pointed out that there were a number of circumstances which went to show that the defence version was not true at all and that what really happened was that Smt. Rambeti sustained injuries accidentally because some of the pellets which by-passed the deceased hit her. For these reasons, therefore, the first contention raised by Mr. Garg is overruled.

11. As regards the second contention that the defence case was more probable than the prosecution version, because the defence F.I.R. lodged by Bisram Singh came to light an hour before the F.I.R. lodged by Sukhendra Singh. We may observe that this contention appears to be based on pure speculation. There is positive evidence of the informant in this case to show that he had reached the police out post earlier than Bisram Singh but the police which was not favourably disposed towards the prosecution party did not record the statement of Sukhendra Singh but insisted on a written report and by the time the written report had to be

made, the defence who forestalled Sukhendra Singh lodged the F.I.R. That apart we have already dealt with the defence version on its merits and found that it is not true at all. In these circumstances, therefore, the mere fact that Bisram Singh managed to get the F.I.R. lodged a little earlier than Sukhendra Singh by itself will not be sufficient to demolish the prosecution case.

12. Coming now to the third contention regarding the absence of blood at the place of occurrence and finding of the blood in the Angan of the accused, nothing much turns upon it. The High Court has specifically adverted to this aspect of the matter and has pointed out that immediately after the occurrence it rained heavily and the place of occurrence became very muddy and that explains why no blood was found at the spot where the deceased was assaulted. The High Court has also explained that Smt. Rambeti must have, after receiving injuries, at the spot, gone back to her house inside and that explains the blood in the Angan of the house of the appellant.

13. Furthermore, all the three contentions raised by the learned counsel for the appellant are essentially pure questions of fact and matters of factual inferences and when two courts of fact have dealt with this aspect and have come to a certain conclusion, this Court in an appeal by special leave will not upset the conclusion of the High Court and reappraise the evidence for itself.

14. Lastly it was urged that at least, having regard to the peculiar facts of the present case, the sentence of death was not at all called for. This contention in our opinion is well founded and must prevail. The High Court has already acquitted Raj Bahadur Singh of the charge of abetment of murder by disbelieving the evidence that he ordered his son Gajendra Singh to kill the deceased. If that is so, then there is no premeditation on the part of the appellant Gajendra Singh, who must have got excited at the spot and fired at the deceased no doubt intending to kill him. There is no brutality or dastardliness about the crime committed by Gajendra Singh. Indeed if he had intended

to act in a more cruel fashion, he could have aimed the blow at the heart or at the head of the deceased, particularly when his father had already hit a lathi blow on the head of the deceased. The appellant, however, did not do so. In view of these special circumstances we are of the opinion that this is not a fit case in which the sentence of death is called for. We would, therefore, affirm the conviction of Gajendra Singh under S. 302 I.P.C. but commute the sentence of death to one of life imprisonment.

15. The appeal is dismissed with the aforesaid modification.

Sentence modified.

AIR 1975 SUPREME COURT 1708

(From: Karnataka)*

A. ALAGIRISWAMI, P. N. BHAGWATT AND P. K. GOSWAMI, JJ.

State of Karnataka and others, Appellants v. G. Nagappa and others, Respondents.

Civil Appeal No. 561 of 1975. D/- 21-7-1975.

(A) Karnataka Municipalities Act (22 of 1964) Ss. 14, 15 and 38 — Mysore Municipalities (Election of Councilors) Rules (1965), R. 75 — Mistakes in Electoral Roll — Scope of power of Returning Officer to correct — Order of Government under Rule 75 cancelling calendar of events — Held illegal.

What is required by Section 14 (1) is that the list of voters of a division should correspond *ipsissima verba* with the Mysore Legislative Assembly Electoral Roll for the territorial area included in the division. If there is any mistake in the Electoral Roll, in that some voters residing in one area or house number are shown as residing in another, it cannot be corrected by the Returning Officer while preparing the list of voters for each division. The only way in which the mistakes, if any, either in the names of the voters or in their addresses, including house numbers in which they reside, can be corrected is by apply-

*(Writ Petn. No. 48 of 1975, D/- 6-2-1975 — Karnataka)

ing for rectification of the Electoral Roll under S. 22 of the Representation of the People Act, 1950. So long as such rectification is not made, the entries in the Electoral Roll would stand and they would necessarily be reflected in the list of voters for the division. But they would not constitute mistakes, so far as the preparation of the list of voters for the division is concerned. AIR 1957 SC 304 Distinguished. (Para 9)

It is only if the list of voters for the division does not correspond with the Electoral Roll for the territorial area comprised in the division, in the sense that voters shown in the Electoral Roll as residing in the territorial areas of the division are omitted to be included in the list of voters, or voters shown in the Electoral Roll as residing in the territorial area of another division are included in the list of voters, that it can be said that the list of voters is defective and not in accordance with the provisions of the Act. (Para 9)

Where the only defect if at all it could be called a defect which the Returning Officer noticed on physical verification was that the voters shown in the Electoral Roll as residing in the territorial area of one division were in fact residing in another, it was held that it could not be regarded as a defect in the divisionwise lists of voters and it would not stamp them with the vice of not being in conformity with the requirements of the Act. The State Government was, therefore, in any view of the matter, not entitled to make the impugned order cancelling the calendar of events under R. 75 on the ground that the divisional lists of voters were defective and the allocation held on the basis of such lists of voters would not be in accordance with the provisions of the Act. W.P. No. 48 of 1975 D/- 6-2-1975 (Karnataka) Affirmed. (Para 10)

(B) Karnataka Municipalities Act (22 of 1964), Ss. 14 and 15 — List of voters — Only one list is contemplated during entire process of election.

It is, clear, on a proper interpretation of the provision of the Act, that the Legislature did not intend that the list of voters should change from time to time during the process of

election and the relevant Electoral Roll for the purpose of preparation of the list of voters must consequently be taken to be the Electoral Roll in force at the date when the election process commenced, that is, the date when the calendar of events was published. (1965) 2 Mys LJ 289 Approved. (Para 11)

The scheme of the Act and particularly Sections 14 and 15 make it clear that it is one list of voters for each division that is contemplated to be in force during the entire process of election. The list of voters is to be prepared for the election and 'election' means the entire process consisting of several stages and embracing several steps by which an elected member is returned, whether or not it is found necessary to take a poll. The list of voters must, therefore, a fortiori remain the same throughout the process of election. AIR 1952 SC 64, Rel. on. (Para 11)

(C) Karnataka Municipalities Act (22 of 1964) S. 14—List of voters — Publication of calendar of events — Designated officer whether empowered to rectify mistakes in the lists.

Obiter: Till the election process has commenced by the issue of notice fixing the calendar of events, there is no reason why the designated officer should not be entitled to rectify such defect in the list of voters and bring the list of voters in conformity with the Electoral Roll. But once the calendar of events is published and the election process has begun, it is extremely doubtful whether any changes can be made in the list of voters for the purpose of setting right any such defect. (Para 12)

Cases Referred: Chronological Paras
(1965) 2 Mys LJ 289 = (1965) 3 Law Rep. 126 11

AIR 1957 SC 304 = 1957 SCR 68 9

AIR 1952 SC 64 = 1952 SCR 218 11

Mr. L. N. Sinha, Sol. Gen. of India, (Mr. M. Veerappa, Advocate with him) for Appellants. Mr. V. M. Tarkunde, Sr. Advocate (M/s. S. S. Javali, A. K. Srivastava and B. P. Singh, Advocates with him) for Nos. 1-9, 16, 17, 19-21 and 26-30. Mr. H. B. Datar, Sr. Advocate (Mr. R. B. Datar, Advocate with him) for Nos. 18 and 25, for Respondents.

Judgment of the Court was delivered by

BHAGWATI, J.:— There is a town called Gangawati in the State of Karnataka. It had a Town Municipal Council constituted under the Karnataka Municipalities Act, 1964. The term of office of the Municipal Councillors elected at the last General Elections expired by efflux of time in 1962, but instead of holding a General Election to constitute a new Town Municipal Council, the State Government appointed an Administrator to exercise the powers and perform and discharge the functions and duties of the Town Municipal Council and also constituted an Advisory Council to advise and assist the Administrator. The appointment of the Administrator and the constitution of the Advisory Council were challenged by one of the residents of Gangawati in the High Court of Karnataka by Writ Petition No. 2405 of 1972. The writ petition was, however, settled as the State Government gave an undertaking that it would take the necessary steps for holding a General Election within a reasonable time. This happened on 6th February, 1974. The State Government thereafter, in accordance with the undertaking given by it, appointed the Returning Officer on 25th February, 1974 and it looked as if the General Election was at least going to be held. But this hope was belied. Before the Returning Officer could issue a notice fixing the calendar of events for the election, the State Government rescinded the notification which had been issued by it earlier under Section 13 of the Act determining inter alia the territorial divisions into which the Municipality shall be divided. The result was that no further steps could be taken by the Returning Officer in the matter of holding the election. Angered and frustrated by this second attempt on the part of the State Government to baulk the holding of the election, the same individual who had filed the earlier writ petition, preferred another writ petition, namely, Writ Petition No. 2715 of 1974, for a mandamus to the State Government to hold the election. The High Court made an order on this writ petition on 7th August, 1974 directing

the State Government to hold the election within four months. This time was later extended to 8th March, 1975.

2 Pursuant to the direction of the High Court, the State Government issued a Notification dated 3rd December, 1974 under S. 13 of the Act determining the territorial divisions into which the Gangawati Municipality shall be divided for the purpose of holding the election and allotting number of seats to each territorial division. The Gangawati Municipality was divided into six territorial divisions and each territorial division was defined and demarcated by reference to census block numbers, wards and also boundaries. The Returning Officer thereafter on 7th December, 1974 issued a notice fixing the calendar of events for holding the election. The Tehsildar, who was the designated officer under Section 14, sub-s. (2), in the meanwhile, prepared the list of voters for each division from the Mysore Legislative Assembly Electoral Roll (hereinafter referred to as the Electoral Roll) by including in the list parts of the Electoral Roll referable to the census block numbers comprised within the division. The list of voters for each division so prepared was authenticated by the designated officer and kept open for inspection in the office of the Municipal Council. A large number of nominations were filed on or before the last date fixed for it in the calendar of events and after scrutiny and withdrawal, a list of the contesting candidates was published by the Returning Officer on 21st December, 1974. The only step which remained to be taken to complete the process of election was the poll which was fixed on 10th January, 1975.

3. However, on 21st December, 1974, when the question of finalisation of polling stations was taken up by the Returning Officer, the Secretary of the Congress Party raised an objection that the divisionwise lists of voters prepared and authenticated by the designated officer were defective "inasmuch as voters who reside in one division are being made to vote in a different division" and these lists of voters should, therefore, be rectified before fixing up the poll-

ing stations. The Returning Officer considered his objection and by an order made on the same date rejected it. This Order is very material and we will, therefore, reproduce it in full. It reads inter alia as follows:

"It is seen from the list maintained that the population in the parts of voters list tallies with the proposal made to Government for the delimitation of the constituencies. Further it is seen that the various parts included in the divisionwise voters list conform to the census block numbers which are mentioned in the notification published in regard to the declaration of delimitation of territorial divisions. It also fits into the ward-wise description of constituencies as declared by Government.

However, it is too late in the day to prefer objections about voters list. The voters list was open for inspection all along. Many interested parties have obtained copies of the same. Nominations have been filed by respective parties on the basis of the same voters list and the scrutiny has been completed and valid nominations have been declared and today at 3.00 p.m. last date for withdrawal is also over and the list of polling stations is finalised.

At this juncture, it is regretted to declare that parties cannot be allowed to go back to the period prior to scrutiny of the nomination papers, especially so when there was not one word of objection or protest over the voters list at the appropriate time. As per Section 23 (3) of the Representation of the People Act, 1950 no amendment or deletion of any entry in the electoral roll should be made or given effect after the last date for making nominations in that constituency or division. Any change in the parts of the Division of Voters will amount to an amendment of electoral roll of that division."

It appears that three of the contesting candidates and a member of the Legislative Assembly belonging to the Congress Party were dissatisfied with this Order and they, therefore, made an application to the Deputy Commissioner pointing out what they thought were defects in the division-wise lists of voters. The Deputy Commissioner

instructed the Returning Officer to make physical verification of these defects and the Returning Officer accordingly went to the respective places where the mistakes were alleged to have occurred and after verification, made a report dated 27th December, 1974. In this report, the Returning Officer stated that: "It was found during my random inspection of the various houses on the borders of the different divisions that some voters residing adjacent to one division have been included in another adjoining division and the voters list in respect of each division has been formed accordingly." The Returning Officer observed that as a result of this physical verification it was found that "the number of voters in the respective divisions would undergo considerable change" and gave figures showing that the change in the number of voters in each division would be in the neighbourhood of twenty-five per cent. Basing itself on this report, the State Government, by an order dated 30-12-1974, cancelled the calendar, of events published by the Returning Officer and directed him to issue fresh calendar of events "after getting the voters lists completed strictly as per the division notified". Though this Order did not refer to the provision of law under which it was purported to be made, the State Government claimed that the source of its power to make this Order lay in Rule 75 of the Mysore Municipalities (Election of Councillors) Rules, 1965 (hereinafter referred to as the Rules) made under Section 38 of the Act. The petitioners, who are residents of Gangawati, finding that the State Government had again tried to fish out some excuse for putting off the general election, preferred the present writ petition questioning the validity of this Order made by the State Government. The High Court, by a judgment and order dated 6th February, 1975 held that the State Government had no power under Rule 75 to cancel the calendar of events validly fixed by the Returning Officer and set at naught the election process which had already commenced and in this view, quashed and set aside the Order of the State Government and directed the Returning Officer to hold the

elections "from the stage at which it was interrupted by the impugned Government Order after fixing convenient dates for the remaining events so that the election may be completed before 8th March, 1975". The State Government challenges the correctness of this view in the present appeal brought with special leave obtained from this Court.

4. The hearing of this appeal concluded on 2nd May, 1975 which was the last working day for the Court before the commencement of the summer vacation. Since the appeal involves the question as to the holding of the election and delay in the pronouncement of the order might defeat the object of filing the appeal, we pronounced our order immediately after the conclusion of the hearing, dismissing the appeal with costs and directing the Returning Officer to complete the election before 18th June, 1975. We now proceed to give our reasons.

5. The question which arises for determination in the appeal is as to whether the State Government had power under Rule 75 to make the impugned order cancelling the calendar of events and thereby in effect setting at naught the entire election process which had proceeded upto the stage of poll. Rule 75, which is the last amongst the Rules, is in the following terms:

"Notwithstanding anything contained in these rules, the State Government and subject to the general or special orders of the Government, the Commissioner shall have the power of superintendence, direction and control of the conduct of elections under these rules, and may make such orders as it or he deems fit for answering that the elections are held in accordance with the provisions of the Act."

It is not necessary for the purpose of the present appeal to embark on a discussion on the wider question as to what are the different circumstances in which the power conferred under Rule 75 can be exercised by the State Government and what kind of order can be made by the State Government in exercise of such power. It would indeed be inexpedient and unwise to draw the

precise lines within which the power under Rule 75 should be exercisable, for there may be infinite valid circumstances which may call for exercise of such power. What we need consider here is only the limited question whether on the facts and circumstances of the present case, the State Government had power under R. 75 to make the impugned order cancelling the calendar of events fixed by the Returning Officer. If such power could not be found in Rule 75, it was common ground that there was no other provision in the Act or the Rules which would justify the making of the impugned order and it would plainly be invalid.

6. Now, the only justification pleaded by the State Government in support of the exercise of the power under Rule 75 was that the division-wise lists of voters prepared and authenticated by the designated officer were defective and if the election were held on the basis of such defective lists of voters, it would not be in accordance with the provisions of the Act and hence the impugned order had to be made by the State Government for ensuring that the election was held in accordance with the provisions of the Act as contemplated under Rule 75. This justification, plausible though it may seem, is, in our opinion, without merit. To test its validity it is necessary to understand the nature of the defect from which, according to the finding of the Returning Officer, the divisional lists of voters suffered and see whether that defect brings the case within the scope and ambit of Rule 75.

7. We may first refer to a few relevant sections of the Act. Section 13 provides that for the purposes of election of councillors at a general election, the State Government shall, after previous publication, by notification, determine (a) the number of territorial divisions into which the municipality shall be divided, (b) the extent of each territorial division, (c) the number of seats allotted to each territorial division which shall be not less than three and not more than five, and (d) the number of seats, if any, reserved for the Scheduled Castes and for women in each territorial division. It was in obedience to the

requirement of this section that the State Government issued the notification dated 3rd December, 1974 determining inter alia the divisions in which the Gangawati Municipality shall be divided for the purpose of holding the election. The extent of each division was defined and demarcated in the Notification with great precision by reference to the census block numbers which had been given to the different areas at the time of the census. These areas were clearly and definitely identifiable by their census block numbers, particularly as the extent of each census block number was well defined and it was known with definiteness and certitude as to which houses were comprised in it. There was, therefore, plainly and manifestly no doubt or uncertainty about the extent of each of the divisions in which the Gangawati Municipality was divided by the Notification.

8. Section 14 is the next important section which deals with the subject of list of voters. It has four sub-sections of which the first three are material. They read as follows:

"(1) The electoral roll of the Mysore Legislative Assembly for the time being in force for such part of the constituency of the Assembly as is included in a division of a municipality shall, for the purpose of this Act, be deemed to be the list of voters for such division.

(2) The officer designated by the Deputy Commissioner in this behalf in respect of a municipality shall maintain a list of voters for each division of such municipality ...

(3) Every person whose name is in the list of voters referred to in sub-section (1) shall, unless disqualified under any law for the time being in force, be qualified to vote, at the election of a member for the division to which such list pertains."

What shall be the qualification of a person to stand as a candidate at an election is laid down in S. 15, sub-section (1). That sub-section provides that every person whose name is in the list of voters for any of the divisions of the municipality shall, unless disqualified under this Act or any other law for the time being in force, be qualified to be elected at the elec-

tion for that division or any other division of the municipality and every person whose name is not in such list shall not be qualified to be elected, at the election for any division of the municipality. Then follows sub-s. (2) which is of some importance. We quote it:

"Subject to any disqualification incurred by a person the list of voters shall be conclusive evidence for the purpose of determining under this section whether the person is qualified or is not qualified to vote or is qualified or is not qualified to be elected as the case may be, at an election."

Section 38 confers power on the State Government to make rules to provide for or regulate all or any of the matters set out in the section for the purpose of holding election of councillors under the Act. It was in pursuance of this section that the Rules were made by the State Government.

9. It will be seen on a plain reading of sub-s. (1) of Section 14 that the electoral roll for the territorial area comprised in a division is to be deemed to be the list of voters for such division. The designated officer is merely to perform the operation of 'scissors and paste' — cut out those portions of the electoral roll which relate to the territorial area included in the division and paste them together so as to form the list of voters for the division. There is no separate qualification laid down in the Act for being placed in the list of voters for a division as was the case in Chief Commr., Ajmer v. Radhey Shyam Dani, 1957 SCR 68 = (AIR 1957 SC 304). In that case, Section 30, sub-section (2) of Ajmer-Merwara Municipalities Regulation, 1925 laid down two conditions which must be fulfilled in order to entitle a person to be enrolled as an elector of the Ajmer Municipalities, namely, (1) that he should be entitled under the Representation of the People Act, 1950 to be registered in the electoral roll for a Parliamentary Constituency, if that constituency had been co-extensive with the Municipality, and (2) that his name should be registered in the electoral roll for a Parliamentary Constituency comprised in the Municipality.

It was for this reason that it was held by this Court that it was not enough that the name of a person should be registered in the electoral roll of a Parliamentary Constituency. That did not entitle him straightway to be included in the electoral roll of the Municipality. It was further required to be seen whether he was entitled to be registered in the electoral roll of the Parliamentary Constituency. That enquiry was necessary to be made before the electoral roll of the Municipality could be prepared. But, here no other qualification is required: the mere fact of a person being in the Electoral Roll for the territorial area comprised in a division is sufficient to include him in the list of voters for such division. Vide sub-section (1) of S. 14. What is required by this sub-section is that the list of voters of a division should correspond ipsissima verba with the Electoral Roll for the territorial area included in the division. If there is any mistake in the Electoral Roll, in that some voters residing in one area or house number are shown as residing in another, it cannot be corrected by the Returning Officer while preparing the list of voters for each division. The Returning Officer has to take the Electoral Roll for the territorial area of the division as it is, with whatever mistakes there may be in it, and that would be the list of voters for the division. The only way in which the mistakes, if any, either in the names of the voters or in their addresses, including house numbers in which they reside, can be corrected is by applying for rectification of the Electoral Roll under Section 22 of the Representation of the People Act, 1950. So long as such rectification is not made, the entries in the Electoral Roll would stand and they would necessarily be reflected in the list of voters for the division. But they would not constitute mistakes, so far as the preparation of the list of voters for the division is concerned. It is only if the list of voters for the division does not correspond with the Electoral Roll for the territorial area comprised in the division, in the sense that voters shown in the Electoral Roll as residing in the territorial area of the division are omitted to be in-

cluded in the list of voters, or voters shown in the Electoral Roll as residing in the territorial area of another division are included in the list of voters, that it can be said that the list of voters is defective and not in accordance with the provisions of the Act.

10. Now in the present case, it is clear from the Order of the Returning Officer dated 21st December, 1974 that the list of voters for each division corresponded fully and completely with the Electoral Roll for the territorial area comprised in such division. The finding of the Returning Officer was that the various parts of the Electoral Roll included in the list of voters for each division conformed to the Census Block numbers of the respective division mentioned in the Notification dated 3rd December, 1974. Each Division was defined and demarcated by reference to Census Block numbers and the parts of the Electoral Roll were also made out on the basis of Census Block numbers. There could, therefore, be no doubt or confusion as to which parts of the Electoral Roll related to the territorial area comprised in a particular division. The corresponding parts of the Electoral Roll could be easily ascertained and identified by reference to Census Block numbers for preparing the list of voters for each division. That was admittedly done in the present case and there was no complaint about it. No defect was also alleged or found in this respect. The only defect — if at all it can be called a defect — which the Returning Officer noticed on physical verification was that the voters shown in the Electoral Roll as residing in the territorial area of one division were in fact residing in another. But, as already pointed out above, that cannot be regarded as a defect in the division-wise lists of voters and it would not stamp them with the vice of not being in conformity with the requirements of the Act. The State Government was, therefore, in any view of the matter not entitled to make the impugned order under Rule 75 on the ground that the divisional lists of voters were defective and the election held on the basis of such lists of voters would not be in accordance

with the provisions of the Act. What the State Government did by making the impugned order was to interfere with the election process which was going on in accordance with law and that was clearly not permissible on any interpretation of Rule 75.

11. That takes us to the alternative argument advanced by the Solicitor General on behalf of the State Government. He contended that in any event even if the impugned order was bad and the election process was liable to be continued from the stage at which it was interrupted, the poll could be taken only on the basis of the revised Electoral Roll which had come into being, in the meanwhile, in February 1975 and, therefore, it was necessary for the designated officer to correct the divisional lists of voters so as to bring them in accord with the revised Electoral Roll. This contention is also without force. It is true that there is no provision in the Act similar to Section 23, sub-section (3) of the Representation of the People Act, 1950 providing that no amendment, transposition or deletion of any entry in the list of voters for a division shall be made and no direction for the inclusion of any name in such list of voters shall be given after the last date for making nominations for an election in the division. But the scheme of the Act and particularly Sections 14 and 15 make it clear that it is one list of voters for each division that is contemplated to be in force during the entire process of election. The list of voters is to be prepared for the election and 'election' means the entire process consisting of several stages and embracing several steps by which an elected member is returned, whether or not it is found necessary to take a poll. Vide *Ponnuswami v. Returning Officer, Namakkal Constituency*, 1952 SCR 218 = (AIR 1952 SC 64). The list of voters must, therefore, a fortiori remain the same throughout the process of election. There cannot be one list of voters for determining the eligibility to stand as a candidate and another for determining the eligibility to vote, at the same election. That would not only be irrational, but

would also introduce confusion and uncertainty in the election process. Candidates would not know at the time when they file their nominations as to what is the strength and composition of the electorate in the division in which they are contesting the election. They would also be handicapped in canvassing for votes. It would indeed be a strange and anomalous position if there were two or more different lists of voters at different stages of the same election. Sub-s. (1) of Section 14 does not contemplate a list of voters which keeps on changing from time to time during the election process. It deems the Electoral Roll for the territorial area of the division in force at the relevant time to be the list of voters for the division "for the purpose of the Act", that is for the purpose of election which is the whole process culminating in a candidate being declared elected and not merely polling. The same list of voters is, therefore, to prevail for all stages in the election. This we find emphasised also in sub-s. (3) of S. 14 which enacts that every person whose name is in the list of voters referred to in sub-section (1) shall be qualified to vote at the election of a member for the division to which such list pertains. Sub-section (2) of S. 15 also points in the same direction. It says that "the list of voters shall be conclusive evidence for the purpose of determining under this section whether the person is qualified or is not qualified to vote or is qualified or is not qualified to be elected as the case may be, at an election". The reference here as a matter of plain grammar, is indisputably to the same list of voters which is to be conclusive evidence for both purposes. It is, therefore, clear, on a proper interpretation of the provision of the Act, that the Legislature did not intend that the list of voters should change from time to time during the process of election and the relevant Electoral Roll for the purpose of preparation of the list of voters must consequently be taken to be the Electoral Roll in force at the date when the election process commenced, that is, the date when the calendar of events was published. The same view was taken by a Division Bench of the

Mysore High Court in *Shivappa Channamallappa Jogendra v. Basavannappa Gadlappa Bankar*, (1965) 2 Mys LJ 289. We are in agreement with that view. The poll in the present case must, therefore, be taken on the basis of the list of voters for each division prepared with reference to the Electoral Roll in force on 7th December, 1974, that being the date on which the calendar of events was published by the Returning Officer.

12. One other question was also raised before us, namely, whether the designated officer can be required to rectify the list of voters for a division, if it can be shown that the list of voters does not correspond exactly with the Electoral Roll for the territorial area of the division, as for example, some voters in a particular house in a Census Block number falling in the division, though shown in the Electoral Roll as such, are, through inadvertence, omitted to be included in the list of voters for the division. It is not necessary for the purpose of the present appeal to decide this question, but we may point out that till the election process has commenced by the issue of notice fixing the calendar of events, there is no reason why the designated officer should not be entitled to rectify such defect in the list of voters and bring the list of voters in conformity with the Electoral Roll. But once the calendar of events is published and the election process has begun, it is extremely doubtful whether any changes can be made in the list of voters for the purpose of setting right any such defect. We, however, do not wish to express any final opinion on this point.

13. These were the reasons which weighed with us in making the order dated 2nd May, 1975 dismissing the appeal with costs and directing the Returning Officer to complete the election before 10th June, 1975 on the basis of the Electoral Roll in force on 7th December, 1974.

Appeal dismissed.

AIR 1975 SUPREME COURT 1716

(From: Allahabad)*

A. ALAGIRISWAMI, P. K. GOSWAMI AND N. L. UNTWALIA, JJ.

Gafoora and another etc. etc., Appellants v. Dy. Director of Consolidation, Meerut and others, Respondents.

Civil Appeals Nos. 1914 to 1917 of 1974, D/- 21-7-1975.

(A) U. P. Consolidation of Holdings Act (5 of 1954), Ss. 9, 11-A, 12, 48 — Non-filing of objection under S. 9 (2) within prescribed time—Effect of — Application purporting to be under Section 12 filed long after publication of notice under S. 9 (1) — Delay in preferring objection not explained — Prayer to treat application as one under S. 9 rejected — Rejection upheld in revision — No error of law — Revisional order, not interfered under Art. 226 of Constitution. (Constitution of India, Art. 226).

Where objections under S. 9 (2) were not filed by certain purchasers of the lands of recorded bhumidhars within the prescribed time and applications purporting to be under S. 12 were filed long after the publication of notice under Section 9 (1) without explaining the cause of delay in preferring the objections, in absence of any material on record to condone the delay there was no error of law in the revisional order of the Deputy Director (Consolidation) under Section 48 in upholding the rejection (by Consolidation Officer) of the prayer of the purchasers to treat their application under Section 12 as one under Section 9 nor did he act in excess of his revisional jurisdiction under Section 48. Section 11-A barred all objections in respect of claim to land, partition of joint holdings and valuation of plots, etc. relating to the consolidation area which had been raised under Section 9 or which might or ought to have been raised under that section but have not been so raised. These questions under S. 11A could not be raised or heard at any subsequent stage of the consolidation pro-

ceedings. Thus, the revisional order under Section 48 could not be interfered by High Court under Art. 226. W.Ps. Nos. 2145-2148, 2143 and 2144 of 1971, D/- 18-4-1974 (All.) Affirmed.

(Para 3)

M/s. Rathee, S. Balakrishnan and N. M. Ghatate, Advocates, for Appellants; M/s. Yogeshwar Prasad, S. K. Bagga and Mrs. S. Bagga, Advocates of M/s. Bagga Advocates, for Respondent No. 4.

Judgment of the Court was delivered by

P. K. GOSWAMI, J.— This order will govern all the above four appeals.

2. The above civil appeals are directed against the common judgment of the Allahabad High Court in Writ Petitions Nos. 2143, 2144, 2145 and 2148 of 1971. One Nathu Masih was the recorded bhoomidar of the lands in dispute. The appellants claim to have purchased for valuable consideration the disputed lands by two registered sale deeds both of July 21, 1959, from Nathu Masih. The appellants, however, did not obtain mutation of their names in the record of rights. Meanwhile consolidation proceedings were commenced under the U. P. Consolidation of Holdings Act, 1953 (U. P. Act No. V of 1954) (briefly the Act). Appropriate notifications in C. H. Form 5 were issued under Section 9 read with Rule 25 (c) of the U. P. Consolidation of Holdings Rules, 1954, in November 1966 inviting objections to the issue of extracts from records and statements and publication of records under Sec. 8A of the Act. Under Section 9 (2) objections may be lodged by any person to whom notice has been sent or by any other person interested within 21 days of receipt of the notice or of the publication of the notice under subsection (1) of Section 9. It is admitted that no objection was preferred under Section 9 (2) by the appellants within the prescribed time. However, an objection was lodged on 19th October, 1967, purporting to be one under Section 12 of the Act. When objection was raised by the respondents to this application under Section 12 on September 12, 1968, the appellants on the same day applied to the Consolida-

* (W.P. Nos. 2145-2148, 2143 and 2144 of 1971, D/- 18-4-1974 (All.).

tion Officer to register their application under Section 9 of the Act and also prayed "that the delay, if any, may be condoned". This application was not supported by any affidavit nor were any grounds mentioned for condonation of the delay. The Consolidation Officer held that the application under Section 12 was not maintainable nor could he condone the delay in absence of any reasons disclosed by the appellants. The applications were, therefore, rejected. The appellants preferred appeals to the Settlement Officer (Consolidation) against the orders of the Consolidation Officer. The Settlement Officer allowed the appeals and set aside the orders of the Consolidation Officer dated September 12, 1968 and September 16, 1968, respectively and remanded the cases to the Consolidation Officer with the direction that he should decide them on merits after registering the same under Section 9 of the Act and also consider the question of limitation. The respondents preferred four revisional applications to the Deputy Director (Consolidation) against the common order of the Settlement Officer of March 7, 1969, under Section 48 of the Act. The Deputy Director (Consolidation) went into the whole matter very carefully and set aside the order of the Settlement Officer and restored the orders of the Consolidation Officer of September 12, 1968 and September 16, 1968. The Deputy Director (Consolidation) in substance held that the applications under Section 12 were barred under Section 11A of the Act and were, therefore, correctly rejected by the Consolidation Officer. He also held that since objections under Section 9 (2) were not filed by the appellants within time and no cause whatsoever was shown at any stage of the proceedings explaining the delay for lodging the objections, these were rightly rejected by the Consolidation Officer. Being aggrieved by the orders of the Deputy Director (Consolidation), the appellants preferred writ applications under Article 226 of the Constitution in the Allahabad High Court and these were dismissed. Hence these appeals by special leave.

3. The short question that arises for consideration is whether the

High Court is correct is not interfering with the order of the Deputy Director (Consolidation) under Article 226 of the Constitution. Jurisdiction under Article 226 is well settled. The High Court will interfere only if some order is passed by an authority in excess of jurisdiction or there is a manifest error of law apparent on the face of the records. The principal question that was canvassed before the Deputy Director (Consolidation) was whether failure to prefer objection within the time-limit prescribed under Section 9 (2) of the Act would entitle an aggrieved party to agitate the matter beyond the prescribed period without explaining the cause of delay in preferring the objection and obtaining a proper order of condonation of delay from the appropriate authority. It is clear from the records that no objection was preferred within the prescribed time. The Deputy Director (Consolidation) refused, if we may say so, rightly to accept that the appellants had earlier lodged any objection on November 21, 1966. That being the position, there was no material whatsoever before the Settlement Officer (Consolidation) for exercising his jurisdiction to condone the delay in lodging objection under Section 9 (2) of the Act. Section 11A bars all objections in respect of claim to land, partition of joint holdings and valuation of plots, etc. relating to the consolidation area which have been raised under Section 9 or which might or ought to have been raised under that section but have not been so raised. These questions under Section 11A cannot be raised or heard at any subsequent stage of the consolidation proceedings. That being the position there is no error of law in the order of Deputy Director (Consolidation) nor is there any excess of jurisdiction committed by him in disposing of the matter as he did in exercise of his revisional power under Section 48.

4. The learned counsel for the appellants made an earnest appeal to us in the course of the hearing that their valuable rights which they secured by registered purchases from the recorded proprietor had been defeated resulting in grave injustice.

That is a matter which this court is not seized of in these appeals and we refrain from expressing any opinion on that submission.

5. In the result the appeals are dismissed but in the circumstances of the case there will be no order as to costs.

Appeals dismissed.

AIR 1975 SUPREME COURT 1718

(From: Madhya Pradesh)*

V. R. KRISHNA IYER, R. S. SARKARIA AND A. C. GUPTA, JJ.

Chaitanya Kumar Adatiya, Appellant v. Smt. Sushila Dixit and others, Respondents.

Civil Appeal No. 1654 of 1973, D/- 17-7-1975.

(A) (Representation of the People) Conduct of Elections Rules (1961), R. 93 — Inspection of election papers — When to be ordered.

An order for inspection of election papers cannot be made as a matter of course. It is only when on the basis of evidence adduced allegations of irregularity are prima facie established and the court is prima facie satisfied that the making of such an order is necessary to do complete justice between the parties that an order for inspection would be justified. The purpose of inspection is not to enable the election petitioner to fish for evidence. (In the instant case the substance of the evidence and the other circumstances clearly indicated that the election petitioner has failed to make out a prima facie case for inspection. The High Court was justified in refusing the prayer for inspection of all the election papers including the counterfoils of the ballot papers.)

(Para 6)

(B) (Representation of the People) Conduct of Elections Rules (1961), Rr. 56 (2) (h) and 38 (1) and (2) — Rejection of ballot paper — It cannot be rejected on ground that signature or thumb impression of the voter had not been taken on counterfoil as required by R. 38 (2) — R. 56 (2) (h)

*(E.P. No. 32 of 1972, D/- 27-8-1973—Madh. Pra.)

makes non-compliance with R. 38 (1) a ground for rejecting ballot paper.

(Para 7)

(C) Representation of the People Act (1951), S. 123 (1) — Corrupt practice — Bribery—Evidence and proof.

The law requires that a corrupt practice involving bribery must be fully established. The evidence must show clearly that the promise or gift directly or indirectly was made to an elector to vote or refrain from voting at an election. AIR 1968 SC 1191, Followed.

(Para 9)

In the instant case the evidence on the point that a sum of Rs. 100/- was given by the returned candidate to Ramayan Mandal, a cultural organisation of a village to secure the support of the voters of that village, was neither reliable nor sufficient to prove that the amount was given with the motive of inducing the villagers to vote for the returned candidate. (Para 9)

(D) Representation of the People Act (1951), S. 116-A — Appeal to Supreme Court — Findings of fact—Interference.

Findings of fact in election cases will not be interfered with in appeal unless palpable errors are present. AIR 1975 SC 403 Followed. (Para 10) Cases Referred: Chronological Paras AIR 1975 SC 403 10 AIR 1968 SC 1191 = (1968) 3 SCR 102 9

M/s. R. L. Sharma, P. N. Anantakar and U. P. Singh, Advocates, for Appellant; Mr. T. P. Naik, Sr. Advocate, (S. K. Gambhir, Advocate, with him), for Respondent No. 1.

Judgment of the Court was delivered by

GUPTA, J.:— On March 13, 1972 the First respondent was declared elected to Madhya Pradesh Legislative Assembly from Hoshangabad Constituency defeating three other contestants who are respectively respondents Nos. 2, 3 and 4. The first respondent secured 13,822 votes and respondents 2, 3 and 4 got 5,688, 970 and 12,554 votes respectively. The appellant who is an elector in the Hoshangabad Constituency, filed an election petition before the High Court of Madhya Pradesh at Jabalpur seeking to have the election of the first respondent declared void alleging that

the first respondent had committed various corrupt practices and also on the grounds of irregularity in the counting of votes and non-compliance with certain other provisions of the Conduct of Elections Rules, 1961 which according to the petitioner, materially affected the result of the election. According to the petitioner, on a proper counting of valid votes respondent No. 4 would have been found to have obtained the largest number of votes and he prayed that the election of the first respondent be declared void and respondent No. 4 be declared duly elected from the Hoshangabad Constituency. The High Court having dismissed the election petition, the petitioner has preferred this appeal questioning the correctness of the High Court's decision.

2. The allegations as to irregularity in the counting of votes which were pressed before us are as follows: (a) In many cases ballot papers were issued to electors without their signatures or thumb impressions being obtained on the counterfoils of the ballot papers as required by R. 38 (2) of the Conduct of Elections Rules, 1961. These votes should have been rejected as spurious under Rule 56 (2) (e).

(b) Rule 40 of the Conduct of Elections Rules, 1961 which permits a blind or infirm elector to take the help of a companion for recording his vote also provides that no person shall be permitted to act as the companion of more than one such elector at any polling station on the same day. The presiding officers are required to keep a record of all cases under this rule in Form 14A appended to these Rules. In violation of this rule the same person was allowed to act as companion for more than one such infirm voters at several polling stations. Paragraph 5 of the election petition which contained the allegation on this point was however struck off by the High Court on the ground that it was vague and lacking in material facts. The appellant questions the propriety of the order striking out the paragraph.

3. On these allegations the petitioner prayed for calling up all papers used at the polls including

counterfoils of the ballot papers and statements in Form 14A to enable the petitioner to inspect the same.

4. Of the various corrupt practices alleged in the petition only two were pressed before us. One of them is that the first respondent gave a sum of Rs. 100/- to Ramayan Mandal of village Phepartal, a cultural organisation, a few days before the polling was held on March 11, 1972. It is alleged that the sum was paid by the first respondent to secure the support of the voters of that village constituting the corrupt practice of bribery mentioned in Section 123 (1) of the Representation of the People Act, 1951. The other allegation is that on February 26, 1972 at a public meeting held at Hoshangabad in support of the candidature of the first respondent, the Chief Minister of Madhya Pradesh stated that the father of respondent No. 4 had induced respondent No. 3, a harijan, with money to stand as a candidate at the election to deprive the first respondent of harijan votes in the constituency numbering about 12,000. This statement was false to the knowledge of both the Chief Minister and the first respondent and was made deliberately with the latter's consent to prejudice the prospects of both respondents Nos. 3 and 4. This, it is alleged, amounts to corrupt practice under Section 123 (4) of the Act. It is further alleged that in that meeting the Chief Minister with the consent of the first respondent held out a threat that he would stop Government grant to the educational institutions with which the father of respondent No. 4 was associated. This according to the petitioner amounts to the corrupt practice of undue influence as defined in Section 123 (2) of the Act.

5. The allegation of irregularity in counting is based on the provisions of Rule 38 (2) of the Conduct of Elections Rules, 1961. Rule 38 is in these terms:

"38. Issue of ballot papers to electors. — (1) Every ballot paper before it is issued to an elector, and the counterfoil attached thereto shall be stamped on the back with such distinguishing mark as the Election Commission may direct, and every ballot paper, before it is issued, shall be

signed in full on its back by the presiding officer.

(2) At the time of issuing a ballot paper to an elector, the polling officer shall —

(a) record on its counterfoil the electoral roll number of the elector as entered in the marked copy of the electoral roll;

(b) obtain the signature or thumb impression of that elector on the said counterfoil; and

(c) mark the name of the elector in the marked copy of the electoral roll to indicate that a ballot paper has been issued to him, without however recording therein the serial number of the ballot paper issued to that elector:

Provided that no ballot paper shall be delivered to an elector unless he has put his signature or thumb impression on the counterfoil of that ballot paper.

(3) Notwithstanding anything contained in sub-rule (2) of Rule 2, it shall not be necessary for any presiding officer or polling officer or any other officer to attest the thumb impression of the elector on the counterfoil.

(4) No person in the polling station shall note down the serial numbers of the ballot papers issued to particular electors."

The nature of the allegations has already been stated. The petitioner examined a number of witnesses to substantiate the allegations. These witnesses are P.Ws. 1, 3, 4, 8, 9, 10, 11, 14, 18, 21, 22 and 26. The testimonies of these witnesses follow the same pattern. All of them admit that their signatures or thumb impressions were taken on the counterfoils of the ballot papers but they saw some voters in the queue whose signatures or thumb impressions were not taken on the counterfoils. None of these witnesses was able to name a single voter whose signature or thumb impression was not taken on the counterfoil though some of the witnesses claimed that the voters whose signatures or thumb impressions were not taken came from the same village where these witnesses lived. Some of these witnesses claimed to have made oral objections to this deviation from

the prescribed procedure, but no written complaint was made either to the polling officer or to the returning officer. No objection was also taken on this ground at the time of counting by the counting agent of any of the candidates. It would be material here to mention that an application for recounting made by respondent No. 4 also did not contain any allegation that signatures or thumb impressions of some of the voters had not been taken on the counterfoils of the ballot papers as required by Rule 38 (2). The High Court found that the evidence was not convincing enough to justify acceptance of the prayer for inspection of the counterfoils and other election papers.

6. This Court in a series of decisions has held that an order for inspection of election papers cannot be made as a matter of course and that it is only when on the basis of evidence adduced allegations of irregularity are prima facie established and the court is prima facie satisfied that the making of such an order is necessary to do complete justice between the parties that an order for inspection would be justified. The purpose of inspection is not to enable the election petitioner to fish for evidence. We do not think that the High Court was wrong in refusing the prayer for inspection in this case; the substance of the evidence and the other circumstances referred to above clearly show that the petitioner had failed to make out a prima facie case for inspection.

7. The petitioner's case is that the returning officer should have rejected as spurious the ballot papers which were issued to voters whose signatures or thumb impressions were not taken on the counterfoils. Rule 56 (2) of the Conduct of Elections Rules, 1961 requires the returning officer to reject a ballot paper in certain cases. This rule so far as it is relevant to the point now under consideration runs as follows:

"56. Counting of Votes. — (1) x x x

(2) The returning officer shall reject a ballot paper — x x x

(e) if it is a spurious ballot paper, or

x x x

(h) if it does not bear (both the mark and the signature) which it should have borne under the provisions of sub-rule (1) of rule 38:

x x x x"

It will be seen that clause (h) makes non-compliance with the requirements of Rule 38 (1) a ground for rejecting a ballot paper but there is no clause which requires a ballot paper to be rejected on the ground that the provisions of Rule 38 (2) have not been complied with. Counsel for the appellant submitted that in cases of non-compliance with Rule 38 (2) the ballot papers in question should be held to be spurious so that clause (e) might cover such cases; otherwise, counsel contended, there would be an obvious lacuna in the Act. The learned counsel relied on the meaning of the word "spurious" as given in Webster's New Twentieth Century Dictionary as "(1) not genuine, not proceeding from true source, (2) not legitimate". Stress was laid on the words "not proceeding from true source". We do not see how the dictionary meaning helps him. 'Not proceeding from true source' only means that the thing is not what it pretends to be, which only means that it is not genuine or legitimate. There is no allegation here that these ballot papers are not genuine. We were also not shown any provision suggesting that a ballot paper issued without complying with the requirements of R. 38 (2) was meant to be rejected so that non-inclusion of such a case in Rule 56 (2) would be a lacuna in the Conduct of Elections Rules; and, if it is a lacuna it is there, and the defect cannot be cured by trying to give a meaning to the word 'spurious' which it cannot bear.

8. Paragraph 5 of the election petition which contained the allegation as to non-compliance with R. 40 of the Conduct of Elections Rules was struck off on the application of the first respondent by the court on September 26, 1972 on the ground that the allegation was vague and did not contain material facts. That the paragraph was vague seems to have been admitted by the petitioner as would be evident from the fact that he made an application for amendment of the election petition seeking inter alia to incorporate certain additional facts in

paragraph 5. But this application for amendment was not even verified, apart from the question whether the new facts sought to be included were sufficient to remove the defect. The High Court rejected the application for amendment and struck off paragraph 5, as stated already, by its order dated September 26, 1972. In our opinion the order was a valid one and we do not find any reason to disturb the same.

9. Turning now to the allegations of corrupt practice, the petitioner seeks to make out a case of bribery under Section 123 (1) of the Representation of the People Act, 1951. It is alleged that the first respondent gave a sum of Rs. 100/- to Ramayan Mandal, a cultural organisation, of village Phepartal. According to the petitioner the money was given to secure the support of the voters of that village. The case is that the first respondent paid this sum to Ramayan Mandal through Kamal Singh, P.W. 24 and Rameshwar Prasad, P.W. 25. Kamal Singh's evidence is that one Rewa Ram gave him the amount which he made over to Gopal Sahu, Secretary of the Organisation. Gopal Sahu has not been examined. Rameshwar Prasad heard about the gift from Kamal Singh. Rewa Ram who was examined by the first respondent stated that he had received the sum by money order from the State Government. It appears from the evidence that the amount in question was a discretionary grant made by the first respondent when she was a Minister of State incharge of Education. The name mentioned in the grant was Dewa Ram which obviously was a mistake for Rewa Ram; it is not the petitioner's case that there were two gifts of Rs. 100/- each to Ramayan Mandal. The grant appears to have been sanctioned in December 1971, not a few days as alleged but long before the poll. In Ghasi Ram v. Dal Singh, (1968) 3 SCR 102 = (AIR 1968 SC 1191) this Court observed:

".....The law requires that a corrupt practice involving bribery must be fully established. The evidence must show clearly that the promise or gift directly or indirectly was made to an elector to vote or refrain from voting at an election."

The High Court found that the evidence on the point was neither reliable nor sufficient to prove that the grant was made with the motive of inducing the villagers to vote for the first respondent. We do not find that on the evidence this finding can be said to be unjustified.

10. The other corrupt practice alleged concerns the speech of the Chief Minister. We have already referred to the substance of the allegations on this point. Chief Minister Shri Sethi in his evidence denied having made any such statements in his speech as alleged by the petitioner. The witnesses examined by the petitioner to prove that Shri Sethi made the statements alleged against him are P.Ws. 6, 11, 13, 15, 30, 31 and 32. Scrutinising the evidence of these witnesses, the High Court did not find it possible to rely on them. These witnesses struck the High Court as obviously tutored to support the allegations made by the petitioner. The petitioner also relied on a report of the speech appearing in the newspaper "Nai Duniya," but did not examine the reporter of the newspaper to prove the contents of the speech as reported by him. On such evidence the High Court was not inclined to accept the account of the speech as given by the witnesses for the petitioner. This is a finding which we do not find any reason to disturb. It has been held in a number of decisions of this Court, and recently in the case of Chanda Singh v. Shiv Ram, AIR 1975 SC 403, that findings of fact in election cases will not be interfered with in appeal unless palpable errors are present.

11. We find no merit in this appeal which is dismissed with costs. Appeal dismissed.

AIR 1975 SUPREME COURT 1722
V. R. KRISHNA IYER AND R. S. SARKARIA, JJ.

Md. Sahabuddin, Petitioner v. The District Magistrate 24 Parganas and others, Respondents.

Writ Petn. No. 537 of 1974, D/- 21-1-1975.

GS/GS/A507/75/SAR

(A) Maintenance of Internal Security Act, 1971, S. 3 — Inordinate delay in passing order of detention after the occurrence of the theft on the basis of which the detaining authority professed to be "satisfied" about the necessity of the detention — Held: The bona fides of the "satisfaction" was not established. (Para 3)

Judgment of the Court was delivered by

KRISHNA IYER, J.:— The petitioner who was detained under an order of the District Magistrate, 24-Parganas, in exercise of his powers under Section 3 of the Maintenance of Internal Security Act, 1971 has moved this Court for release from custody on the ground that the order has been passed without any real subjective satisfaction and that another person who had been detained under the Maintenance of Internal Security Act, on the same ground, has already been released by the High Court.

2. On one short ground, the order of detention must fail. The single instance relied on by the detaining authority for the subjective satisfaction reached by him is dated 27/28th July 1973 and relates to stealing of telephone cables. If really this ground had been the basis of the detention order, one would have reasonably expected the District Magistrate to act promptly. In any case, the order seemed to have been passed nearly seven months after the criminal incident. No explanation whatever in the shape of a counter affidavit by the District Magistrate or anyone else on behalf of the State has been filed. We have to presume that there is no explanation worthwhile offering. Time was taken by counsel for filing a counter affidavit when this writ petition came up for hearing last time; but none is forthcoming yet.

3. On the basis that there is a long unexplained delay between the criminal occurrence and the detention order, this Court has held that such detention must be held illegal because the subjective satisfaction has no proximate rational nexus with the prejudicial act. We have to follow the same view here also. The order of detention is quashed, the rule nisi made

absolute and the petitioner is directed to be released forthwith.

Rule made absolute.

AIR 1975 SUPREME COURT 1723

(From: Calcutta)*

A. ALAGIRISWAMI, P. N. BHAGWATI AND P. K. GOSWAMI, JJ.

The State of West Bengal, Appellant v. Shyamapada etc., Respondents.

Civil Appeals Nos. 57 to 59 of 1975, D/- 15-7-1975.

(A) Land Acquisition Act (1894), S. 23 — Danga lands growing sabai grass—Acquisition of — Compensation for — Determination.

In land acquisition proceedings, the land owners had claimed compensation at the rate of Rs. 800 per acre for danga lands on which sabai grass was grown and Rs. 200 per acre for the rest of the danga lands. The Land Acquisition Collector had awarded compensation at the rate of Rs. 50 per acre for all the danga lands including the portion on which sabai grass was grown. He awarded compensation at the rate of Rs. 26/4/- per acre for the value of sabai grass grown on 100 acres of land. The District Judge on reference upheld the compensation awarded in respect of all the danga lands but he raised the compensation to Rs. 5,400/- in respect of sabai grass grown on 150 acres of land. The High Court in appeal fixed the compensation in respect of the danga lands on which sabai grass was grown at Rs. 800/- an acre after holding that the owners of the land were entitled to compensation in respect of 150 acres of such lands at a multiple of 20 times the annual income. The High Court accepted the price of one maund of sabai grass to be at Rs. 4/-. For the rest of the danga lands the compensation was raised to Rs. 100/- an acre. On appeal to Supreme Court by the State.

Held (1) that it was wholly unjustifiable for the Land Acquisition Officer and the District Judge to grant compensation to the land owners only

*(A.F. O. D. Nos. 178 to 180 of 1964, D/- 2-6-1971).

GS/HS/C620/75/SSG

for the crop standing on the land, since after one crop was taken for 7 to 10 years another crop could be raised after an interval of one to two years. As sale deeds regarding sales of land on which sabai grass was grown were not available, the compensation to be awarded to the land owners should be at 20 times the annual income from the land.

(Para 4)

(2) that there was no case for interference with the judgment of the High Court as regards the value of the land cultivated with sabai grass.

(Para 5)

(3) that the High Court was quite justified in awarding compensation for the danga lands at the rate of Rs. 100/- per acre, when the materials on record showed the value of danga lands at Rs. 200/- per acre to Rs. 490/- per acre and even Rs. 600/- per acre. A. F. O. D. Nos. 178 to 180 of 1964, D/- 2-6-1971 (Cal), Affirmed.

(Para 6)

Mr. B. Sen, Senior Advocate, (M/s S. Bose, G. S. Chatterjee, and Mrs. Leila Seth, Advocates, of M/s. Sukumar Basu & Co. with him), for Appellant; M/s. D. N. Mukherjee and N. R. Choudhary Advocates, for Respondents.

Judgment of the Court was delivered by

A. ALAGIRISWAMI, J.:— These three appeals by the State of West Bengal are against the judgment of the Calcutta High court allowing in part appeals of the present respondents before the Calcutta High Court against the judgment of the District Judge of Midnapore in three references under s. 18 of the Land Acquisition Act. 858.59 acres of Land belonging to the respondents were acquired by the State of West Bengal in pursuance of a notification dated 17-1-52 under Section 4 (1) of the Land Acquisition Act. The lands acquired consisted of different types but we are in these appeals concerned only with 607.84 acres of danga land. In 150 acres out of the 607.84 acres sabai grass was grown.

2. The respondents had claimed compensation at the rate of Rupees 800 per acre for land on which sabai grass was grown and Rs. 200 per acre

for the rest of the danga land. The Land Acquisition Collector had awarded compensation at the rate of Rs. 50 per acre for all the danga lands including the portion on which sabai grass was grown. He awarded compensation at the rate of Rs. 26/4/- per acre for the value of sabai grass grown on 100 acres of land. The learned District Judge upheld the order of the Land Acquisition Collector as regards the compensation awarded in respect of all the danga lands but in respect of the standing crop of sabai grass he held that 150 acres had been grown with sabai grass, that 18 maunds of sabai grass could be grown in an acre, that the value of sabai grass was Rs. 3/- per maund and taking 1/3rd for cultivating expenses, raised the compensation for the standing crop to Rs. 5,400/-.

3. The learned Judges of the High Court fixed the compensation in respect of the danga lands on which sabai grass was grown at Rs. 800 an acre, after holding, as did the District Judge, that 150 acres land was cultivated with sabai grass. They held that the owners of the land were entitled to compensation in respect of those lands at a multiple of 20 times the annual income. For the rest of the danga lands the compensation was raised to Rs. 100/- an acre. The appeals are confined only to these two questions.

4. Mr. B. Sen appearing on behalf of the State of West Bengal contended that it looked rather absurd that while sali land, which is considered to be the best quality of land on which paddy is grown, was awarded compensation at the rate of Rupees 425/- per acre and the land owners had no objection to the compensation, they wanted Rs. 800 per acre for land growing sabai grass. It must be noted that even the land owners claimed only Rs. 600 per acre for sali land, Rs. 800 per acre for danga land on which sabai grass was grown and for the rest they claimed Rs. 200/- per acre. While the land classification for revenue purposes might have its own rationale, it is not uncommon to find that land which has a lower classification for revenue purposes fetches a higher price in the market. The ques-

tion of the value of the land on which sabai grass is grown should therefore be decided on other considerations. In this connection we may refer to the book called "The Wealth of India", which is a dictionary of Indian raw materials and industrial products published by the Council of Scientific & Industrial Research, which has an article on sabai grass in Vol. III, pp. 219-221. It refers to sabai grass as a tufted perennial grass common, among other places, in Bengal and that it adapts itself readily to the barren danga soils of West Bengal. According to this book, in the danga soils of West Bengal the yield averages to 20-30 md. per acre per annum. The yield and quality of grass from continuously cropped areas suffer after 7-10 years. It is therefore necessary to withhold cropping for one or two years at fair intervals. It would thus be seen that the fact that the life of sabai grass is 7 to 10 years does not mean that the land on which it is grown is useless thereafter or that its value can be worked out on any other basis except that of a multiple of the annual income. After one crop is taken for 7 to 10 years another crop can be raised after an interval of one to two years. It was therefore wholly unjustifiable for the Land Acquisition Collector as well as the learned District Judge, Midnapore to grant compensation to the land owners only for the crop standing on the land. As sale deeds regarding sales of land on which sabai grass is grown are not available in this case, the compensation to be awarded to the land owners should be at 20 times the annual income from the land.

5. Even according to the Land Acquisition Collector the crop standing on the land was yielding Rupees 26/4/- per acre on an yield of 10 maunds and according to the learned District Judge Rs. 36/- per acre on an yield of 18 maunds. On the basis of 20 years' income the compensation would have to be Rs. 525/- per acre at the rate of income adopted by the Land Acquisition Collector and Rupees 720/- per acre at the rate adopted by the learned District Judge. We may refer to the evidence of claimants' witness No. 3 who gives the value of sabai grass at Rs. 4/8/- to Rs. 5/8/-,

as also the evidence of one of the claimants that the price of sabai grass varied from Rs. 5/- to Rs. 5/8/- in 1951. The learned Judges of the High Court have accepted the price of one maund of sabai grass at Rs. 4/- and considering the accounts produced by the land owners which showed that they had sold sabai grass at Rs. 4/8/- to Rs. 5/8/- per maund, Rs. 4/- per maund taken by the learned Judges of the High Court as the basis for determining the compensation cannot be said to err on the liberal side. So also the yield of 20 maunds an acre in view of the evidence of P.W. 6 as well as the extracts from "The Wealth of India" already referred to. We see no reason for not accepting the learned District Judge's conclusion that 150 acres had been cultivated with sabai grass. We are therefore of opinion that there is no case for interference with the judgment of the learned Judges of the High Court as regards the value of the land cultivated with sabai grass.

6. As regards the rest of the danga lands even the Kanoongo assessed the value of the danga land in Ex. A at Rs. 75 per acre. The learned Judges have referred to certain other documents which showed the value of danga lands at Rs. 200/- per acre to Rs. 490/- per acre and even Rupees 600/- per acre. In the face of these findings we are of opinion that the learned Judges of the High Court were quite justified in awarding compensation for the danga lands at the rate of Rs. 100/- per acre. This conclusion is strengthened by a reference to Ex. A at page 60 of Part II of the High Court paper-book. By deed No. 187 of 1951 sali and danga land had been sold at Rs. 703.20 per acre whereas by deed No. 405 of 1951 sali land had been sold at Rs. 800 per acre. There is another sale of sali land by deed No. 465 of 1951 at Rs. 1034-7-9. By deed No. 823 of 1951 sali and danga lands have been sold at Rupees 111-1-9. Though we do not know the relative proportion of danga and sali lands in these documents, they give a rough idea of the value of sali lands. We refer to these documents only to lend assurance to our conclusion that the learned Judges of the High Court

were right in regard to the value of the danga land.

7. We uphold the decision of the High Court and dismiss the appeals with costs.

Appeals dismissed.

AIR 1975 SUPREME COURT 1725

(From: Bombay)*

A. ALAGARISWAMI, P. K. GO-SWAMI AND N. L. UNTWALIA, JJ.

M/s. Chembur Co-op. Industrial Estate Ltd., Appellant v. M. K. Chhatra and another, Respondents.

Civil Appeal No. 1945 of 1972, D/- 22-7-1975.

(A) Industrial Disputes Act (1947), Sch. 2 item 3 — Grant of relief to workman wrongfully dismissed — None of the alleged charges proved against the employee, an accountant — Dismissal found illegal — Facts relating to removal of some documents from office record indicating that he had forfeited confidence of employer — Reinstatement held not justified — Compensation, as agreed between employee and employer, allowed. Spl. Appln. No. 2780 of 1971 D/- 20-12-1971 (Bom.) Reversed. (Paras 2, 3)

Mr. B. Dutta, Advocate, for Appellant; Respondent No. 2 in Person.

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— This is an appeal against the judgment of the High Court of Bombay dismissing in limine Civil Application No. 2780 of 1971 filed by the appellant Society under Article 227 of the Constitution of India against the award of the Presiding Officer, Third Labour Court, Bombay. The 2nd respondent was appointed as an Accountant in the office of the appellant in August, 1965. On certain complaints against him the Managing Committee of the appellant society examined the 2nd respondent at length on a number of days and on 21st August 1966 suspended him from service. He was thereafter dismissed by a resolution of the Managing Com-

*(Spl. Appln. No. 2780 of 1971, D/- 20-12-1971 — Bom.)

GS/HS/C729/75/LGC

mittee on 30th September 1966. The dispute was referred to the Third Labour Court, Bombay for adjudication by the order of the Government of Maharashtra. The Labour Court concluded that there was no enquiry at all held against the 2nd respondent. Before the Labour Court the 2nd respondent examined himself and on behalf of the appellant society its Chairman and its Honorary Secretary as well as Joint Secretary were examined. On consideration of the evidence before it the Labour Court came to the conclusion that none of the charges against the 2nd respondent were proved and ordered him to be reinstated. As already stated the Special Civil Application filed by the appellant society before the Bombay High Court was summarily rejected. This appeal filed in pursuance of the Special Leave granted by this Court is limited to the question whether the 2nd respondent should be reinstated or compensation should be given.

2. Three charges were framed against the 2nd respondent. The first was that the 2nd respondent called himself as an office secretary though he had never been designated as such. The second charge was that he removed from the office records some documents. The third charge was that he substituted a letter dated 19th May 1966 and circulated a letter to the members of the society intimating to them that a cheque of Mr. Bhamiri one of the members of the Managing Committee, was dishonoured. Though the 2nd respondent had been examined at length before he was suspended on the 21st August 1966 no enquiry was held thereafter. So clearly the order of dismissal could not be sustained on the basis of the pre-suspension enquiry held against him. The next question, therefore, is whether the evidence let in before the Labour Court proved the charges against the 2nd respondent. The Labour Court has elaborately considered the evidence and come to the conclusion that none of the charges have been proved. The most important charge against the 2nd respondent to our mind was the one relating to the allegation that he had removed the letter received from the architects of the society. It appears that in that letter the archi-

itects had left the question of fees payable to them to the discretion of the Managing Committee of the society. Because this letter had been removed from the records of the society by the 2nd respondent and kept with him the Managing Committee of the society had to go on approaching the architects for a reduction of their fees. This would clearly have involved pecuniary loss to the society. But before the Labour Court no evidence was let in on this point. An attempt was made to use the statement made by the 2nd respondent before the Managing Committee in support of this charge. But it does not appear to have been shown to the 2nd respondent nor he was questioned on that point before the Labour Court. In the circumstances it could not be said that either this charge or any of the other charges was proved against the 2nd respondent.

3. However, the facts relating to the removal by the 2nd respondent of a letter from the architects show that he had clearly forfeited the confidence of his employers. We do not therefore think that we would be justified in ordering reinstatement of the 2nd respondent. It was also urged on behalf of the appellant society that it is not now discharging any function. But this question had not been raised in time nor did the 2nd respondent have an opportunity to meet that point. We are therefore deciding this appeal without any reference to this representation. We must however refer to the fact that the 2nd respondent was prepared to accept payment at the rate of Rs. 380/- a month from the date of his suspension till the date of the award by the Tribunal. This would come to Rs. 22,800/- Mr. Datta appearing for the appellant society had first wanted to get the instructions of his clients to this proposal. But after the arguments were over he stated that he was accepting the offer. In the circumstances we think it would be enough if we order that compensation be paid to the 2nd respondent as indicated above after deducting the amount of Rs. 7,432.98 already withdrawn by him. There will be no order as to costs.

Order accordingly.

AIR 1975 SUPREME COURT 1727

(From: Punjab & Haryana)*

N. L. UNTWALIA AND

S. M. FAZL ALI, JJ.

Ram Narain (In Criminal Appeal No. 258 of 1974); Jaggar Singh and others (In Criminal Appeal No. 259 of 1974, Appellants v. The State of Punjab, Respondent.

Criminal Appeals Nos. 258 and 259 of 1974, D/- 15-7-1975.

(A) Penal Code (1860), S. 302 —

Murder — Appreciation of evidence — Injuries caused by lethal weapon — Prosecution evidence inconsistent with medical evidence and that of ballistic expert — Accused are entitled to acquittal. Criminal Appeal No. 778 of 1973 D/- 19-2-1974 (Punj & Har) Reversed. (Evidence Act (1872), S. 3; Evidence — Appreciation of).

Where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence. If the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, this is a most fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case. AIR 1953 SC 415, Followed. (Para 14)

Held in the circumstances of the case the High Court overlooked most of the circumstances which were damaging to the prosecution case. It lightly brushed aside the inconsistency between the medical evidence and the prosecution version. The question of the time of occurrence having been shifted from 8-00 P.M. to 6.30 P.M. had been blindly believed as also the evidence regarding the production of the weapons by the accused. In view of these striking circumstances, the High Court should have approached the case with much more care and caution than it has, particularly when a death sentence was involved. While appreciat-

*(Cri. Appeal No. 778 of 1973 and Murder Ref. No. 41 of 1973, D/- 19-2-1974 Punj & Har.)

GS/GS/C622/75/MVJ

ing the evidence of the witnesses, the High Court does not appear to have considered this important aspect, but readily accepted the prosecution case without noticing that the evidence of the eye-witnesses in the Court was a belated attempt to improve their testimony and bring the same in line with the Doctor's evidence with a view to support an incorrect case. Criminal Appeal No. 778 of 1973 D/- 19-2-1974 (Punj & Har) Reversed.

(Paras 13, 14)

Cases Referred: Chronological Paras

AIR 1953 SC 415 = 1950 SCR 821 =

1953 Cri LJ 1761 14

Mr. A. N. Mulla, Sr. Advocate (In Crl. Appeal No. 258 of 1974), (M/s. N. S. Marwaha, K. B. Rohtagi and D. R. Gupta, Advocates, with him), for Appellants; M/s. O. P. Sharma and Dewan Balak Ram, Advocates, for Respondent.

Judgment of the Court was delivered by

FAZL ALI, J.:— Criminal Appeal No. 258 of 1974 by special leave has been preferred by the appellant Ram Narain Singh who was tried by the Sessions Judge, Bhatinda who convicted the appellant under S. 302 I.P.C. and sentenced him to death and a fine of Rs. 2,000/- or in default further rigorous imprisonment for two years. Ram Narain Singh was also convicted under S. 307/34 and sentenced to three years R.I. and a fine of Rs. 300/-, under S. 449 I.P.C. and sentenced to three years R. I. and a fine of Rs. 300/-. There was a further conviction in so far as Ram Narain Singh is concerned under S. 324/34 I.P.C. under which he was sentenced to one year's rigorous imprisonment and under Section 323/34 I.P.C. to six months R. I. All the sentences to run concurrently. The other appellants Jaggar Singh, Hakam Singh and Mal Singh in Criminal Appeal No. 259 of 1974 were convicted under S. 302/34 I.P.C. and sentenced to imprisonment for life and a fine of Rs. 1000/- each or in default one year's R.I. each. Jaggar Singh was also convicted under Section 307 I.P.C. and sentenced to three years R. I. and a fine of Rs. 300/-, under Section 449 I. P. C. to three years R. I. and a fine of Rs. 300, and under Section 324/34 I. P. C. to

one year's R. I. Hakam Singh and Mal Singh were also convicted under Section 307/34 I.P.C. and sentenced to three years R. I. and a fine of Rupees 300/- each. Hakam Singh was also convicted under S. 324/34 I.P.C. and sentenced to one year's R. I. and under Section 323 I.P.C. and sentenced to six months R. I., while Mal Singh was convicted under S. 324 I.P.C. and sentenced to one year's R. I. and under S. 323/34 I.P.C. and sentenced to six months R. I. All the sentences to run concurrently. The learned Sessions Judge has also made a reference to the High Court of Punjab & Haryana for confirmation of the death sentence passed on Ram Narain Singh. All the appellants had filed separate appeals before the High Court which were amalgamated and were heard and decided by one judgment. The High Court dismissed the appeals and affirmed the convictions and sentences passed by the Sessions Judge and on its refusal to grant leave to appeal to the Supreme Court the appellants came up for special leave to this Court which granted special leave. Jaggar Singh, Hakam Singh and Mal Singh have filed a separate appeal to this Court, in which case also special leave was granted by this Court, and as both the appeals arise out of a common judgment, we propose to deal with them by one judgment.

2. Put briefly the prosecution case is that the appellant Ram Narain Singh was the Sar-Panch of the Gram Panchayat of village Hassanpur and is alleged to have forcibly taken possession of 10 kils of land belonging to the Panchayat. Despite several attempts by the Panchayat to dislodge the appellant Ram Narain Singh from this land nothing of consequence happened as a result of which the members of the Panchayat filed a complaint against Ram Narain Singh before the Deputy Commissioner seeking ejectment of Ram Narain Singh from the land. The deceased Teja Singh and his brother Surjit Singh being members of the said Panchayat took an active part in the campaign for ousting Ram Narain Singh from the Panchayat land which he had forcibly taken possession of. According

to the prosecution, the appellant Ram Narain Singh nursed a serious grouse against the deceased and Surjit Singh for their action. It is also alleged that the deceased had threatened Ram Narain Singh some time before the occurrence that if Ram Narain Singh did not surrender the possession voluntarily he will get him dispossessed. The story of the prosecution further discloses that on the date of occurrence i.e. October 2, 1972 the deceased along with his brothers Surjit Singh and Joginder Singh had gone to attend a fair at village Phaphre Bhaike and after spending a day there they were returning to their own village near about the sun-set, when somewhere on the way Teja Singh stayed behind to answer the call of nature while the other two companions, namely, Surjit Singh and Joginder Singh proceeded to their house. Teja Singh also arrived at the house soon thereafter. Within a few minutes of the arrival of Teja Singh in the house, the accused Ram Narain Singh and Jaggar Singh armed with single barrel guns entered the house along with Mal Singh and Hakam Singh who were armed with Gandasas. Mal Singh and Hakam Singh remained at the door of the house, whereas the appellants Ram Narain Singh and Jaggar Singh entered the house. As soon as they entered the house, Jaggar Singh aimed the gun at Surjit Singh P.W. and fired at him. Fortunately the fire missed him. Thereafter Ram Narain Singh fired a shot from his gun which hit Teja Singh on his chest as a result of which he fell down and died on the spot. Thereafter both the accused caught the deceased from his legs and hands and dragged him out of the house at some distance. When Surjit Singh P.W. tried to intervene he was hit by Mal Singh with a Gandasa. Hakam Singh accused also followed suit and inflicted three Gandasa blows on his right leg, right arm and back. Meanwhile Joginder Singh appeared on the scene with a Gandasa in his hand and raised alarm whereupon all the accused ran away from the place of occurrence along with their weapons. The dead body of the deceased Teja Singh was removed to the courtyard of the house and kept there. Surjit Singh P.W. who

was one of the injured brothers left the dead body at the spot and proceeded to the police station at Bhikhi through fields and pastures to avoid any confrontation with the accused and lodged the first information report Ext. P.G. at 11-50 P.M. ASI Kul-dip Singh prepared an injury statement and got Surjit Singh admitted into the Civil Dispensary, Bhikhi. The A.S.I. Kuldip Singh reached the place of occurrence at 2-30 A.M. on October 3, 1972 and held inquest on the dead body of Teja Singh. The A.S.I. found blood-stained earth from underneath the dead body of the deceased as also from outside the house. He also took possession of two empty cartridges Exts. P-11 and P-12 which were lying near the entrance door. We might also mention here that the definite case of the prosecution before the Sessions Judge was that while the shot was fired at the deceased Teja Singh by Ram Narain Singh he had kept the right hand flexed on his chest. It was thus stated by the eye-witnesses that at the time of firing, the deceased had put his right hand on his chest. These two additions or embellishments appear to us to have been necessitated in order to bring the evidence of the eye-witnesses in consonance with the evidence of the Doctor as also that of the ballistic expert, and we shall deal with this aspect of the matter a little later. In the course of investigation, Karnail Singh P.W. a distant relation of the deceased produced the accused Ram Narain Singh and others before the A.S.I. along with the rifle and a Jhola containing the cartridges as also the blood-stained gandasa. The police after usual investigations submitted charge-sheets against all the accused persons as a result of which they were committed for trial before the learned Sessions Judge who convicted them as indicated above.

3. The defence of the accused was that the prosecution had concocted a false case against the accused due to enmity and with a view to wreak vengeance on the accused Ram Narain Singh for not giving up possession of the Panchayat land. It was further alleged by the defence that all the witnesses examined in this case were inimically disposed towards

the accused. The learned Sessions Judge, after considering the entire evidence on the record, accepted the prosecution case and convicted the accused. The accused then filed an appeal before the High Court which was dismissed and hence these appeals by special leave.

4. Mr. A. N. Mulla counsel for the appellants has drawn our attention to certain outstanding features of this case which, according to him, are sufficient to throw doubt on the entire prosecution case. In this connection he has raised the following three important contentions:

Firstly, it was argued that the prosecution witnesses have concealed the true version of the occurrence and even if their statements are taken at their face value it is totally inconsistent with the medical evidence as also the ballistic expert's evidence.

Secondly, it was urged that the prosecution has changed the time and place of occurrence and it was suggested that the deceased may have been assaulted by an unidentified assailant somewhere in the fields and the appellants have been falsely implicated in the offence.

Thirdly, it was argued that the entire prosecution case was sought to be proved by the partisan evidence which ought not to have been accepted in this case and the dramatic production of the gun and other weapons by all the accused persons at the instance of Karnail Singh P.W. an enemy of the accused smacks of pure concoction and appears to be too good to be true.

5. Before dealing with the contentions raised by the learned counsel for the appellants we would like to indicate the nature of the evidence led by the prosecution in support of the case. To begin with, there is the central evidence consisting of two eye witnesses Surjit Singh and Joginder Singh the brothers of the deceased who were in the house when the deceased Teja Singh and Surjit Singh were attacked. This evidence is sought to be corroborated by the evidence of P.W. 15 Buggar Singh who deposed that he had seen the accused proceeding to the house of Teja Singh armed with a gun and

gandasa. Mohinder Singh P.W. 16 another witness for the prosecution seeks to corroborate the evidence of the eye witnesses by stating that immediately after the occurrence Joginder Singh came to him and informed him about the occurrence. Finally, there is the evidence of Karnail Singh and the A.S.I. Balwant Singh to prove the production of the guns and the blood-stained gandasas by all the accused on which strong reliance has been placed by the courts below.

6. Coming to the evidence of Surjit Singh who has been described by the High Court as a stamped witness as he had been injured by the accused in the course of the occurrence, a careful perusal of his evidence would clearly show that it is replete with inherent improbabilities and full of serious contradictions and meaningful embellishments. After giving the narrative of the occurrence as detailed above, the witness goes on to state that leaving Joginder Singh at the spot he proceeded to police station Bhiki on foot and he traversed through the fields lest he may be way-laid by the accused and killed. The witness does not give any explanation why he did not call any person from the village and ask him to accompany him to the police station if he was afraid of the accused and particularly when he was also injured. Secondly, according to the witness, although the occurrence took place at about 6-30 P.M. he left the village for police station at 8-00 P.M. i. e. after about 1½ hours. He further admits in cross-examination at p. 39 of the High Court Paper Book that during this period he did not inform anybody in the village regarding the occurrence. Although the witness says in Court that he had asked Joginder Singh to inform the people of the village Panchayat, yet he admits in his cross-examination that he did not mention that fact either in the F.I.R. or in his statement before the Committing Magistrate. The witness further admits that no body else came to the spot so long as he was in the village. We find it difficult to believe that although such a serious occurrence had taken place resulting in gunshot injuries to the deceased and

gandasa injuries to Surjit Singh, yet the informant took no steps to inform anybody and nobody came to the scene of occurrence. Such an unnatural conduct can only be consistent with the fact that the deceased may have been assaulted at a later point of time in the night by some unidentified assailants and then brought to the house. The informant also does not give any explanation why he took full 1 1/2 hours to leave the village for the police station. This is yet an intrinsic circumstance to support the theory of the accused that the occurrence must have taken place at 8-00 P.M. and this theory is supported by the other prosecution witnesses, as we shall show hereafter. Another significant fact which may be noted in his evidence is that although two empty cartridges were lying on the spot, he did not take care to collect them and produce the same before the police when he went there to lodge the F.I.R. Finally, he says in his evidence that after firing at the deceased, the accused threw the empties and reloaded their guns but did not fire again. It is not at all understandable as to why this was so. According to his evidence, Surjit Singh himself was the main target of the appellant Jaggar Singh and if the first shot missed him, it is not understandable why Jaggar Singh did not make an attempt to fire for the second time after he had reloaded his gun. In fact the story about the reloading of the guns also came to light for the first time in the Sessions Court and does not find place in the statement of this witness either in the F.I.R. before the Police or the Committing Magistrate. But the most important circumstance which discredits the evidence of this witness is the manner in which Ram Narain Singh is said to have assaulted the deceased Teja Singh. It is the consistent evidence of this witness as also of his brother Joginder Singh that when Ram Narain Singh fired a shot from his gun, Teja Singh had put his arm on the right side of his chest. This particular posture was undoubtedly a most conspicuous fact which could not have been missed by the witness if it was really there. In these circumstances, therefore, we should have expected this fact to be

mentioned in the F.I.R. but it is conspicuously absent from the F.I.R., nor was this fact mentioned by either Surjit Singh or his brother Joginder Singh in their statements before the police or before the Committing Magistrate. It seems to us that the theory of the deceased having placed his arm on the right side of his chest has been introduced only after the Doctor who was examined as the second witness in the Sessions Court stated in his examination-in-chief that if the elbow of right arm is flexed lying in front of the chest, then injuries Nos. 1 to 4 could be caused with a single firearm discharge. It would appear that this witness was examined before the Sessions Court on May 14, 1973 and P.W. Surjit Singh was examined on the same day after the evidence of the Doctor was recorded. P.Ws. Surjit Singh and Joginder Singh had to introduce the theory of the deceased having put his right arm on his chest to bring the occurrence in tune and in consonance with the evidence of the Doctor. This was undoubtedly a belated idea because if it had been a fact there is no reason why the eye-witnesses should not have deposed to it in their statements before the police or even before the Committing Court. Till that time the witnesses were not aware of the injuries said to have been caused to the deceased Ram Narain Singh by a single fire unless the deceased was in a particular posture. This fact came to light for the first time when the Doctor was examined in the Sessions Court and the witnesses in order to corroborate their testimony with the evidence of the Doctor introduced this embellishment in the story of the assault on the deceased. Considered against this background, the argument of the learned counsel for the appellants that the evidence of the eyewitnesses was inconsistent with the medical evidence appears to be well founded. In other words, the position is that if we discard this part of the evidence of the eye-witnesses which has come to light for the first time in the Sessions Court, then according to medical evidence, the deceased would have got two gunshots whereas it was never the prosecution case that Ram

Narain Singh or any other accused fired a second shot at the deceased at any time. The medical evidence, therefore, clearly falsifies the prosecution case regarding the manner in which the deceased was hit.

7. Even the ballistic expert on a question by the Court deposed as follows:

"In case if it is a straight fire, and if the right arm is kept just in front of the chest, then it is possible that these injuries could be caused by one single fire."

Thus, according to the ballistic expert's evidence, unless there was cogent material and reliable evidence to show that the deceased had kept his right arm in front of his chest, the deceased could not have sustained less than two injuries. The evidence of Surjit Singh and Joginder Singh on this point appears to us to be clearly an afterthought and cannot be accepted. Thus the prosecution has not been able to explain how the deceased died by sustaining one gunshot injury. Further more, the evidence of Dr. S. S. Walia shows that there were two gunshot injuries on Teja Singh, namely, injury No. 1 which by itself was sufficient to cause his death, and injury No. 4 which was also the result of the gunshot. The Doctor has further opined in his cross-examination that both injuries Nos. 2 and 4 could have been caused from a distance of less than 4 feet and that there was blackening both on injury Nos. 4 and 2 which were on the uncovered parts of the body. The Doctor further deposed that there was corresponding burning of the shirt by injuries Nos. 2, 3 and 4. If this be the position, then injury No. 4 is not at all explained. The blackening on injury No. 4 clearly indicates that this was also a gunshot injury and the ballistic expert has also testified to the effect at p. 60 of the High Court Paper Book that in case the blackening which has been reported by the doctor in injury No. 2 and injury No. 4 were not the actual blackening due to the powder gases then it is possible that it could be from one single fire. The doctor, however, says nothing of this sort. Thus a combined reading of the evidence of Dr. Walia, the

medical expert and Mr. J. K. Sinha, Ballistic expert, clearly establishes that the deceased died of two gunshot injuries and the prosecution has not been able to explain this important circumstance. For these reasons, therefore, the evidence of the two eye-witnesses Surjit Singh and Joginder Singh is wholly inconsistent with the medical evidence as also the evidence of ballistic expert and must be rejected on that ground alone, apart from other inherent improbabilities which appear in their evidence and which have already been pointed out.

8. Apart from the infirmities from which the evidence of surjit Singh appears to suffer, Joginder Singh's evidence also suffers from the same defects of a vital character. He also, like Surjit Singh, had never mentioned the fact of the deceased having flexed his arm near the right side of his chest either before the police or in his statement before the Committing Magistrate but mentioned it for the first time before the Sessions Court obviously to bring his evidence in line with the Doctor's view. This witness then says that he went to inform the village people and thus contradicts Surjit Singh who stated that nobody came to the place of occurrence and who had not said before the police that Joginder Singh had been sent to inform the members of the Panchayat. Further more, the story of reloading of the guns and throwing the empty cartridges appears to be an afterthought, because it does not find place either in the F.I.R. or in the statement before the police or even before the Committing Court. Apart from these, there is one more important intrinsic circumstance appearing from his evidence which establishes without any shadow of doubt that the occurrence could not have taken place at 6-30 P.M. While Joginder Singh was giving his evidence in the Court and was narrating the story that on their return from village Phaphre Bhaiké, Teja Singh stayed away to answer call of nature. The observation of the Sessions Judge is that the witness started shaking and he was given time to compose himself. It seems to us that the story of the deceased having gone to an-

swer the call of nature is a faked one and it must be at that time that he may have been attacked by an unidentified assailant and killed and as the witness was deposing falsely his conscience pricked him and he started shaking and was given time by the Court of Session to compose himself. Again in his evidence he makes out a new case that after the assault on Surjit Singh he picked up a gandasā, raised lalkara and ran after the accused. This is neither mentioned by Surjit Singh in his evidence nor is it mentioned in the F.I.R. nor has this witness mentioned this fact in his statement before the police. Another important circumstance which throws serious doubt on the credibility of these two witnesses (Surjit Singh and Joginder Singh) is that although both these witnesses stated that two gunshots had been fired one by Jaggar Singh which missed Surjit Singh and the other by the accused Ram Narain Singh which hit the deceased and if the medical evidence is to be believed then there is also a third fire because the deceased had two gunshot injuries Nos. 2 and 4, yet no pellets were found either in the courtyard or in the house or embedded in the wall. What happened to these pellets, no one knows. This is, in our opinion, a very strong circumstance to indicate that the occurrence did not take place in the house at all but had taken place somewhere in the fields at about 8 P.M. when the injured persons were not in a position to identify the assailants. But the situs of the occurrence has been shifted to the house in order to implicate the accused. For these reasons, therefore, we are satisfied that the evidence of P.Ws. Surjit Singh and Joginder Singh is not worthy of credence and, therefore, no reliance can be placed on their evidence. If we disbelieve their evidence, then it follows that the evidence of Mohinder Singh and other witnesses which is only of corroborative type would not in any way improve the prosecution case. The first contention of the learned counsel for the appellants that the prosecution version is inconsistent with the medical evidence must, therefore, prevail and on this ground alone the prosecution case is fit to be rejected.

9. This brings us to the other aspects of the case, namely, whether or not the prosecution had tried to change the time and place of occurrence, as contended by the learned counsel for the appellants. There is no direct evidence to show that the occurrence took place at 8-00 P.M. but there are certain strong circumstances which lead to the irresistible inference and an inescapable conclusion that the occurrence must have taken place at about 8 P.M. In the first place, the informant himself has categorically stated in his evidence that he had left for the police station at 8-00 P.M. although the occurrence had taken place at 6-30 P.M. He has not given any explanation why he waited in the village for 1 1/2 hours if he eventually decided to go to the police station alone without taking any escort. This clearly shows that the occurrence must have taken place at about 8-00 P.M. and the time has been shifted to 6-30 P.M. only with a view to make it appear that the occurrence took place in the house where the accused could be properly identified. Another important circumstance which supports this inference is that according to the evidence of Surjit Singh who stated at p. 41 of the High Court Paper Book that they had taken their food at village Phaphre Bhaike about an hour before the occurrence. Here he is completely belied by the medical evidence of Dr. Walia which shows that undigested food was found in the stomach of the deceased and according to him the deceased must have taken his food only five minutes before his death or at the most within half an hour of his death. Doctor's evidence, therefore, clearly shows that he must have taken his food at 8-00 P.M. which is also the usual time when the villagers take their food. Another important circumstance which shows that the occurrence must have taken place at 8-00 P.M. is the evidence of P.W. 15 Jaggar Singh that after hearing about the occurrence he came out of his house after about four hours of the alleged firing and went to the spot about 1 1/2 hours before the police arrived. The witness states that the police arrived at the spot about 1 1/2 hours after he had gone to the spot. According to the

evidence of the A. S. I. he had proceeded to the village Hassanpur at about 2-30 A.M. on October 3, 1972. This means that the witness must have reached the spot at about 1-00 A.M. This would put the occurrence at about 9-00 P.M. on October 2, 1972 as the witness stirred out of his house four hours after the occurrence. This version also belies the version of the two eye-witnesses that the occurrence took place in their house at about 6-30 P.M.

10. Finally, there is the evidence of Mohinder Singh P.W. 16 who deposed in very clear terms that it was about 8-00 or 8-30 P.M. when he was present in his house when Joginder Singh came there and informed him that Jaggar Singh had fired at Surjit Singh but the shot had not hit him and thereafter Ram Narain Singh had shot dead Teja Singh and that Mal Singh and Hakam Singh had injured Surjit Singh. This also places the occurrence between 8-00 to 8-30 P.M. The cumulative effect of all these circumstances, unmistakably point out to the conclusion that the occurrence really took place at 8-00 P.M. and if that is so, then there is no evidence on the record to show how the appellants could have been identified by the witnesses.

11. On the day of the occurrence i.e. October 2, 1972, it would be quite dark at 8-00 P.M. and unless there was some light burning in the house it would be difficult for the witnesses to have identified the assailants and to have given such a graphic description of the occurrence. Thus if the occurrence took place at 8-00 P.M. there can be only two possibilities — (1) that the deceased Teja Singh and the injured Surjit Singh were assaulted near the fields in dark night and they were not able to identify the assailants. It is possible that the appellants may have been the real assailants but the question is one of identification; and (2) that the occurrence took place inside the house of the deceased. There also the accused could not be identified because there is no evidence of any witness to show that any light was burning there, nor does any of the eye witnesses say that he had identified the

accused by voice. For these reasons, therefore, we are convinced that even accepting the prosecution case at its face value, if the occurrence took place at 8-00 P.M. the possibility of mistake in identification cannot be excluded in the present circumstances.

12. Another important circumstance which throws very serious doubt on the prosecution case and which shows that the prosecution has overstated its case is the dramatic production by the accused persons of the guns and the blood-stained gandasa at the instance of Karnail Singh who was by no means favourably inclined towards the accused being a distant relation of the deceased. Karnail Singh states that on October 4, 1972 he produced all the four accused persons before the Investigating Officer in the school premises. The appellant Ram Narain Singh was carrying his gun Ext. P-13 and a Jhola Ext. P-14 which contained four live cartridges as also his licence. Similarly Jaggar Singh was carrying another gun Ext. P-20 and a Jhola Ext. P-21 containing live cartridges. Both the guns were sealed into a parcel and seized by the police. Hakam Singh was carrying a Gandasa at the time of his arrest which was blood-stained even at that time. In cross-examination the witness admitted that he never produced any other accused before the police prior to the occurrence. He further admitted that the A.S.I. did not see the barrel of the guns in his presence by opening it in his presence, to find out whether it was recently fired. He further admits that some blood was sticking to the blade of the Gandasa produced by the accused Hakam Singh. The story given out by this witness appears to be too good to be true and is full of inherent improbabilities. We do not find any good reason why the accused should have suddenly agreed to enlist the services of this witness particularly when he was a relation of the deceased in order to appear before the police along with the weapons only two days after the commission of the offence. Indeed if the accused were such desperados they could have gone to the police station direct and admitted their guilt. It is also difficult to believe that al-

though the weapons were produced two days after the occurrence the accused would not take the precaution of washing off the blood marks from the Gandasa. It seems to us that there was no such dramatic production before the police. Both the appellants Ram Narain Singh and Jaggar Singh possessed licences for holding guns and although the cartridges found could have been fired from their guns there was no reliable evidence to show that the guns were recently fired. In these circumstances, therefore, the mere possession of the guns and the live cartridges would not connect the accused with the crime. In fact the production of the accused by Karnail Singh clearly shows that the prosecution can go to any extent in concocting the case against the accused, particularly in the background of enmity which existed between the accused and the deceased. We are, however, not in a position to believe this as a probable story. The learned counsel for the appellant was, therefore, fully justified in submitting that the dramatic production of the accused with their weapons was a meaningful embellishment by the prosecution which cannot be believed.

13. The High Court appears to have overlooked most of these circumstances discussed by us which were extremely damaging to the prosecution case. The High Court has lightly brushed aside the inconsistency between the medical evidence and the prosecution version. The question of the time of occurrence having been shifted from 8-00 P.M. to 6-30 P.M. has been blindly believed as also the evidence regarding the production of the weapons by the accused. In view of these striking circumstances, we should have expected the High Court to have approached this case with much more care and caution than it has, particularly when a death sentence was involved.

14. Where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, this is a most fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case. In

Mohinder Singh v. The State; 1950 SCR 821 = (AIR 1953 SC 415 = 1953 Cri LJ 1761) this Court observed in similar circumstances as follows:

"In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it is doubtful whether the injuries which are attributed to the appellant were caused by a gun or by a rifle."

It is obvious that where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence. While appreciating the evidence of the witnesses, the High Court does not appear to have considered this important aspect, but readily accepted the prosecution case without noticing that the evidence of the eye witnesses in the Court was a belated attempt to improve their testimony and bring the same in line with the Doctor's evidence with a view to support an incorrect case.

15. For the reasons given above we were satisfied that the prosecution had not been able to prove its case against any of the accused beyond reasonable doubt and the appellants were, therefore, entitled to an acquittal. By our order passed on May 2, 1975, we had allowed the appeals and set aside the convictions of and the sentences passed on the appellants. They were directed to be set at liberty forthwith. We deliver our reasoned judgment to-day in support of the order of acquittal already passed.

Appeals allowed.

AIR 1975 SUPREME COURT 1735

(From: Allahabad)*

**A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.**

The Govind Sugar Mills Ltd. and another Appellants v. Hind Mazdoor Sabha and others, Respondents.

Civil Appeal No. 795 of 1975, D/- 5-8-1975.

(A) U.P. Industrial Disputes Act (28 of 1947) Ss. 4K and 3 (b)—Issuance of notification under S. 3 (b) — Not obligatory for the Government to make reference under S. 4K. Spl. Appeal No. 189 of 1969, D/- 7-12-1973 (All) partly reversed.

Where the High Court quashed the order of the Government refusing to make reference and further directed the State Government and the Labour Commissioner to refer the dispute for adjudication in exercise of their power under Section 4K on the view that it was obligatory for the Government to do so after the issuance of the notification under S. 3 (b).

Held that the order of the High Court directing the Government and the Labour Commissioner to make reference was not sustainable and was liable to be set aside. It would be open to the Government to reconsider the matter in the light of the judgment of High Court and within the ambit of well settled principles of law for exercise of their power of reference and to take such decision in the matter as they might think fit and proper to take in accordance with law. Spl. Appeal No. 189 of 1969 D/- 7-12-1973, (All) partly reversed. AIR 1961 SC 420 Distinguished. (Para 5)

It does not seem to be quite reasonable to take the view that after the refusal of the Government to make a reference is quashed a writ of mandamus to make a reference must necessarily follow. The matter has still to be left for the exercise of the power by the Government on relevant considerations in the light of the judgment quashing the order of refusal. AIR 1964 SC 1617 Explained. Civil Appeal No. 781 of 1973, D/- 30-7-1975 (SC) Rel. on. (Para 4)

*(Spl. Appeal No. 189 of 1969, D/- 7-12-1973 — All.—Luck. Bench.)

HS/HS/C861/75/CWM

Cases Referred: Chronological Paras

(1975) Civil Appeal No. 781 of 1973,
D/- 30-7-1975 (SC) 4

AIR 1964 SC 1617 = (1964) 6 SCR
22 3, 4

AIR 1961 SC 420 = (1961) 2 SCR 330
2, 3

Mr. B. Sen, Sr. Advocate (M/s. B. P. Maheshwari and Suresh Sethi, Advocates with him), for Appellants. M/s. J. P. Goyal, D. P. Mukherjee and Raghunath Singh Advocates, for Respondents.

Judgment of the Court was delivered by

UNTWALIA, J.:— This is an appeal by special leave. It is said that by a notification dated 27-4-1961 issued under Section 3 (b) of the U. P. Industrial Disputes Act — U. P. Act XXVIII of 1947 — hereinafter called the Act, the recommendations of the First Sugar Wage Board were directed to come in force with effect from November 1, 1960. Certain Sugar Mills including the appellants are said to have refused to implement the provisions of the notification dated 27-4-1961. This gave rise to an industrial dispute. Eventually the State Government of Uttar Pradesh by its order dated 22-9-1966 refused to make a reference for adjudication of the dispute under Section 4-K of the Act. Respondent No. 1 filed a writ application in the Allahabad High Court under Article 226 of the Constitution of India asking for a writ of certiorari to quash the order of the Government dated 22-6-1966 and a writ of mandamus directing them to make a reference. A learned single Judge of the High Court dismissed the writ application. But the same was allowed in a Special Appeal by a Bench of the High Court. The two appellants approached this Court for grant of special leave. It was granted "limited to the question as to whether the High Court was justified in giving directions to respondents 1 and 2 to refer the dispute of the workmen for adjudication under S. 4K of the U. P. Industrial Disputes Act."

2. In the Special Appeal the High Court has taken the view following the decision of this Court in *State of Uttar Pradesh v. Basti Sugar Mills Co. Ltd.*, (1961) 2 SCR 330 = (AIR

1961 SC 420) that when action was taken under Section 3 (b) of the Act it was obligatory for the State Government to make a reference under Section 4K for adjudication of the Industrial dispute raised in relation to the said action. The High Court on a consideration of the entire facts and circumstances of the case allowed the writ petition and quashed the order of the State Government dated 22-6-1966 by grant of a writ of certiorari. In this appeal since the special leave was granted on a limited question we are not called upon to interfere with the said portion of the order of the High Court. But it further directed the State Government and the Labour Commissioner to refer the dispute for adjudication in exercise of their power under S. 4K of the Act. It seems to have been so done on the view that it was obligatory for the State Government to do so after the issuance of the notification under Section 3 (b) of the Act. In our opinion this was not correct.

3. The decision of this Court in the case of *Basti Sugar Mills* (1961) 2 SCR 330 = (AIR 1961 SC 420) (supra) was given with reference to clause (d) of Section 3 of the Act as it stood prior to the amendment made by U. P. Act I of 1957. By the said amending Act, clause (d) was dropped and substituted by another cl. (d) with which we are not concerned and the provision of making a reference was made in Section 4K. Section 4K of the Act is in pari materia with Section 10 (1) of the Industrial Disputes Act, 1947 — Central Act XIV of 1947. It has been pointed out by this Court in the case of *Bombay Union of Journalists v. State of Bombay*, (1964) 6 SCR 22 = (AIR 1964 SC 1617) that the power of the Government under Section 10 (1) of the Central Act is discretionary and it is open to the Government under certain circumstances by taking into consideration the relevant factors to refuse to make a reference. Section 4K of the Act divorced from the context and set up of Section 3 stands on the same footing. Clause (d) of Section 3 as it stood in the Act before 1957 was so interwoven and inter-connected with the exercise of the power in clause (b) that it led this Court to opine that a

writ of mandamus could be issued directing the State Government to make a reference under Section 3 (d) of the Act as it stood before the 1957 amendment. In our judgment, however, the position has changed after the amendment brought about in the year 1957.

4. In the judgment of this Court delivered a few days ago, namely *M/s. Mahabir Jute Mills Ltd., Gorakhpore v. Shri Shibban Lal Saxena*, Civil Appeal No. 781 of 1973, (judgment D/- 30-7-1975) it has been held on a consideration of the provisions of law contained in Section 4K of the Act that after quashing the order of the Government refusing to make a reference the High Court could ask the Government to reconsider the matter but it could not give peremptory directions to make a reference. We may, however, take note of a sentence occurring in the judgment of this Court in the case of *Bombay Union of Journalists*, (1964) 6 SCR 22 at p. 35 = (AIR 1964 SC 1617 at p. 1624) which reads thus:

"If the appropriate Government refuses to make a reference for irrelevant considerations, or on extraneous grounds, or acts mala fide, that, of course, would be another matter; in such a case a party would be entitled to move the High Court for a writ of mandamus."

We think what was meant to be conveyed by the sentence aforesaid was that the party would be entitled to move the High Court for interfering with the order of the Government and not necessarily for the issuance of a writ of mandamus to direct the Government to make a reference. The mandamus would be to reconsider the matter. It does not seem to be quite reasonable to take the view that after the refusal of the Government to make a reference is quashed a writ of mandamus to make a reference must necessarily follow. The matter has still to be left for the exercise of the power by the Government on relevant considerations in the light of the judgment quashing the order of refusal.

5. For the reasons stated above we allow this appeal only to the extent that the order of the High Court

made in the Special Appeal directing the Government of U.P. and the Labour Commissioner to make a reference under Section 4K of the Act is not sustainable and is set aside. We were informed at the Bar that two references have already been made in pursuance of the said direction. It is plain that the said order made cannot hold good when we have set aside the order of the High Court giving the direction in pursuance of which the references have been made. It will, however, be open to the State Government to reconsider the matter in the light of the judgment of the High Court and within the ambit of well-settled principles of law for exercise of their power of reference and to take such decision in the matter as they may think fit and proper to take in accordance with law. We shall make no order as to costs.

Appeal partly allowed.

AIR 1975 SUPREME COURT 1737

(From: 5th Industrial Tribunal, West Bengal)*

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

M/s. Hindustan Aeronautics Ltd.
Appellant v. *The Workmen and others*,
Respondents.

Civil Appeal No. 1330 of 1969, D/-
4-8-1975.

(A) Industrial Disputes Act (1947),
Ss. 10 and 2 (a) (i) — Appropriate Government — Government company having Divisional Office at Bangalore and branch at Barrackpore (W. B.) — Dispute in branch office — Reference by Governor, W. B. held valid.

The Hindustan Aeronautics Ltd. is a Government Company incorporated under S. 617 of the Companies Act. The shares of the company are entirely owned by the Central Government. The Divisional Office of the Company is in Bangalore and a branch of the company is at Barrackpore (West Bengal). A dispute arose in respect of the employees working in the branch and the Governor of West Bengal made a reference under S. 10 (1) of the Act.

Held, that the reference was good and valid. AIR 1970 SC 82 = 1970 Lab

*(From Award of 5th Industrial Tribunal W. B. in Case No. 26 of 1967, D/- 5-3-1969.)

HS/HS/C863/75/MVJ

IC 212, Followed; AIR 1959 SC 620, Distinguished. (Para 4)

It may be assumed that the Barrackpore branch was under the control of the Bangalore division of the Company. Yet it was a separate branch engaged in an industry of repairs of aircrafts or the like at Barrackpore. For the purposes of the Act and on the facts of the case the Barrackpore branch was an industry carried on by the company as a separate unit. The workers were receiving their pay packages at Barrackpore and were under the control of the officers of the company stationed there. If there was any disturbance of industrial peace at Barrackpore where a considerable number of workmen were working the appropriate Government concerned in the maintenance of the industrial peace was the West Bengal Government. The grievances of the workmen of Barrackpore were their own and the cause of action in relation to the industrial dispute in question arose there. Therefore, the Government of W. B. was the appropriate Government to make the reference.

(Para 4)

It may also be added that by amendments made in the definition of "appropriate Government" in Section 2 (a) (i) from time to time certain statutory corporations were incorporated in the definition to make the Central Government an appropriate Government in relation to the industry carried on by them. But no public company even if the shares were exclusively owned by the Government was attempted to be roped in the said definition. (Para 3)

(B) Industrial Disputes Act (1947), S. 15 — Reference of dispute for adjudication — Jurisdiction of Tribunal.

A dispute was referred to an Industrial Tribunal for adjudication. Some of the issues were regarding the allowance for education of employees' children, and some 10 employees in the canteen if should be made permanent. The Tribunal made an award allowing educational expenses to employees' children. By the award the canteen employees were directed to be made permanent.

Held, that the award should be set aside. (Para 5)

In substance and in effect the directions given by the Tribunal was by way of revision of the pay structure of the employees. No such reference was either asked for or made. The Tribunal, therefore, had no jurisdiction to change the wage structure in the garb of allowing educational expenses for the employees' children. (Para 5)

Further, the 10 workmen sought to be made permanent were casual work-

men before 4-1-1967 within the meaning of clauses (b), (d) of Standing Order I headed "Classification of workmen". They were appointed as temporary workmen within the meaning of clauses (b) (d) of Standing Order I on and from 4-1-1967. The Tribunal's direction to make them permanent on and from 4-1-1968 treating them as probationers appointed in permanent vacancies was not justified.

(Para 7)

Cases Referred: Chronological Paras

AIR 1970 SC 82 = (1969) 3 SCR 995 =	
1970 Lab IC 212	2, 3
AIR 1963 SC 1811 = (1964) 4 SCR 99	2
AIR 1959 SC 620 = (1959) 2 Sup SCR 150	4
(1950) 1 KB 18 = 65 LJKB 428	2
(1948) 2 All ER 432 = (1949) 1 KB 35	2
(1901) 2 KB 781 = 70 LJKB 860	2

Mr. V. S. Desai, Sr. Advocate, (Mr. R. B. Datar, Advocate with him); for Appellant; Mr. A. K. Sen, Sr. Advocate (Mr. Sukumar Ghose, Advocate with him), for Respondent No. 1.

Judgment of the Court was delivered by

UNTWALIA, J.:— This is an appeal by special leave filed by Hindustan Aeronautics Ltd. from the award dated 8-3-1969 made by the Fifth Industrial Tribunal, West Bengal. The Governor of West Bengal made the reference under Section 10 (1) of the Industrial Disputes Act, 1947—hereinafter called the Act, for adjudication on the following 5 issues:

- "(1) Allowance for the education of employees' children;
- (2) House Building loan;
- (3) Free conveyance or conveyance allowance;
- (4) Revision of Lunch allowance;
- (5) Whether the following canteen employees should be made permanent"—the names of 10 employees given.

The Tribunal granted no relief to the workmen on issues 2 and 3, allowed their claim in part in respect of issues 1, 4 and 5. Feeling aggrieved by the said award the appellant which is a Government company constituted under Section 617 of the Companies Act, the shares of which are entirely owned by the Central Government, has filed this appeal. The dispute relates to about 1,000 workmen working at the Barrackpore (West Bengal) branch of the Company's repairing workshop represented by the Hindustan Aeronautics Workers' Union, Barrackpore.

2. The competency of the Government of West Bengal to make the reference was challenged before the Tribunal as also here. Mr. V. S. Desai, learned counsel for the appellant, submitted that the appropriate Government within the meaning of Section 2 (a) of

the Act competent to make the reference was the Central Government, or, if a State Government, it was the Government of Karnataka where the Bangalore Divisional Office of the Company is situated and under which works the Barrackpore branch. Counsel stressed the point that the Central Government owned the entire bundle of shares in the company. It appoints and removes the Board of Directors as well as the Chairman and the Managing Director. All matters of importance are reserved for the decision of the President of India and ultimately executed in accordance with his directions. The memorandum and Articles of Association of the company unmistakably point out the vital role and control of the Central Government in the matter of carrying on of the industry owned by the appellant. Hence, counsel submitted that the industrial dispute in question concerned an industry which was carried on "under the authority of the Central Government" within the meaning of Section 2 (a) (i) of the Act and the Central Government was the only appropriate Government to make the reference under Section 10. The submission so made was identical to the one made before and repelled by this Court in the case of Heavy Engineering Mazdoor Union v. The State of Bihar, (1969) 3 SCR 995 = (AIR 1970 SC 82 = 1970 Lab IC 212) wherein it has been said at page 1,000 (of SCR) = (at p. 86 of AIR and at p. 216 of Lab IC):

"It is true that besides the Central Government having contributed the entire share capital, extensive powers are conferred on it including the power to give directions as to how the company should function, the power to appoint directors and even the power to determine the wages and salaries payable by the company to its employees. But these powers are derived from the company's memorandum of association and the Articles of Association and not by reason of the company being the agent of the Central Government. The question whether a corporation is an agent of the State must depend on the facts of each case. Where a statute setting up a corporation so provides, such a corporation can easily be identified as the agent of the State as in *Graham v. Public Works Commissioners*, (1901) 2 KB 781 where Phillimore, J. said that the Crown does in certain cases establish with the consent of Parliament certain officials or bodies who are to be treated as agents of the Crown even though they have the power of contracting as principals. In the absence of a statutory provision, however, a commercial corporation acting on its own behalf, even though it is controlled wholly or partially by a Government department, will be ordinarily presumed

not to be a servant or agent of the State. The fact that a Minister appoints the members or directors of a corporation and he is entitled to call for information, to give directions which are binding on the directors and to supervise over the conduct of the business of the corporation does not render the corporation an agent of the Government. (See the *State Trading Corporation of India Ltd. v. The Commercial Tax Officer, Visakhapatnam*)—(1964) 4 SCR 99 at 188 = (AIR 1963 SC 1811 at p. 1849), per Shah, J. and *Tamlin v. Hannsford*—(1950) 1 KB 18 at pp. 25, 26. Such an inference that the corporation is the agent of the Government may be drawn where it is performing in substance governmental and not commercial functions. (cf. *London County Territorial and Auxilliary Forces Association v. Nichols*)—(1948) 2 All ER 432."

3. Mr. Desai made a futile and unsubstantial attempt to distinguish the case of *Heavy Engineering Mazdoor Union*, (AIR 1970 SC 82 = 1970 Lab IC 212) on the ground that that was the case of a Government Company carrying on an industry where Private Sector Undertakings were also operating. It was not an industry, as in the instant case, which the Government alone was entitled to carry on to the exclusion of the private operators. The distinction so made is of no consequence and does not affect the ratio of the case in the least. We may also add that by amendments made in the definition of "appropriate Government" in Section 2 (a) (i) from time to time certain statutory corporations were incorporated in the definition to make the Central Government an appropriate Government in relation to the industry carried on by them. But no public company even if the shares were exclusively owned by the Government was attempted to be roped in the said definition.

4. The other leg of the argument to challenge the competency of the West Bengal Government to make the reference is also fruitless. It may be assumed that the Barrackpore branch was under the control of the Bangalore division of the company. Yet it was a separate branch engaged in an industry of repairs of aircrafts or the like at Barrackpore. For the purposes of the Act and on the facts of this case the Barrackpore branch was an industry carried on by the company as a separate unit. The workers were receiving their pay packages at Barrackpore and were under the control of the officers of the company stationed there. If there was any disturbance of industrial peace at Barrackpore where a considerable number of workmen were working the appropriate Government concerned in the maintenance of the indus-

trial peace was the West Bengal Government. The grievances of the workmen of Barrackpore were their own and the cause of action in relation to the industrial dispute in question arose there. The reference, therefore, for adjudication of such a dispute by the Governor of West Bengal was good and valid. The facts of the case of *M/s. Lipton Limited v. Their Employees*, (1959) 2 Supp SCR 150 = (AIR 1959 SC 620) cited on behalf of the appellant are clearly distinguishable. The ratio of that case was pressed into service in vain on behalf of the appellant.

5. The first demand on behalf of the workmen as respects the education allowance of the children was chiefly based upon the educational facilities said to be available to the workmen of Bangalore. On behalf of the management it was pointed out that certain educational facilities were given to the employees living in the township of Bangalore but not in the city of Bangalore. The workmen working at Barrackpore had also been provided with certain educational facilities. We, however, do not propose to go into the merits of the rival contentions. In our opinion the award directing the company to pay Rs. 12 per month to each employee to meet educational expenses of their children irrespective of the number of children a particular workman may have is beyond the scope of the issue referred for adjudication. The Tribunal while discussing this issue felt constrained to think that strictly speaking claim for allowance for the education of employees' children could not form a subject-matter of industrial dispute. Really it was a matter to be taken into consideration at the time of fixing their wages. In substance and in effect the directions given by the Tribunal is by way of revision of the pay structure of the Barrackpore employees. No such reference was either asked for or made. The Tribunal, therefore, had no jurisdiction to change the wage structure in the garb of allowing educational expenses for the employees' children. We may add that on behalf of the appellant it was stated before us that the latest revised wage structure has taken the matter of education of the employees' children into consideration, while, Mr. A. K. Sen, appearing for the workmen, did not accept it to be so. If necessary and advisable a proper industrial dispute may be raised in that regard in future but the award as it stands cannot be upheld.

6. Apropos issue No. 4 it was stated on behalf of the appellant that all staff and not only the supervisory staff were getting Rs. 1.50 as lunch allowance under circumstances similar to the ones

under which the employees belonging to the supervisory staff were getting Rupees 1.50 as lunch allowance. The award of the Tribunal, therefore, was unnecessary and superfluous in that regard. If that be so, the award may be a surplusage as it is conceded on behalf of the appellant that under the existing service conditions every employee eligible to get a lunch allowance was getting @ Rs. 1.50.

7. The 10 workmen sought to be made permanent under issue No. 5 were casual workmen before 4-1-1967 within the meaning of clause (b) (d) of Standing Order I headed "Classification of workmen". They were appointed as temporary workmen within the meaning of clause (b) (d) of Standing Order I on and from 4-1-1967. The Tribunal's direction to make them permanent on and from 4-1-1968 treating them as probationers appointed in permanent vacancies was not justified. The Tribunal did not go into the question as to whether more permanent workmen were necessary to be appointed in the canteen over and above the existing permanent strength to justify the making of the 10 workmen as permanent in the canteen where they were working. No direction of creation of new posts was given. On the evidence as adduced before the Tribunal and on the basis of the findings recorded by it, it is plain that the 10 workmen or any of them could be made permanent only against the permanent vacancies and not otherwise. On behalf of the appellant it was stated before us that all of them have been made permanent against such vacancies, while, on behalf of the workmen the assertion was that none of them has been made permanent so far. The management has no objection in absorbing the 10 workmen concerned in permanent vacancies as and when they occur if any of them has not been already absorbed. The workmen want nothing more than this.

8. In the result the appeal is allowed and substantially the award of the Tribunal is set aside but subject to the clarifications and observations made above. In the circumstances, there will be no order as to costs.

Appeal allowed.

AIR 1975 SUPREME COURT 1741

(From: Kerala)*

Y. V. CHANDRACHUD, P. N. BHAGWATI AND R. S. SARKARIA, JJ.**R. K. Lakshmanan, Appellant v. A. K. Srinivasan and another, Respondents.****Criminal Appeal No. 130 of 1975, D/- 1-8-1975.****(A) Criminal P. C. (1898), S. 561-A — Expunging of objectionable matter from record — Tests — Remarks by High Court against District Magistrate while quashing his order — Application for expunction of those remarks — Applying the tests, case for excision of those remarks held not made out.**

The tests to be applied in considering the expunction of disparaging remarks against persons or authorities whose conduct comes in for consideration before courts of law in cases to be decided by them, were neatly summed up by the Supreme Court in *State of U. P. v. Muhammad Nain*, AIR 1964 SC 703 = (1964) 1 Cri LJ 549, thus:

- "(i) Whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself;
 - (ii) Whether there is evidence on record bearing on that conduct justifying the remarks; and
 - (iii) Whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve."
- (Para 12)

The respondent (an Advocate) filed a petition before the High Court of Kerala under Sec. 561-A praying that the appellant (District Magistrate, Ernakulam) be directed to withdraw the notice issued to him (Advocate) requiring him to appear before the Court, on the ground that the issue of the notice was arbitrary and amounted to an abuse of the process of the Court because there was no provision in the Criminal P. C. empowering the Magistrate to issue such a notice to command the Advocate's appearance when he was not connected with the proceeding before him and the notice was issued to humiliate him in particular and the Bar in general since the latter had passed a resolution protesting against the improper and discourteous treatment meted out by the District Magistrate to the

members of the Bar. After taking into consideration the appellant's report regarding the allegations contained in the Advocate's petition, the High Court quashed the notice holding that the "action of the Magistrate (appellant) in issuing the impugned notice to the petitioner (respondent) constituted grave misuse of his power and flagrant abuse of the process of the Court." The appellant's application for expunction of certain remarks made against him was rejected by the High Court.

Held (by the Supreme Court applying the aforesaid tests for expunction, to the facts and circumstances of the instant case) that, as the appellant was represented before the High Court by a senior Public Prosecutor, the appellant had adequate opportunity of explaining his conduct and defending the impugned action. The appellant therefore could not complain that the remarks in question were passed by the High Court without affording him due opportunity to explain and defend his action. (Para 14)

Nor could it be said that this was a case where there was no evidence on record bearing on the conduct of the appellant to which the remarks in question pertained. There was ample material before the High Court bearing on the impugned conduct of the appellant, justifying the adverse comments in question. (Paras 15, 17)

Again, the passages sought to be expunged could not be said to be irrelevant or alien to the subject-matter of the case before the High Court. The remarks in question sought to be expunged, viz., that the issue of the impugned notice to the Advocate (respondent) by the appellant was illegal and arbitrary were an integral part of the reasoning of the High Court. They were not irrelevant or foreign to the matter in issue. They were inextricably intertwined with the findings and the order recorded by the High Court in that case. Excision of these remarks would emasculate the order of the High Court, robbing it of its very rationale. (Paras 18, 20, 21)

Judged by the aforesaid tests, no case for interference by Supreme Court has been made out. *Crl. Misc. Petn. No. 7 of 1974 with Crl. M. P. No. 967/73, D/- 13-3-74 (Ker.)*. Affirmed. (Para 22)

Cases Referred: Chronological Paras
AIR 1964 SC 703 = (1964) 2 SCR 363 = (1964) 1 Cri LJ 549 12

Mr. K. T. Harindranath, Sr. Advocate, (Mr. T. T. Kunhikanan, Advocate with him), for Appellant; Mr. A. S. Nambiar, Advocate (for No. 1) and Mr. K. R. Nambiar, Advocate (for No. 2), for Respondents.

* (Criminal Misc. Petns. Nos. 7 of 1974 and 967 of 1973, D/- 13-3-1974 (Ker.).)

The Judgment of the Court was delivered by

SARKARIA, J.:— This appeal by special leave is directed against a judgment of the Kerala High Court rejecting the appellant's application under Section 561-A, Criminal Procedure Code for expunction of certain remarks made against him in the High Court's Order, dated 20-11-1973, in Criminal Misc. Petition No. 967 of 1973.

2. The appellant is a member of the Kerala Judicial Service, while the respondent herein is an Advocate practising at Ernakulam. On 14-8-1973, the appellant was working as District Magistrate, Ernakulam. One Kamalasanan, who was an accused in C. C. Nos. 216 and 217 of 1973 pending before him, was ordered to be released on bail on his executing a bond for Rs. 1,000 with two sureties in the like amount. The two sureties were Kamaleswaran, the brother of the accused, and Sri Thankappan Nair. Thankappan's address was given as "businessman, son of Parameswaran Pillai, Thambanoor, Trivandrum". The affidavit filed by Thankappan, while offering himself as surety, was attested by Sri A. K. Srinivasan, Advocate stating: "solemnly affirmed at Ernakulam on this 14th day of August 1973 and signed before me who is personally known to me."

3. The above cases stood posted for examination of the accused under Section 342 of the Code of Criminal Procedure. When on that date the cases were called for hearing, the accused was absent. His counsel Shri Srinivasan appeared and represented that although he had no information from the accused, who had to come from Trivandrum, yet he was expecting him to reach the court in time. The appellant (District Magistrate) thereupon ordered cancellation of the bail bonds and directed issue of notices to the surety under Section 514 of the Code of Criminal Procedure calling upon him to show cause before 16-10-1973 why the terms of the surety bonds providing for forfeiture of the sum of Rs. 1,000 be not enforced. The notices issued to the Surety, Thankappan Nair, were returned unserved whereupon on the 17th October, 1973, the appellant issued a non-bailable warrant for the arrest of the Surety. On the following day, the appellant issued a notice to Sri A. K. Srinivasan, Advocate which ran as under:

"Ernakulam District Magistrate Court No. M. C. 106 and M. C. 107 of 1973.

Notice for Shri A. K. Srinivasan, Advocate

The abovementioned cases are being fixed for hearing on 3-11-1973 at 11 A. M.

You are required to appear before the Court.

By Order

Sd/-

Saristadar."

18th October, 1973

4. It may be mentioned here that in the proceedings initiated under Section 514 of the Code of Criminal Procedure in the two cases, Mr. Srinivasan, Advocate was not the duly constituted attorney for the Surety, Thankappan.

5. On receipt of the aforesaid notice, Mr. Srinivasan, Advocate filed Crl. M. P. 967 of 1973 before the High Court of Kerala under Section 561-A of the Code of Criminal Procedure praying that the appellant be directed to withdraw the notice, dated 18-10-1973, on the ground that the issue of notice was arbitrary and amounted to an abuse of the process of the court because—

(a) There is no provision in the Criminal Procedure Code empowering the Magistrate to issue such a notice to command the Advocate's appearance when he is not connected either as a witness or a party or otherwise with the proceedings relating to cancellation of bail-bonds;

(b) The notice was issued to humiliate him and the Bar since the latter had passed a resolution, on 21-7-1973, protesting against the improper and discourteous treatment meted out by the Magistrate to the members of the Bar.

6. The learned Judge of the High Court before whom this petition came up for hearing, by an order dated 2-11-1973, called for a report from the appellant by 5-11-1973 regarding the allegations contained in the Advocate's petition and particularly as to under which provision of law and under what circumstances he had thought it fit to issue a notice to the Advocate requiring him to appear before him on 3-11-1973. The appellant thereupon submitted the report to the High Court, the material part of which reads:

"When notice was sent to the surety Thankappan Nair whose address is given as, businessman, Thambanoor, Trivandrum, it was reported by the Police that there is no such person, as far as they could gather, from the detailed enquiries made and therefore notice could not be served. In the affidavits filed by Shri Thankappan Nair in these two cases when he offered himself as surety, the signatures of the deponent were attested by Shri A. K. Sreenivasan, Advocate stating 'Solemnly affirmed at Ernakulam on this the 14th day of August 1973 and signed before me, who is personally known to me.' From the report of the Police Trivandrum it appeared that this might be a case of false personation. It is seen that

in several cases the accused have been got released by false sureties. I have already submitted a report about this to the Hon'ble High Court as per my letter dated 31-10-1973.

x. x. x. x. There are several other similar instances of false personation and filing false affidavits pending enquiry before this Court. Under the circumstances in this case also it appeared to the court that a false affidavit has been filed by false personation. If it is false personation, the attestation by the advocate should necessarily be false. The offences under Sections 193, 196, 197, 199 and 205 of the Indian Penal Code appear to have been committed. These are some of the offences mentioned in Section 195, Cr. P. C. Under Section 476 of the Cr. P. C. 'when any Civil, Revenue or Criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interest of justice that an enquiry should be made into any offence referred to in Section 195, sub-section (1), Cl. (b) or cl. (c), which appears to have been committed in or in relation to a proceeding in that court, such court may, after such preliminary inquiry if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court..... To ascertain whether there is a person as described in the affidavits filed in the name of Shri Thankappan Nair notice was issued as part of the preliminary enquiry contemplated under Section 476, Cr. P. C. to Shri A. K. Sreenivasan who has attested the affidavits of the said Thankappan Nair stating that the deponent is personally known to him. This had to be done in view of the report of the police. Notice to Shri A. K. Sreenivasan was issued to appear in court on 3-11-1973 not in his capacity as Advocate appearing for the accused but as the person who has attested the affidavit of the said surety stating that he personally knows the surety. The court can make the preliminary enquiry mentioned above, either through the police or to the accused or to the other surety or to the person who attested the affidavit. In this matter accused is absconding the other surety could not be served and the police report is as stated above. So the only person to whom the inquiry under Section 476 could be made in the circumstances is the person who has attested the affidavit."

7. On 8-11-1973, the Advocate filed an affidavit in which he inter alia averred:

"I submit that the present explanation that the notice was issued to me as a part of the preliminary enquiry contemplated under Section 476 of the Cri-

iminal Procedure Code is, obviously an afterthought, since it is difficult that any reasonable man would have inferred from the Police Report dated 12-10-1973 that Sri Thankappan Nair, one of the sureties was a non-existent person and therefore the attestation made by me on 14-8-1973 would have been false."

He further reiterated with elaboration the allegations in his petition that the impugned action of the Magistrate lacked good faith and due care and had been issued to humiliate the bar generally and the petitioner particularly.

8. After taking into consideration the appellant's report and other material on record, the High Court quashed the notice holding that "the 'action' of the District Magistrate in issuing the impugned notice to the appellant constitutes grave misuse of his power and flagrant abuse of the process of the court."

9. The appellant then moved an application (Cr. M. P. No. 7 of 1974) for expunction of the remarks made against him by the High Court in its order, dated 20-11-1973. The application was rejected.

10. Against that order, dated 13-3-1974, refusing to expunge the adverse remarks, Shri Lakshmanan, the District Magistrate has come in appeal to this Court.

11. In the reply affidavit, dated 21-3-1975, filed in this Court, the appellant has submitted that if this Court is prima facie of the opinion that the passages requested to be expunged are too many and spread over throughout the order, at least these four passages be expunged from the order in question:

"(i) I cannot help remarking that the information furnished to this Court by the District Magistrate in his report dated 3-11-1973 regarding the contents of the Police report is grossly inaccurate and misleading."

"(ii) I make no secret, of my opinion that the action taken by the District Magistrate, in the present case in issuing a notice to the petitioner, who is a member of the Bar, was most highly arbitrary and the very casual fashion in which the said action has been done renders it all the more objectionable."

"(iii) that the action taken against the petitioner by the District Magistrate is totally devoid of any legal sanction and highly arbitrary."

"(iv) I hold that the action of the District Magistrate in issuing the impugned notice to the petitioner constitutes a grave misuse of his power and also flagrant abuse of the process of his court."

12. The tests to be applied in considering the expunction of disparaging remarks against persons or authorities whose conduct comes in for consideration before courts of law in cases to be decided by them, were neatly summed up by this Court, speaking through S. K. Das, J. in *State of U. P. v. Muhammad Nain*, (1964) 2 SCR 363 at p. 374 = (AIR 1964 SC 703 at p. 707 = 1964-1 Cri LJ 549 at p. 554) thus:

- (i) Whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself;
- (ii) Whether there is evidence on record bearing on that conduct justifying the remarks; and
- (iii) Whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve."

13. Let us now apply these tests to the present case.

14. In the petition filed under Section 561-A, Code of Criminal Procedure, by the Advocate, the appellant was impleaded as the sole respondent. The appellant was called upon by the High Court to explain his conduct in issuing the impugned notice. In reply, the appellant submitted a detailed report. It is not controverted that before the High Court, the appellant was represented by a senior Public Prosecutor who had been directed to defend him by the State Government. The appellant had thus adequate opportunity of explaining his conduct and defending the impugned action. Indeed, in his report submitted to the High Court, he did his best to justify his conduct in that case. The appellant therefore, cannot complain that the remarks in question were passed by the High Court without affording him due opportunity to explain and defend his action.

15. Nor can it be said that this is a case where there was no evidence on record bearing on the conduct of the appellant to which the remarks in question pertain.

16. It is true that *ex facie*, the notice requiring the Advocate to attend the Court of the appellant on 3-11-73, though couched in curt and peremptory language, was not, by itself, a very offensive document. But the Advocate's allegation was that it had not been issued in good faith and the sole purpose of issuing this notice was to humiliate the Advocate and the Bar who had earlier

passed a resolution complaining to the High Court against the misbehaviour of the appellant towards the members of the Bar. Subsequently, on 8-11-1973 the Advocate filed an affidavit setting forth full particulars of the circumstances which, according to him, showed how the notice was illegal, arbitrary and tainted by bad faith. He annexed a copy of the Bar's resolution, to his affidavit. The report sent by the appellant to the High Court confirmed that the allegations made in the Advocate's petition were not empty apprehensions. The report revealed that the notice was not an innocuous request to the counsel to furnish better particulars of the surety, but it was a preliminary step taken under cover of Section 476, Criminal Procedure Code for possible prosecution of the Advocate. The appellant gave a clear clue to his ulterior intent, when in the report, he said:

"Notice to Shri A. K. Sreenivasan was issued..... not in his capacity as Advocate appearing for the accused but as the person who has attested the affidavit of the said surety....."

17. Thus there was ample material before the High Court bearing on the impugned conduct of the appellant, justifying the adverse comments in question.

18. Again, the passages sought to be expunged could not be said to be irrelevant or alien to the subject-matter of the case before the High Court.

19. The notice issued to the Surety had been returned by the police with an endorsement which, rendered into English, reads as under:

"Notice could not be served on the person referred to in the notice as he (process server) did not get any information about him after detailed enquiry made about him in Tampanoor from different businessmen. For want of sufficient information and more detailed particulars regarding the nature of the business conducted at Tampanoor by the person referred to in the notice, the service could not be effected. Submitted for orders".

20. But in his report submitted to the High Court, the appellant stated that "it was reported by the Police that there is no such person as far as they could gather from the detailed inquiries made and therefore notice could not be served". Manifestly, this statement did not present a faithful and correct picture of the endorsement of the process server. Evidently, this misleading stand was taken by the appellant to show that action under Section 476, Criminal Procedure Code against the Advocate would

not be groundless. In these premises it cannot be said that the observations of the High Court that "information furnished to this Court by the District Magistrate in his report dated 3-11-1973 regarding the contents of the Police report is grossly inaccurate and misleading" was unjustified.

21. The substance of the other remarks in question is substantially the same, viz., that the issue of the impugned notice to the Advocate by the appellant was illegal and arbitrary and amounted to a gross abuse of the process of the Court. These remarks were an integral part of the reasoning of the High Court. They were not irrelevant or foreign to the matter in issue. They were inextricably intertwined with the findings and the order recorded by the High Court in that case. Excision of these remarks would emasculate the order of the High Court, robbing it of its very rationale.

22. Judged by the aforesaid tests, no case for interference by this Court has been made out.

23. Accordingly, we dismiss the appeal, with no order as to costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 1745

(From: Patna)

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

Sahu Minerals and Properties Ltd.,
Appellant v. Presiding Officer, Labour
Court and others, Respondents.

Civil Appeals Nos. 1266 and 1267 of
1969, D/- 6-8-1975.

(A) Industrial Disputes Act (1947),
Section 33-C (2) and Sch. 3, Item 10 —
Application under Section 33-C (2) —
Employer contending that the workmen
were entitled to compensation under proviso
to Section 25-FFF (1) and not to retrenchment
compensation — Labour
Court held competent to decide the question —
Item 10 of Sch. 3 held not attracted.

It was competent to the Labour Court to decide whether the case before it was a case of retrenchment compensation or the proviso to sub-section (1) of Section 25-FFF was attracted on closure of the establishment. The question even according to the employer falls under Section 25-FFF and therefore in deciding that question the Labour Court has necessarily to decide whether the proviso has been satisfied. AIR 1964 SC 743 and (1969) 2 SCR 902, Foll.; AIR 1970 SC 237 = 1970 Lab IC 276, Disting. (Para 6)

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It cannot be contended that only an Industrial Tribunal is competent to decide such a dispute in view of Item 10 of Sch. 3. Item 10 of Third Schedule does not cover a case where the only dispute is about the compensation whether it is to be paid under Section 25-F or 25-FFF. Item 10 refers to cases where the right to retrench workers or to close an establishment is disputed and that question is referred for adjudication to the Industrial Tribunal. In that case the Tribunal will be competent to decide whether the closure or retrenchment was justified and whether the retrenched workmen should be reinstated or the workers in the establishment purported to have been closed should be continued to be paid on the basis that the so-called closure was no closure at all. (Para 7)

Cases Referred: Chronological Paras

AIR 1970 SC 237 = (1970) 1 SCR 507 =
1970 Lab IC 276 2, 3
(1969) 2 SCR 902 = (1970) 2 SCJ 118 5
AIR 1964 SC 743 = (1964) 3 SCR 140 4

The Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— By two notifications dated 22-6-1965 and 28-8-1965 the Government of Bihar sent to the Labour Court, Chota Nagpur Division, Ranchi applications in respect of 73 workers of the appellant for decision under Section 33-C (2) of the Industrial Disputes Act for retrenchment compensation. The employer contended that it was a case of closure for reasons beyond its control and that therefore the workmen were entitled to compensation under the proviso to sub-section (1) of Sec. 25-FFF of the Act and not to retrenchment compensation. The workers contended, however, that they were entitled to retrenchment compensation under Section 25-F. The Labour Court held that it was a case of retrenchment. Two writ petitions filed by the employer before the High Court of Patna failed and these appeals have been filed in pursuance of a certificate of fitness granted by the High Court.

2. The argument on behalf of the appellant is that where there is a dispute before the Labour Court considering an application under Section 33-C (2) as to whether the workmen had been retrenched or the factory had been closed for reasons beyond the control of the employer, it was not a matter which the Labour Court was competent to decide and that it was a matter which only an Industrial Tribunal considering a reference under Section 10 is competent to decide. In particular Item 10 of the Third Schedule to the Act is relied upon to show that the matter relating to retrenchment and closure is one which only an Industrial Tribunal is competent to de-

cide. Reliance is placed upon a decision of this Court in *U. P. Elect. Co. v. R. K. Shukla*, (1970) 1 SCR 507 = (AIR 1970 SC 237 = 1970 Lab IC 276) where it was held that the power of the Labour Court is to compute the compensation claimed to be payable to the workmen on the footing that there has been retrenchment of the workmen, that where retrenchment is conceded and the only matter in dispute is that by virtue of Section 25-FF no liability to pay compensation has arisen the Labour Court will be competent to decide the question, that in such a case the question is one of computation and not of determination, of the conditions precedent to the accrual of liability, and that where the dispute is whether workmen have been retrenched and computation of the amount is subsidiary or incidental, the Labour Court will have no authority to trespass upon the powers of the Tribunal with which it is statutorily invested.

3. In the *U. P. Electric Company's case* (1970) 1 SCR 507 = (AIR 1970 SC 237 = 1970 Lab LC 276) (supra) the facts were somewhat different. The Court in that case noticed at page 513 (of SCR) = (at p. 240 of AIR and at p. 280 of Lab IC) of the report that—

"The Company had expressly raised a contention that they had not retrenched the workmen and that the workmen had voluntarily abandoned the Company's service by seeking employment with the Board even before the company closed its undertaking."

This Court emphasised at page 517 (of SCR) = (at p. 242 of AIR and at p. 282 of Lab IC) of the report that—

"If the liability arises from an award, settlement or under the provisions of Chapter V-A or by virtue of a statute or a scheme made thereunder, mere denial by the employer may not be sufficient to negative the claim under Section 33-C (2) before the Labour Court".

We, therefore, do not see how the decision in the *U. P. Electric Company's case* (supra) can come to the aid of the appellant in this case. The said case is clearly distinguishable on the peculiar facts as noticed above.

4. In *Central Bank of India Ltd. v. P. S. Rajagopalan*, (1964) 3 SCR 140 = (AIR 1964 SC 743) this Court considered the scope of Section 33-C (2) elaborately and it would be necessary to quote at some length from that decision. In that case it was urged by the employer that Sec. 33-C (2) can be invoked by a workman who is entitled to receive from the employer the benefit there specified, but the right of the workman to receive the benefit has to be admitted and could not be a matter of dispute between the parties and that the only point which the Labour Court can determine is one in re-

lation to the computation of the benefit in terms of money. This Court observed:

"We are not impressed by this argument. In our opinion, on a fair and reasonable construction of sub-section (2) it is clear that if a workman's right to receive the benefit is disputed, that may have to be determined by the Labour Court. Before proceeding to compute the benefit in terms of money the Labour Court inevitably has to deal with the question as to whether the workman has a right to receive that benefit. If the said right is not disputed, nothing more needs to be done and the Labour Court can proceed to compute the value of the benefit in terms of money; but if the said right is disputed, the Labour Court must deal with that question and decide whether the workman has the right to receive the benefit as alleged by him and it is only if the Labour Court answers this point in favour of the workman that the next question of making necessary computation can arise. It seems to us that the opening clause of sub-section (2) does not admit of the construction for which the appellant contends unless we add some words in that clause. The clause "Where any workman is entitled to receive from the employer any benefit" does not mean "where such workman is admittedly, or admitted to be, entitled to receive such benefit". The appellant's construction would necessarily introduce the addition of the words "admittedly, or admitted to be" in that clause, and that clearly is not permissible. Besides, it seems to us that if the appellant's construction is accepted, it would necessarily mean that it would be at the option of the employer to allow the workman to avail himself of the remedy provided by sub-section (2), because he has merely to raise an objection on the ground that the right claimed by the workman is not admitted to oust the jurisdiction of the Labour Court to entertain the workman's application. The claim under Section 33-C (2) clearly postulates that the determination of the question about computing the benefit in terms of money may, in some cases, have to be preceded by an enquiry into the existence of the right and such an enquiry must be held to be incidental to the main determination which has been assigned to the Labour Court by sub-section (2). As Maxwell has observed "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution (1)". We must accordingly hold that Section 33-C (2) takes within its purview cases of workmen who claimed that the benefit to which they are entitled should be com-

(1) Maxwell on Interpretation of Statutes, p. 350.

puted in terms of money, even though the right to the benefit on which their claim is based is disputed by their employers. Incidentally, it may be relevant to add that it would be somewhat odd that under sub-section (3), the Labour Court should have been authorised to delegate the work of computing the money value of the benefit to the Commissioner if the determination of the said question was the only task assigned to the Labour Court under sub-section (2). On the other hand, sub-section (3) becomes intelligible if it is held that what can be assigned to the Commissioner includes only a part of the assignment of the Labour Court under sub-section (2)."

Furtheron this Court observed:

"It is thus clear that claim made under Section 33-C (1), by itself can be only claim referable to the settlement, award, or the relevant provisions of Chapter V-A. These words of limitations are not to be found in Section 33-C (2) and to that extent, the scope of S. 33-C (2) is undoubtedly wider than that of Section 33-C (1). It is unnecessary in the present appeals either to state exhaustively or even to indicate broadly what other categories of claims can fall under Section 33-C (2). There is no doubt that the three categories of claims mentioned in Section 33-C (1) fall under Section 33-C (2) and in that sense, Section 33-C (2) can itself be deemed to be a kind of execution proceeding, but it is possible that claims not based on settlements, awards or made under the provisions of Chapter V-A, may also be competent under Section 33-C (2) and that may illustrate its wider scope."

This Court then went on to discuss some of the claims which would not fall under Section 33-C (2), which is not very relevant for the purposes of this case. The present case stands on an even stronger footing. Even the employer does not dispute that the workmen are entitled to compensation. It only says that the compensation should be calculated on a particular basis different from the basis on which the workmen claim. The claim also falls under Chapter V-A.

5. In the decision in *South Arcot Elect. Co. v. N. K. Khan*, (1969) 2 SCR 902 where a right had been claimed by the various workmen in their applications under Section 33-C (2), it was held that it was a right which accrued to them under Section 25-FF of the Act and was an existing right at the time when these applications were made, that the Labour Court clearly had jurisdiction to decide whether such a right did or did not exist when dealing with the application under that provision, and that the mere denial

of that right by the company could not take away its jurisdiction.

6. We hold that in this case it was competent to the Labour Court to decide whether the case before it was a case of retrenchment compensation or the proviso to sub-section (1) of Section 25-FFF was attracted on closure of the establishment. The question even according to the employer falls under Section 25-FFF and therefore in deciding that question the Labour Court has necessarily to decide whether the proviso has been satisfied.

7. We do not consider that the reference to Item No. 10 of the Third Schedule to the Act can decide the matter one way or the other. The item reads as follows:

"10. Retrenchment of workmen and closure of establishment." It does not say that all questions arising out of retrenchment of workmen and closure of establishments have to be decided by Industrial Tribunal. Logically if the contention is to be accepted, even if the question of retrenchment is not disputed the Labour Court will not be competent to decide the question of compensation payable in a case of retrenchment because it raises a question of jurisdiction. This entry should therefore be held to refer to cases where the right to retrench workers or to close an establishment is disputed and that question is referred for adjudication to the Industrial Tribunal. In that case the Tribunal will be competent to decide whether the closure or retrenchment was justified and whether the retrenched workmen should be reinstated or the workers in the establishment purported to have been closed should be continued to be paid on the basis that the so-called closure was no closure at all. In the present case the workmen do not ask for reinstatement. They accept the termination of their services and ask for compensation. The only dispute is about the compensation whether it is to be paid under Section 25-F or 25-FFF. Item 10 of Third Schedule will not cover such a case.

8. We therefore uphold the decision of the High Court and dismiss these appeals with costs.

Appeals dismissed.

AIR 1975 SUPREME COURT 1748

(From: Madhya Pradesh)*

**H. R. KHANNA, M. H. BEG AND
A. C. GUPTA, JJ.****Ashok Dulichand, Appellant v.
Madhavlal Dube and another, Respondents.****Civil Appeal No. 1327 of 1973, D/-
5-8-1975.****(A) Evidence Act (1872), Section 65
(a) — Election petition — Photostat copy
of manuscript of leaflet — Successful candi-
date not shown to be in possession of
original — Document, not above suspicion
— Leading of secondary evidence — Not
permissible.**

Where in an election petition by an elector challenging the election of successful candidate to the Legislative Assembly the petitioner sought to file a photostat copy of the manuscript of a leaflet alleged to have been written by that candidate making defamatory and false averments against an unsuccessful candidate and the petitioner failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken, the photostat copy being not above suspicion the petitioner could not be permitted to lead secondary evidence in the shape of photostat copy when there was neither any averment nor any material to show that the original document was in possession of the successful candidate. Ele. Petn. No. 36 of 1972, D/- 21-7-1973 (Madh. Pra.), Affirmed. (Para 7)

**(B) Representation of the People Act
(1951), Section 123 (4) — Corrupt practice
as defined in Section 123 (4) — Require-
ment of.**

Apart from the other requirements, it is of the essence of the matter that the impugned statement of fact in relation to the personal character or conduct of a candidate which is alleged to have been published should be false. Unless the said statement of fact is shown to be false, its publication would not constitute corrupt practice as defined in Section 123 (4). (Para 8)

M/s. N. M. Ghatate and S. Balakrishnan, Advocates, for Appellant; Mr. S. S. Khanduja, Advocate for Respondent No. 1; Respondent No. 2, Ex parte.

Judgment of the Court was delivered by

H. R. KHANNA, J.:— This appeal is directed against the judgment of Madhya Pradesh High Court whereby that court

*(Elec. Petn. No. 36 of 1972, D/- 21-7-1973, Madh. Pra.)

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dismissed the election petition filed by the petitioner-appellant to challenge the election of respondent No. 1 to Madhya Pradesh Legislative Assembly Pandhurna constituency in Chhindwara District.

2. The election for Pandhurna constituency took place on March 8, 1972. There were six candidates who contested the election. The main contest was, however, between Madhavlal Dube respondent No. 1 and Dr. Ratanchand Mangalchand Sanghvi respondent No. 2. Respondent No. 1 was declared elected. The appellant, who was an elector in the above mentioned constituency, filed election petition to challenge the election of respondent No. 1 on various grounds. It is not necessary to set out all the grounds because in appeal before us only one ground which is the subject-matter of Issue No. 10 has been pressed on behalf of the appellant. The allegation which gave rise to issue No. 10 was contained in para. 13 of the election petition. The petition was, however, ordered to be amended because it did not contain full particulars. The allegation with particulars was thereafter contained in para. 13 of the amended petition. According to the appellant, respondent No. 1 or his agent or any other person with his consent had got published and widely circulated a leaflet with the caption "Sawal Janta Ke" purporting to be on behalf of Pandhurna Matdar Sangh. The aforesaid leaflet, according to the appellant, seemed to have been drafted by respondent No. 1 and was full of defamatory and false averments calculated to prejudice the election prospects of repdt. No. 2. The leaflet was stated to have been very widely circulated and distributed throughout the constituency. Every sentence of the leaflet, it was added, contained statement of fact about the personal character or conduct of respondent No. 2 which was false to the knowledge of respondent No. 1. Respondent No. 1 and his friends were stated to have got the leaflet published under the pseudonym of Pandhurna Matdar Sangh although there was no such Sangh in existence. The name of the press and publisher's name was also not mentioned in the leaflet. The appellant also mentioned the places where and the names of persons through whom the leaflets were alleged to have been distributed.

3. According to the leaflet which has been marked Ex. P-4, respondent No. 2 was not a man of good character. The said respondent was alleged to have committed rape upon a nurse while he was a government doctor. He was also stated to be carrying on with another woman. The activities of respondent No. 2 were stated to have driven his wife to insanity. Reference was also made to some other shady and unethical activities in which

respondent No. 2 was stated to be indulging.

4. Respondent No. 1 in his written statement denied that he, his agents or any other person with his consent had got published and circulated the leaflet in question. It was also denied by respondent No. 1 that he had drafted the aforesaid leaflet. According to respondent No. 1, he had no connection with that leaflet and he was unable to make any statement about the truth or falsity of its contents. It was denied that the said leaflet was widely circulated and distributed throughout the constituency. The allegation that the leaflet was calculated to prejudice the election prospects of respondent No. 2 too was denied. Likewise, respondent No. 1 denied that the different sentences of the leaflet contained statement of fact about the personal character or conduct of respondent No. 2 which was false to the knowledge of respondent No. 1. According further to the respondent, he came to know of the said leaflet only some weeks after the election was over. The said leaflet, it was added, appeared to have been got printed by someone interested in respondent No. 2 to create a ground for filing an election petition. Issue No. 10 reads as under:

"10 (a) Whether the leaflet with the caption 'Sawal Janta Ke' was published by respondent No. 1, his agents or any other person with his consent?

(b) whether the respondent No. 1 has any connection with the aforesaid leaflet?

(c) Whether the material contained in the leaflet relates to personal character of respondent No. 2?

(d) Whether the leaflet was widely circulated and distributed throughout the constituency and it was calculated to prejudice the election prospects of respondent No. 2?

(e) Whether the leaflet was distributed at the places and by the persons named in paragraph 13 of the election petition?

(f) Whether all persons named in the paragraph 13 except Shrimati Kamla Bai Mohogaonkar of Mohogaon were active supporters of respondent No. 2?

Whether any corrupt practice under Section 123 (4) of the R. P. Act was committed in respect of the above?

Whether the allegations made in paragraph 13 make out a ground for challenging the election of respondent No. 1 under Section 100 (1) of the R. P. Act, 1951?"

5. The High Court decided issues 10(a) and (b) against the appellant on the ground that no evidence had been led by him in this behalf. On issue 10 (c); it was held, that though the material contained in leaflet P4 related to the personal

character and conduct of respondent No. 2, the appellant had failed to prove that its contents were false to the knowledge of respondent No. 1 or that he did not believe them to be true. No corrupt practice as defined in Section 123 (4) of the Representation of the People Act was held to have been proved. Issues 10 (d) and (e) were held to be of no consequence in view of the fact that it was not proved that respondent No. 1 was guilty of corrupt practice. In the result the election petition was dismissed.

6. In appeal before us Mr. Ghatate on behalf of the appellant has argued that the appellant wanted to file a photostat copy of the manuscript of leaflet P-4 which, according to the appellant, had been written by respondent No. 1. The High Court, it is pointed out, did not admit the aforesaid photostat copy in evidence on the ground that there was no sufficient reason for allowing the appellant to lead secondary evidence. It is that order of the High Court which has been the main target of the criticism of Mr. Ghatate.

7. After hearing the learned Counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of Section 65 of the Indian Evidence Act, secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case respondent No. 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was, however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of respondent No. 1. There

was also no other material on the record to indicate that the original document was in the possession of respondent No. 1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No. 1 in his affidavit denied being in possession of or having anything to do with such a document. The photostat copy appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court.

8. The matter may also be looked at from another angle. There is no evidence on record to show that the contents of leaflet Ex. P-4 were false. Respondent No. 2 in relation to whose personal character and conduct statements were made in leaflet P-4 was not examined as a witness. No other evidence was also led of any person who knew about the character or conduct of respondent No. 2 to show that the statements contained in leaflet in question were false. The High Court consequently arrived at the conclusion that on the material on record it could not be held that the contents of the said leaflet were false and that respondent No. 1 believed them to be false or did not believe them to be true. As such, no corrupt practice as defined in Section 123 (4) of the Representation of the People Act, 1951, was held to have been proved. A corrupt practice, according to Section 123 (4), consists of the publication by a candidate or his agent or by any other person, with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election. Apart from the other requirements, it is of the essence of the matter that the impugned statement of fact in relation to the personal character or conduct of a candidate with is alleged to have been published should be false. Unless the said statement of fact is shown to be false, its publication would not constitute corrupt practice as defined in clause (4) of Section 123 of the Act. When there is complete absence of any material on the record to show that the impugned statement of fact is false, no occasion would plainly arise for remanding the case to the High Court to

enable the appellant to produce in evidence the photostat copy in question with a view to show that the original of that had been written by the respondent.

9. There is no merit in the appeal. The same is accordingly dismissed with costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 1750

(From: Madras)*

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

S. M. Gopalakrishna Chetty, Appellant v. Ganeshan and others, Respondents.
Civil Appeals Nos. 493-495 of 1974,
D/- 11-8-1975.

(A) Madras Buildings (Lease and Rent Control) Act (18 of 1960), Sections 2 (6), 14 (1) (b) — Whether Holder of life interest can apply under Section 14 (1) (b) — Order of Madras High Court dated 9-8-1973 in C. R. Nos. 1470 to 1472 of 1973, Reversed.

The inclusive definition of landlord in Section 2 (6) would clearly take in its sweep the landlord who holds a life interest in the premises and who admittedly has been on his own right under the Deed of Settlement as a trustee receiving rents of the premises from the tenants. A controversy that may arise between a landlord and others, who are not his tenants under the Act, is outside the ken of this Act. Even a possible dispute, imaginary or real, between the landlord and the remaindermen cannot affect adjudication of the claim of the landlord against his tenants under the provisions of the Act. It will also not affect the efficacy of the nature of the plea of bona fide on the part of the landlord, if otherwise so. Such questions are, therefore, irrelevant in a litigation between the landlord and tenants when a suit for eviction is instituted by the former on any of the grounds available to him under the Act. The landlord who is the holder of life interest in the property, is thus entitled to evict the tenants under Sec. 14 (1) (b) of the Act on the ground that the building is bona fide required by the landlord for demolition and for reconstruction. Order of Madras High Court D/- 9-8-1973 in C. R. Nos. 1470 to 1472 of 1973, Reversed.

(Paras 2, 7, 8)

(B) Madras Buildings (Lease and Rent Control) Act (18 of 1960), Section 14 (1) (b) — Single application with regard to two tenancies — Maintainability.

A single petition with regard to two different tenancies, in the same premises,

*(Civil Revn. Petns. Nos. 1470 to 1472 of 1973, D/- 9-8-1973 (Mad)).

HS/HS/C874/75/DHZ

one for residential purpose and the other for non-residential purpose, is maintainable. (Para 10)

Cases Referred: Chronological Paras
AIR 1974 SC 818 = 1974 Ren CR 170 8

Mr. K. S. Ramamurthi, Sr. Advocate, (M/s. T. N. Vallinayagam, R. N. Nath and V. Mayakrishnan, Advocates with him), for Appellant.

The Judgment of the Court was delivered by

GOSWAMI, J.— These appeals by special leave are directed against the order of the High Court of Madras in Three Civil Revision Petitions under Section 25 of the Madras Buildings (Lease and Rent Control) Act 1960 (briefly the Act) whereby the High Court refused to interfere with the orders of the Appellate Authority under the Act holding that the appellant (hereinafter to be described as the landlord) has no right to evict the respondents (hereinafter to be described as the tenants) from the premises in question on the ground of demolition and reconstruction.

2. The tenancy under the landlord is admitted by the tenants. There is also no question with regard to the validity of the notice of eviction. The only questions in controversy in these appeals are whether the landlord in this case, who is the holder of life interest in the property, is entitled to evict the tenants under Section 14 (1) (b) of the Act on the ground that the building is bona fide required by the landlord for demolition and for reconstruction. The second question raised in one of the appeals is whether a single petition is maintainable to evict the tenants from two different tenancies one for residential purpose and the other for non-residential purpose. The latter point has been held by the High Court in favour of the landlord but the tenants are raising it in seeking to support the earlier order of the Appellate Authority.

3. The premises are situated at Anna Pillai Street, Madras. Originally the premises belonged to late S. Manicka Chettyar, father of S. M. Gopalakrishna, the present landlord. By virtue of a Deed of Settlement executed by S. Manicka Chettyar on May 9, 1934, possession of the premises was delivered to his wife, Manoranjithammala, as trustee and guardian of his three minor children, S. M. Gopalakrishna then aged 13 years, and his two minor daughters, Indrani Ammal and Palani Ammal. We are not concerned with the various directions in the Deed of Settlement except to note the admitted position that Manoranjithammala was allowed to enjoy the rents and profits of the property for her lifetime subject to certain charges mentioned in the Deed. After the lifetime of the settlor's wife, his son, S. M. Gopalakrishna (appellant)

"shall enjoy the rents and profits of the said property for his lifetime" subject to certain charges on account of his two sisters. It is further mentioned in the Deed that after the lifetime of Gopalakrishna, his son and son's heir or any predeceased son living at that time shall enjoy the property subject to identical charges as absolute owners with right of sale, gift, etc. There are further directions in case of other contingencies with which we are not concerned. We, may, however, note that S. M. Gopalakrishna is issueless.

4. From the above terms of the Settlement it is contended by the tenants that the landlord has only a life interest in the premises in question and that it is inherent in such a life interest that it is not permissible for the landlord to invoke Section 14 (1) (b) as grounds for eviction of the tenants by demolition of the property for the purpose of reconstruction. It is emphasised that since the interest of the remainder-men may be prejudiced, the landlord with a life interest in the premises cannot evict the tenants on these grounds.

5. The Rent Controller held that the requirement of the landlord was bona fide and ordered for eviction of the tenants. The Court of Small Causes, which is the appellate authority, allowed the appeals lodged by the tenants against the orders of eviction and set aside the orders of eviction. As noticed earlier the High Court refused to interfere in revision.

6. The High Court agreed with the view of the Appellate Authority that the landlord had no right to ask for eviction of the respondents on the ground of demolition and reconstruction, he admittedly having only a life interest or right to enjoy the property for his life. The appellant submits that this view is not legally tenable.

7. Before we proceed to consider the point in controversy, we may read Section 14 (1) (b):

14. "Recovery of possession by landlord for repairs or for reconstruction.—

(1) Notwithstanding anything contained in this Act, but subject to the provisions of Sections 12 and 13, on an application made by a landlord, the Controller shall, if he is satisfied—

xx xx xx xx

(b) that the building is bona fide required by the landlord for the immediate purpose of demolishing it and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished, pass an order directing the tenant to deliver possession of the building to the landlord before a specified date."

The expression landlord is defined under Section 2 (6) as follows:—

"'Landlord' includes the person who is receiving or is entitled to receive the rent of a building, whether on his own account or on behalf of another or on behalf of himself and others, or as an agent, trustee, executor, administrator, receiver or guardian or who would so receive the rent or be entitled to receive the rent, if the building were let to a tenant."

This inclusive definition of landlord would clearly take in its sweep the present landlord who holds a life interest in the premises and who admittedly has been on his own right under the Deed of Settlement as a trustee receiving rents of the premises from the tenants. We are not even concerned with the question as has been sought to be established in the case by proving that there is no possibility of any objection from the daughters of the settlor or from any other remainder-men. It is sufficient to observe that the rights between S. M. Gopalakrishna and the remainder-men with regard to the terms of the Deed of Settlement will have to be worked out in appropriate proceeding if necessary, and the general law will govern the matter if any occasion arises.

8. On the other hand, the Act with which we are concerned is a self-contained and complete code for regulation of the rights between landlord and tenants as defined in the Act (See *M/s. Ravel and Co. v. K. G. Ramachandran*, AIR 1974 SC 818). Thus a controversy that may arise between a landlord and others, who are not his tenants under the Act is, outside the ken of this Act. Even a possible dispute, imaginary or real, between the landlord and the remainder-men cannot affect adjudication of the claim of the landlord against his tenants under the provisions of the Act. It will also not affect the efficacy of the nature of the plea of bona fide on the part of the landlord, if otherwise so. Such questions as are raised in this appeal by the tenants are, therefore, irrelevant in a litigation between the landlord and tenants when a suit for eviction is instituted by the former on any of the grounds available to him under the Act. It is clear that when the objection on the score of the landlord being a holder of life interest and hence incapable of invoking Section 14 (1) (b) fails the suit must be decreed.

9. It was strenuously submitted by Mr. Natesan that a tenant with a life interest cannot be allowed to demolish the property in order to reconstruct it as that action would, per se, be not bona fide. We are unable to accede to this submission. A landlord has every right to demolish his property in order to build a new structure on the site with a view to improve his business or to get better re-

turns on his investment. Such a step, per se, cannot be characterised as mala fide on the part of the landlord. There is, therefore, no merit in this contention.

10. Mr. Natesan faintly submitted that a single petition with regard to two different tenancies, although in the same premises, one for residential purpose and the other for non-residential purpose, is not maintainable. We do not find any substance in such a contention when the tenancy is one.

11. In the result the appeals are allowed and the order of the High Court as well as that of the appellate authority are set aside. The order of the Controller allowing eviction of the tenants stands restored. We will, however, allow time to the tenants upto 31st January, 1976, to vacate the premises on the distinct condition that they shall submit affidavits in this Court undertaking to vacate the premises by the aforesaid date within two weeks from to-day. The appellant will be entitled to his costs in these appeals. One set of costs.

Appeals allowed.

AIR 1975 SUPREME COURT 1752

(From:— Gujarat)*

Y. V. CHANDRACHUD, P. N. BHAGWATI AND R. S. SARKARIA, JJ.

Ramniklal Gokaldas Oza, Appellant v. The State of Gujarat, Respondent.

Criminal Appeal No. 90 of 1971, D/- 6-8-1975.

(A) Constitution of India, Art. 136 — Special Leave Appeal in Criminal Cases — Interference with concurrent finding of fact — Scope.

In a criminal case, while hearing an appeal by special leave, the Supreme Court should not ordinarily embark upon a reappraisal of the evidence, when both the Sessions Court and the High Court have agreed in their appreciation of the evidence and arrived at concurrent findings of fact. It must be remembered that the Supreme Court is not a regular court of appeal which an accused may approach as of right in criminal cases. It is an extraordinary jurisdiction which the Supreme Court exercises when it entertains an appeal by special leave and this jurisdiction, by its very nature, is exercisable only when the Court is satisfied that it is necessary to interfere in order to prevent grave or serious miscarriage of justice. Mere errors in appreciation of the evidence are not enough

* (Criminal Appeals Nos. 476 and 516 of 1969, D/- 3-2-1971 (Guj.))

to attract this invigilatory jurisdiction.

(Para 3)

Held, on facts and circumstances, that no grave or manifest failure of justice had been occasioned as a result of the Sessions Court and the High Court concurrently accepting the testimony of the prosecution witness despite the contradiction with earlier police statement. There was no cogent reason to interfere with the appreciation of evidence of the prosecution witness by the lower courts. Cr. Apps. Nos. 476 and 516 of 1969, D/-3-2-1971 (Guj.), Affirmed. (Para 6)

Mr. D. Mukherjee, Sr. Advocate. (Mr. Vimal Dave and Miss Kailash Mehta, Advocates with him), for Appellant; M/s S. K. Anand and M. N. Shroff, Advocates, for Respondent.

Judgment of the Court was delivered by

BHAGWATI, J.:— This appeal, by special leave, is directed against a judgment of the High Court of Gujarat confirming the conviction and sentence recorded against the appellant by the Additional Sessions Judge, Ahmedabad for offences under Sections 419, 420 and 471 of the Indian Penal Code.

2. The conviction is based solely on the identification of the appellant by two witnesses, namely, Jayatilal Vyas and Karsan Lad. The evidence of both these witnesses has been accepted by the learned Sessions Judge as well as the High Court and on the basis of this evidence, the learned Sessions Judge and the High Court have arrived at concurrent findings of fact resulting in the conviction of the appellant. The veracity and credibility of the evidence of these two witnesses is assailed before us on behalf of the appellant, but we do not see any reason to interfere with the appreciation of this evidence by the learned Sessions Judge and the High Court.

3. It is a wholesome rule evolved by this Court, which has been consistently followed, that in a criminal case, while hearing an appeal by special leave, this Court should not ordinarily embark upon a reappraisal of the evidence, when both the Sessions Court and the High Court have agreed in their appreciation of the evidence and arrived at concurrent findings of fact. It must be remembered that this Court is not a regular Court of appeal which an accused may approach as of right in criminal cases. It is an extraordinary jurisdiction which this Court exercises when it entertains an appeal by special leave and this jurisdiction, by its very nature, is exercisable only when this Court is satisfied that it is necessary to interfere in order to prevent grave or serious miscarriage of

justice. Mere errors in appreciation of the evidence are not enough to attract this invigilatory jurisdiction. Or else, this Court would be converted into a regular Court of appeal where every judgment of the High Court in a criminal case would be liable to be scrutinised for its correctness. That is not the function of this Court.

4. Here, both the witnesses Jayatilal Vyas and Karsan Lad were believed by the Sessions Court and the High Court. We have carefully gone through the evidence of Jayatilal Vyas and we do not find any such infirmity in it as would warrant interference by us. The only material circumstance deposed to by Jayatilal Vyas was that when he went to Karsan Lad, who was the Ward Keeper in the Construction Ward, for issue of hack-saw blades at about 11.30 a. m. on 10th June, 1966, he saw the appellant seated by the side of Karsan Lad. On seeing him, the appellant asked what was the purpose of his visit to which he replied stating that he had come to obtain hack-saw blades. He then enquired of the appellant as to why he was there, to which the reply was that "as there was shortage of staff, he was deputed for work" by the Executive Engineer. There is nothing unnatural about this incident. Jayatilal Vyas and the appellant both worked as Tally clerks in the office of the Executive Engineer (Construction) at Ahmedabad for about eighteen months and merely because they worked in two different departments of the same office, it cannot be said that Jayatilal Vyas could not have known the appellant. Jayatilal Vyas was at the relevant time working as a pricing clerk in the office of the Executive Engineer (Construction) at Abu Road and it is indeed difficult to see why, if a false witness had to be suborned, the Railway or the Police authorities should have picked out a clerk from Abu Road for the purpose of implicating the appellant. If Jayatilal Vyas did not in fact come down to Ahmedabad and go to the Construction Ward for the purpose of issue of Hack-saw blades, the Railway and the Police authorities would not have dared to call him as a witness to give this evidence, because he could have been easily falsified by the production of records from the office of the Executive Engineer (Construction) at Abu Road as also from the records of the Railway General Stores and Construction Ward at Ahmedabad. Moreover, there is no reason suggested why Jayatilal Vyas should have been all too ready to give evidence falsely implicating the appellant. It may also be noted that on 14th June, 1966 Jayatilal Vyas was summoned from Abu Road to Ahmedabad and on the same day, he

gave his statement to the Sub-Inspector of the Railway Protection Force where he narrated the identical story which he has given in his evidence. It is also a little difficult to understand why any one should have chosen to falsely palm off this incident on the appellant. Why fob it on the appellant and on no one else? The evidence given by Jayatilal Vyas is perfectly natural and the appellant has failed to show any cogent reason why we should disbelieve this witness, when both the Sessions Court as well as the High Court have accepted him as a truthful witness and relied on his testimony.

5. It is true that so far as the other witness Karsan Lad is concerned, there is one infirmity in his evidence. Karsan Lad stated that on 10th June, 1966 at about 9.45 a.m. the appellant came to him with three documents, namely, two material schedules marked 'A' and 'B' and the letter of authority marked 'C' for obtaining delivery of galvanized iron sheets. The appellant did not disclose his real name but gave the fictitious name of V. N. Makwana of the office of the Executive Engineer, Ahmedabad. Karsan Lad inspected these three documents and showed them to S. K. Parekh, Deputy Store Keeper, who stated that the galvanized iron sheets might be delivered, if available. Karsan Lad then checked up the stock register and since the galvanized iron sheets were available, he made an endorsement on the material schedule marked 'A' and returned the three documents to the appellant and asked him to go to the ledger section for stock marking. The appellant returned ten minutes later with the three documents containing remarks from the ledger section. Karsan Lad thereafter sent the three documents to one B. S. Darji to prepare an issue note and he himself went to the store room for the purpose of getting the galvanized iron sheets ready for delivery. He asked the appellant as to how he proposed to remove the galvanized iron sheets, to which the appellant replied stating that he was expecting his truck. It appears that truck No. GTD 3100 had already been arranged by the appellant and was standing near the godown. After fifteen or twenty minutes the appellant informed Karsan Lad that his truck had arrived. The appellant brought the truck to the store room with six labourers and at that time he was accompanied by one other person, who, according to Karsan Lad, was accused No. 2. Then one hundred galvanized iron sheets were loaded in the truck and Karsan Lad asked the appellant to sign the issue note and the gate pass, as that was a necessary formality

required to be completed before the truck could be permitted to leave the Store, the object being to ensure that the signature of the person taking delivery tallied with the signature of the person authorised to take delivery as set out in the letter of authority. The appellant did not sign the issue note and the gate pass and stated that he would first like to verify the quantity of galvanized iron sheets placed in the truck before he signed these two documents. The appellant went out of the office on this pretext and failed to return. Accused No. 2 at this time was sitting in the office and Karsan Lad, therefore, after waiting for some time, asked accused No. 2 to find out what had happened to the appellant and thereupon accused No. 2 also left the office, never to return. Since neither the appellant nor accused No. 2 came back to sign the issue note and the gate pass and to take delivery of the galvanized iron sheets, Karsan Lad brought this fact to the notice of S. K. Parekh and under the instructions of the latter, Karsan Lad got the galvanized iron sheets unloaded from the truck and placed them back in the Store room and the truck was then allowed to go under a gate pass. Karsan Lad stated that, on that day he did not suspect any foul play because he had seen "the person who introduced himself as V. N. Makwana talking to Mr. Vyas who had come from Abu Road" and he had, therefore, taken him to be a railway employee. It was only later that he came to know that the three documents marked 'A', 'B' and 'C' were forged. He asserted that the person who first came to him with the disputed documents was accused No. 1, that is the appellant, while the person who joined him later was accused No. 2 before the Court.

6. Now, it seems that in the statement which Karsan Lad gave to the investigating officer on 29th June, 1966 he stated:

"I had told the said Makwana to go to the ledger section to verify the stock position. At that time, near my table the person who had come with Makwana, whose name I do not know—was there and Vyas, the Material Chaser, from Abu Road was talking with him. Makwana had gone to the Ledger Section and his companion kept sitting there."

This extract from the police statement of Karsan Lad would show that on 29th June, 1966 when he gave his police statement, his case was that Jayatilal Vyas had a talk with the person who had come subsequently and at that time, the person who had come earlier and introduced himself as V. N. Makwana had gone to the Ledger Sec-

tion to verify the stock position. Now, if this were true, it would mean that it was accused No. 2 who came earlier under the pretended name of V. N. Makwana and presented the three forged documents and took a leading part in the operation and the appellant came into the picture only later, for one thing is certain that the person with whom Jayatilal Vyas had a talk was the appellant. But according to the evidence given by Karsan Lad in Court, it was the appellant who came earlier and introduced himself in the fictitious name of V. N. Makwana and the person who came later was accused No. 2. There is thus clearly a contradiction between the police statement of Karsan Lad and the evidence given by him in Court. Both the learned Sessions Judge and the High Court applied their mind to this contradiction and took the view, on a consideration of the totality of the circumstances, that what was stated by Karsan Lad before the police was a mistake and the evidence given by him in Court represented what really happened. It is quite possible that if we were hearing the first appeal against the conviction of the appellant, we might have taken a different view. We might have found it difficult to explain away the contradiction by merely dubbing the earlier police statement of Karsan Lad as mistaken. But, as we said earlier, it is not our practice to reappraise the evidence. We are not a regular court of appeal. When both the learned Sessions Judge as well as the High Court have, on an appreciation of the evidence, accepted the testimony of Karsan Lad, despite the contradiction with the earlier police statement, we would be transgressing the limits which we have imposed on the exercise of our jurisdiction as a matter of self-discipline, if we interfere with the appreciation of evidence by the learned Sessions Judge and the High Court and hold that by reason of the contradiction, we cannot accept the testimony of Karsan Lad. We are satisfied, on a conspectus of all the circumstances of the case, that no grave or manifest failure of justice has been occasioned as a result of the learned Sessions Judge and the High Court concurrently accepting the testimony of Karsan Lad and basing the conviction of the appellant upon it. There is no doubt, having regard to the evidence of Jayatilal Vyas, that the appellant was in the office of Construction Ward at about 11.30 a.m. on 10th June, 1966 when he had no reason to be there unless he wanted some material to be issued to him and he was not innocent of what was being done by his associate but was an active participant in the operation of obtaining delivery of galvanized iron sheets by means of the

three forged documents marked 'A', 'B' and 'C'. We do not see any cogent reason to interfere with the appreciation of the evidence of Karsan Lad by the learned Sessions Judge and the High Court.

7. The appeal, therefore, fails and is dismissed.

Appeal dismissed.

AIR 1975 SUPREME COURT 1755

(From: Calcutta)*

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

Union of India and others, Appellants
v. Sripati Ranjan Biswas and another,
Respondents.

Civil Appeal No. 556 of 1975. D/- 7-8-1975.

(A) Central Civil Services (Classification, Control and Appeal) Rules (1957), Rule 23 (2) (b) — Appeal to President under — Disposal of appeal by Minister — President acting on advice of Minister — Disposal, neither improper nor illegal — A. F. O. O. No. 683 of 1971, D/- 13-12-1973 (Cal.). Reversed. (Constitution of India, Art. 77).

The question relating to the domain of appointment or dismissal of a Government servant falls within the ambit of a purely executive function of the President in the case of the Union Government and of the Governor in the case of a State. In the case of the Central Government servant, such a function being ultimately an executive function of the President, the fact that the final order is preceded or accompanied by a quasi-judicial enquiry held by the Minister does not affect the character of that function by the President. The decision of any Minister under rules of business made under Art. 77 (3) is the decision of the President. Any reference to the President under any rule made under the Constitution must needs be to the President as the constitutional head, as envisaged in the Constitution acting with the aid and advice of the Council of Ministers. AIR 1974 SC 2192 = 1974 Lab IC 1380. Followed.

(Paras 8, 9)

Where an appeal to the President under Rule 23 (2) (b) of the Central Civil Services (Classification, Control and Appeal) Rules as filed by a Central Government servant against his dismissal was disposed of by a Minister and the President acted on the advice of the Minister in confirming the said order of dismissal, the disposal of the appeal in the afore-

*(A. F. O. O. No. 683 of 1971, D/- 13-12-1973 (Cal)).

said manner could not be said to be improper or illegal. There was no question of delegation involved in such a matter. The appellate order, in such a case, could not be said to be suffering from any constitutional infirmity. A. F. O. O. No. 683 of 1971, D/- 13-12-1973 (Cal), Reversed.

(Para 10)

Cases Referred: Chronological Paras
AIR 1974 SC 2192 = 1974 Lab IC 1380 6,
7, 8

Mr. L. N. Sinha, Solicitor General, (M/s. P. P. Rao and Girish Chandra, Advocates, with him), for Appellants; Mr. A. K. Sen, Sr. Advocate, (Mr. Prodyot Kumar Chakravarty, Advocate with him), for Respondent No. 1.

Judgment of the Court was delivered by

P. K. GOSWAMI, J.:— This appeal by special leave is directed against the judgment of the Division Bench of the High Court of Calcutta of December 13, 1973 reversing the judgment of the learned single Judge who had earlier found no infirmity in the impugned order of dismissal of the first respondent (hereinafter to be described as the respondent).

2. The respondent was a confirmed Appraiser with about eleven years' service in the Customs Department in Class II of Gazetted Officers. On December 4, 1961, he was suspended and a charge-sheet was served upon him. The charges related to firstly taking illegal gratification, secondly possession of assets disproportionate to his disclosed income and thirdly purchase of a plot of land without sanction of the appropriate authority. The respondent was found guilty in the course of a departmental enquiry of the second and third charges and was exonerated with regard to the first charge. A second notice was served upon him on December 17, 1962, affording an opportunity to show cause why he should not be dismissed from service. Thereupon the respondent preferred an application under Article 226 of the Constitution in the High Court challenging the show cause notice and obtained a Rule. This Rule was disposed of by the High Court quashing the third charge and the Collector of Customs was directed to reconsider the appropriate penalty to be imposed on the surviving second charge. On February 3, 1964, the Collector of Customs passed an order dismissing the respondent basing on the second charge. The respondent preferred an appeal to the President of India under Rule 23 (2) (b) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957 (briefly the Rules). After consulting the Union Public Service Commission under Rule 30 (2) of the Rules, the President of India rejected the respondent's appeal.

3. On November 25, 1966, the respondent filed a petition under Art. 226 of the Constitution in the High Court challenging the validity of the dismissal order as well as the appellate order of the President. The learned single Judge allowed the writ petition on August 29, 1967, holding that the appellate authority decided the appeal without considering whether the drastic punishment of dismissal was excessive or not in violation of the provisions of Rule 30 (2) (c). The learned Judge, however, gave liberty to proceed with the appeal afresh. Thereafter the Minister in the Ministry of Finance, Government of India, heard the appeal on March 28, 1969. Ultimately the respondent's appeal to the President of India was rejected on April 25, 1969 and the Under Secretary to the Government of India in the Finance Ministry communicated the order in the name of the President on May 9, 1969. The communication was in the following terms:—

"I am directed to refer to your letter dated 2-4-1968 and 5-6-1969, containing your further submission in reply to the notice issued to you vide this Ministry's No. F-49/1/67-Ad. II dated 23-2-1968, and to say that the President has carefully considered the further submissions made by you in consultation with the Union Public Service Commission. The arguments advanced by you at the time of the hearing granted to you by Shri P. C. Sethi, Minister in the Ministry of Finance, on behalf of the President on 28-3-1969 have also been carefully considered by him. Upon consideration of all the facts and circumstances of the case the President has decided that the penalty of dismissal from service imposed on you by the Disciplinary Authority (viz.) the Collector of Customs, Calcutta is not excessive or severe and that your appeal should be rejected. The President hereby orders accordingly. A copy of the U. P. S. C.'s letter No. F. 3/56/68-61 dated 26-10-1968 and a copy of the order passed by the Minister on behalf of the President are enclosed herewith."

4. The respondent in a third round of litigation challenged the above order in the High Court under Article 226 of the Constitution. The learned single Judge dismissed the same but in appeal against that judgment the Division Bench set aside the order of the learned single Judge and quashed the aforesaid order of May 9, 1969. Hence this appeal by the Union of India.

5. The High Court held that the powers and duties which the President is required to exercise as an appellate authority under Rule 23 (2) (b) of the Rules are not constitutional duties imposed upon the President under the Constitution. Ac-

ording to the High Court the functions and duties of the President as an appellate authority under the said Rules are not part of business of the Government of India nor are they part of the President's duties under the Constitution. The High Court, therefore, came to the conclusion that the Minister had no right to deal with the appeal which had been preferred to the President of India under the said Rules.

6. The above question is squarely covered by a recent decision of this Court in *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192 = (1974 Lab IC 1380). Even so, Mr. A. K. Sen appearing on behalf of the respondent submits that there is still an area which has not been covered by the said decision. Mr. Sen submits that hearing of an appeal under a statutory rule, as in this case, is a quasi-judicial act and, therefore, it cannot be delegated by the President to the Minister.

7. It is, however, clear that in *Samsher Singh's* case AIR 1974 SC 2192 = (1974 Lab IC 1380) the question related to the termination of service of a subordinate Judge under Rule 9 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and that of another officer in the Punjab Civil Service (Judicial Branch) under Rule 7 (3) in Part D of the Punjab Civil Services (Judicial Branch) Rules, 1951 as amended from time to time. It is not disputed that the above two Rules under which the termination took place are statutory Rules.

8. The question which is raised in this appeal relates to the domain of appointment or dismissal of a Government servant. Such a question falls within the ambit of a purely executive function of the President in the case of the Union Government and of the Governor in the case of a State. In the present case, such a function being ultimately an executive function of the President, the fact that the final order is preceded or accompanied by a quasi-judicial enquiry held by the Minister does not affect the character of the exercise of that function by the President. There is, therefore, nothing in principle which can be distinguished in this appeal from the ratio of the decision in *Samsher Singh's* case. The legal position is brought out very clearly in para. 57 of the report in *Shamsher Singh*, AIR 1974 SC 2192 = (1974 Lab IC 1380) (supra) in the following extracts:—

"Appointment or dismissal or removal of persons belonging to the Judicial Service of the State is not a personal function but is an executive function of the Governor exercised in accordance with the rules in that behalf under the Constitution".

Again in para. 48 the Court observed—

"The President as well as the Governor is the Constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the Constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister or Officer under rules of business made under any of these two Articles 77 (3) and 166 (3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of Minister or officer under the rules of business is the decision of the President or the Governor."

We are, therefore, unable to see how the present case of the respondent can get out of the rule laid down in *Samsher Singh's* case (supra).

9. In the history of the entire background of the constitutional development of our country, when the Constitution conclusively contemplates a Constitutional President it is not permissible nor is it even intended to invest upon the President a different role of a ruling monarch. Any reference to the President under any rule made under the Constitution must needs be to the President as the constitutional head, as envisaged in the Constitution acting with the aid and advice of the Council of Ministers.

10. Disposal of the appeal by the Minister under Rule 23 (2) (b) of the Rules is, therefore, a proper and legal disposal of the appeal to the President who has acted on the advice of the Minister in confirming the impugned order of dismissal. There is no question of delegation involved in such a matter. We find no constitutional infirmity in the impugned order of May 9, 1969.

11. In the result the appeal is allowed. The judgment of the Division Bench of the High Court is set aside. We will, however, make no order as to costs.
Appeal allowed.

AIR 1975 SUPREME COURT 1758

(From: 1972 All. W.R. (H.C.) 385)

A. N. RAY, C. J., K. K. MATHEW,
V. R. KRISHNA IYER AND
S. MURTAZA FAZL ALI, JJ.Dwarka Prasad, Appellant v.
Dwarka Das Saraf, Respondent.Civil Appeal No. 210 of 1973, D/-
11-8-1975.**(A) U. P. (Temporary) Control of
Rent and Eviction Act (3 of 1947),
S. 2 (1) (a) (as amended by Act 17 of
1954) — Accommodation — Meaning
of — Lease of Cinema theatre — 1972
All. W.R. (H.C.) 385, Reversed.**

A lease of an 'accommodation' must essentially be of a building — not a business or industry together with the building in which it is situated. Of course, a building which is ordinarily let, be it for residential or non-residential purposes, will not be the bare walls, floor and roof, but will have necessary amenities to make habitation happy. That is why the legislature has fairly included gardens, grounds and out-houses, if any, appurtenant to such building. Likewise, leases sometimes are of furnished buildings and that is why 'any furniture supplied by the landlord for use in such building' is treated as part of the building. These additions are appurtenant, subservient and beneficial to the building itself. They make occupation of the building more convenient and pleasant but the principal thing demised is the building and the additives are auxiliary. Where the lease is composite and has a plurality of purposes, the decisive test is the dominant purpose of the demise. Under the Act the protected category of accommodation is residential and non-residential buildings and not business houses. The legislature by the amending Act clarified what was implicit earlier and expressly carved out what otherwise might be mistakenly covered by the main definition. The proviso does not expand, by implication, the protected area of building tenancies to embrace 'business' leases.

A lease of a lucrative theatre with expensive cinema equipment, which latter pressed the lessee to go into the transaction, cannot reasonably be re-

duced into a mere tenancy of a building together with fittings which but make the user more comfortable. When the last renewed lease of 1959 was executed, there was a running cinema business and further the rent apportioned for the building qua building was only a fraction of the rent for the costly fixtures intended for the cinema business'.

Held that the lease sued on did not fall within the scope of the definition of 'accommodation'. 1972 All. W.R. (H.C.) 385, Reversed. (Paras 7, 8, 10, 17, 25, 26)

**(B) Interpretation of Statutes —
Proviso — Scope of.**

If, on a fair construction, the principal provision is clear, a proviso cannot expand or limit it. A proviso must be limited to the subject matter of the enacting clause. A proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. (Paras 16, 18)

Cases Referred: Chronological Paras

AIR 1974 SC 396 = (1974) 2 SCR 530	
AIR 1971 Andh Pra 156 = (1971) 1	
Andh WR 194 (FB)	21, 23
1969 Jab LJ 639 = 1969 Ren C. J.	
961	24
AIR 1966 Ker 244 = 1966 Ker LT 261	
(FB)	21, 23
AIR 1965 SC 716 = 1965 Jab LJ 370	
	20
(1964) 68 Cal WN 1136 = ILR (1966)	
1 Cal 482	24
AIR 1959 SC 713 = (1959) Supp 2	
SCR 256	18
AIR 1959 SC 1012 = (1959) Supp 2	
SCR 875	18
AIR 1959 Andh Pra 9 = (1958) 2	
Andh WR 447	23
AIR 1957 SC 309 = 1957 SCR 20	24
AIR 1957 Andh Pra 619 = 1956 Andh	
WR 1093	23
AIR 1955 SC 765 = (1955) 2 SCR	
483	18
AIR 1953 Cal 149	24
AIR 1953 Sau 113	24
AIR 1950 Mad 284 = (1949) 2 Mad	
LJ 694	21, 22
1912 AC 533 = 81 LJ KB 918	18
1910 PD 57 = 79 LJ KB 517	18

M/s. R. K. Garg, S. C. Agarwala, V. J. Francis and Madho Prasad, Advocates, for Appellant; M/s. V. M. Tarkunde and Hardayal Hardy, Sr. Advocates (Mr. P. P. Juneja, Advocate, with them), for Respondent No. 1.

The Judgment of the Court was delivered by

KRISHNA IYER, J.:— The rent control law has been a rich source of lengthy litigation in the country and the present appeal by certificate under Art. 133 (1) (a) of the Constitution at the instance of the appellant-landlord, is illustrative of one reason for such proliferation of cases, namely, the lack of clarity in legislative drafting and dovetailing of amendments which have the potential for creating interpretative confusion.

2. The facts are few and may be stated briefly, although, at a later stage, further details may have to be mentioned at relevant places to illumine the arguments advanced on both sides by counsel, Shri R. K. Garg (for the appellant) and Shri V. M. Tarkunde (for the respondent). Shortly put, the legal issues are only three: (A) Is a cinema theatre, equipped with projectors and other fittings and ready to be launched as an entertainment house, an 'accommodation' as defined in Section 2 (1) (d) of the U. P. (Temporary) Control of Rent and Eviction Act, 1947 (U. P. Act III of 1947) for short, the Act)? (B) If it is an 'accommodation' as so defined, what is the impact of the proviso brought in by amendment in 1954 (Act XVII of 1954) (for short, the Amending Act)? (C) If the Act barricades eviction by the landlord because the premises let constitutes an 'accommodation', does the repeal of the Act and exclusion of cinema houses altogether from the operation of the 1972 Act (U. P. Act 13 of 1972) (for short, the later Act) rescue the right of the appellant-landlord to eject the tenant-respondent?

3. The building covered by the suit is admittedly one built and adapted for screening films. The plaintiff had been carrying on a cinema business in this theatre for a long number of years but, when he discontinued, the defendant approached

him in January 1952 for the grant of a lease of the building with all the equipment and fittings and furniture necessary for his operating the cinema. The necessary certificates, sanctions and permissions, preliminary to the conduct of cinema shows, stood in the name of the plaintiff, including water-pipe connection, electricity supply and structural fitness. Before commencement of cinema shows, a licence is necessary under the U. P. Cinemas (Regulation) Act and this licence has to be taken out by the actual operator of the cinema and not by the landlord of the theatre and equipments. Therefore, once the lease for the entire building and cinema projector, accessories and the like was finalised, the deed of demise was actually executed, it being provided that the commencement of the lease would synchronize with the inaugural cinema show on March 25, 1953. It was provided in the lease deeds that the rent for the building, simpliciter, may be shown separately from that attributable to the costly equipments, for the purposes of property tax and other taxes. By this apportionment, the building, as such, was to bear a burden of Rupees 400/- per mensem by way of rent and a monthly sum of Rs. 1,000/- was fixed for the projector and all other items fixed in the building. The leases were renewed from time to time till 1959. The suit for eviction was based on these leases which formed the foundation of the action.

4. At this stage it may be noticed that the learned counsel for the defendant-tenant 'did not dispute that running a cinema business did constitute an industrial purpose so that the accommodation was used for an industrial purpose'. Another significant fact admitted by the defendant's counsel before the High Court was 'that for the purpose of this case, in spite of there being separate documents of lease in respect of the demised properties as referred to above, these sets of contracts may be treated as a single transaction each time'. On these facts and circumstances, we have to decide whether the subject matter of the demise is an 'accommodation' within the meaning of the

Act. After settling this issue, the other two points adverted to above may have to be considered. While the trial Judge held that the suit property was not 'an accommodation' within the sweep of the Act, the High Court, on appeal before a Division Bench, could not agree and, on account of the difference of opinion between the two Judges who heard the appeal, the case was posted before a third Judge who took the view that the 'subject matter of the lease in question was an 'accommodation' within the meaning of the Act. The suit, on this view, had to be dismissed. The aggrieved landlord has come up to challenge this judgment.

5. Let us now take a close-up of the definition of 'accommodation' in the Act and apply it to the admitted facts here. Section 2 (a), as it stood at the time of the first lease, ran thus:

"Accommodation" means residential and non-residential accommodation in any building or part of a building and includes,

(i) gardens, grounds and out houses, of any appurtenant to such building or part of a building;

(ii) any furniture supplied by the landlord for use in such building or part of a building;

(iii) any fitting affixed to such building or part of a building for the more beneficial enjoyment thereof." The Amending Act added a clause reading thus:

"but does not include any accommodation used as a factory or for an industrial purpose where the business carried on in or upon the building is also leased out to the lessee by the same transaction."

at the end of clause (a). We have to go by the amended definition in the present case. Since the basic fabric of the demise remained the same notwithstanding several renewals its terms have a bearing on the decision of the case. So we may reproduce it (relevant part) at this stage:

"We have taken a Cinema hall known as Dwarka Prasad Theatre Hall for running a cinema on a monthly rent of Rs. 200/-

commencing from March 25, 1953."

To complete the picture, we quote from the factual summing-up by Satish Chandra J., since it is convenient and uncontested:

"The same day the defendants executed another lease deed stating that they had taken the Dwarka Theatre Hall on a rent of Rs. 200/- per month and that in this building there is new furniture fitted for about 500 seats with ceiling and fittings of electric light and fans, complete machinery, ceiling fans and operating machine together with all articles present in the hall of the theatre a list whereof has been duly signed by the executant and that they had taken this also on a monthly rent of Rupees 1,100/- besides rent of the building. The lease deed dated 1-4-1954 executed by the defendants stated that whereas besides the cinema house popularly known as Dwarka Theatre Hall which has been taken on hire of Rs. 200/- per month, the defendants had also taken on rent of Rs. 800/- per month the new furniture with tapestry about 500 seats and ceiling and complete electric fittings including fans and machine and ceiling fans and operating machine together with the entire paraphernalia present in the theatre hall. The defendants in this lease deed stated that they had taken the building on rent to continue running a cinema. The lease deed of 10th January 1956 was a confirmation of the same subject matter of the lease. It appears that by now the landlord was fitting new furniture in the hall and for that reason the rent was increased to Rs. 1200/- per month. Similarly, in the lease deed dated 26th May, 1959 the defendants stated that they have taken a cinema hall known as Dwarka Theatre Hall on a monthly rent of Rs. 400/- and the furniture of about 500 seats, ceiling, electric fittings, with fans, complete machine, ceiling fans, operating machine and other articles present in the theatre hall, a list whereof was attached, on a monthly rent of Rs. 1000/-."

Let us revert to the law. 'Accommodation', in plain English, may cover cinema houses with or without fittings. But legislative drafting does not always leave things that easy. Had

in possession to retain his possession even though not "as such" over the land till the mortgagor considered it to be in his interest to take back possession and accordingly revoked his consent, it would certainly be a provision which would squarely fall within the phrase "except as hereinafter provided" or "save as otherwise provided in this Act."

62. The matter may be looked into from another aspect. As already noticed above, by virtue of Section 6 (g) (i) a usufructuary mortgage gets substituted by a simple mortgage. To find out the effect of this substitution it will be pertinent to keep in view the rights and liabilities attached to a simple mortgage. In this connection sub-sections (a) and (b) of Section 58 of the Transfer of Property Act may be referred to. From their perusal the following position emerges. The ingredients of a mortgage are (i) that it is the transfer of an interest in specific immovable property and (ii) that such transfer is for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The ingredients of a simple mortgage are (i) that the mortgagor binds himself personally to pay the money and (ii) that he agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money.

63. It is, therefore not possible to conceive of a mortgage without an interest in specific immovable property being transferred for purpose of securing a debt. Normally, therefore, the erstwhile usufructuary mortgagee having become a simple mortgagee would have, in the event of the mortgagor failing to pay the mortgage money, been entitled to cause the mortgaged property of which he has become the simple mortgagee to be sold, but his right in this behalf has been taken away by sub-section (h) of Section 6. What was then the purpose of providing that the usufructuary mortgage shall be substituted by a simple mortgage? It cannot be said that the Legislature was doing an exercise in futility. One such purpose seems to be to retain the status of the erstwhile usufructuary mortgagee as that of a secured creditor and to make provision for interest which may be different than the one under the usufructuary mortgage. There seems to be yet another purpose. It would be seen that a practice of putting a creditor in possession of immovable property in lieu of interest even if such creditor was only a simple mortgagee or holder of a simple money bond was in vogue in the State of Uttar Pradesh among agriculturists when U. P. Zamindari Abolition and Land Reforms Act was passed. The Legislature will be presumed to be aware of this practice. It wanted to place the erst-

while usufructuary mortgagee, if he continued in possession even after the date of vesting on the same footing as that of a simple mortgagee who was put in possession over immovable property in lieu of interest before the date of vesting and continued in possession even thereafter. There is no provision in the U. P. Zamindari Abolition and Land Reforms Act as a result of which possession of such a simple mortgagee which was permissive in its inception may per se become adverse. In *Hansu Koeri v. Jang Bahadur* 1963 All LJ 456 the possession of creditor in lieu of interest payable on a simple money bond was held to be that of a licensee. The Legislature, therefore, seems to have brought about a situation in which if the mortgagor was of the view that it was in his interest to allow the mortgagee to retain possession over the land in lieu of interest payable under Section 6 (g) (ii) there may be no statutory bar in doing so. If the mortgagor does not demand possession he will be deemed to have continued his consent till such time that it is revoked. It will not amount to a mortgage of bhumidhari land within the meaning of Section 155 of the Act because the mortgage contemplated by this section is one executed by the bhumidhar "as such" i. e., as bhumidhar. Here the bhumidhar does not execute any such mortgage. A simple mortgage comes into being by operation of law and not by any voluntary act of the bhumidhar. Even Section 164 of the Act will not apply because this section too contemplates transfer of a holding or part thereof by a bhumidhar by which possession is transferred and not transfer of possession simpliciter. A holding can be transferred only in one of the modes recognised by law. What would be the effect of the U. P. Zamindars' Debt Reduction Act, 1952, on such an arrangement is a different question. I express no opinion on it as it does not arise in these cases. As a result of the extinction of the usufructuary mortgage the possession of the mortgagee may have per se become adverse but this position was sought to be avoided and it was achieved by enacting Section 6 (g) and using the words "as such" in Section 14.

64. One thing more. From what has been discussed above and from the mere fact that two Division Benches of this Court took conflicting views there seems to be no doubt that the view that the consent did not automatically stand revoked and the possession of the mortgagee after the date of vesting continued to be permissive is, to say the least, a plausible view, even if not the only possible view. If the mortgagor was under an impression, as he obviously was, that the possession of the mortgagee even after the date of vesting continued to be permissive and under that impression he did not file a suit for his ejectment within the limitation prescribed for a suit under section 209, is he to be told subsequently that your rights have got extinguished and your mortgagee who continues to be a simple mortgagee has

acquired sirdari rights under Section 210? I am aware that in interpreting a statute of limitation, equity has no place if such statute is clear and unambiguous. But that is not the position in these cases. Here interpretation of any statute of limitation, as such, is not involved. The question which really arises here is one of interpretation of a piece of beneficent legislation and it has to be decided as to which of the two possible interpretations to be preferred.

65. It cannot be disputed that S. 14 is a piece of beneficent legislation calculated to enable the debtor to get back his sir and khudkasht land. It is a rule of interpretation firmly established that in interpreting such a piece of legislation if there is any doubt that doubt should be resolved in favour of the person for whose benefit the Act was passed; see *Jivabhai Purshottam v. Chhagan Karson* AIR 1961 SC 1491. The policy of the Act was to give the debtor bhumidhari rights in his sir and khudkasht land which was in personal cultivation of the mortgagee in possession. In the instant case, in my opinion, the words of the statute are clearly in favour of the mortgagor. But even if they are capable of two constructions, one of which is likely to defeat or impair the policy of the Act while the other construction is likely to assist the achievement of the said policy, then the Courts would prefer to adopt the latter construction; vide *Kanai Lal Sur v. Paramnidhi Sadbhukhan* AIR 1957 SC 907.

66. In this view of the matter that interpretation of the relevant provisions of the U. P. Zamindari Abolition and Land Reforms Act is to be preferred which conforms with the intention of the beneficent legislation namely which saves the rights of the debtor and not that which destroys it. Such interpretation would be that the possession of the mortgagee continues to be permissive even after the date of vesting till it is revoked by the mortgagor. The other interpretation would lead to an anomalous result. Not only the mortgagee will continue to be possessed of the right to realise the mortgage money as a secured creditor, he will also become sirdar of the land under Section 210. This would obviously defeat the very purpose of the Act.

67. It will, therefore, not be right to say that because of Sections 4, 6 and 14 of the Act the consent stood automatically revoked when estates stood vested in the State Government free from all encumbrances. Their effect would be that if the mortgagee continues in possession even after the date of vesting the nature of his possession will be permissive and neither the mortgagor nor the mortgagee will be entitled to claim any of the rights or be subject to any of the liabilities attached to an usufructuary mortgage. It would be so till the consent is revoked. Revocation of consent depends upon the volition of

the person giving the consent and some act on his part, e.g., demanding possession or filing a suit for possession is necessary on account of which it can be said that consent has been revoked.

68. Let us now examine the provisions of Section 209 of the Act. A plain reading of this section makes it clear that before a suit under this section can be filed two ingredients have to be made out. The person against whom the suit is to be filed should be (1) a person taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force, and (2) he should have taken or should be retaining possession without the consent of the bhumidhar, sirdar or asami or the Gaon Sabha, as the case may be.

69. If a person enters into possession over the land of another without his consent, it will be a case of taking possession and if the possession of such person starts with consent but he continues in possession even after such consent has been revoked, he will, after the revocation of the consent, be retaining possession within the meaning of this section. If I may say so with due respect, the correct legal position in regard to the nature of possession of a mortgagee in possession after the date of vesting is as has been enunciated in *Radhey Shyam's* case 1969 All LJ 1095 (supra) namely:—

"Undoubtedly, a certain change in the nature of the legal rights of the Bhumidhar and his mortgagee was brought about by the Act but it could not have the effect of converting the permissive possession of the mortgagee into adverse possession. The mortgagee's right to be in possession in the capacity of a usufructuary mortgagee (the words as such in Section 14 (1) may be noticed) certainly came to an end by the force of a statutory provision with the result that it became devoid of legal sanction and was rendered entirely dependent upon the consent of the Bhumidhar which would, therefore, be revoked at will. The revocation had to be a conscious and deliberate act of the Bhumidhar and from the mere fact that the right of the mortgagee to remain in possession became devoid of legal sanction it cannot be concluded that the consent of the Bhumidhar stood automatically revoked. It is true that revocation of consent by a Bhumidhar, in a case where the person in possession of his land loses the right to continue in possession which was in its origin permissive, need not take any particular form, and if a suit under Section 209 of the Act is filed by the Bhumidhar for the ejectment of such person that would in itself be proof of and amount to revocation. But in the absence of any proof of revocation there will be a presumption of

continuance of the consent so long as there is no denial by the person in possession, to the knowledge of the Bhumidhar, that his possession is permissive. Until such denial, the burden of proving which would be on the person in possession, his possession cannot assume the character of possession without the consent of the Bhumidhar and it cannot call for a suit under Section 209 of the Act."

70. As already seen above, there is nothing in the Act as a result of which the possession of the mortgagee could be said to have by operation of law per se become, on the date of vesting, without the consent of the mortgagor. Consequently, unless it was established that the mortgagee had clearly and unequivocally repudiated the permissive character of his possession to the knowledge of the mortgagor, his possession would continue to be permissive and with the consent of the mortgagor till such consent was revoked.

71. From the above discussion it also follows that the period of limitation for a suit under Section 209 of the Act will commence to run from the date of demand for possession and not from the date of vesting.

72. The suit petition in Ram Chet's case C. M. W. No. 2733 of 1963 = D/- 29-7-1968 (All) (supra) was rejected in limine. The various aspects of the matter referred to above do not seem to have been brought to the notice of the learned Judges and, in my opinion, it is Radhey Shyam's case 1969 All LJ 1095 (supra) which lays down the law correctly.

73. A similar view was taken by S. N. Dwivedi, J., and H. C. P. Tripathi, J., in Special Appeal No. 240 of 1968; Ram Pyare v. Badri. This appeal was filed against the judgment in Badri v. Ram Pyare, 1968 R. D. 507. In support of the appeal reliance was placed on the decision in the case of Radhey Shyam 1969 All LJ 1095 (supra). For the respondents it was urged that in view of Sections 4 and 6 of the U. P. Zamindari Abolition and Land Reforms Act all land vested in the State and as such it could not be said that the respondent's possession over the disputed plot was with the permission of the mortgagors. This submission, however, was repelled and the special appeal was allowed on 13th November, 1970. It was held that reading Sections 4, 6 and 18 together, "it becomes evident that it was a contemporaneous arrangement whereby the ownership in the estate vested in the State, but the cultivatory rights over the specific plots of land, namely, sir and khudkasht were settled with their original holder. That being so, the only difference which the aforesaid sections of the U. P. Zamindari

Abolition and Land Reforms Act will bring in respect of this case is that the status of the mortgagor was raised from that of a sir-holder to the bhumidhar. That, in our opinion, will not affect the original position that the respondents entered into possession with the consent of the mortgagors on the basis of the usufructuary mortgage executed by them in respect of those plots. In this view of the matter we are of opinion that the view taken by the Division Bench in the case of Radhey Shyam is correct and fully covers this case."

74. Learned Counsel for the mortgagee, however, urged that on sir and khudkasht land being mortgaged exproprietary tenancy rights accrued automatically in favour of the mortgagor and if he did not take steps within limitation to recover possession in his capacity as an exproprietary tenant over the land from the mortgagee, his rights would extinguish and as such on the date of vesting the possession of the mortgagee would be in his own rights and not with the consent of the mortgagor. A plain reading of Section 14 of the Act would indicate that this section creates a legal fiction namely that if its requirements are made out, the mortgaged land "shall, for purposes of Section 18, be deemed to be the sir or khudkasht of the mortgagor or his legal representative." As a result of this legal fiction the mortgagor will notwithstanding the fact that the land was in possession of the mortgagee of an estate or share therein on the date of vesting, become bhumidhar of the said land.

75. In East End Dwellings Co. Ltd. v. Finsbury Borough Council, 1952 AC 109 at p. 132 Lord Asquith held:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents, which, if the putative state of affairs had in fact existed, must inevitably have followed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

76. In Commr. of Income-tax v. S. Teja Singh, AIR 1959 SC 352 it was held that it is a rule of interpretation well settled that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate. If the legal fiction contained in Section 14 is pursued to its logical conclusion, any conception of the mortgagee being in possession on the date of vesting not as mortgagee of such land but in his own

rights so as to defeat the claim of the mortgagor to become bhumidhar is ruled out.

77. It is true that in virtue of Sections 4, 6 and 14 of the Act and the decision of the Supreme Court in *Rana Sheo Ambar Singh v. Allahabad Bank*, AIR 1961 SC 1790, the mortgage money cannot be recovered by sale of the land in which fresh rights of a bhumidhar are created in favour of the mortgagor and can be recovered only from the compensation and rehabilitation grant and not otherwise. But in my opinion in view of the foregoing discussion, this circumstance is not of much consequence so far as the determination of the question as to whether the consent stood automatically revoked or not is concerned. As would be clear from the observations made in *Rana Sheo Ambar Singh's* case to the effect, "Thus the mortgage consisted of the proprietary interest only of the mortgagor in the sixty seven villages, and as it was a simple mortgage, possession of no part of the property was given to the mortgagee", the mortgage in that case was not a usufructuary mortgage and the question as to what would be the nature of possession of the mortgagee after the date of vesting had not come up for consideration in that case.

78. The cases under Section 127 of the Oudh Rent Act 1886, Section 34 of the North-Western Provinces Tenancy Act, 1901 and corresponding sections under the subsequent tenancy Acts laying down that the landlord has to either expressly or impliedly exercise his option to treat a trespasser as a tenant and that knowledge of a trespasser's possession for any period, however long, cannot be held to imply consent, in my opinion are of not much assistance in solving the problem with which we are faced namely whether the possession of a mortgagee which admittedly started with the consent of the mortgagor becomes automatically without his consent on the coming into force of Section 14 of the Act.

79. The case of *Sita Ram v. Abhey Ram*, 1944 RD 118 too is of no assistance. In that case one Shyamlal who was an occupancy tenant had executed a mortgage of his holding and put the mortgagee in possession. He did so with the consent of the then Lambardar Tikam Singh, subsequently one Sita Ram derived interest in the proprietary title from Tikam Singh. Thereafter Shyamlal the tenant surrendered his tenancy rights in favour of Sita Ram. A suit was filed by Sita Ram for the ejectment of the mortgagee and one of the pleas raised in defence was that Tikam Singh having his consent to the execution of the mortgage aforesaid, Sita Ram who derived his title from Tikam Singh was estopped from fil-

ing the suit for ejectment. This plea was repelled by the Board of Revenue on the ground that the consent given by Tikam Singh was relevant only for the execution of the mortgage so that no suit for ejectment could be filed on the ground of illegal transfer but that consent could not be treated as an assurance that even if the interest of the tenant in the holding got extinguished by surrender the mortgagee would be immune from ejectment. What was held in substance was that consent given for a limited purpose could not be stretched to embrace within its sweep an altogether different purpose so as to attract the plea of estoppel. No question of estoppel is involved in the cases before us. The distinction between a case where an occupancy tenant-mortgagor's interest in his holding got extinguished and a mortgagor who becomes bhumidhar in view of Sections 14 and 18 of the Act is apparent.

80. If an occupancy tenant was ejected or died without leaving any heir or surrendered the holding he ceased to have any interest whatsoever in the land and no question of his sub-tenant or licensee continuing in possession with his consent could naturally arise. He was completely obliterated from the scene. The same is not the position of a usufructuary mortgagee as is clear from the foregoing discussion. The status of the mortgagee is substituted from usufructuary mortgagee to simple mortgagee subject of course to the statutory restrictions created by Section 6 (h). He continues to be a secured creditor. His continuance in possession even after the date of vesting is not disfavoured by the Legislature, except that his possession will not be as usufructuary mortgagee. Even the mortgagor who had given his consent is not completely obliterated from the scene so that he ceases to have any interest in the land as is the case with an occupancy tenant after his being ejected or dying without leaving any heir or surrendering the holding. Here fresh rights of bhumidhar are created in favour of the mortgagor in that very land in place of the earlier rights which vested in the State and the mortgagor gets a simultaneous right—so to speak without any hiatus to take or retain possession over that very land as bhumidhar over which the usufructuary mortgagee was in possession as such till the date of vesting and continues in possession even thereafter even though not "as such". It is in this context that the nature of his possession after the date of vesting has to be considered and on such consideration it does not appear that his possession becomes per se adverse after the date of vesting.

81. The observations made in *Radhey Shyam's* case 1969 All LJ 1095

(supra) to the effect that "the mortgaged property continued to be a security for the debt and the relationship not only of debtor and creditor but also of mortgagor and mortgagee was left subsisting between the parties to the mortgage, vide Section 6 (g), (i) of the Act" have to be read in the context in which they were made. As is apparent, they were made relying upon Section 6 (g) (i) which provides that a usufructuary mortgage shall be deemed, without prejudice to the rights of the State Government under Section 4, to have been substituted by a simple mortgage. These observations reproduce the ingredients of a simple mortgage. The observations made in paragraph 11 of the report that the mortgage debt remained realizable from the mortgaged property even after the enforcement of the Act, no doubt, cannot be taken to interpret the law correctly in view of the decision of the Supreme Court in Rana Sheo Ambar Singh's case, AIR 1961 SC 1790 (supra).

82. My answer to the two questions referred to above is, therefore, as follows:—

(1) The possession of the mortgagee whose rights have extinguished under Section 14 (1) of the Zamindari Abolition and Land Reforms Act on or after the date of vesting is not per se adverse but is permissive.

(2) the period of limitation for a suit under Section 209 of the U. P. Zamindari Abolition and Land Reforms Act would commence to run not from the date of vesting but from the date of demand for possession.

R. L. GULATI, J.:— 83. I agree.

BY THE COURT

84. In view of the majority opinion the questions referred to this Bench are answered as follows:—

(1) The possession of the mortgagee whose rights have extinguished under Section 14 (1) of the Zamindari Abolition and Land Reforms Act on or after the date of vesting is not per se adverse but is permissive.

(2) The period of limitation for a suit under Section 209 of the U. P. Zamindari Abolition and Land Reforms Act would commence to run not from the date of vesting but from the date of demand for possession.

Answered accordingly.

AIR 1975 ALLAHABAD 309

K. N. SINGH, J.

G. C. Ghildayal, Petitioner v. District Judge, Allahabad and another, Respondents.

Civil Misc. Writ No. 865 of 1975. D/- 5-3-1975.

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972). Section 21 (1) Explanation (ii) — Presumption under — Compliance with Rule 16 of U. P. Urban Buildings Regulation of Letting, Rent and Eviction) Rules — Necessity (U. P. Urban Buildings of Letting, Rent and Eviction) Rules, Rule 16).

Explanation (ii) read with the substantive provision contained in sub-section (1) and (1) (a) of Section 21 contemplates that where the landlord makes an application for the eviction of the tenant from the building under tenancy for purposes of his own residence, he is not required to prove the genuineness or bona fide of his need, instead in such a case such need shall be deemed sufficient under Explanation (ii) provided the landlord was away from the city, Municipality notified Area or Town Area within which the building may be situated on account of his engagement in any profession, trade, calling or employment and by reason of the cessation of his engagement in such profession, trade or calling and employment he may require the building for his own residence. The Explanation thus lays down a rule of evidence which raises a presumption with regard to the need of the landlord. In a case where there is a presumption available to a landlord under Explanation (ii) to Section 21 of the Act, the Prescribed Authority is not required to consider the various factors under Rule 16 of the U. P. Building (Regulation of Letting, Rent and Eviction) Rules because the legislature has expressly laid down that the bona fide need of the landlord shall be presumed for the purposes of Section 21 (1) (a). (Paras 6, 7)

(B) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972, Rule 16 (1) (e) — "Likely to be available to such tenants".

The expression "likely to be available to such tenants" does not require the authorities concerned to record a positive finding that suitable alternative accommodation was available to them. The Prescribed Authority is only required to consider as to whether there was any likelihood of availability of suitable alternative accommodation to the tenants. Where the authorities observed that the tenant did not make any bona fide effort for an alternative accommodation although it was available, the requirement of clause

(e) of Rule 16 (1) is fully complied with by the authorities. (Para 11)

(C) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Section 21 (1) (a) — Question of hardship to tenant — Consideration.

Where Explanation II to Section 21 (1) (a) of the Act is applicable the Prescribed Authority or the District Judge is not required to consider the hardship likely to be caused to the tenant as would be clear from the enacting clause of Rule 16 of the Rules. (Para 12)

(D) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, (1972), Rule 16 — "Shall have regard to such facts as the following" — Meaning of.

The expression "shall have regard to such facts as the following" occurring in the enacting clause of Rule 16 indicates that the guidelines mentioned therein should be considered by the Prescribed Authority. However, the expression "shall have regard to" does not contemplate that the Prescribed Authority must address itself to all the factors enumerated in clauses (a) to (g), and the order of eviction would not be invalid on the ground that one of the considerations enumerated in clauses (a) to (g) was not expressly considered in evicting the tenant from the building. AIR 1943 PC 164 and AIR 1963 SC 1128, Rel. on. (Para 13)

(E) Constitution of India, Article 226 — Finding of fact — Interference.

Authorities having jurisdiction to record findings of fact — Authorities doing so on appreciation of evidence — High Court in exercise of jurisdiction under Article 226 not entitled to interfere with those findings even though some of them may be erroneous. AIR 1964 SC 477, Rel. on. (Para 15)

Cases Referred: Chronological Paras

(1975) 1 All LR 13 14
(1974) Spl. Appeal No. 304 of 1974, D/- 21-11-1974 (All) 14
1973 All WR (HC) 622 = 1973 Ren CR 627 14
AIR 1964 SC 477 = (1964) 5 SCR 64 15
AIR 1963 SC 1128 = (1963) Supp (2) SCR 127 13
AIR 1943 PC 164 = 70 Ind App 129 13

Mohd. Mooris, K. C. Saxena and Habibullah, for Petitioner; S. P. Gupta and Standing Counsel, for Respondents.

ORDER:— This is a petition under Article 226 of the Constitution directed against the order of the Prescribed Authority passed under Section 21 of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, directing the petitioner's eviction from the accommodation in question and the order of the IV Additional District Judge,

Allahabad, dismissing the petitioner's appeal.

2. Sri G. C. Ghildayal, the petitioner, is a practising Advocate of this Court. He is one of the tenants of the premises of building No. 11, Mayo Road, Allahabad, since 1948. There are two other tenants besides the applicant who are occupying the portion of the said building as tenants. Justice Hiralal Kapoor, who is landlord of the premises in question, filed an application under Section 21 of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, hereinafter referred to as the Act, against the petitioner as well as the two other tenants, namely, Sri S. Williams and Lalmani Singh, before the prescribed Authority, Allahabad, for their eviction on the ground that he bona fide required the building in question for his own residence and occupation. Certain technical objections were raised against the application with the result Justice Kapoor made amendments in the original application and three separate applications were filed against the petitioner as well as against the two other tenants. The petitioner as well as the other two tenants contested the application on a number of grounds. The prescribed Authority held that the landlord's need was genuine and bona fide and pressing as compared to the tenants' need and requirement, therefore he allowed the landlord's application and directed the petitioner's eviction by his order dated 4th November, 1974. The petitioner and the other two tenants filed three separate appeals before the Appellate Authority. All the three appeals were disposed of by the Additional District Judge by a common order dated 16th January, 1975. The Appellate Authority affirmed the findings of the Prescribed Authority and upheld the order of eviction. Aggrieved, the petitioner approached this Court by means of the present writ petition challenging the aforesaid two orders of the Appellate Authority and the Prescribed Authority directing the petitioner's eviction from the premises in question.

3. Sri K. C. Saxena, learned Counsel for the petitioner, submitted that the orders of the Prescribed Authority as well as that of the Appellate Authority are not sustainable in law as both the authorities failed to consider the hardship likely to be caused to the petitioner by his eviction from the premises in question and further the said authorities failed to consider the comparative needs of the tenant and the landlord. It was further submitted that both the authorities failed to consider the relevant factors in considering the landlord's application and they passed order of eviction in violation of Section 21 and Rule 16 of the U. P. Urban Buildings (Regulation of Letting, Rent

and Eviction) Rules. He further urged that both the authorities committed a patent error of law and fact in coming to the conclusion that since the landlord was a High Court Judge, his social status required more accommodation for him and that the petitioner could find an alternative accommodation for his residence.

4. Sri Jagdish Swarup, learned Counsel appearing for the respondent-landlord, urged that the findings recorded by the Prescribed Authority and the Appellate Authority about the bona fide and genuine need of the landlord are findings of fact which cannot be interfered with in the present proceedings, the two authorities have considered the matter at length and compared the need of the tenant and the landlord, their orders do not suffer from any legal infirmity. He further urged that the various factors prescribed in Rule 16 are not necessary to be considered by the Prescribed Authority in a case where the Explanation to Section 21 (1) of the Act was applicable and in the alternative he urged that the Prescribed Authority as well as the Appellate Authority, considered the question of likely hardship to the tenant and the orders do not suffer from any patent error of law or fact.

5. Section 21 of the Act lays down that the Prescribed Authority may on an application by the landlord order the eviction of a tenant from the building under tenancy if it is satisfied that any of the grounds laid down therein exists. Under clause (a) of Section 21 (1) if the Prescribed Authority is satisfied that the building is bona fide required by the landlord for occupation by himself or any member of his family either for residential purposes or for purposes of any profession, trade, or calling, it may order eviction of the tenant from the building under tenancy. The Explanation to sub-section (1) lays down certain exceptions to the general provisions contained under sub-section (1). There are four Explanations to sub-section (1) of Section 21. Explanation (i) lays down that where the tenant or any member of his family may have built or may have otherwise acquired in a vacant state or may have got vacated after acquisition a residential building in the same city, Municipality, Notified Area or Town Area, in such a case no objection by the tenant shall be entertained in opposition to the application of the landlord filed under sub-section (1) of Section 21. Explanation (ii) further lays down that in a case where the landlord was engaged in any trade, profession, employment, or calling, away from the Municipality, Notified Area, or Town Area and by reason of cessation of such engagement the landlord needed the building for occupation by himself for residential purposes, such need shall be

deemed sufficient for the purpose of cl. (a). Explanation (ii) thus creates a presumption relating to the bona fide need of the landlord. Similarly, Explanations (iii) and (iv) make provision for presuming bona fide need of the landlord if the conditions set out therein are fulfilled. The four Explanations to sub-section (1) of Section 21 of the Act have been enacted by the legislature to safeguard the interest of landlord.

6. In the instant case, Explanation (ii) is material which is in the following words:—

"(ii) where the landlord was engaged in any profession, trade, calling or employment, away from the city, municipality, notified area or town area within which the building is situated and by reason of the cessation of such engagement he needs the building for occupation by himself for residential purposes, such need shall be deemed sufficient for purposes of clause (a)."

The above explanation read with the substantive provision contained in sub-section (1) and (1) (a) of Section 21 contemplates that where the landlord who makes an application for the eviction of the tenant from the building under tenancy for purposes of his own residence, the landlord is not required to prove the genuineness or bona fide of his need, instead in such a case, such need shall be deemed sufficient under the aforesaid Explanation (ii) provided the landlord was away from the city, Municipality, notified Area or Town Area within which the building may be situated on account of his engagement in any profession, trade, calling or employment and by reason of the cessation of his engagement in such profession, trade or calling and employment he may require the building for his own residence. The legislature intended that where a landlord who may be employed in service and for that reason he may be residing away from the place or city wherein his building may be situated, and if on account of termination of his service or on account of his retirement from service, he required the building for his own occupation, in such a case the landlord need not prove his bona fide need as contemplated by Section 21 (1) (a), instead his need will be deemed sufficient for the purpose of clause (a). The Explanation thus lays down a rule of evidence which raises a presumption with regard to the need of the landlord.

7. Rule 16 lays down that in considering the requirement of personal occupation for purposes of residence by the landlord or any member of his family the Prescribed Authority shall take into account the likely hardship of the tenant from the grant of the application as against the likely hardship which may be

caused to the landlord from the refusal of the application and for that purpose it shall also have regard to the facts enumerated in the various sub-clauses of the rule. Rule 16 contains two clauses. Clause (1) lays down guidelines which are required to be taken into account in considering the case of a landlord for purposes of his residence, while clause (2) of the rule prescribes factors which are required to be taken into account in considering the case of a landlord in respect of a building let out for purposes of business. Rule 16 (1) contains clauses (a) to (g) which the Prescribed Authority has to take into account in considering the application of the landlord. The enacting clause of Rule 16 (1) further lays down that the considerations laid down in the rule, i.e., likely hardship which may be caused to the tenant from the grant of the application or the consideration of the various factors as contained in clauses (a) to (g) are not necessary to be taken into account in a case where any of the four explanations to Section 21 (i) is applicable. Thus in a case where there is a presumption available to a landlord under Explanation (ii) to Section 21 of the Act, the Prescribed Authority is not required to consider the various factors under Rule 16 because the legislature has expressly laid down that the bona fide need of the landlord shall be presumed for the purposes of Section 21 (1) (a).

8. In the instant case admittedly Justice H. L. Kapoor prior to his elevation to the High Court as a Judge was engaged in service as District Judge and in that connection he was posted outside the city of Allahabad. In June, 1972, he retired from service and thereafter he came to reside at Allahabad. In September, 1972, he was appointed a Judge of this Court. On 24th February, 1973, he filed an application for the release of the accommodation in question. After his retirement and even after his appointment as a Judge of this Court he has been residing in House No. 13, Mayo Road, Allahabad, along with his brothers and nephews and other relations. These facts clearly attract Explanation (ii) to Section 21 (1) (a) and thus he is entitled to the benefit of the presumption contained in the said provision. The need of the landlord was thus bona fide and genuine for his own residence and occupation and the Prescribed Authority and the District Judge were not required to consider the likely hardship which may be caused to the tenants.

9. But even if Explanation (ii) is not attracted as has been urged on behalf of the petitioner, the Prescribed Authority as well as the Additional District Judge have recorded findings on the appraisal of evidence on record that the

need of the landlord was bona fide and genuine and they considered the question of likely hardship also. It is noteworthy that thrice Commissioners were appointed by the Prescribed Authority to inspect the premises in question and to submit report. The reports of the Commissioners are on the record. A perusal of the same clearly indicates that Justice H. L. Kapoor was occupying only two rooms and he was sharing a drawing room with his brother Sri Krishna Kapoor who is a practising Advocate of this Court. Both the brothers are residing in the same portion of the building. The contention of Justice H. L. Kapoor that he is not able to do any official work at his residence and that he is greatly embarrassed on account of the presence of the Chamber of his brother, an Advocate of this Court, is fully supported by the three reports of the Commissioners, who found that Sri Krishna Kapoor was having his office in one of the rooms in the same portion of the building. The Prescribed Authority as well as the District Judge both have further recorded a finding that having regard to the social status and the need of a High Court Judge for having privacy to discharge his official duties which include dictation of judgments, which are highly confidential in nature, Justice Kapoor required separate and adequate accommodation for him. The circumstances in which Justice H. L. Kapoor is residing is neither befitting to a Judge nor convenient for his living. The two authorities have further recorded a finding that even though there are a number of rooms in the premises No. 13 Mayo Road, Allahabad, in which Justice H. L. Kapoor is residing but there are as many as 23 different members of the family of Justice Kapoor residing in the same premises. The house (13 Mayo Road) is a joint family property and various portions are in the occupation of the other members of the family. Justice H. L. Kapoor is living in two rooms and he has no separate drawing room, no room for his office and no dining room according to his requirement and social status. Both the authorities have further recorded a finding that Sri Krishna Kapoor is a practising lawyer and he is living in the premises in which Justice H. L. Kapoor is residing which has been causing great embarrassment to him. Further one of the nephews of Justice H. L. Kapoor carries on business in cement and he has a godown in the same premises. Customers and outsiders visit the premises for purchase of cement. On this account also Justice H. L. Kapoor is not able to maintain his privacy. The findings recorded by both these authorities are well supported by the evidence on record including the three reports of the Commissioners appointed by the Prescribed Authority as

well as by the affidavits filed before the said authorities. Thus both the authorities have recorded a finding that the need of the landlord was bona fide and genuine.

10. The contention that the comparative need of the landlord and tenant was not considered is untenable. The Prescribed Authority considered the need of the petitioner and other two tenants. The Prescribed Authority observed that on a comparison he was of the opinion that the need of the landlord was more pressing than that of the tenant. In that connection the Prescribed Authority observed that the landlords' application for release of the accommodation in question was pending for the last two years but the petitioner did not make any sincere or bona fide effort for obtaining any other alternative accommodation for him even though alternative accommodations were available. It further observed that the need of the landlord was genuine and bona fide and more pressing as compared to the need and requirement of the petitioner. There is no doubt paucity of accommodation but nonetheless the petitioner did not make any effort for getting an alternative accommodation allotted to him. The findings recorded by the Prescribed Authority were affirmed by the District Judge. In the circumstances both the authorities complied with the requirements of Rule 16.

11. Sri K. C. Saxena, learned counsel for the petitioner, then urged that the Prescribed Authority as well as the Additional District Judge failed to consider the requirement of Rule 16 (1) (e) which lays down that where there are a number of tenants separately occupying a block of tenements and the landlord desires their eviction on grounds of his personal need the Prescribed Authority shall consider whether suitable alternative accommodation is likely to be available to such tenants. It is noteworthy that the Prescribed Authority has only to consider as to whether suitable alternative accommodation is likely to be available to such tenants. In the instant case there are three tenants separately occupying the building in question and the landlord desires their eviction on the ground of his personal need, but the Prescribed Authority as well as the Additional District Judge both considered the question of availability of suitable alternative accommodation and in that connection both the authorities observed that the petitioner did not make any bona fide effort for an alternative accommodation although it was available. The expression "likely to be available to such tenants" does not require the authorities concerned to record a positive finding that suitable alternative accommodation was available to them. The Prescribed Authority is required to

consider as to whether there was any likelihood of availability of suitable alternative accommodation to the tenants. The requirement of clause (e) of Rule 16 (1) has been fully complied with by the Prescribed Authority as well as by the District Judge.

12. It was then urged that the question of hardship likely to be caused to the tenant from eviction from the premises in question was not considered either by the Prescribed Authority or by the District Judge. The argument is wholly misconceived. Since Explanation (ii) to Section 21 (1) (a) is applicable to the instant case the Prescribed Authority or the District Judge were not required to consider the hardship likely to be caused to the petitioner as would be clear from the enacting clause of Rule 16. But even if the question of likely hardship to the tenant was required to be considered the two authorities have considered that question. As noted earlier the Prescribed Authority as well as the District Judge both recorded a finding that if the application of the landlord was refused great hardship would be caused to the landlord. Justice H. L. Kapoor, who has got only two rooms at his disposal for residence and he has no separate drawing room, no office room and no dining room. The Prescribed Authority as well as the District Judge considered the question of adequacy and reasonableness of the accommodation available to Justice H. L. Kapoor and having regard to the various factors prescribed in clause (e) of Rule 16 (1) both the authorities have recorded a finding that if the application of the landlord was refused and the accommodation was not released in his favour he would be put to great hardship and in that connection they considered the likely hardship which may be caused to the tenants. The petitioner's contention is thus untenable.

13. I find no substance in the contention that unless the various considerations enumerated in clauses (a) to (g) of Rule 16 (1) are taken into account, the order of the Prescribed Authority releasing the accommodation in favour of the landlord would be vitiated. The scheme of Section 21 and Rule 16 makes it clear that once the landlord's need is found genuine and bona fide for his residence the Prescribed Authority shall evict the tenant but in passing that order of eviction the Prescribed Authority should consider the considerations mentioned in clauses (a) to (g) of Rule 16 which provide guidelines to the Prescribed Authority for considering the application for release of accommodation on the ground of personal requirement of the landlord and in that connection likely hardship which may be caused to the tenant from

the grant of application and the likely hardship which may be caused to the landlord from the rejection of his application for release has to be taken into account and for that purpose the various considerations as enumerated in clauses (a) to (g) are required to be considered. The expression "shall have regard to such facts as the following" occurring in the enacting clause of Rule 16 indicates that the guidelines mentioned therein should be considered by the Prescribed Authority. It is, however, noteworthy that the expression "shall have regard to" does not contemplate that the Prescribed Authority must address itself to all the factors enumerated in clauses (a) to (g) and the order would not be invalid on the ground that one of the considerations enumerated in clauses (a) to (g) was not expressly considered in evicting the tenant from the building in his tenancy.

The expressions "have regard to" or "having regard to" have been subject to judicial interpretation in *Ryots of Garabandho v. Zamindar of Parlakimedi*, AIR 1943 PC 164. The Privy Council dealt with the meaning of the expression in the following words:—

"The view taken by the majority of the Collective Board of Revenue in making the order dated October 19, 1936, which is now complained of, is that the requirement to 'having regard to' the provisions in question has no more definite or technical meaning than that of ordinary usage and only requires that these provisions must be taken into consideration."

The above observation of the Privy Council was quoted with approval by the Supreme Court in *Mysore State Electricity Board v. Bangalore W. C. and S. Mills*, AIR 1963 SC 1128. The Supreme Court interpreted Section 49 of the Electricity (Supply) Act, 1948 and observed that even though under the said section the Electricity Board was required to fix tariff "having regard to the nature and geographical position of the supply and the purpose for which it is required" a consumer of electricity was not entitled to raise a dispute against the Board on the footing that the Board did not pay due regard to the nature and geographical position of the supply and the purpose for which it was required. The principle laid down in these cases is applicable in interpreting Rule 16 wherein the expression "shall have regard to such facts" occurs. The primary consideration for the Prescribed Authority is to take into account the likely hardship which may be caused to the tenant or the landlord by the grant or refusal of the application and in that connection it may also consider such facts as enumerated in clauses (a) to (g). In

the instant case, clauses (a) and (e) of Rule 16 (1) were applicable. As already discussed, the Prescribed Authority as well as the Additional District Judge have considered the factors mentioned in cls. (a) and (e) of Rule 16, other clauses were not applicable to the facts of the instant case.

14. Learned counsel for the petitioner placed reliance on a judgment of brother Gulati, J. in *Roshan Lal v. State*, (1975) 1 All LR 13, affirmed in Special Appeal No. 304 of 1974, decided on 21st November, 1974 (All), in support of his contention that even in a case where any of the Explanations to Sec. 21 (1) (a) was applicable, the Prescribed Authority was under a legal duty to consider the various factors prescribed under Rule 16 and the hardship likely to be caused to the tenant on his eviction from the premises. It is true that brother Gulati held that even in a case where the landlord is able to make out a bona fide need for the accommodation in question the Prescribed Authority is required to consider the likely hardship which may be caused to the tenant from his eviction while considering the question of release of the accommodation and eviction of the tenant therefrom. As already discussed in the instant case both the authorities namely the Prescribed Authority and the Additional District Judge have recorded a detailed finding on this question and in my opinion they have fully complied with the requirements of Rule 16. Thus the case of *Roshan Lal* is of no assistance to the petitioner.

Reliance was then placed on *Jaganath Prasad v. State*, 1973 All WR (HC) 622 on behalf of the petitioner in support of the contention that in a case where the need of the landlord is found genuine and bona fide it is imperative for the Prescribed Authority to compare the need of the landlord and the tenant. I have already referred to the findings recorded by the Prescribed Authority and the District Judge and both the authorities have compared the need of the tenant and the landlord and I do not find any error in their judgment.

15. Learned Counsel for the petitioner urged that the findings recorded by the District Judge as well as by the Prescribed Authority were erroneous and in that connection he referred to the observations made by the District Judge that the petitioner was an Advocate and as such he must be an influential person and it would not be difficult for him to find an alternative accommodation. The Prescribed Authority had recorded a detailed finding and observed that the petitioner did not make any effort to obtain any alternative accommodation although alternative accommodations were available.

That finding was affirmed by the Appellate Authority and it was only in a passing manner that the Appellate Authority made an observation that the petitioner being an Advocate must be an influential person; as such he could find an alternative accommodation. Even though the observations may be erroneous it would not warrant interference by this Court under Article 226 of the Constitution. The Prescribed Authority and the Appellate Authority had jurisdiction to record findings of fact as they have done in the instant case on the appreciation of evidence on the record and this Court is not entitled to interfere with those findings even though some of the findings may be erroneous. The findings recorded by the said two authorities cannot be reviewed by this Court like an Appellate Court. Both the authorities were entitled to come to their own conclusion. A writ of certiorari can issue for correcting errors committed by inferior courts or Tribunals where in exercise of its jurisdiction, the Tribunal acts improperly or illegally, or violates principles of natural justice in passing the order. Further a patent error of law can be corrected by issue of a writ of certiorari but the jurisdiction of this Court does not extend to correction of errors which may have arisen on appreciation of evidence. Adequacy or sufficiency of evidence on a point or the inference of facts to be drawn from the said finding is within the exclusive jurisdiction of the Tribunal and the same cannot be agitated in this Court under Article 226 of the Constitution.

In *Syed Yakoob v. K. S. Radhakrishnan*, AIR 1964 SC 477 the Supreme Court observed as follows:—

"The jurisdiction of High Court to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an Appellate Court. The limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be re-opened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be." Applying the above observations of the Supreme Court, I find no error apparent on the face of the record in the impugned orders, hence the petitioner is not entitled to the issue of any writ or direction in the present proceedings.

16. In view of the above discussion, I do not find any error apparent on the face of the record in the two impugned orders. The petition fails and is accordingly dismissed. There will be no order as to costs.

Petition dismissed.

AIR 1975 ALLAHABAD 315

FULL BENCH

K. B. ASTHANA, C. J., SATISH CHANDRA, K. N. SINGH, C. S. P. SINGH AND K. N. SETH, JJ.

Gyan Singh, Petitioner v. The District Magistrate, Bijnor and others. Respondents.

Civil Misc. Writ No. 7583 of 1973. D/- 23-4-1975.

(A) U. P. Municipalities Act (2 of 1916), Section 87-A (3) — Requirement regarding manner for sending notice — Directory — Substantial compliance — Scope for interference in writ jurisdiction — Observations in 1968 All WR 114 and 1968 All LJ 704, Overruled. (Constitution of India, Article 226).

The second part of sub-section (3) of Section 87-A laying down manner for sending notice to the members of the Board is directory, while the first part of the said sub-section requiring the District Magistrate to convene a meeting and to send notices to the members is mandatory. It would be sufficient compliance of the directory provision of this sub-section if notice is served on the members not by registered post but by any other mode and in that situation the motion of non-confidence which may be carried at the said meeting cannot be nullified on the ground of any literal non-compliance of service of notice by registered post. AIR 1957 SC 912 and AIR 1965 SC 895, Rel. on; AIR 1958 All 374 (FB), Distinguished; Observation in 1968 All WR 114, Overruled; Spl. Appeal No. 313 of 1956, D/- 22-1-1957 (All); Spl. Appeal No. 17 of 1957, D/- 25-1-1957 (All); Spl. Appeal No. 19 of 1956, D/- 9-2-1956 (All) and 1962 All LJ 930, Approved. (Para 18)

The President must be given an opportunity to attend the meeting and for that purpose notice must be sent to him as it is required to be sent to other members of the Board in accordance with Section 87-A (3). AIR 1958 All 109 and AIR 1971 All 77 (FB), Approved. (Para 22)

The emphasis on sending notice to members by registered post and for publication of the same in the manner directed by the District Magistrate, is directed only to invoke the presumption as contemplated in the last sentence of the sub-section. In the absence of presumption, it is always open to a party to prove that notice though sent in a different manner was served on the members. (Para 9)

Even if the notice is not sent to the members by registered post the meeting cannot be held to have been illegally convened provided it is proved that the notice was received by the members and they had knowledge of the meeting.

(Para 9)

The actual service of the notice of the meeting need not be proved. It would be sufficient compliance with the provisions of Section 87-A (3) if notice is sent to the members and the members acquire knowledge about the time, date and place of the meeting. Observation in 1968 All WR 114, Overruled. (Para 15)

In a case where the petitioner is found to have acquired knowledge of the meeting and if he voluntarily abstained from participating in that meeting it would not be sound exercise of jurisdiction under Article 226 of the Constitution to grant relief to the petitioner for nullifying the resolution of no-confidence which may have been passed by the majority of the members of the Board. Observations in 1968 All WR 114 and 1968 All LJ 704, Overruled; AIR 1967 All 465, Approved. (Paras 15, 16, 17)

In the instant case the District Magistrate had sent notice to the petitioner-President through ordinary post giving him information about the date, time and place of the meeting for purposes of considering the no-confidence motion against him. The notice was served on the petitioner and he had full knowledge about the date, time and place of the meeting. The petitioner, however, did not attend the meeting.

Held that it would not be proper to exercise discretion and grant relief to the petitioner as there was substantial compliance with the directory provisions of the Act and no prejudice was shown to have been caused to the petitioner.

(Para 24)

Cases Referred: Chronological Paras
AIR 1971 All 77 = 1970 All LJ 1122 (FB)

1968 All LJ 704 21
1968 All WR 114 14, 15
AIR 1967 All 465 = 1967 All LJ 681 17
AIR 1965 SC 895 = (1965) 1 SCR 970 5
1962 All LJ 930 = ILR (1963) 1 All 180

AIR 1958 All 109 13
AIR 1958 All 374 = ILR (1958) 2 All 817 20
(FB) 1, 10

AIR 1957 SC 912 = 1958 SCR 533 5
(1957) Spl. Appeal No. 313 of 1956, D/- 11
22-1-1957 (All)
(1957) Spl. Appeal No. 17 of 1957, D/- 12, 13
25-1-1957 (All)
(1956) Spl. Appeal No. 19 of 1956, D/- 9-2-1956 (All) 14

K. C. Saxena, for Petitioner; V. K. Khanna, Standing Counsel, for Respondents.

K. N. SINGH, J.:— A Full Bench of this Court consisting of three Judges referred this petition to a larger Bench as in their opinion certain observations made and conclusions drawn by a Full Bench of this Court in *Mahesh Chandra v. Tara Chand*, AIR 1958 All 374 (FB) required

reconsideration. The Full Bench was of the opinion that in this case a question of gravity and general importance was involved with regard to the principles on which this Court, while exercising its jurisdiction under Article 226 of the Constitution, can in its discretion, refuse relief to the petitioner, even though it may be established that there was non-compliance of a provision of law mandatory or directory in nature. In view of the observations made by the Full Bench this writ petition has been referred to a larger Bench for decision.

2. Briefly, the facts giving rise to the petition are that Sardar Gyan Singh petitioner was President of the Municipal Board, Dhampur, District Bijnor, which is constituted of sixteen elected members and the President. The petitioner was not an elected member of the Board but by virtue of Section 49 of the U. P. Municipalities Act, 1916, he was ex-officio member of the Board. On 24th October, 1973, two members of the Board presented a notice of intention to move a motion of no-confidence in the present (sic) (President?—Ed.) to the District Magistrate, Bijnor, together with a copy of the motion signed by ten members of the Board including those who personally presented the same to the District Magistrate. On 8th November, 1973, the District Magistrate convened a meeting of the Board for consideration of the motion of no-confidence to be held at the office of the Board on 24th November, 1973, at 11 A. M. which was to be presided over by Irshad Husain, Munsif Magistrate, Nagina. The District Magistrate sent notices by registered post to all the members of the Board informing them about the date, time and place of the meeting. No registered notice of the meeting was, however, sent to the petitioner at his place of residence, instead a copy of the notice was endorsed to the President of Nagar Palika, Dhampur, (Municipal Board, Dhampur) for information and necessary action. This notice was sent by ordinary post and it was received in the office of the Nagar Palika on 14th November, 1973. The District Magistrate further directed publication of the notice in 'Lokmat' and 'Chingari', two local newspapers published from Bijnor. He further directed that a copy of the notice be pasted on the Notice Board of the Municipal Board as well as on the Notice Board of the Tahsil and Collectorate. The direction of the District Magistrate was complied with and the notices were posted on the notice Boards of the Nagar Palika, Dhampur, Tahsil of Dhampur, and Collectorate at Bijnor. They were further published in 'Lokmat' and 'Chingari', the two local newspapers.

3. On 23rd November, 1973, i.e., one day prior to the holding of the meet-

ing the petitioner filed the present petition before this Court under Article 226 of the Constitution for the issue of writ of mandamus directing the District Magistrate not to hold meeting of the Board convened for considering the no-confidence motion against him. The petition was admitted and the notices were made returnable to a Division Bench. On the stay application the Bench refused to stay the holding of the meeting, instead it granted a limited stay order that if the motion of no-confidence is carried at the meeting it shall not be deemed to have come into existence within the meaning of Section 44-A read with Section 47-A of the U. P. Municipalities Act and no proceedings shall be taken for the election of a new President. The meeting of the Board was held on 24th November, 1973, which was presided over by the Munsif, Nagina. In all ten members of the Board attended the meeting, the petitioner, however, did not attend the meeting. All the ten members unanimously voted in favour of the no-confidence motion with the result the motion was carried. The petitioner thereafter got the petition amended and added a prayer for the quashing of the proceedings of the meeting of the Board held on 24th November, 1973, and for the issue of a writ of mandamus directing the respondents not to interfere with the petitioner's functioning as President of the Municipal Board, Dhampur.

4. Sri K. C. Saxena, learned counsel for the petitioner, submitted that the provisions of Section 87-A (3) of the U. P. Municipalities Act (hereinafter referred to as 'the Act') are mandatory, its non-compliance vitiated the motion of no-confidence even if declared to have been carried by the members of the Board. Since no registered notice was sent to the petitioner at his place of residence the mandatory provision of sub-section (3) of Section 87-A of the Act was disregarded, consequently the motion of non-confidence is rendered void. Learned Standing Counsel and Sri V. K. Khanna appearing for the respondents urged that the provisions of Section 87-A (3) are directory in nature and it was sufficiently complied with inasmuch as the District Magistrate had sent notice addressed to the petitioner which was received in his office on 14th November, 1973. The petitioner had full knowledge and information about the meeting and as such he was not prejudiced by the non-service of the notice through registered post.

5. Section 87-A of the Act deals with motion of no-confidence against President of a Municipal Board. It begins by stating that "subject to the provisions of this section a motion expressing no-confidence in the President can be made only in accordance with the procedure

laid down in the section". The section contains 15 different sub-sections but for our purposes only first three sub-sections are material which are set out as under:

"87-A: (1) Subject to the provisions of this section, a motion expressing non-confidence in the President shall be made only in accordance with the procedure laid down below.

(2) Written notice of intention to make a motion of non-confidence on its president signed by such number of members of the board as constituted not less than one-half of the total number of members of the Board, together with a copy of the motion which it is proposed to make, shall be delivered in person together by any two of the members signing the notice to the District Magistrate.

(3) The District Magistrate shall then convene a meeting for the consideration of the motion to be held at the office of the board, on the date and at the time appointed by him which shall not be earlier than thirty and not later than thirty five days from the date on which the notice under sub-section (2) was delivered to him. He shall send by registered post not less than seven clear days before the date of the meeting, a notice of such meeting and of the date and time appointed therefor, to every member of the board at his place of residence and shall at the same time cause such notice to be published in such manner as he may deem fit. Thereupon every member shall be deemed to have received the notice."

The question which arises for consideration is whether the provisions of Sec. 87-A (3) of the Act are mandatory or directory. No universal rule can be laid down for the construction of statutes whether a particular statute is mandatory or directory. The use of the word "shall" or "may" is also not a decisive factor in determining this question. In State of U. P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912, Article 320 (3) (c) of the Constitution was held to be directory and not mandatory even though the word "shall" appears in almost every paragraph and every clause or sub-clause of that article. In considering the question the purpose and the object of the provision contained in the statute, the setting and the context in which the provisions occur and the purpose which is sought to be achieved by the provisions and the legislative intent in making the provision are necessary to be considered. In Raza Buland Sugar Co. v. Rampur Municipality, AIR 1965 SC 895 the Supreme Court while considering the mandatory or directory nature of the provisions contained in Section 131 (3) of the U. P. Municipalities Act, considered this question at length and laid down certain principles. Wanchoo, J., speaking for the majority held:

"The question whether a particular provision of a statute which on the face of it appears mandatory—inasmuch as it uses the word 'shall'—as in the present case—or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory."

In making the above observations, the Supreme Court was considering the provisions of Section 131 (3) and Section 94 (3) of the U. P. Municipalities Act. Section 131 (1) of the Act empowers a Board to impose a tax by special resolution and for that purpose it is required to frame proposals in the manner laid down in sub-section (1). Sub-section (2) requires that a draft of the rules may also be prepared. Sub-section (3) however lays down that the Board shall publish tax proposals and the draft rules in the manner prescribed in Section 94 of the Act. Section 94 (3) lays down that every resolution passed by a Board at a meeting shall be, as soon thereafter as may be, published in Hindi in any local paper. The Municipal Board, Rampur, had published the tax proposals and the draft rules in a local newspaper but the newspaper was not a Hindi newspaper, instead it was an Urdu newspaper. The contention that Section 131 (3) read with Section 94 (3) of the Act was mandatory in nature, therefore it required strict compliance, the Board's failure to publish the tax proposals and the draft rules in a local Hindi Newspaper vitiated the imposition of the tax, was repelled by the Supreme Court. The Supreme Court held that the first part of the sub-section (3) of Section 131 which required publication of the tax proposals and the draft rules was mandatory in nature, but the second part of the sub-section which laid down manner of publication was directory in nature, therefore, substantial compliance of the same would meet the requirement of law. The publication of tax proposals and draft rules in Urdu newspaper was found to be in substantial compliance of the second part of Section 131 (3) of the Act.

6. In view of the aforesaid principles laid down by the Supreme Court we have to consider the provisions of Section 87-A (3) of the Act to determine mandatory or directory nature of the said provision. A President of the Municipal Board is elected by the members of the Board. He is at the apex of the local civic administration, his term correlates with the term of the Board which is five years. Sections 50 and 51 confer wide powers and duties and assign important functions to him. He exercises large number of powers of the Board. The legislature considered it necessary to make special provision for considering a motion of no-confidence against the President. The legislature required that no motion of non-confidence shall be brought against a President before the expiry of the period of one year from the date of assumption of his office. The purpose of making provision for moving a no-confidence motion against the President is that if the President commits default in performance of his duties or if there is mal-administration due to his negligence or indifference to the civic administration, the President should be ousted from his office and for that reason members of the Board have been invested with a right to move motion of no-confidence against the President. If the motion is carried by majority of members at the specially convened meeting the President is required to vacate his office. The right to move a motion of no-confidence in the President is a strong weapon in the hands of the members. The legislature intended that this right should (sic) (not? Ed.) be exercised in a light-hearted manner and for that reason it enacted Section 87-A laying down a special procedure with regard to manner of presentation of motion of no-confidence, convening of the meeting and the manner in which the motion is to be discussed and voted. Normally an ordinary or special meeting of a Board for transacting business therein is presided over by the President, but a meeting convened for the purpose of considering the motion of no-confidence is required to be presided over by an independent authority namely a civil judicial officer.

7. Sub-section (1) of Section 87-A ensures that a motion expressing no-confidence against the President shall be made only in accordance with the procedure laid down in the sub-sections. The procedure for presenting the motion of no-confidence is contained in sub-section (2). Sub-section (3) makes provision for convening meeting and for giving notice of the meeting to the members of the Board. Sub-section (3) is in two parts. The first part lays down that after a notice of intention to move a motion of no-confidence as required by sub-section (2) is presented to the District Magistrate

together with a copy of the proposed motion, he shall convene a meeting for consideration of the motion to be held in the office of the Board and for that purpose he has to fix a date and time which should not be earlier than 30 days and not later than 35 days from the date on which the notice may have been delivered to him. After the District Magistrate has fixed the time, date and place for the meeting, he is required to give notice to members of the Board about the time, date, place and purpose of the meeting to enable them to be present at the meeting convened for considering the motion of no-confidence. The second part of the sub-section lays down the manner of sending notices to the members, it requires the District Magistrate to send notice to the members by registered post at their place of residence containing information about the date, time and place of the meeting at least seven clear days before the date of the meeting. The District Magistrate is further required to cause publication of the notice in such other manner as he may deem fit. He may direct the publication of notice by pasting the same on the Notice Board of the Municipal Board or by publication in the discretion of the District Magistrate but whatever manner he may adopt for publication of the notice the procedure must be complied with. If both these steps are taken, that is, the notices are sent to members by registered post to their place of residence and publication is done in the manner as directed by the District Magistrate, then a presumption would arise as contemplated by the last part of the sub-section that every member shall be deemed to have received the notice.

8. A careful analysis of sub-section (3) would make it clear that the first part which requires the District Magistrate to convene meeting of the Board for considering the motion of no-confidence against the President is mandatory. The District Magistrate is required to perform a public duty in convening a meeting of the Board for consideration of the motion at the office of the Board on the date and time as fixed by him, he has no choice in the matter. He has to convene a meeting on a date within 30 and 35 days from the date of presentation of the motion to him. The District Magistrate is further enjoined to perform a public duty of sending notice of the meeting to the members; this again is a mandatory requirement of law which must be strictly complied with. The second part of the sub-section lays down the manner required to be followed in sending notices to the members. It lays down that notice of the meeting shall be sent by registered post to every member of the Board at his place of residence. The essence of this provision is to give information to the

members to enable them to avail opportunity of participating in the meeting convened for the purpose of considering the no-confidence motion. The first part of the section requiring the District Magistrate to convene meeting and to send notices to the members is mandatory, any disregard of that provision would defeat the very purpose of the meeting, but the manner of service of notice and publication of the same is directory in nature, therefore a substantial compliance of the same would meet the requirement of law.

9. The purpose of service of notice by registered post and publication of the notice otherwise is to ensure that members should get adequate notice of the meeting to enable them to participate in the debate over the no-confidence motion at the meeting. That purpose is not defeated if the notice is sent to the members not by registered post but by other methods and seven clear days are given to the members. The legislature never intended that unless notice is sent by registered post to the members the proceedings of the meeting would be vitiated. The legislature, no doubt, stressed that if the two steps as laid down in the sub-section are taken by the District Magistrate, i.e., notice of the meeting is sent to members by registered post at their place of residence and further if it is published in the manner directed by the District Magistrate, a presumption would arise and every member shall be deemed to have received the notice of the meeting. In that case it will not be open to any member to contend that he did not receive notice of the meeting or that the meeting was illegally constituted for want of notice. The purpose of sending notice can be achieved even without sending the same by registered post. There may be a case where the postal system may be disorganised and it may not be possible to send notice by registered post. In that situation the District Magistrate may send notice to members of the Board by special messenger giving them seven clear days before the date of the meeting. In that event the legislative intent and purpose requiring sending of notice would be fully achieved, although in that event the rule of presumption as laid down in the sub-section would not be available and if a challenge was made by a member that no notice was received by him, the deeming provision will not be applicable and it would require proof that the notice even though sent by ordinary post or by special messenger was actually served on the member. The emphasis on sending notice to members by registered post and for publication of the same in the manner directed by the District Magistrate, is directed to invoke the presumption as contemplated in the last sentence

of the sub-section. In the absence of presumption, it is always open to a party to prove that notice though sent in a different manner was served on the members. In view of the above discussion, I am of the opinion that even if the notice is not sent to the members by registered post the meeting cannot be held to have been illegally convened provided it is proved that the notice was received by the members and they had knowledge of the meeting.

10. Learned Counsel for the petitioner placed reliance on the observations made by a Full Bench of this Court in AIR 1958 All 374 in support of his contention that the provisions of Section 87-A (3) of the Act are mandatory and not directory. In Tara Chand Modi's case, a motion of no-confidence had been passed and the proceedings of the meeting had been communicated to the President. Tara Chand Modi contested the validity of the motion of no-confidence on the ground that the procedure laid down in Section 87-A of the Act was not complied with inasmuch as the Judicial Officer presiding at the meeting did not read out the motion of no-confidence and further a copy of the motion which had been earlier presented along with the written notice of intention to make a motion of no-confidence against him was not forwarded to him, therefore the provisions of Section 87-A (7) and (11) were not complied with. The question which came up for consideration before the Full Bench was as to whether Section 87-A and Section 87-A (7) and (11) lay down procedure which was mandatory or directory in nature. Gurtu, J. observed that the primary purpose of the prescriptions laid down in Sections 87-A (7) and 87-A (11) and Section 47-A of the Act was that the President should know on what ground the vote of no-confidence was passed against him so that he may, if he so desired make a representation to the State Government to dissolve the Board or to deal with the charges made against him. The learned Judge concluded that Sections 87-A (7) and 87-A (11) are mandatory and they have to be strictly complied with to achieve the object contemplated by the Act. The opinion of Gurtu, J. was not accepted by B. Mukerji, J. with whom the third learned Judge agreed. B. Mukerji, J. held that the provisions of Section 87-A could be broadly divided into two parts, one dealing with the provisions which relate to the calling of the meeting and the actual holding of the meeting and the other dealing with what has to follow the termination of the meeting: the learned Judge held that the first part of Section 87-A was mandatory in its scope but the second portion which made provision for taking certain steps after the termination of the meeting was directory as

it was in the nature of ministerial function. The learned Judge further held that the provisions of sub-sections (7) and (11) of Section 87-A of the Act were directory. Thus in the Full Bench case of AIR 1958 All 374 (FB) (supra) the question as to whether Section 87-A (3) was mandatory or directory was not in question. The question which is raised in the instant case was neither raised, discussed or decided in that case.

11. Section 87-A (3) came up for interpretation before this Court in a number of cases. It is necessary to examine those cases. In Special Appeal No. 313 of 1956 (All) Tara Chand Modi v. Dist. Magistrate, Meerut, decided on 22-1-1957, it was urged that the meeting convened for consideration of the motion of no-confidence against the President was illegal inasmuch as no notice was sent to the members by registered post at their place of residence. It was further urged that since the provisions of Section 87-A (3) were mandatory in nature, its non-compliance rendered the proceedings of the meeting illegal. A Division Bench of this Court consisting of M. L. Chaturvedi and A. P. Srivastava, JJ. repelled the contention and held that even though the notices were not sent to the members at their residential address nevertheless the requirements of Section 87-A (3) were sufficiently complied with as the notices had been sent to the members. In that connection the learned Judge observed:

"The only purpose of the direction that the notices should be posted at a particular date with a particular kind of address, therefore, appears to be to ensure service of the notice in order to justify the presumption mentioned in the clause. If, therefore, the notices are served the purpose is fulfilled and no importance can be attached to the omission to address the notices in a particular manner."

The Bench further observed that the contention that every single direction contained in Section 87-A is mandatory in the sense that even the slightest departure from the literal compliance with it will entail a nullification of the motion of no-confidence is not acceptable. It was further observed that all the directions contained in Section 87-A cannot be put on the same footing, a substantial though not literal compliance with them will be enough. The Bench was of the opinion that the second portion of sub-section (3) of Section 87-A was directory and not mandatory. The judgment of the Division Bench was approved by the majority in the Full Bench case of Mahesh Chandra (supra).

12. In Special Appeal No. 17 of 1957 (All), Chokhey Lal v. District Magistrate, Meerut, decided on 25-1-1957, the contention that since the notice of the

meeting convened for considering the motion of no-confidence was not sent to the place of residence of a member, the proceedings of the meeting were vitiated for non-compliance of Section 87-A (3), although the member had received the notice, was repelled by a Division Bench of this Court consisting of Desai and Beg, JJ. In that connection the Bench observed:

"The main purpose behind the issue of a notice is that every member should have notice of the date and time fixed for the meeting. As long as the appellant had information of the date and time fixed for the meeting it does not matter in the least if he received the notice not at his residence but some other place."

13. In *Sharafat Ullah v. State*, (1962 All LJ 930) another Division Bench of this Court quoted with approval the view expressed by the aforesaid two Division Benches in *Tara Chand Modi's* case and *Chhokhey Lal's* case Spl. Appeal No. 17 of 1957, D/- 25-1-1957 (All).

14. In *Radhey Shyam Maheswarl v. District Magistrate, Special Appeal No. 19 of 1956* (All) decided on 9-2-1956, no notice of the meeting convened for considering the motion of no-confidence against the Chairman of Town Area Committee was sent to the Chairman of the Town Area Committee by registered post, instead a copy of the notice was sent to the Chairman through a peon for information. It is noteworthy that provisions of Section 87-A of the Act are applicable to the Town Areas and for considering the motion of no-confidence against the Chairman of the Town Area Committee the provisions of Section 87-A of the Municipalities Act are required to be complied with (vide *Abdul Aziz v. State of U. P.*, AIR 1958 All 109). In *Radhey Shyam's* case (supra) the provisions of Section 87-A (3) were not complied with literally as no notice to the Chairman who was a member of the Town Area Committee was sent by registered post at his place of residence, instead a notice was sent to him by peon giving him information of the meeting convened for considering the motion of no-confidence against him. In that situation it was contended that the proceedings of the meeting were nullified. The contention was repelled by the Division Bench consisting of Desai, C. J. and L. Prasad, J., and it was observed that it made no difference whether the notice was sent through a peon to the Chairman or it was sent through registered post. The requirement of law was sufficiently complied with provided he received the notice. In the opinion of the Bench the Chairman was not prejudiced by the irregularity committed by the District Magistrate in sending notice to him in some other manner.

Sri K. C. Saxena, learned counsel for the petitioner placed reliance on *Vishwanath Tripathi v. State of U. P.*, (1968 All WR 114). In that case petitioner's contention that the meeting for the purpose of considering the motion of no-confidence against the President of the Municipal Board was not validly constituted inasmuch as no notice of the meeting had been served or could be deemed to have been served upon one of the petitioners therefore the entire proceedings of the meeting were a nullity was accepted by R. S. Pathak, J. There was no dispute between the parties that notice of the meeting sent to a member of the Board was not actually served upon him. In that situation the question arose as to whether the deeming provision contained in the second part of the sub-section could be invoked to raise a presumption that the member concerned had received the notice. The learned Judge observed that unless the notice is sent to the members by registered post and further unless the publication of the notice is done in the manner considered fit by the District Magistrate no legal fiction, as intended by the legislature, could operate to the effect that the members should be deemed to have received the notice. As discussed above I am in agreement with the proposition that the legal fiction can arise only if both the modes are adopted by the District Magistrate, i.e., by sending notice to the members by registered post and publication of the notice in the manner directed by the District Magistrate.

15. We, however, do not agree with the observations of the learned Judge that the actual service of the notice of the meeting should be proved. It would be sufficient compliance with the provisions of Section 87-A (3) if notice is sent to the members and the members acquire knowledge about the time, date and place of the meeting. The facts involved in *Vishwanath Tripathi's* case 1968 All WR 114 are different than those available in the present case. The observations of R. S. Pathak, J., that Section 87-A (3) was mandatory in its entirety does not represent correct view for the reasons stated earlier. If notice is sent by registered post and publication of the notice is done, the legal fiction enacted by the legislature would at once come into play and thereupon every member shall be deemed to have received notice even though a member may not have actually received the same. On the material on record of that case, R. S. Pathak, J., held that neither the notice of the meeting was actually served upon one of the petitioners nor the notice was published in any other manner as directed by the District Magistrate, therefore the meeting was not validly constituted. The learned Judge further

held that even if the member had knowledge of the meeting he was under no obligation to take notice and for that reason he was not disentitled to relief under Article 226 of the Constitution. We are not in agreement with this view of the learned Judge. As already stated the purpose of sending notice is to give information to the members to attend the meeting convened for the purpose of considering the motion of no-confidence, and once it is established that the member concerned had notice and had acquired knowledge of the date and time of the meeting convened for considering the motion of no-confidence, the purpose for which notice is required to be sent would be fulfilled and the member concerned will not be entitled to any relief from this Court under Article 226 of the Constitution for nullifying the proceedings of the meeting.

16. In *J. K. Paliwal v. District Magistrate* (1968 All LJ 704) Satish Chandra, J. considered the provisions of Section 87-A (3) of the Act. The learned Judge observed:

"If the notice required under Section 87-A (3) of the Municipalities Act is not sent to any member the meeting is not validly convened and the proceedings at such meeting are wholly invalid. Sending of notice to the members is a condition precedent to the exercise of the power of the District Magistrate to convene a meeting of the Board to consider a motion of no-confidence. The condition precedent not having been fulfilled the exercise of power to convene the meeting is without jurisdiction."

I do not find any reason to take a different view. I have already discussed that the requirement laid down under Section 87-A (3) of the Act for convening meeting by the District Magistrate and sending notice to the members of the Board is mandatory. If no notice is sent at all to a member of the Board, the proceedings transacted at the said meeting would be nullified. The observations quoted above were made by the learned Judge on the facts of that case where it was conceded that no notice of the meeting had been sent to the President of the Board although he was a member of the Board. The question with which we are faced was not under consideration before the learned Judge. The learned Judge, however, observed that even if the President had acquired knowledge of the meeting convened for the purpose of considering a motion of no-confidence in him, he was under no obligation to attend the meeting. With great respect to the learned Judge I do not agree. In my opinion even if a member or the President of the Board may not be under a duty to attend the meeting convened for considering the mo-

tion of no-confidence in the President, in the absence of service of notice on him but in that event such a member or President will not be entitled to discretionary relief from this Court under Article 226 of the Constitution. It is well settled principle that a petitioner is not entitled to issue of writ as of right under Article 226 of the Constitution. The conduct of a petitioner is a relevant consideration in exercising the discretionary power of this Court under the said Article. In a case where the petitioner is found to have acquired knowledge of the meeting and if he voluntarily abstained from participating in that meeting it would not be sound exercise of jurisdiction under Article 226 of the Constitution to grant relief to the petitioner for nullifying the resolution of no-confidence which may have been passed by the majority of the members of the Board.

17. In *Dr. B. N. Sarin v. State of U. P.*, 1967 All LJ 681 = (AIR 1967 All 465), S. N. Dwivedi, J., held that the President of the Board to whom notice of the meeting convened for consideration of the no-confidence motion in the President was not sent due to mistake of the office of the District Magistrate, was not entitled to any relief under Article 226 of the Constitution because it was established before the Court that the President had full knowledge of the date, time, place and purpose of the meeting. The learned Judge held that the President could not be suffered to impeach the majority resolution for want of notice. I am in respectful agreement with the proposition of law laid down by Dwivedi, J., that the conduct of a petitioner is relevant consideration in granting discretionary relief under Article 226 of the Constitution and for that reason this Court may refuse relief to a petitioner having regard to the facts and circumstances available in the case.

18. The above discussion shows that the preponderance of the Judicial opinion is that the second part of sub-section (3) of Section 87-A is directory, its literal compliance is not necessary. A substantial compliance in regard to service of notice of the meeting for consideration of the motion of no-confidence on the members will be sufficient, and any literal non-compliance of the said provision will not invalidate the meeting or the motion of no-confidence which may be adopted at the said meeting. In view of the above discussion I am of the opinion that the second part of sub-section (3) of S. 87-A of the Act laying down manner for sending the notice to the members of the Board is directory, while the first part of the said sub-section requiring the District Magistrate to convene a meeting and to send notices to the members is mandatory. It would be sufficient

compliance of the directory provision of this sub-section if notice is served on the members not by registered post but by any other mode and in that situation the motion of no-confidence which may be carried at the said meeting cannot be nullified on the ground of any literal non-compliance of service of notice by registered post.

19. The President is elected by the members of the Municipal Board in accordance with Section 43 of the Act. A member of the Board or any elector who is not less than 30 years of age is qualified to be chosen as President of the Board. Thus a non-member may be elected President of the Board. But once an elector is elected President he becomes member of the Board *ex-officio* under Section 49 of the Act which lays down that the President of a Board if he is not already a member of the Board shall be *ex-officio* member of the Board. The President presides over the meetings of the Board. All questions which come up before the meeting of the Board are decided by majority of the members at the meeting. Section 92 of the Act lays down that in case of equality of the vote the President of the Board shall have a second or casting vote. These provisions clearly indicate that a President is a member of the Board for all purposes even though he may not be an elected member of the Board. Section 87-A (3) enjoins a duty on the District Magistrate to convene a meeting for consideration of the motion of no-confidence against the President. It further lays a duty on him to send notice of the meeting by registered post to every member of the Board at his place of residence. The District Magistrate therefore must send notice of the meeting to the President also by registered post at his place of residence even though he may not be an elected member. The motion of no-confidence is directed against the President, he is the most affected party in the matter. He is entitled to take part in the debate at the meeting and to defend himself. Thus principles of natural justice require that he should be given notice of the meeting so that he may get an opportunity of defending himself.

20. Sub-section (9) of Section 87-A lays down that upon the conclusion of the debate or upon the expiry of three hours time from the commencement of the meeting convened for purposes of considering the motion of no-confidence in the President, the Presiding Officer shall put the motion to the vote of the Board. The 'Board' as defined in Section 2 (1) means the Municipal Board which includes members, officers or servants of the Board. This provision also indicates that the President who is in-

cluded in the definition of Board is entitled to vote on the motion of no-confidence. The question whether a President who was not an elected member of the Board was entitled to the notice of the meeting convened for the purpose of considering the motion of no-confidence against him was discussed at length by a Division Bench of this Court in *Abdul Aiz v. State of U. P.*, AIR 1958 All 109. The Division Bench held that the President was a member of the Board even if he was not an elected member of the Board and he was entitled to notice of the meeting like any other elected member. We are in full agreement with the law laid down by the Division Bench.

21. The above conclusion is further fortified by the provisions of sub-section (12) of Section 87-A which lays down that the motion of no-confidence shall be deemed to have been carried only when it is carried by more than half of the total number of members of the Board. "Total number of members of the Board" includes the elected members as well as the President of the Board who may not be an elected member. If the motion is not carried by the majority of more than half of the members of the Board the motion shall be ineffective and the President cannot be removed from his office. In *Mangla Prasad v. District Magistrate*, (AIR 1971 All 77) (FB), a Full Bench of this Court held that for purposes of Section 87-A (12) the total number of members of the Board includes the total number of members initially constituting the Board including the President. We are in agreement with the view of the Full Bench expressed in *Mangla Prasad's* case.

22. Once the motion of no-confidence is carried a copy of the same along with the proceedings of the meeting is communicated to the President and under Section 47-A he is required to resign within three days of the communication of the minutes of the meeting but he has an option to make representation to the State Government for superseding the Board stating reasons therefor. These provisions clearly indicate that the President must be given an opportunity to attend the meeting and for that purpose notice must be sent to him as it is required to be sent to other members of the Board in accordance with Section 87-A (3) of the Act.

23. Though the law was laid down as far back as 1958, this Court has come across many cases where the District Magistrate has not sent notice to the President by Registered Post on the mistaken view that he is not a member. In our opinion, the State Government may inform them the true legal position to avoid unnecessary litigation.

24. In the present case the material on record clearly shows that the District Magistrate had sent notice to the petitioner through ordinary post giving him information about the date, time and place of the meeting for purposes of considering the no-confidence motion against him. The notice was served on the petitioner and he had full knowledge about the date, time and place of the meeting. In the circumstances the petitioner's contention that the meeting was illegally convened or that the motion of no-confidence passed against him was nullified on account of non-compliance of Section 87-A (3) cannot be accepted. There was substantial compliance of the provisions of Section 87-A (3) as notice had been sent to the petitioner. It is well settled principle that under Article 226 of the Constitution a petitioner is not entitled to relief even if he is successful in showing that the meeting was convened and the motion of no-confidence was passed in disregard of directory provisions of Section 87-A of the Act. In a case where there is substantial compliance of the directory provisions of the Act and no prejudice is shown to have been caused to the petitioner, it will not be proper to exercise our discretion and grant relief to the petitioner.

25. In view of the above discussion I am of the opinion that the petitioner is not entitled to any relief. In the result the petition fails and is accordingly dismissed but there will be no order as to costs.

K. B. ASTHANA, J.:— I agree and have nothing to add.

SATISH CHANDRA, J.:— I concur.

C. S. P. SINGH, J.:— I agree.

K. N. SETH, J.:— I agree.
Petition dismissed.

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FULL BENCH

YASHODA NANDAN, M. N. SHUKLA, C. S. P. SINGH, N. D. OJHA AND M. P. MEHROTRA, JJ.

Avdhesh Singh and another, Appellants v. Bikarma Ahir and others, Respondents.

Special Appeals Nos. 403 and 621 of 1967; Civil Mis. Writ No. 6097 of 1970, D/- 28-2-1975.*

(A) U. P. Zamindari Abolition and Land Reforms Act (I of 1951), S. 240-J and Chap. IXA (Ss. 240-A to 240-M) —

*(Against judgment of Satish Chandra, J. in C. M. W. No. 3273 of 1966. D/- 10-4-1967.)

FS/GS/C157/75/KSB

Finality of compensation statement — Nature and extent of — Statement if and when can be challenged in collateral proceedings — Principle of res judicata — Applicability — ILR (1966) 2 A.I. 580. Overruled. (Civil P. C. (1908), S. 11).

Per Full Bench:— The compensation statement prepared under Chapter IX-A of the Act is final under Section 240-J (2) as far as the identity of the land acquired, the quantum of compensation assessed, and the identity of the land-holder who in lieu of extinction of his rights in the land is entitled to receive the compensation, are concerned and for no other purpose. (Para 11)

The Full Bench answered the four questions referred to it in the following terms:—

(1) The finality of the Compensation Statement extinguishes the rights and title of the landholder and the landholder is debarred from showing in collateral or separate proceedings that the land is not held by an Adhivasi, except in cases where the provisions of the Act have not been followed or where the Compensation Statement has been prepared in disregard of the fundamental principles of judicial procedure. If the requirements of the Act have not been complied with or the fundamental principles of judicial procedure have been disregarded, the Compensation Statement signed and sealed by the Compensation Officer under Section 240-J (2) of the Act can be assailed in collateral proceedings. AIR 1974 SC 1069. Rel. on.

(2) The Compensation Statement signed and sealed under S. 240-J (2) of the Act is final between the land-holder and the State alone.

(3) The Compensation Statement amounts to an adjudication of title between the land-holder and the person claiming Adhivasi rights and the principle of res judicata and constructive res judicata will apply only to an Adhivasi who has been a party to proceedings consequent on an objection of the nature contemplated by S. 240-H (2) (a) of the Act.

(4) The land-holder against whom Compensation Statement has become final and who has received compensation has no locus standi to re-agitate his rights in respect of the land in question. (Para 12)

Views expressed in AIR 1969 All 26 (FB), though obiter, held correct and decisions in which a contrary view is expressed held not correctly decided.

(Para 10)

The use of the word "final" in Section 240-J of the Act does not debar the compensation officer from rectifying any clerical error in the Compensation Statement. Though the Act does not specif-

cally confer any such power on him, there is inherent right in all courts and tribunals to review their orders under certain limitations. If the decision on an objection under Section 240-H (2) (a) or (b) has not been correctly recorded in the Final Compensation Statement signed and sealed by the Compensation Officer, there is no reason to hold that the Compensation Officer is powerless to rectify the error because of the use of the word "final" in Section 240-J (2) of the Act. ILR (1966) 2 All 580. Overruled.

(Paras 9, 10)

(Scheme, object and interpretation of provisions of Chap. IX (Ss. 240-A to 240-M) inserted by Act 22 of 1952 explained in paras 6 to 8.)

(B) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 240-F and Rule 193-E — Manner of publication of Compensation Statement.

Rule 193-E (i) makes provision for publication in the Official Gazette of a notice in Z. A. Form No. 111 after the draft Compensation Statement has been drawn up by the Compensation Officer. Though the manner in which the publication has to be made was left by Section 240-F to the rule-making authority, the requirement that the Compensation Statement shall be published in itself implies that the publication must be effective so that all concerned may have notice thereof. Therefore the publication of the statement in the official gazette amounts in law as effective publication and amounts to a notice to all concerned of the contents thereof. AIR 1965 SC 722, Rel. on. (Para 6)

Cases Referred: Chronological Paras

AIR 1974 SC 1069	12
AIR 1969 All 26 = 1968 All LJ 89 (FB)	
	2, 3, 8, 9, 10
(1966) Civil Misc. Writ No. 1193 of 1966,	
D/- 3-5-1966 = ILR (1966) 2 All 580	9
AIR 1965 SC 722 = (1965) 1 Cri LJ 641	6
AIR 1957 All 67 = 1956 All LJ 13	9
AIR 1933 All 49 = 143 Ind Cas 324	9
1933 AC 289 = 102 LKJB 191	9
(1932) 1 KB 617	9
(1916) 2 AC 203 = 85 LJP 193	9
(1913) ILR 35 All 331 = 40 Ind App 151	9
(PC)	9
(1881) 7 AC 19 = 51 LJ Ch 209	9
(1870-72) 14 Moo Ind App 40 = 7 Beng	
LR 186 (PC)	9

K. P. Singh and R. N. Singh, for Appellants; L. S. Srivastava, Sankatha Rai, Standing Counsel, for Respondents.

YASHODA NANDAN, J.:— Special Appeals Nos. 403 and 621 of 1967 which arose out of the same judgment of a learned Single Judge came up before a Division Bench consisting of two of us. The appeals involved a consideration of

the nature, extent of and conditions under which the Compensation Statement signed and sealed by the Compensation Officer in accordance with Section 240-J of U. P. Act 1 of 1951—hereinafter referred to as the Act—assumes finality. Since there was considerable divergence of opinion on these questions in reported and unreported decisions of this Court, the Bench referred the following questions for answer to a larger Bench:—

1. Whether the finality of Compensation Statement under Sec. 240-J, U. P. Zamindari Abolition and Land Reforms Act extinguishes the rights and title of the land-holder and the land-holder is debarred from showing in the subsequent proceedings that the land is not held by Adhivasi?
2. Whether the finality of Compensation Statement under Section 240-J is final between land-holder and State only and not between land-holder and person claiming Adhivasi rights?
3. Whether the finality amounts to an adjudication of title between the land-holder and the person claiming Adhivasi right and the principle of res judicata or constructive res judicata applies?
4. Whether the land-holder against whom Compensation Statement has become final and who has received compensation has no locus standi to re-agitate his rights in respect of the land in question?
5. What is the nature of proceedings under Section 240-D of the U. P. Zamindari Abolition and Land Reforms Act and their effect in a regular title suit or proceeding?
6. What is the meaning of the word 'final' used in Section 240-J (2) of the U. P. Zamindari Abolition and Land Reforms Act?

2. Identical problems arose before one of us in Writ Petition No. 6097 of 1970 and consequently the learned Single Judge hearing it also referred the same questions for consideration by and answers thereof to a large Bench. As a result of the references, these questions came up for consideration before a Full Bench consisting of three Judges. During the hearing of the references some doubts were entertained with regard to the correctness of the Full Bench decision of this Court in *Maqbool Raza v. Joint Director of Consolidation, U. P. Lucknow*, 1968 All LJ 89 = (AIR 1969 All 26) (FB). It was contended before the Full Bench that the Bench which decided 1968 All LJ 89 = (AIR 1969 All 26) (FB) (supra) was concerned with the effect of the

Compensation Statement finalised under Section 240-J on rival claims to Adhivasi rights and not with a case where the land-holder was claiming that the person shown as Adhivasi in the Compensation Statement was really not so and that he (the land-holder) continued to retain his title over the disputed land despite the proceedings under Chapter IX-A as is the case in the two special appeals and the writ petition before us. The Full Bench consequently referred the questions mentioned earlier for consideration by a larger Bench. This is how these cases happen to be before us.

3. During the hearing before us learned counsel representing the parties agreed that the last two questions of the order of reference either do not arise or the answers to them would be covered by the answers to the first four questions. We consequently do not propose to answer those two questions. The questions that have been referred to us have been the subject-matter of consideration in a head-string of decisions, many of which have interpreted the Full Bench decision in 1968 All LJ 89 = (AIR 1969 All 26) (FB) (supra) in diverse ways.

4. The Act as originally enacted provided for abolition of rights of intermediaries and their vesting in the State and simultaneous conferment of rights on the actual tillers of the soil. It created three classes of tenure-holders, viz. (1) Bhumidhars, (2) Sirdars and (3) Asamis. It also under Section 20 of the Act recognised a class of persons having different types of rights who were described as Adhivasis, though they were not tenure-holders and had merely a right to continue in occupation. Subsequently by U. P. Supplementary Act No. XX of 1952 Adhivasi rights were also conferred on persons who were in cultivatory possession of land in 1359 Fasli. It appears that the legislature realised that its objective of securing land to the tillers of the soil had not been fully achieved and consequently with a view to completing the process of providing security of tenure to such persons it enacted U. P. Land Reforms (Supplementary) Act 1952 (U. P. Act No. XXXI of 1952) which brought about substantial changes in the Act. This Amending Act of 1952 introduced Chapter IX-A in the Act with the scope of which we are concerned in these references. This Chapter contains in all 14 sections and is headed "Conferment of Sirdari rights on Adhivasi."

5. At this stage the relevant provisions of Chapter IX-A may usefully be surveyed. Section 240-A of Chapter IX-A empowers the State Government to declare by means of a notification published in the Official Gazette that as from a date

to be specified therein, the rights, title and interest of the land-holder in land which, on the date immediately preceding the said date, was held or deemed to be held by an Adhivasi, shall as from the beginning of the date so specified, cease and vest, except as provided in the subsequent sections of the Chapter, in the State free from all encumbrances. Section 240-B provides for the consequences that would ensue in the area in respect of which a notification under Sec. 240-A of the Act has been published. Sec. 240-C enacts that "every land-holder whose rights, title or interest in the land referred to in Section 240-A are acquired under the said section shall be entitled to receive and be paid compensation as hereinafter provided" (Emphasis supplied). Section 240-D places a duty on the Compensation Officer to prepare a Compensation Statement "for purposes of assessment and payment of compensation for acquisition of rights, title and interest of land-holder in the land referred to in Section 240-A". It further provides that the Compensation Statement prepared shall show.

"(a) the name or names of the land-holder;

(b) Where the land referred to in Section 240-A was, on the date immediately preceding the date of vesting,—

(i) recorded as sir, khudkasht or fixed rate tenancy of the land-holder, or

(ii) included in the holding of a person belonging to any of the classes mentioned in the clause (d) of Section 18, or

(iii) included in the holding of a person belonging to any of the classes mentioned in Section 19
the rent computed at hereditary rates applicable on the said date;

(c) Where the land referred to in Section 240-A was land other than land mentioned in clause (b), the rent payable for such land by the tenant thereof on the said date; and

(d) Such other particulars as may be prescribed."

Section 240-E deals with the manner in which compensation to be paid to land-holders whose rights, title or interest are acquired by virtue of a notification under Section 240-A is to be assessed. Section 240-F requires the publication of the Compensation Statement prepared under Section 240-D and runs as under:

"S. 240-F. Preliminary publication of statement. The Compensation Statement prepared under Section 240-D shall be published in the manner prescribed and a copy thereof shall also be sent to the land-holder concerned."

Section 240-G is in the following terms:—

"S. 240-G. Filing of objections.— Any person interested or the State Government may in the manner prescribed file before the Compensation Officer an objection upon such statement within the period of one month from the date of its publication."

Section 240-H is concerned with the manner in which objections filed under Section 240-G are to be dealt with and reads as follows:—

"S. 240-H. Disposal of objections— (1) Except as provided in sub-section (2), the Compensation Officer shall after hearing the parties, if necessary, on the objections filed under Section 240-G dispose of the objections in the manner prescribed.

(2) Where the objection filed under sub-section (1)—

(a) is that the land is not referred to in sub-section (1) of Section 240-A, the Compensation Officer shall frame an issue to that effect and refer it for disposal to the court which would have jurisdiction to decide a suit under Section 229-B read with Section 234-A in respect of the land and thereupon all the provisions, relating to the hearing and disposal of such suits shall apply to the reference as if it were suit;

(b) involves a question of title and such question has not already been determined by a competent court, the Compensation Officer shall, except in which Section 240-HH applies, refer the question for determination to the Court of competent jurisdiction.

Explanation— Whether a person is or is not an Adhivasi shall not be deemed to raise a question of title within the meaning of this clause.

(3) The Court of competent jurisdiction shall determine the question referred to it under clause (b) of sub-section (2) in the manner prescribed and its decision thereon shall be final."

Section 240-HH provides that if the question of title referred to in clause (b) of Section 240-H (2) is in respect of land in an area where proceedings under the U. P. Consolidation of Holdings Act as it stood prior to its amendment by the U. P. Consolidation of Holdings (Amendment) Act, 1958, are taking place, the Compensation Officer shall refer it to the Civil Judge having jurisdiction who shall thereupon refer it for determination to the Arbitrator appointed under Section 37 (1) of that Act. Section 240-I provides for an appeal to the Collector against orders of the Compensation Officer and reads thus:—

"S. 240-I. Appeal to the Collector— Notwithstanding anything contained in any law, any person aggrieved by the order of the Compensation Officer deciding the objection in so far as it relates to the amount of compensation under Section 240-H, may appeal to the Collector, who shall decide the appeal in the manner prescribed and the decision of the Collector shall be final."

Section 240-J is in the following terms:—

"S. 240-J. Final publication of the statement.—

(1) Where no objection has been filed in regard to the compensation statement published in pursuance of Section 240-F, or where such objections are filed and have been finally disposed of, the compensation officer shall, sign the statement and affix his seal thereto.

(2) The statement so signed and sealed shall become final.

(3) A copy of the final statement shall be supplied free of charge to the land-holder concerned."

Section 240-K provides for the manner in which compensation shall be paid to the land-holder while Section 240-L lays down that nothing contained in Chapter IX-A shall apply to evacuee property. Section 240-M confers on the State Government power to make rules for the purpose of carrying into effect the provisions of Chapter IX-A of the Act.

6. The main object of Chapter IX-A is to acquire the rights, title and interest of the land-holder in land which on the date immediately preceding the date declared in the notification contemplated by Section 240-A was held or deemed to be held by an Adhivasi and to vest the same in the State so that Sardari rights may accrue in favour of Adhivasis. This must be clearly kept in mind in construing the scope of the various provisions of Chapter IX-A because it is an elementary rule of construction that any interpretation that would defeat or nullify the object which the legislature seeks to achieve must be avoided. As a result of the notification issued under Section 240-A, the rights, title and interest of such land-holders as are contemplated by that section automatically vest in the State. However, no law which fails to provide for payment of compensation for property acquired would be constitutionally valid and consequently Section 240-C, specifically provides that land-holders whose rights, title and interest in land referred to in Section 240-A are acquired shall be entitled to receive and to be paid compensation as "hereinafter provided". The use of the words "be paid compensation as hereinafter provided"

indicates that the provisions which follow are concerned with the assessment and payment of compensation to the land-holders whose rights, title and interest in land are acquired by reason of the notification under Section 240-A.

Section 240-D lays a duty on the Compensation Officer to prepare a Compensation Statement for the limited "purposes of assessment and payment of compensation for acquisition of rights, title and interest of land-holder in the land referred to in Section 240-A". Assessment and payment of compensation necessarily and inevitably involves determination of the identity of the land in respect of which compensation has to be assessed and paid, the amount of compensation to be paid and the individual entitled to receive it. Clauses (a) to (c) of Section 240-D contain matters and particulars which are of relevance for the purposes of determination of the individual who is entitled to compensation and for computation of the amount of compensation. When Section 240-D (d) provides that the Compensation Statement shall show such other particulars as may be prescribed, it envisages that the rule making authority may prescribe by rule such other particulars as might be helpful in deciding the identity of the land acquired, the quantum of compensation to be paid and the person to whom they have to be paid. If the rule-making authority provides by rules for particulars other than those needed for the above-mentioned purposes, the Compensation Officer is under no duty to include them in the Compensation Statement because such matters would be beyond what the legislature intended. I wish to emphasise here, even at the risk of repetition, that the limited object of preparation of the Compensation Statement under Section 240-D is to provide a basis for determination of the identity of the land acquired, the assessment of compensation payable therefor and the land-holder entitled thereto. As to which individual is the Adhivasi of the land acquired has no impact on decision of either of these three matters. An ex parte determination by the Compensation Officer of these matters could not have been countenanced. The legislature consequently has provided by Section 240-F that the Compensation Statement prepared under Section 240-D shall be published in the manner prescribed and a copy thereof shall be sent to the land-holder concerned. While this provision provides that a copy of the Compensation Statement shall be sent to the land-holder concerned which necessarily means the landholder mentioned in it, it also requires publication in the manner prescribed. Rr. 193-B and 193-C of the Rules framed under the Act provide for

various statements that have to be prepared consequent on a notification under Section 240-A. Rule 193-E (i) makes provision for publication in the Official Gazette of a notice in Z. A. Form No. 111 after the draft Compensation Statement has been drawn up by the Compensation Officer. Sub-rule (ii) of Rule 193-E requires that a copy of the notice in Z. A. Form No. 111 along with a certified extract of the draft compensation statement shall be served on the land-holder in the manner specified in the Code of Civil Procedure. Though the manner in which the publication has to be made was left to the rule-making authority, the requirement that the Compensation Statement shall be published in itself implies that the publication must be effective so that all concerned may have notice thereof. The rule has, as noticed, provided for publication of a notice in Z. A. Form No. 111 in the Official Gazette. Publication in the Official Gazette in this country has always been considered in the eye of law as effective publication.

In the State of Maharashtra v. Mayer Hans George, AIR 1965 SC 722 the question arose as to whether the respondent before the Supreme Court could be convicted for importing gold in India contrary to the requirements of the Foreign Exchange Regulation Act, 1947 in disregard of a notification issued by the Reserve Bank of India in the Official Gazette. Section 3 (1) of that Act, as far as relevant for our purposes, ran as follows:—

"The Central Government may, by notification, in the Official Gazette, order that subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any, prescribed bring or send into India any gold....."

Explanation "In exercise of the powers conferred by the said section, the Central Government issued the following notification dated 25th August, 1948:—

"In exercise of the powers conferred by sub-section (1) of Section 8 of the Foreign Exchange Regulation Act, 1947 (VII of 1947) and in supersession of the Government of India....., the Central Government is pleased to direct that, except with the general or special permission of the Reserve Bank, no person shall bring or send into India from any place out of India;

(a) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not;....."

On the 25th August, 1948 the Reserve Bank of India issued a notification of the

same date. Subsequently on the 8th November, 1962 in supersession of the said notification the Reserve Bank of India issued another notification published in the Official Gazette dated 24th November, 1962. The respondent's act in importing gold in this country was in accord with the notification of the Reserve Bank of India dated 25th August, 1948 but was in breach of the notification published on 24th November, 1962. The respondent had left Zurich on the 27th November, 1962 and it was urged that he could not have had knowledge of the notification of the Reserve Bank which was published in the Gazette on the 24th November, 1962 in India. In spite of the fact that Section 8 did not provide for the manner in which the Reserve Bank could provide for general or special permission, by reason of the Gazette notification, it was held that he must be attributed with the knowledge of the contents thereof in the eye of law. Ayyangar, J. who delivered the majority judgment for himself and on behalf of Mudholkar, J. described publication in the Official Gazette as "the usual mode of publication in India....."

The publication of the Compensation Statement consequently amounts, to my mind, to a notice to all concerned of the contents thereof. Section 240-G gives a right to "any person interested" or the State Government to file objections before the Compensation Officer within the period of one month from the date of its publication. The question arises as to what is the scope of the words "person interested" for the purposes of Section 240-G. Does it include the recorded or unrecorded Adhivasi? To my mind the answer must be in the negative. Since the Compensation Statement prepared under Section 240-D and published under Section 240-F is prepared expressly for purposes of assessment and payment of compensation for acquisition of rights, title and interest of land-holder in the land referred to in Section 240-A, the only persons interested in disputing its correctness can be (1) those claiming that they and not the person shown in the Compensation Statement are the land-holders entitled to compensation, or that they also along with the land-holder mentioned in it are entitled to compensation, (2) the land-holder shown in the Compensation Statement or any one else claiming to be the land-holder who asserts that the land is not of the nature contemplated by Section 240-A of the Act and thus has not been acquired and (3) the recorded land-holder or any one else claiming to be the land-holder disputing the assessment of compensation as disclosed in the Compensation Statement. An Adhivasi recorded or unrecord-

ed in the Compensation Statement can possibly have no interest in supporting or disputing the quantum of compensation assessed or to the identity of the person to whom it is paid or asserting that the land does not belong to the class contemplated by Section 240-A and hence in the entries in the Compensation Statement. No objection consequently, to my mind, is entertainable at the instance of an Adhivasi recorded or unrecorded in the Compensation Statement.

Section 240-H lends support to this view. An objection has to be filed before the Compensation Officer. If the objection is to the effect that the land mentioned in the Compensation Statement is not land referred to in sub-section (1) of Section 240-A, the Compensation Officer is required to frame an issue to that effect and to refer it for disposal to the Court which would have jurisdiction to decide a suit under Section 229-B read with Section 234-A in respect of the land and in such an event all the provisions relating to the hearing and disposal of such suits shall apply to the reference as if it were a suit. On account of the deeming clause towards the end of Section 240-H (2) (a) the objection takes the form of a suit. A suit under Section 229-B read with Section 234-A, according to Schedule I, has to be decided by an Assistant Collector of the First Class. In the very nature of things neither an Adhivasi, if any mentioned in the Compensation Statement, nor any one else claiming to be an Adhivasi can conceivably be interested in establishing that the land mentioned in the Compensation Statement is not of the nature referred to in sub-section (1) of Section 240-A. In fact, every person claiming to be an Adhivasi of the land in question would be interested in showing that it is land of that nature, otherwise he would not become Sirdar. Only land-holders whose rights are claimed to have been acquired by reason of a notification under Section 240-A can be interested in asserting that the land mentioned in the Compensation Statement is not land of the nature contemplated by Section 240-A and hence in filing an objection of the nature envisaged by Section 240-H (2) (a). If, however, in the objection contemplated by Section 240-H (2) (a) the Adhivasi recorded or unrecorded is impleaded as a party, he and the land-holder both would be bound by the decision arrived at in the consequent proceedings on the principle of res judicata and it will be open to neither of them to contend in a separate suit that the decision was incorrect. An Adhivasi who is not a party to the proceedings would, however, remain unaffected by the decision. An objection as envisaged by Section 240-H (b) can be raised by persons

interested in showing that either they alone to the exclusion of the person shown as land-holder in the Compensation Statement or along with him are land-holders entitled to compensation. Section 240-H (2) (b) lends support to the conclusion that consequent on the publication of the Compensation Statement under Section 240-F any one claiming to have title as land-holder and entitled to compensation must file an objection in accordance with Section 240-G within a month of its publication because such a person is evidently a person interested within the meaning of Section 240-G. The decisions given on objections of the nature contemplated by Section 240-H (2) (a) and (b) are decisions by courts and would bind the State, the land-holders concerned and in case some one claiming to be an Adhivasi has been impleaded or has on his own initiative become a party to the proceedings under Section 240-H (2) (a) such Adhivasi. The decisions given by competent courts on objections under these provisions cannot by any principle of law be open to challenge in collateral proceedings. The decisions given by courts concerned on objections of the nature envisaged by Section 240-H (2) (a) and (b) become incorporated in the final statement signed and sealed by the Compensation Officer under Section 240-J.

7. In the scheme of Chapter IX-A what strikes me is that land-holders claiming title to land indicated in the Compensation Statement as of the nature provided for in Section 240-A have been given the right to establish their title thereto and also to establish that it is not land liable to acquisition in forums which are regular courts. Normally there is no period of limitation for a suit for declaration of title or for a declaration that a specific piece of land is not of a particular variety. Section 240-G prescribes a period of limitation by providing that those asserting title to land shown in the Compensation Statement prepared under Section 240-D or those contending that it is not land subject to acquisition must move the Courts concerned through the agency of the Compensation Officer. The Compensation Officer himself is a mere receiving agency of the objections which have to be decided as suits. The land-holder who either fails to file an objection to the effect that the land is not subject to the acquisition because it is not covered by Section 240-A or who fails to assert title thereto in substance and in effect fails to move the courts concerned for relief within the time prescribed by law. In such an event by reason of the principle of constructive res judicata he will be debarred, to my mind, from raising contentions which he could and ought to

have raised in objections of the nature envisaged by Section 240-H (2) (a) and (b). This will be so not because of any constructive decision by the Compensation Officer but because of the failure to move the relevant courts through the agency of the Compensation Officer.

8. Apart from objections to the effect that the land in question is not of the nature contemplated by Section 240-A or with regard to title to the land which are envisaged by Section 240-H (2) (a) and S. 240-H (2) (b) both of which, as already held, can only be raised by the land-holder mentioned in the Compensation Statement or other persons claiming to be the landholders, the only other objection contemplated by Sec. 240-F can be to my mind with regard to the quantum of compensation tentatively assessed by the Compensation Officer. It is significant that an appeal against an order of the Compensation Officer under Section 240-I lies only against a decision deciding an objection relating to the amount of compensation. An appeal against any other decision by the Compensation Officer is not provided for and this to my mind is because the Compensation Officer has no power to decide an objection of any other character. "Compensation Officer" means "Compensation Officer" appointed under Section 319 according to Section 3 (6) of the Act. Though by rules all Assistant Collectors of the First Class have been appointed as Compensation Officers, the Act does not necessitate their being officers who function as courts. Compensation Officers are neither civil nor revenue Courts and do not function as such while exercising powers under Chapter IX-A of the Act. While deciding the amount of compensation to be paid, Compensation Officers have merely to make some arithmetical calculations in accordance with Section 240-E. In support of the conclusions arrived at by it, the Full Bench in 1968 All LJ 89 = (AIR 1969 All 26) (supra) took note of the fact that even before the introduction of Chapter IX-A in the Act, there existed provisions for adjudication of disputes between the persons claiming to be Adhivasis or Sirdars. Chapter IX-A has introduced no parallel provisions for the same purposes. Chapter IX-A thus provides no machinery for adjudicating as to who was the Adhivasi of the land in question immediately preceding the notification under Section 240-A and who has become Sirdar by virtue of a notification under that provision.

9. It was rightly held by S. N. Dwivedi and S. D. Khare, JJ. in Smt. Ashgari Begum v. Deputy Director of Consolidation (Civil Misc. Writ No. 1193

of 1966 decided on 3rd May, 1966)* that the word "final" in Section 240-J (2) of the Act could not have been used in the sense of barring an appeal or revision because there exist no general provisions for appeal or revision against the Final Compensation Statement prepared after the objections and appeals, if any, have been decided. I am, however, not inclined to accept the view that because of the word "final" the Compensation Officer is debarred from rectifying any clerical error in the Compensation Statement. Though the Act does not specifically confer any such power on him, there is to my mind inherent right in all courts and tribunals to review their orders under certain limitations. If the decision on an objection under Section 240-H (2) (a) or (b) has not been correctly recorded in the Final Compensation Statement signed and sealed by the Compensation Officer, I do not see any reason to hold that the Compensation Officer is powerless to rectify the error because of the use of the word "final" in Section 240-J (2) of the Act. A Division Bench of this Court in *Debi Prasad v. Sri Khelawan*, 1956 All LJ 13 = (AIR 1957 All 67), in a well considered judgment held that the rule that no court or judge has power to rehear, review, alter or vary any judgment or order after it has been entered or drawn up respectively is subject to certain qualifications and they were enumerated by the Bench as follows:—

"(1) Until a judgment or order has been delivered and signed there is inherent in every court the power to vary its own orders so as to carry out what was intended and to render the language free from doubt; or even to withdraw the order so that the decision may be reconsidered—Halsbury's Laws of England (Hailsham Edition) Volume 19, p. 261; *Lawrie v. Lees*, (1881) 7 AC 19 (35).

(2) After the judgment or order has been entered or drawn up or signed, there is power both under Section 152 of the Civil Procedure Code, and inherent in the judge who gave or made the judgment or order to correct any clerical mistake or error arising from any accidental slip or omission so as to do substantial justice and give effect to his meaning and intention (1881) 7 AC 19 (supra).

(3) If an order or judgment has been made or judgment entered without notice to a party when that party had the right to be heard, the court or judge may set it aside.

The *Boliver* (1916) 2 AC 203 Halsbury's Laws of England (Hailsham Ed.) Vol. 19, p. 263.

(4) If an order has been signed by inadvertence or failure of memory when it was intended that it should not be signed at that stage, the court or judge may recall the order. *Jai Karan v. Panchaiti Akhara* (AIR 1933 All 49).

(5) Where a decree has been passed against a dead person, the order may be vacated and the case reheard (*Debi Bux Singh v. Habib Shah*, (1913) ILR 35 All 331). The same rule applies to an order passed against a company which has already been dissolved or which was non-existent—*Lazard Brothers and Co. v. Barque Industrielle de Moscow*, (1932) 1 KB 617 (624) SC on appeal (1933) AC 289 (296).

(6) A court has larger power of modifying or setting aside interlocutory orders than it has in respect of final orders. Thus an order for sale of unsaleable property may be set aside — *Tafazzul Husain v. Raghunath Prasad*, (1870-72) 14 Moo Ind App 40 (PC)."

These exceptions were applied by the Bench which decided 1956 All LJ 13 = (AIR 1957 All 67) (supra) to proceedings before a Sub-Divisional Officer under Section 4 of the U. P. Supplementary Act, 1952. In my judgment, the views expressed by the Full Bench in 1968 All LJ 89 = (AIR 1969 All 26) (supra) were correct and the reasons given therein are convincing even though they might have been obiter.

10. Numerous decisions, as already stated, were cited before us taking one view or the other with regard to the scope and extent of the finality which attaches to Compensation Statement signed and sealed by the Compensation Officer under Section 240-J (2) of the Act but I do not think it necessary to burden this judgment by a review of them. It is sufficient to hold that cases in which a view has been expressed contrary to those taken in 1968 All LJ 89 = (AIR 1969 All 26) (FB) have not been correctly decided.

11. For the reasons given above, my conclusion is that the Compensation Statement prepared under Chapter IX-A of the Act is final as far as the identity of the land acquired, the quantum of compensation assessed, and the identity of the land-holder who in lieu of extinction of his rights in the land is entitled to receive the compensation are concerned and for no other purpose.

12. My answer to the first four questions referred to us are as follows:—

*Reported in ILR (1966) 2 All 580

- (1) Finality of Compensation Statement under Section 240-J, U. P. Zamin-dari Abolition and Land Reforms Act extinguishes the rights and title of the land-holder and the land-holder is debarred from showing in collateral or separate proceedings that the land is not held by an Adhivasi, except in cases where the provisions of the Act have not been followed or where the Compensation Statement has been prepared in disregard of the fundamental principles of judicial procedure (Katikara Chintamani Dora v. Guatreddi Annamanaidu, AIR 1974 SC 1069). If the requirements of the Act have not been complied with or the fundamental principles of judicial procedure have been disregarded, the Compensation Statement signed and sealed by the Compensation Officer under Section 240-J (2) of the Act can be assailed in collateral proceedings.
- (2) The Compensation Statement signed and sealed under Section 240-J (2) of the Act is final between the land-holder and the State alone.
- (3) The Compensation Statement amounts to an adjudication of title between the land-holder and the person claiming Adhivasi rights and the principle of res judicata and constructive res judicata will apply only to an Adhivasi who has been a party to proceedings consequent on an objection of the nature contemplated by Section 240-H (2) (a) of the Act.
- (4) The land-holder against whom Compensation Statement has become final and who has received compensation has no locus standi to reagitate his rights in respect of the land in question.

M. N. SHUKLA, J.:— I agree.

C. S. P. SINGH, J.:— I agree.

N. D. OJHA, J.:— I agree.

M. P. MEHROTRA, J.:— I agree.
Answer accordingly.

**AIR 1975 ALLAHABAD 332
SPECIAL BENCH**

K. B. ASTHANA, C. J., GOPINATH AND
SAXENA, JJ.

M/s. Nar Singh Das and Brothers,
Applicant v. The State of U. P., Opposite
Party.

Stamp Act Reference No. 161 of 1972,
D/- 31-3-1975.

FS/GS/C155/75/MVJ

(A) Stamp Act (1899), S. 24 and Sch. 1-B, Art. 23 (U. P.) — Transfer in consideration of debt — Vendor compelled to sell house for Rs. 15,500 in discharge of total liability of Rs. 61,600 — Ad valorem stamp duty is payable on Rs. 61,600 and not Rs. 15,500.

Section 24 lays down the rule as to how transfer, in consideration of debt, is to be charged to stamp duty. Where the material recital of the sale deed clearly shows that the vendor was compelled to transfer the house for Rs. 15,500 to the Vendee in the discharge of the total liability of Rs. 61,600 and the document itself evidences the fact that on transfer of the house the debt was discharged, it means that instead of accepting Rupees 61,600 the Vendee accepted Rs. 15,500 in lieu thereof. The transfer of the house was in consideration of the whole of the debt i.e. Rs. 61,600. Thus for the purpose of payment of ad valorem stamp duty the value of the consideration would be Rs. 61,600 under Article 23 of Schedule I-B of the U. P. Stamp (Amendment) Act, 1962. (Para 5)

It could not be contended that the house being valued at Rs. 15,500 in the sale-deed under Article 23 of the U. P. Stamp (Amendment) Act, 1962 the stamp duty was payable on that amount and not on the amount of debt of Rs. 61,600 inasmuch as the house was not sold in consideration of the payment of that debt and what the recital in the sale-deed showed was only the previous transaction and history of the settlement between the parties and the contract of sale of the house was an independent transaction, distinct from the settlement, arrived at between the creditor and the debtor, the creditor having relinquished a part of the debt and having agreed to the amount of Rs. 15,500 as representing the existing debt. This contention is against the tenor of the recital of the sale deed itself. On construction of recitals in the sale deed itself the authorities have come to a finding that the transfer was in consideration of payment of full debt of Rs. 61,600. (Para 6)

Further, once Section 24 of the Act applies then the consideration would be the value of the debt which stands discharged or paid up, no matter whatever may be the market value of the property mentioned in the sale-deed itself. The question of going behind the market value by the revenue authorities or the relinquishment of part of debt by vendee does not arise. (Para 7)

Cases Referred: Chronological Paras
AIR 1972 SC 899 = (1972) 3 SCR 332 7
AIR 1970 All 599 = 1970 All LJ 464 (SB) 8

AIR 1965 SC 1092 = (1965) 2 SCR 269 8

S. M. Agarwal, for Applicant; R. M. Sahai, for Opposite Party.

ASTHANA, C. J.:— This is a reference under Section 57 of the Indian Stamp Act by the Chief Controlling Revenue Authority, viz., the Board of Revenue, Uttar Pradesh.

2. Admittedly, the vendor was indebted to the extent of Rs. 61,600 to the vendee on the date when the sale-deed in question, dated 25-1-1968, was executed transferring a house for Rupees 15,500. It appears from the recital in the sale-deed, that the vendee had been demanding the payment of his money due on the supplies of cloth to the vendor, who was carrying on business in cloth in Kanpur market; that the vendor had suffered losses and much of his money was retained by his customers and he found himself in difficulty, that the vendor and the vendee then entered into an arrangement and executed the sale-deed dated 25-1-1968. The sale-deed shows that on the sale of the house for Rs. 15,500 the total debt of Rs. 61,600 stood discharged. It may further be stated that the title deed of the house, sold, had earlier been deposited with the vendee as security. When the sale-deed was presented before the Sub-Registrar he impounded it as he found that the stamp duty on the value of Rs. 15,500 had only been paid and not on Rs. 61,600, the amount of the debt which was wiped out by the sale of the house. The Additional Collector of Agra upheld the view of the Sub-Registrar and called upon the vendee to pay a stamp duty on the sum of Rs. 61,600 plus Rs. 15,500 with penalty under Section 24 of the Stamp Act. The vendee, being aggrieved, filed a revision before the Board of Revenue and then also made an application that the matter be referred under Section 57 of the Stamp Act to the High Court. The Board of Revenue has submitted a statement of the case with its opinion and has formulated two points of law; viz.,

(1) Whether the instrument under consideration is chargeable as an instrument of conveyance with ad valorem duty on the amount of total debt of Rs. 61,600, for which the property was encumbered, under Article 23, Schedule I-B of the U. P. Stamp (Amendment) Act, 1962 read with Section 24 thereof? and

(2) If the answer to the above question is in the affirmative, whether additional stamp duty @ 2% would be payable on the total debt of Rs. 61,600 in accordance with the provision of Section 62 of the Avas Avam Vikas Parishad Adhiniyam, 1965 as amended by Section 12 of the U. P. Local Self-Government Laws (Amendment) Act, 1966 (Act XXIX of

1966) read with Government Notification No. O-324 H/XXXVII-8(HB) 65 dated 29-3-1966 published in the U. P. Gazette dated 29-3-66 (Niwas Vibhag)?

3. We may say here that in our judgment question No. 2 does not arise on the statement of the case. Neither the order of the Collector nor the opinion of the Board of Revenue deals with the charging of Additional Stamp Duty of two per cent. Moreover the question, framed, involves an enquiry into the fact whether Section 62 of the Avas Avam Vikas Parishad Adhiniyam, 1965 as amended by Section 12 of the U. P. Local Self-Government Laws (Amendment) Act, 1966 (Act No. XXIX of 1966), was applicable to the house sold. We need not, therefore, answer the second question.

4. As regards the first question we may point out that the words "for which the property was encumbered" occurring in the question seem to have been inadvertently or under some misconception introduced by the Board of Revenue. It was not the case of any party before the Collector that the house sold was subject to mortgage for the debt of Rs. 61,600 which had accrued up to the date of the execution of the sale-deed. What we understand by the question is whether under Article 23, Schedule I-B of the U. P. Stamp Act XXV of 1962 the stamp duty paid on the amount of Rs. 15,500, the value of the house transferred, was in accordance with law and the Sub-Registrar was in error in impounding the sale-deed when presented for registration or the stamp duty was payable on the amount of Rs. 61,600, the total debt in consideration of which the house was sold under Section 24 of the Stamp Act.

5. We have heard learned counsel for the vendee and the learned counsel for the Revenue. In our judgment the provisions of Section 24 of the Stamp Act were attracted to the facts and circumstances of the case. Section 24 of the Stamp Act lays down the rule of law as to how transfer, in consideration of debt, is to be charged to stamp duty. The material recital of the sale-deed clearly shows that the vendor was compelled to transfer the house for Rs. 15,500 to the vendee, in the discharge of the total liability of Rs. 61,600. The document itself evidences the fact that on the transfer of the house the debt of Rs. 61,600 was discharged, that is to say, that instead of accepting Rs. 61,600 in full payment of the debt the vendee, as the creditor, accepted Rs. 15,500 in lieu thereof. There cannot, therefore, be any escape from the conclusion that the transfer of the house was in full payment of the

debt by the vendor. Section 24 of the Stamp Act says that where any property is transferred to any person in consideration wholly or in part, of any debt due to him..... such debt..... is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with ad valorem duty. In the instant case the debt discharged amounted to Rs. 61,600 and this was the amount owed by the vendor to the vendee. The transfer of the house was in consideration of the whole of the debt i.e. Rs. 61,600. Thus for the purpose of payment of ad valorem stamp duty the value of the consideration would be Rs. 61,600 under Article 23 of Schedule I-B of the U. P. Stamp (Amendment) Act, 1962.

6. We are unable to agree with the contention of the learned counsel for the vendee that the house being valued at Rs. 15,500 in the sale-deed under Article 23 of the U. P. Stamp (Amendment) Act, 1962 the stamp duty was payable on that amount and not on the amount of debt of Rs. 61,600 inasmuch as the house was not sold in consideration of the payment of that debt and what the recital in the sale-deed showed was only the previous transaction and history of the settlement between the parties and the contract of sale of the house was an independent transaction, distinct from the settlement arrived at between the creditor and the debtor, the creditor having relinquished a part of the debt and having agreed to the amount of Rs. 15,500 as representing the existing debt. In other words, the argument was that on the date the sale-deed was executed there was no existing debt of Rs. 61,600 but only of Rs. 15,500. The contention of the learned counsel is against the tenor of the recital of the sale-deed itself. The learned Addl. Collector and the Board of Revenue, in our judgment, have rightly construed the recital in coming to the conclusion that the transfer of the house was in consideration of the payment of the full debt of Rs. 61,600. In fact the finding is based on the recital and admission of the existing liability of Rs. 61,600 on the part of the vendor. It is recited in the sale-deed that the vendor being in difficulty, the vendee, as a measure of concession, agreed to buy the house for Rs. 15,500 and discharged the vendor of the liability and there remained nothing outstanding against the vendor in regard to the debt of Rs. 61,600.

7. Learned counsel referred to Section 63 of the Indian Contract Act in support of his submission that it is always open to a creditor to relinquish any part of the debt and this having been done by the vendee, as a creditor, the only liabi-

lity which remained on the vendor was of Rs. 15,500 and that is all what the recital in the sale-deed evidenced. The further submission was that the consideration for the sale was only Rs. 15,500 and the Board of Revenue was in error in taking the view that the consideration for the sale was of Rs. 61,600. In this connection learned counsel drew our attention to the case of Himalaya House Co. Ltd. v. Chief Controlling Revenue Authority (AIR 1972 SC 899) wherein it was held that the Revenue Authorities are not permitted by law to go behind the valuation of the property mentioned in the document for purpose of determining the stamp duty payable. We do not think that here any such question arises. Once Section 24 of the Act applies then the consideration would be the value of the debt which stands discharged or paid up, no matter whatever may be the market value of the property mentioned in the sale-deed itself. The revenue authority have not gone behind the market value of the house but they have applied the provisions of Section 24 of the Stamp Act.

8. It was next urged that Section 24 of the Stamp Act was not attracted inasmuch as the house was not sold subject to the mortgage or encumbrance. Reliance was placed on the Board of Revenue, U. P. v. Sidhnath Mehrotra, AIR 1965 SC 1092. It is not necessary for us to further discuss the facts of the instant case in order to find out whether the declaration of law by the Supreme Court helps the learned counsel. We have already found above that the house was transferred in consideration of the full payment of the debt of Rs. 61,600, and we have further found that the house was not transferred for enforcing the security of the debt of Rs. 61,600, nor was the transfer subject to that debt. The Supreme Court has held in the case cited that when the sale is subject to encumbrance then the Explanation to Section 24 is applicable. Here on the facts we find that the sale was in consideration of the payment of the debt. It was not the case here that the sale was subject to any encumbrance. Section 24 clearly applies and the consideration would be, for purposes of calculating stamp duty payable, ad valorem on the amount of the debt discharged i.e. Rs. 61,600. Learned counsel referred to the decision of this Court in Chief Inspector of Stamps, Allahabad v. Murlidhar Kanodia, Kanpur, AIR 1970 All 599 (SB). We do not think the ratio of the decision in that case, in any way helps the learned counsel. There a power of attorney, executed was the subject-matter of consideration and this Court was concerned only to find whether it

was for a valuable consideration or only for a good consideration. It was found that power of attorney or the contract of agency therein was not for valuable consideration hence the ad valorem stamp duty was not payable. Further it was found on the document considered in that case that there was no transaction of transfer of any property. It is clear, therefore, that nothing in that case will be helpful in resolving the controversy in the instant case.

9. It was also argued that the document in question be read in two parts; first part as release and the second part as transfer. No such question was raised either before the Additional Collector or the Board of Revenue and it is not a part of the statement of the case. Moreover we have already found that on the tenor and the nature of the recital in the document, it appears to be one and single transaction, namely, the transfer of the house in consideration of the payment of debt of Rs. 61,600.

10. For the reasons given above we answer that ad valorem stamp duty on the amount of total debt of Rs. 61,600 is chargeable under Article 23, Schedule I-B of the U. P. Stamp (Amendment) Act, 1962 and Section 24 thereof. No order as to costs.

Answer accordingly.

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YASHODA NANDAN AND K. C.
AGARWAL, JJ.

Man Singh, Applicant v. Ch. Bishambar Singh and another, Opposite Party.

Civil Revn. No. 1458 of 1974. D/- 2-5-1975.*

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Ss. 20, 39 and 40 — Sec. 20 whether retrospective — Applicability of S. 20 to suits pending at commencement of the Act.

A building was constructed in 1964. A suit was filed in 1972 for ejectment therefrom of the tenant. The U. P. Urban Buildings Act came into force in 1972 after institution of the suit which was decreed in 1973 by the Court of Small Causes. Revision therefrom was instituted in 1973 under Section 25 of the Provincial Small Cause Courts Act and remained pending till 1974 and ten years' period since the completion of the construction

*(Against judgment and decree of L. R. Kohli, 4th Addl. Dist. J., Meerut in S. C. C. Revn. No. 346 of 1973. D/- 8-10-1974.)

lapsed. Held, that the suit was not liable to be dismissed on the ground that it was barred by Section 20 but it should be dealt with in accordance with Section 39 read with Section 20. This would hold good to a suit pending in revision because on account of Section 40, Section 39 would be attracted thereto. (Para 6)

Gur Pratap Singh, for Applicant,
A. D. Prabhakar, for Opposite Party.

ORDER:— When this revision came up for admission before a learned Single Judge, he referred the following question for decision by a larger Bench and directed that the revision be listed for admission after the opinion of the larger Bench has been received:—

"If a building is constructed in 1964 and suit is filed in 1972 for ejectment of the tenant and the suit is decreed in 1973 by the court of Small Causes and the revision instituted in 1973 under Section 25 of the Provincial Small Cause Courts Act remains pending till 1974 and ten years' period since the completion of the construction lapsed, can the suit be dismissed on the ground that it was barred by Section 20 of the U. P. Urban Buildings (Regulations of Letting, Rent and Eviction) Act, 1972."

2. The material facts giving rise to this revision are that on the 3rd May, 1972, plaintiff-respondent No. 1, claiming to be the landlord of the premises in question, instituted a suit in the court of the learned City Munsif, Meerut, for ejectment of the applicant and defendant opposite party and for recovery of arrears of rent and pendente lite and future mesne profits at the rate of Rs. 45 per month. In consequence of the amendment of the Provincial Small Cause Courts Act, 1887 by the Uttar Pradesh Civil Laws Amendment Act, 1972 which came into force on the 16th September, 1972, the suit came to be transferred to the court of the learned Judge, Small Causes at Meerut. The applicant and opposite party No. 2 resisted the claim on various pleas. Benefit of S. 39 of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972—hereinafter referred to as the Act—was also claimed.

3. The trial court decreed the suit for ejectment as well as for recovery of arrears of rent and pendente lite and future mesne profits. Aggrieved by the decree of the trial court, the defendant-applicant filed a revision before the learned IV Additional District Judge, Meerut. The court below upheld the finding recorded by the trial court that the premises in dispute has been constructed in the year 1964. The claim based on Section 39 of the Act was rejected since in the view of the court below the defendants were not entitled to its benefit

"because the Act itself is not applicable to the case." In the result, the court below dismissed the revision with the modification that it was ordered that the defendants shall not be evicted till the 31st December, 1974.

4. As far as the question framed by the learned Single Judge is concerned, a mere reading of Section 20 of the Act makes it clear that it must be answered in the negative. Section 20 of the Act, as far as material for our purposes is in the following terms:—

"20 (1). Save as provided in sub-section (2), or in clause (r) of sub-section (2) of Section 43, no suit shall be instituted for the eviction of a tenant from a building, notwithstanding the determination of his tenancy by efflux of time or on the expiration of a notice to quit or in any other manner:—

Provided that nothing in this sub-section shall bar a suit for the eviction of a tenant on the determination of his tenancy by efflux of time where the tenancy for a fixed term was entered into by or in pursuance of a compromise or adjustment arrived at with reference to a suit, appeal, revision or execution proceeding, which is either recorded in court or otherwise reduced to writing and signed by the tenant.

(2) A suit for the eviction of a tenant from a building after the determination of his tenancy may be instituted on one or more of the following grounds, namely—

..... " (emphasis supplied)

5. An analysis of Section 20 makes it clear that it is prospective and is a bar merely to the institution of suits after the coming into force of the Act. The suit giving rise to the instant revision was already pending on the date when the Act came into force and is not liable to be dismissed on the mere ground that its continuance is barred by Section 20 of the Act. This, however, does not mean that Section 20 of the Act will necessarily have no effect whatsoever on the suit pending in the instant revision. Section 20 of the Act, though negative in form, permits institution of suits for the eviction of tenants from premises to which the U. P. (Temporary) Control of Rent and Eviction Act, 1947—hereinafter referred to as the Old Act—applied, after the coming into force of the Act on the basis of permission obtained from the District Magistrate under Section 3 of the Old Act on its assuming finality under clauses (i), (l), (m) or (o) of Section 43 (2) of the Act. The proviso to sub-section (1) of Section 20 also permits institution of suits for the eviction of the tenants on

the determination of their tenancy by efflux of time where the tenancy for a fixed term was entered into by or in pursuance of a compromise or adjustment arrived at with reference to a suit, appeal, revision or execution proceeding, which is either recorded in court or otherwise reduced to writing and signed by the tenant. Sub-section (2) of Section 20 enables institution of suits for eviction of tenants from buildings on the grounds mentioned in clauses (a) to (g) thereof. Clause (a) of sub-section (2) of Section 20 is more or less similar to clause (a) of Section 3 of the Old Act and permits institution of a suit for eviction of a tenant from the building on the ground that the tenant is in arrears of rent for not less than four months and had failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand. Suits for eviction of tenants after the coming into force of the Act on ground other than those enumerated in sub-sections (1) and (2) of Section 20 stand barred. A suit for the eviction of a tenant even on grounds mentioned in clauses (b) to (g) of sub-section (2) of Section 20 of the Act may also contain an allegation that the defendant-tenant is in arrears of rent; though not for the period contemplated in clause (a) of Section 20 (2) of the Act. Section 20 (3) of the Act requires a tenant, who is being sued for his eviction on any of the grounds mentioned in sub-section (2) to deposit the entire amount of rent and other sums mentioned therein in the manner provided in that provision on penalty otherwise of his defence being struck off or refusal to entertain his defence. Thus a tenant who is desirous of resisting his eviction in a suit instituted on any of the grounds mentioned in sub-section (2) must make the deposit in accordance with Section 20 (3) of the Act irrespective of the question whether he is being sued on the grounds mentioned in Section 20 (2) (a) or on any of the other grounds of sub-section (2). While sub-section (3) is not confined in its operation to a suit for eviction of a tenant on the ground mentioned in clause (a) of sub-section (2), sub-section (4) is applicable only to suits for eviction of tenants on the ground mentioned in Section 20 (2) (a) of the Act. Sub-section (4) enables a tenant being sued for his eviction on the ground mentioned in clause (a) of sub-section (2) of Section 20 to save his tenancy by making deposits mentioned in that sub-section in accordance with the requirements thereof. To suits pending on the date of the coming into force of the Act in respect of buildings to which the Old Act did not apply but to which the Act becomes applicable by reason of Section 2 (2) of the Act, the provisions of Section 39 of

the Act are attracted. Section 39 of the Act enables parties to such suits to amend their pleadings and to adduce additional evidence where necessary. It provides that in case a tenant makes the deposit mentioned therein within the time prescribed thereby, the suit for his eviction shall not be decreed except on any of the grounds mentioned in the proviso to sub-section (1) or in clauses (b) to (g) of sub-section (2) of Section 20. Thus if a suit for eviction of a tenant from premises to which the Old Act did not apply is pending, to which the Act becomes applicable on the coming into force thereof and eviction of the defendant-tenant is being sought on grounds mentioned in the proviso to sub-section (1) or clauses (b) to (g) of sub-section (2) of Section 20, the claim for his eviction may be decreed in spite of the fact that the tenant may have made the deposits contemplated by Section 39, within the time prescribed therein. Failure to make the requisite deposits by the defendant-tenant in such cases will only entail his defence being struck off or refusal by the court to entertain the defence. But if a suit is based on the ground that the tenant is in arrears of rent for the requisite period and has failed to pay the same in spite of a notice of demand and the requisite deposits have been made within the time prescribed by Section 39, the suit for eviction of the tenant will be liable to be dismissed since on account of that provision relief for his ejectment cannot be granted. In respect of buildings to which the Old Act did not apply, a landlord was entitled to institute a suit for eviction of his tenant merely by terminating his tenancy by means of a notice under Section 106 of the Transfer of Property Act. There need not have been any particular grounds for the claims for the eviction of the tenant. In such suits, however, damages for use and occupation would necessarily have accrued subsequent to the termination of the tenancy of the tenant. In such cases also the tenant would be at liberty by reason of Section 39 of the Act to save his tenancy by making such deposits as may be due from him on account of damages for use and occupation and costs etc. in accordance with that provision, even though there may not exist any claim for arrears of rent.

6. For the reasons given above, our answer to the question referred by the learned Single Judge is as follows:—

"If a building is constructed in 1964 and suit is filed in 1972 for ejectment of the tenant and the suit is decreed in 1973 by the Court of Small Causes and the revision instituted in 1973 under Section 25 of the Provincial Small Cause Courts Act remains pending till 1974 and ten years'

period since the completion of the construction lapsed, the suit is not liable to be dismissed on the ground that it was barred by Section 20 of the Act but it should be dealt with in accordance with Section 39 of the Act read with Section 20 thereof."

Our answer as given above would hold good to a suit pending in revision because on account of Section 40, Section 39 of the Act would be attracted thereto.

7. The papers of this revision will now be placed before the learned Single Judge with our opinion.

Reference answered.

AIR 1975 ALLAHABAD 337

T. S. MISRA, J.

Smt. Neera, Appellant v. Kishan Swarup, Respondent.

Second Appeal No. 390 of 1973, D/-20-3-1975.*

(A) Words & Phrases — Word 'bad-chalan' — Does not merely mean misbehaviour but it connotes unchastity.

(Para 4)

(B) Hindu Marriage Act (1955), S. 13 (1a) (U. P.) — Cruelty — What constitutes as a ground of divorce — Accusation of unchastity to wife — If and when amounts to cruelty — What wife has to prove. (Ss. 9, 10).

Maligning the wife by the husband as unchaste may in certain circumstances amount to cruelty. Cruelty as envisaged in Section 13 (1a) as amended by U. P. Act XIII of 1962, may be physical or psychological. The question of cruelty is, however, to be judged on the basis of the evidence on the record and the totality of the circumstances of the case. The cultural background of the spouses, their temperament, social status and upbringing, educational acquirements, their behaviour with each other in daily life, their colloquialism, and the usual and normal way of conversation with each other and their norms and conceptions have to be kept in view in determining as to whether the accusation of unchastity would, on the facts proved and in the circumstances of the case, amount to cruelty within the meaning of Section 13 (1a) of the Act. (Para 5)

In order to secure a decree of divorce on the ground of cruelty, it is necessary for the applicant wife to establish that (a) she had been persistently or repeatedly treated by the husband with cruelty and (b) that the cruelty was of such a

*(Against decree of Akhtar Husain, Dist. J., Bulandshahr, in Civil Appeal No. 239 of 1971, D/- 25-1-1973.)

FS/GS/C164/75/KSB

nature, degree and extent as to cause a reasonable apprehension in her mind that it would be harmful or injurious for her to live with the husband. Merely proving that the husband had been falsely accusing her with unchastity and treating her with cruelty would not be enough to entitle her to a decree of divorce.

(Para 10)

(C) Hindu Marriage Act (1955), S. 23

(2) — Duty of Court to attempt reconciliation.

Section 23 (2) of the Act makes it a primary duty of the Court to ensure that the marriage tie is not broken and make every effort in the first instance to bring about a reconciliation between the parties before proceeding to grant any relief under the Act.

(Para 6)

K. C. Saxena, for Appellant: Vishnu Sahai, B. Dayal, and S. P. Singh Raghav, for Respondent.

JUDGMENT:— This is an appeal by a young wife against her husband seeking divorce and in the alternative judicial separation. The marriage of the appellant with the respondent took place on 13th May, 1969 in accordance with Hindu Law and custom. She came to reside with the respondent at his house in village Bhadora on 14th May, 1969 and lived with him till 19th May, 1969 when she returned to her father's place. Thereafter she again lived with her husband from 12th June, 1969 to 22nd July, 1969. Again, she lived with him for some time till 22nd November, 1969. She went to Anupshahr to attend the marriage of the son of Bishan Swarup and returned to her father's place on 13th May, 1969 (?) and since then she has been residing with her father. Her allegations against the respondent were that he ill-treated her, called her ugly and black and also accused her of unchastity. He caused physical injuries to her, gave her beating off and on and once sprinkled kerosene oil on her and tried to burn her. She also alleged that the respondent had illicit connections with other ladies and when she objected to the same she was mercilessly beaten and abused and called unchaste and was threatened that her nose would be chopped off and she would be killed. Persistent and repeated ill-treatment by the respondent made her believe that if she would live with him she would be killed. The cruel behaviour of the respondent inflicting physical and mental torture on her has left an impact on her mind that it would be injurious and harmful to her if she would live with him as his wife. She, therefore, filed a petition under Sections 10 and 13 of the Hindu Marriage Act for the aforementioned reliefs. The petition was contested by the respondent denying the allegations made against him.

2. The trial court, on a consideration of the evidence on the record, recorded a finding that the petitioner had failed to prove that the respondent was living in adultery. It, however, held that the false accusation against the chastity of the petitioner amounted to cruelty and that the evidence on the record established that the petitioner was treated with cruelty by the respondent, that she was beaten and was threatened and that she was called unchaste. It, therefore, recorded a finding that the respondent treated the petitioner with cruelty both physical and mental. The accusation of unchastity amounted to mental cruelty and it gave reasonable apprehension in the mind of the petitioner that it would be quite harmful and injurious for her to live with the respondent. On these findings the trial court granted a decree of divorce to the petitioner. Against that decision an appeal was preferred by the present respondent Sri Krishna Swarup. The learned District Judge, who heard the appeal, concurred with the trial court that it was not proved that the husband, who is the respondent before me lived in adultery. As a consequence of this finding the learned District Judge further held that Krishan Swarup had, therefore, no occasion for subjecting his wife to any mental or physical torture. Disagreeing with the trial court he, therefore, held that in the instant case the wife was not ill-treated by the husband. Dealing with the grievance that the respondent had falsely accused his wife of unchastity the learned District Judge held that he did not accuse her of unchastity. The learned District Judge, therefore, allowed the appeal and set aside the decree passed by the trial court. Aggrieved, the petitioner has come up to this Court in second appeal.

3. For the appellant it was urged that the appellate court below had erred in holding that she was not physically and mentally tortured by the respondent and that the respondent had not accused her of unchastity. It was submitted that the finding of the appellate court below was perverse and at any rate it was based on misconstruction of the evidence on record. It was urged that the grievance that the respondent had accused the appellant of unchastity was proved by oral and documentary evidence on the record. The appellant had deposed on oath that she was repeatedly maligned as unchaste by the respondent. Her statement, it was urged, found support from a letter Ex. 5 dated 2nd August, 1969 sent by the appellant's father to Sunder Lal as also from Ex. 1 which is a notice given by the respondent to the father of the appellant on 24th November, 1969. I

was taken through the evidence on the record. The appellant had asserted in her petition that she was repeatedly accused of being unchaste by the respondent and was tortured by him. She was very often beaten, was called ugly and black and was also threatened that her nose would be chopped off and she would be killed. She had also alleged that the respondent had once sprinkled kerosene oil on her body and tried to burn her but luckily she was saved. She examined herself in the case to support her averments made in the petition. It appears from Ex. 5 that the appellant was maligned as unchaste. Even in the notice Ex. 1 an accusation was made that the appellant was unchaste. This notice was given by the respondent to the father of the appellant informing him that the respondent would reach the house of the addressee to fetch the appellant and that if she would not be sent with him he would take legal action. The contents of that notice are typed in Hindi letters. At the foot of the notice it is stated that initial letters in line 12 thereof were scored. Similarly one word in line 7 was scored. It is signed by the respondent. A sentence was, however, written in that notice in ink. That sentence is very material and needs to be reproduced. It reads:-

"Halan ki uske badchalan hote huye bhi mai usko lane ko tayyar hun."

That sentence was, however, scored out by drawing a straight line over it. But despite that it can be very easily read out. This document was admitted by the respondent. It is not the case of the respondent that the aforesaid sentence written in ink in the said letter was not added by him. The trial court while coming to the conclusion that the respondent had accused the appellant of being unchaste relied on this document as well. The learned District Judge, who heard the appeal, however, did not place reliance on that sentence in Ex. 1. The learned District Judge observed:

"The hand-written contents read that in spite of her bad character (chal chalan) he was prepared to bring her along with him. This hand-written portion appears to have been scored out by drawing a straight line from one end to the other. Phrase 'chal chalan' without any reference to the context can also mean misbehaviour and not necessarily unchastity. At any rate since this hand-written portion was struck off none is entitled to read it and much less base a finding upon it. Possibility was not ruled out that under extreme despair, worry and anxiety this sentence was carelessly written and on a second thought its consequences were assessed and at the earliest opportunity, therefore, struck off. Such casual

and unmindful remark should not forever mutilate the sacramental ties with which the couple was bound as life partners.

4. The learned District Judge has obviously misread the hand-written portion of the said notice Ex. 1. The respondent had not used the word 'chal chalan' but had used the word 'badchalan'. He had written that despite her being unchaste he was prepared to take her along with him. The word 'badchalan' does not mean misbehaviour. It connotes unchastity. It is true that the hand-written sentence was scored out by drawing a straight line from one end to the other but it was not so scored out as not to be deciphered. The sentence was meant to be read. Otherwise it would either have not been written or it would have been scored in such a way that no one could despite efforts made in that behalf read it. It is a strong circumstance corroborative of the fact that the respondent maligned the appellant of being unchaste. There is truth in the statement of the appellant that the respondent did accuse her of being unchaste. There is no evidence on the record that the said accusation was correct.

5. Maligning the wife by the husband as unchaste may in certain circumstances amount to cruelty. Cruelty as envisaged in Section 13 (1a) as amended by U. P. Act XIII of 1962, may be physical or psychological. The question of cruelty is, however, to be judged on the basis of the evidence on the record and the totality of the circumstances of the case. The cultural background of the spouses, their temperament, social status and upbringing, educational acquirements, their behaviour with each other in daily life, their colloquialism, and the usual and normal way of conversation with each other and their norms and conceptions have to be kept in view in determining as to whether the accusation of unchastity would, on the facts proved and in the circumstances of the case, amount to cruelty within the meaning of Section 13 (1a) of the Act. Cruelty need not be physical violence inflicted by one spouse on the other, but it may also be in his conduct, demeanour and treatment. Section 13 is not thus restricted to acts of physical violence, but it also covers cases of such mental torture as would cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious to the petitioner to live with the other party. A solitary incident of cruelty or an isolated lapse of tongue would, however, not be sufficient to bring the case within the ambit of Section 13 (1a) of the Act. The respondent must be shown to have committed the imputed

act of cruelty "persistently or repeatedly" and the nature, degree and extent of cruelty was such as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the other party.

6. Divorce is a very serious matter which affects not only the lives of the two individuals but which has a great social bearing. It is in the interest of the community that the institution of marriage is upheld. A Hindu marriage is not merely a sacrament, but like all marriages, it is also a status, and as such it is a matter of concern of the community as well as the parties. The right to abandon the marital alliance is, therefore, hedged with positive restrictions and conditions. The husband and wife are not free to terminate their marriage at pleasure. Divorce may not be the panacea for all matrimonial ills, but, in certain circumstances that may be the only remedy. A Hindu marriage may now be dissolved either on the ground of 'fault' of the respondent or on the 'break down' thereof. Adultery is an instance in support of 'fault' concept; the 'breakdown' theory is founded on the idea of individual happiness. Failure of marriage with the resultant unhappiness between the parties are the factors governing the 'breakdown' theory. Besides these two theories the marriage may also be put an end to on the ground of insanity or other debility like virulent and incurable form of leprosy. The Hindu Marriage Act refers to both "fault" and "breakdown" theories. Cruelty is one of the grounds which may bring about a break down of marriage, but what should be the nature, degree and extent of cruelty which would make it actionable under Section 13 (1a) of the Act, would depend on the capacity of the petitioner for endurance. The test, therefore, would not be whether the respondent is cruel, but whether the conduct appears as cruel to the other spouse. In other words, what is relevant is the impact or effect of the alleged conduct on the petitioner. Cruelty must be of such a nature and degree as to cause a reasonable apprehension in the mind of the petitioner that it would be injurious or harmful to the petitioner to live with the respondent. Similarly, under Section 9 of the Act the claim for restitution of conjugal rights may be resisted on the ground of 'cruelty' of such a nature and degree. Section 18 of the Hindu Adoptions and Maintenance Act, 1956 enables the wife to secure separate residence with maintenance on the establishment of 'cruelty' inflicted by the husband. Divorce may be a protective weapon for the aggrieved spouse; it

should not be used to secure an opportunity for sex relations. Sub-section (2) of Section 23 of the Hindu Marriage Act, hence makes it a primary duty of the Court to ensure that the marriage tie is not broken and make every effort in the first instance to bring about a reconciliation between the parties before proceeding to grant any relief under the Act. The legal system in England and Wales has also laid great stress on marital reconciliation. Statutory provisions were included in the Divorce Reforms Act, 1969 with a view to facilitating reconciliation in matrimonial causes. That Act has now been repealed and re-enacted by the Matrimonial Causes Act, 1973 which also makes provisions for reconciliation. The Law Commission in England commented that the objectives of divorce law in that country were:—

- (i) to buttress, rather than to undermine the stability of marriage; and
- (ii) when, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation.

7. Under the Hindu Marriage Act the aim of reconciliation as provided in sub-section (2) of Section 23 is a means to the overriding end of 'buttressing..... the stability of marriage.

8. Indeed the provisions in Hindu Law do reflect a concern with reconciliation. For example, usually no petition for divorce can be presented to the court unless three years have passed since the date of marriage, or leave for presenting a petition within that time has been obtained on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent. This bar to an over-hasty dissolution of marriage is strengthened by the court being required to have regard to the question whether there is a reasonable possibility of reconciliation.

9. In the instant case, neither the trial court nor the appellate court below made any efforts to bring about a reconciliation between the parties. Effort was however, made by me to bring about a reconciliation between the appellant and the respondent, but it yielded no result. The appeal is, therefore, being decided on merits.

10. The appellate court below recorded a finding that the allegation of unchastity made by the husband respondent against the appellant was false. So also it found that the allegation of the appellant against the respondent that the latter was living in adultery was also

false. In the notice Ex. 1, the respondent had no doubt written that despite her being unchaste he was prepared to take the appellant along with him. The appellant had also deposed that while she stayed with the respondent she was accused of being unchaste. It is now to be seen whether the accusation was of such a nature and degree as to cause a reasonable apprehension in her mind that it would be harmful or injurious for her to live with the respondent. None of the documents filed on behalf of the appellant discloses that the impact of such an accusation was such as to make her apprehensive that it would be harmful or injurious for her to live with the respondent. Even in the letter which she sent to the respondent after the respondent had sent the notice Ex. 1 to her father she did not complain that she had been falsely accused of being unchaste, and that the said accusation had caused a reasonable apprehension in her mind that it would be harmful or injurious for her to live with the respondent. It was no doubt, not proper and desirable on the part of the respondent to malign his wife, the appellant, of unchastity; but in order to secure a decree of divorce on the ground of cruelty, it was necessary for the appellant to establish that (a) she had been persistently or repeatedly treated by the husband with cruelty and (b) that the cruelty was of such a nature, degree and extent as to cause a reasonable apprehension in her mind that it would be harmful or injurious for her to live with the husband. In the case in hand, though the appellant had been successful in proving that the respondent had treated her with cruelty by accusing her of unchastity, she has failed to establish that the respondent had treated her with such cruelty as to cause a reasonable apprehension in her mind that it would be harmful or injurious for her to live with the other party. It may be noticed that her other allegations that the respondent had inflicted physical injury on her while she stayed with him, was not found to be correct by the appellate court below. The only ground which was urged before me was that the appellant had been falsely accused of being unchaste and that this accusation amounted to cruelty. The appellant had, therefore, to establish that this false accusation of unchastity had caused a reasonable apprehension in her mind that it would be harmful or injurious for her to live with the respondent. She has, in my view, failed to establish this fact. The appellate court below was, therefore, correct in not granting a decree of divorce to her.

11. In the circumstances, the appeal fails and is dismissed. The parties

shall, however, bear their own costs throughout.

Appeal dismissed.

AIR 1975 ALLAHABAD 341

T. S. MISRA, J.

Mst. Bhagwanti, Appellant v. Mst. Jiuti and another, Respondents.

Second Appeal No. 508 of 1972, D/- 27-2-1975.*

(A) Civil P. C. (1908), S. 107—Powers of appellate Court — Whether it can decide the case itself without remanding it to trial Court.

Where the evidence on the record is sufficient to enable the appellate court to pronounce a judgment, the appellate court may after re-settling the issues, if necessary, finally determine the suit notwithstanding that the judgment of the trial Court had proceeded wholly upon some ground other than that on which the appellate court proceeds. Held on facts and in the circumstances of case that appellate court below was, justified in deciding the said question and had committed no error in not remanding the case to the trial court. (Para 3)

(B) Civil P. C. (1908). S. 91 — Obstruction of public way — Suit for removal of obstruction and for injunction — Maintainability — (Specific Relief Act (1963), Ss. 38 and 39).

Any person who has a house abutting on a public road or lane is entitled to access to the road or lane from the house and no person or authority can destroy that right. This right does not emanate from prescription or long user but from the fact that the house abuts on the public way. Hence, if an obstruction is made, by any person or authority, of such public way which affects the ingress and egress, special damage to the owner of the property must be presumed.

Where the defendant by raising a construction on public road completely blocked the door of the plaintiff's house which abutted on it.

Held, that it cannot be denied that the plaintiff had suffered inconvenience and therefore special damage in the circumstances of the case must be presumed. By means of this public nuisance, special damage was caused to the plaintiff and therefore, she was entitled to maintain the suit for demolition of the construc-

* (Against judgment and decree of K. L. Sharma. 4th Addl. Civil J., Varanasi in Civil Appeal No. 299 of 1971, D/- 20-1-1972.)

tion in question and for the injunction prayed for. (Para 8)

(C) U. P. Nagar Mahapalika Adhiniyam (2 of 1959), Ss. 128 (1) and Sch. I, Part B — Lease deed executed by Sahayak Nagar Adhikari and not by Mukhya Nagar Adhikari — Lease invalid.

(Para 5)

Sidheshwari Prasad, for Appellant; N. D. Pant and Sankatha Rai, for Respondents.

JUDGMENT :— This appeal by defendant No. 2 arises in the following circumstances. The plaintiff and one Mst. Bhurki purchased the southern half portion of premises No. D-3/36 situate in Mohalla Shivala, Bhelpur Ward, Varanasi on 26th of November, 1964. After some time the plaintiff and Smt. Bhurki partitioned the premises and thus the half northern portion thereof came to the share of the plaintiff and the southern portion fell to the share of Smt. Bhurki. A partition wall was raised between the two portions. The main door of the house for egress and ingress purposes abutted the settlement plot No. 1709 which is a public street. The plaintiff alleged that she and Smt. Bhurki and their predecessor in title had always enjoyed the right of passage to and from the said premises over the public street as of right without any hindrance and obstruction from anybody. Defendant No. 1 Nagar Mahapalika of the City of Varanasi, however, wrongly and illegally granted a lease of a portion of the said plot No. 1709 to defendant No. 2 on 9th November, 1964. This fact came to the knowledge of the plaintiff only when defendant No. 2 started encroaching upon the portion of said plot No. 1709 in such a way that the plaintiff's right for egress and ingress to her house was threatened to be completely affected. The plaintiff raised an objection to the same but to no avail. She approached the Nagar Mahapalika and the police authorities. The Nagar Mahapalika issued notice to defendant No. 2 for demolition of the wall which defendant No. 2 had constructed treating the same as unauthorised. The said wall virtually and practically blocked the only passage for egress and ingress to the plaintiff's house. Defendant No. 2 thereupon filed the suit against the Nagar Mahapalika for injunction restraining the Nagar Mahapalika from demolishing the wall and other constructions in question. The plaintiff filed an application in that suit for being impleaded as a party, but that application was opposed and the court disallowed it with the remark that she might agitate her right in a separate suit hence the plaintiff filed the suit which has given rise to this appeal against the Nagar Mahapalika and de-

fendant No. 2 for an injunction ordering defendant No. 2 to remove all constructions which she had raised and which would be obstructing the passage for egress and ingress to the plaintiff's house and to restrain the defendant from doing any act over said plot No. 1709 which might prejudicially affect the plaintiff in her enjoyment of free passage over said plot No. 1709.

2. The suit was resisted by defendant No. 2. She alleged that the land over which the constructions in question had been made formed part of the house which is adjacent to the house of the plaintiff. She further alleged that she had obtained a lease of the land in dispute from the Nagar Mahapalika and has had every right to make constructions on the same. She denied that the plaintiff had any right of passage over any portion of the land in question and that no door of house No. B-3/36 ever opened on that land. It was further alleged that even if there was any partition between the plaintiff and Smt. Bhurki, the plaintiff should have adjusted the equities and the rights of passage inter se and she could not create any fresh rights in her favour with regard to the passage on the land in dispute. The Nagar Mahapalika in its written statement pleaded that it was entitled to lease-out the portion of the public land vesting in it and the plaintiff had no right to complain against the same. Further, it was alleged that if the plaintiff had any right of passage over the portion leased out to defendant No. 2, the plaintiff was free to enjoy it and that the Nagar Mahapalika would not put any hindrance in the way of the plaintiff. The Nagar Mahapalika also contended that the constructions made by defendant No. 2 were unauthorised but on account of a temporary injunction granted by the court, the constructions could not be demolished. Khasra Bando-bast and a sale-deed of 1933 and other documents were filed to prove that plot No. 1709 is a public lane. The trial court on a consideration of the evidence on record found that the said plot is a public lane and that the main door of the plaintiff's house always existed towards east and opened on the said public lane and that the said plot No. 1709 was used as a passage by the plaintiff for egress and ingress purposes to her house. It further held that the said plot No. 1709 never formed part of the house of defendant No. 2. The trial court, therefore, decreed the suit and directed defendant No. 2 to remove the constructions in dispute within one month failing which the same were ordered to be demolished through court. Against that decision defendant No. 2 preferred an appeal. The appellate

court below on re-appraisal of the evidence found that the land of settlement plot No. 1709 which adjoined to the house of the plaintiff and defendant No. 2 was being used as Abadi Rasta and it was a public way. It also found that the door of the plaintiff's house existed and opened on the disputed land before the objectionable constructions had been raised by defendant No. 2 and that the plaintiff had enjoyed the right of passage through her door of the house over said plot No. 1709 prior to the constructions raised by defendant No. 2. These findings are findings of fact and are conclusive. The appellate court below further held that the lease granted by the Nagar Mahapalika to defendant No. 2 was not valid. The lease-deed had not been executed by the Mukhya Nagar Adhikari but had been executed by the Sahayak Nagar Adhikari who had no power to do so. The said deed, therefore, did not confer any right on defendant No. 2 to raise any construction on the said land. The appellate court below, therefore, dismissed the appeal. Aggrieved, defendant No. 2 has come to this Court on second appeal.

3. For the appellant it was urged at the outset that the trial court had framed an issue as to whether the plaintiff had acquired an easementary right of way over the plots in suit and the parties adduced evidence on the same. The trial court recorded a finding on that issue in favour of the plaintiff. The appellate court below observed that the trial court had erred in framing an issue with regard to the easementary right of way, inasmuch as the plaintiff did not allege and claim any easementary right of passage but merely claimed a right of passage for egress and ingress of said premises No. D-3/36 through the settlement plot No. 1709 which was a rasta land. The appellate court below, therefore, did not uphold the finding of the learned Munsif on the question of easementary right of passage. However, on a careful scrutiny of the evidence on record, the appellate court below found that a door of the plaintiff's house existed and it opened upon the disputed land, that the said settlement plot No. 1709 was being used as Abadi Rasta and it was a public way and that the plaintiff had a right to use that land as a passage to her premises. Learned counsel for the appellant urged that as no issue has been framed on the point by the trial court, the appellate court below should have remanded the case instead of deciding the point itself. I find no merits in this contention. I do not think that defendant No. 2, appellant, was taken by surprise. The case of the plaintiff as set up in the plaint was that her house abutted on the settlement plot

No. 1709 and that she and her predecessor in title were always enjoying the right of passage to the said premises over the said plot as of right and without any hindrance or obstruction from anybody. She was thus asserting her right of passage. This right was disputed by defendant No. 2, appellant. The parties went to trial fully understanding that the central fact involved in the case was whether the plaintiff had any right of passage through said land No. 1709, on a portion of which defendant No. 2 had raised certain constructions. In these circumstances, the absence of an issue would not be sufficient to vitiate the decision. Where the evidence on the record is sufficient to enable the appellate court below to pronounce a judgment, the appellate court may after re-settling the issues, if necessary, finally determine the suit notwithstanding that the judgment of the trial court had proceeded wholly upon some ground other than that on which the appellate court proceeds. That being so, the appellate court below was, in my view, justified in deciding the said question and had committed no error in not remanding the case to the trial court.

4. It was next urged that the appellate court below had erred in holding that the lease granted by the Nagar Mahapalika was invalid. It was established from the evidence on the record that settlement plot No. 1709 is a public pathway. It is one of the duties of the Nagar Mahapalika to construct, maintain or repair public roads and streets. It cannot grant any lease of any portion of the public street or public road to the prejudice of any person whose house abuts on the same. The lease in the instant case was found to be invalid. The lease deed was admittedly executed by Sahayak Nagar Adhikari and not by the Mukhya Nagar Adhikari. It was urged on behalf of the appellant that the Mukhya Nagar Adhikari had delegated his powers to the Sahayak Nagar Adhikari to execute lease deeds on behalf of Nagar Mahapalika. Clause B of sub-section (1) of Section 119 of the Nagar Mahapalika Adhiniyam provides that:

"Subject to the other provisions of this Act and the rules thereunder and subject to such conditions and restrictions as may be specified by the Mahapalika.....

(b) the Executive Committee may delegate to the Mukhya Nagar Adhikari any of its functions under this Act other than those specified in Part B of Schedule I."

Under Section 128 of the said Act, the Mahapalika shall, for the purposes of the Act, and subject to the provisions thereof and rules made thereunder have power to

sell, let on hire, lease, exchange, mortgage, grant or otherwise dispose of any property or any interest therein acquired by or vested in the Mahapalika under the Act.

5. Section 128 of the Act provides that:

"(1) Every disposal of property belonging to the Mahapalika shall be made by the Mukhya Nagar Adhikari on behalf of the Mahapalika."

Part B of Schedule I stipulates that the functions of the Mukhya Nagar Adhikari under Section 129 cannot be delegated to the other officers or servants of the Nagar Mahapalika. That being so, the Mukhya Nagar Adhikari could not delegate his power to the Sahayak Nagar Adhikari to execute a lease-deed with regard to any property or any interest therein acquired by no vested (sic) in the Mahapalika. The lease-deed in the instant case having been executed by the Sahayak Nagar Adhikari was, therefore, rightly held to be invalid.

6. It was next urged that the plaintiff had failed to establish that any partition had taken place between her and her sister as a result of which the portion claimed by her fell to her share. It has been found as a fact that the partition did take place between the said two parties. This finding, not being perverse or illegal, cannot be assailed in second appeal.

7. It was further urged that the sister of the plaintiff had not been impleaded in the suit and, therefore, the suit was not maintainable. This plea was not taken by defendant No. 2 at the initial stage. The said sister of the plaintiff was neither a necessary nor a proper party and the suit was maintainable even in the absence of the sister of the plaintiff.

8. Lastly it was urged that the plaintiff had failed to make out a case of special damages and, therefore, the suit was not maintainable. There is no merit in this contention. The plaintiff had claimed in the suit that her house abutted on the settlement plot No. 1709 which is a public 'Rasta' and that her access to the same was being obstructed by defendant No. 2 who had raised the construction in question on a portion thereof. It is not disputed that defendant No. 2 has made a construction on a portion of the said plot No. 1709 and that by the said construction, the door of the house of the plaintiff has been completely blocked. It cannot, therefore, be denied that the plaintiff had suffered the inconvenience and, therefore, special damages in the circumstances of the case must be presumed. By means of this public nuisance special damage was caused to the plaintiff and she was, therefore, entitled to the reliefs

claimed for in the suit. Any person who has a house abutting on a public road or lane is entitled to access to the road or lane from the house and no person or authority can destroy that right. This right does not emanate from prescription or long user but from the fact that the house abuts on the public way. Hence, if an obstruction is made by any person or authority of such public way which affects the ingress and egress, special damage to the owner of the property must be presumed. Defendant No. 2 by raising the construction on the portion of settlement plot No. 1709 has obstructed the plaintiff's passage thereon. The plaintiff, having thereby suffered special damage was, therefore, entitled to maintain the suit for demolition of the construction in question and for the injunction prayed for.

9. Lastly, it was urged that since the construction has now been in existence for more than a decade it would be expedient and proper to grant token damages instead of ordering the demolition of the construction. There is no substance in this contention. The suit was filed on 10th April, 1967. Defendant No. 2 had made the construction knowing it that the land was a public Rasta and that the construction would block the passage of the plaintiff.

10. No other point was urged.

11. There is no merit in this appeal. It is accordingly dismissed with costs. The interim order dated 6th of March, 1972, subsequently confirmed by the order dated 14th of March, 1973, is vacated.

Appeal dismissed.

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FULL BENCH

H. N. SETH, C. S. P. SINGH AND
N. D. OZHA, JJ.

Shitla Prasad, Petitioner v. M. Saidullah and others, Respondents.

Civil Misc. Writ No 6539 of 1974. D/- 3-4-1975.

(A) Constitution of India, Article 226 — Contractual rights — Enforcement of — Petitioner entering into an agreement with the District Magistrate for selling of levy sugar as an authorised retailer — Termination of agreement — Petitioner held not entitled to any relief under Article 226 — Question of following the principles of natural justice did not arise — Spl. A. No. 2 of 1973, D/- 13-2-1973 (All), Overruled — (U. P. Sugar Control Order (1966), Clauses 3 to 5). Natural justice — Principles of — Applicability.

FS/FS/C153/75/LGC

The petitioner, as a result of agreements entered into between him and the District Magistrate, was appointed as authorised retailer under the provisions of U. P. Sugar Control Order 1966 for sale of levy sugar. Under Clause 16 of the agreement, the District Magistrate was authorised to cancel the agreement at any time without assigning any reason. Under Cl. 19 of the agreement it was open to the District Magistrate to terminate the agreement also in a case where the authorised retailer fails to carry out any direction issued by the District Magistrate or contravenes any terms of the agreement. On a complaint against the petitioner the agreement was terminated by the District Magistrate after getting an enquiry made by S. D. M. but without affording any opportunity to the petitioner to have his say in the matter.

Held that by terminating the agreement the District Magistrate did not interfere with any right of the petitioner which could be secured by filing a petition under Article 226 of the Constitution. Infringement, if any, was that of petitioner's contractual rights which he could, if so advised, secure in a properly instituted suit. (Paras 12, 23)

The petitioner had no legal right to trade in levy sugar and if his agreement had been unjustifiably terminated the infringement if any was that of a pure and simple contractual right. Whether the contract was terminated under Clause 16 or Clause 19 of the agreement, it still resulted in cancellation of contract in pursuance of a right flowing from the contract. Such cancellation, if at all, infringed merely a contractual right and nothing else. In such a case the question of following the principles of natural justice did not arise. (Case law discussed). Spl. Appeal No. 2 of 1973, D/- 13-2-1973 (All), Overruled. (Paras 13, 18)

Cases Referred: Chronological Paras
 AIR 1975 SC 266 = (1975) 1 SCC 70 22
 AIR 1974 SC 1543 = 1974 SCD 627 1, 13
 AIR 1973 SC 205 = (1972) 1 SCA 555 21
 (1973) Civil Misc. Writ No. 5123 of 1973,
 D/- 19-10-1973 (All) 10
 (1973) Civil Misc. Writ No. 5057 of 1973,
 D/- 30-8-1973 (All) 1, 9, 10
 (1973) Spl. Appeal No. 2 of 1973, D/- 13-2-
 1973 (All) 1, 8, 10
 AIR 1970 SC 150 = (1970) 1 SCR 457 19
 AIR 1968 SC 292 = 1968 Lab IC 232 17, 18
 AIR 1966 SC 334 = (1966) 1 SCR 120 15
 1964 AC 40 = (1963) 2 WLR 935 17
 AIR 1959 SC 490 = 1959 Supp. (1) SCR
 787 14
 AIR 1954 SC 592 = 1955 SCR 305 16, 21
 (1953) 2 QB 482 = (1953) 2 All ER 490 17

Sudhir Chandra Agarwal, for Petitioner; Standing Counsel and Dhruv Narain, for Respondents.

H. N. SETH, J.:— This petition under Article 226 of the Constitution has come up before this Bench for reconciling the apparent conflict of judicial opinion in this Court vide *Pahari Sahu v. District Magistrate, Varanasi*, Civ. Misc. Writ No. 5057 of 1973, decided on 30-8-1973 (All) and *State v. Om Prakash*, Spl. Appeal No. 2 of 1973, decided by the Lucknow Bench of this Court on 13-2-1973 (All), in the light of the Supreme Court decision in the case *S. Chandra Sekharan v. Tamil Nadu Government*, AIR 1974 SC 1543.

2. The petitioner Sitla Prasad claims that as a result of agreements entered into between him and the District Magistrate Pratapgarh, he was appointed as authorised retail distributor under the provisions of the U. P. Foodgrains Distribution Order and the U. P. Sugar Control Order, 1966, for sale of Government Foodgrains and levy sugar. Terms of the agreement, on which he was so appointed, are contained in the form of declaration (Annexure 1 to the writ petition). It appears that some complaints with regard to distribution of levy sugar by the petitioner, were received by the District Authorities. Accordingly, the District Magistrate, after getting certain enquiries made, passed an order on 15-10-1974, directing that petitioner's licence as well as the agreement entered into by him be cancelled. He directed the District Supply Officer to take immediate steps to appoint some other person in place of the petitioner and till such appointment was made, to attach the quota which was to be distributed through petitioner's shop to the nearest shop. Thereafter the District Supply Officer, by his letter dated 22nd October, 1974 informed the petitioner that his agreements in respect of cheap foodgrain and retail sugar shop had been cancelled under clauses 18 and 16 of the respective agreements. The petitioner then filed the present petition and challenged the validity of the order of the District Magistrate Pratapgarh, cancelling his fair price foodgrains and levy sugar shop, as communicated to him by the Dist. Supply Officer, on 22-10-1974. He urged that the order was vitiated because of the mala fide of the District Magistrate and also because while cancelling petitioner's fair price shop, the District Magistrate did not afford him an opportunity to meet the allegations on which his shop was going to be cancelled and acted in contravention of the principles of natural justice.

3. In the counter-affidavit filed on behalf of the respondents, it has been made clear that although in the communication made by the District Supply Officer on 22nd October, 1974, it was stated that petitioner's agreement in respect of his shop for supplying cheap Government

Foodgrains had been cancelled, but in fact the District Magistrate did not make any order cancelling any agreement entered into with the petitioner, under the provisions of U. P. Foodgrains Distribution Order, 1966. The District Magistrate merely directed cancellation of petitioner's agreement under the U. P. Sugar Control Order, 1966. The respondents further clarified that the petitioner did not hold any sugar licence and there was no question of cancelling any such licence held by him. Any reference to sugar licence, in District Magistrate's order dated 15-10-1974, was redundant. In view of the clarification made by the respondents the controversy in the present writ petition was confined to the question whether or not the District Magistrate was justified in cancelling petitioner's agreement with regard to distribution of sugar and whether any grievance in respect thereof can be agitated in a petition under Article 226 of the Constitution.

4. According to the respondents, petitioner's agreement for selling levy sugar could be revoked under Clause 16 of the agreement (Annexure 1 to the writ petition) which provides that it would be open to the District Magistrate or the Town Rationing Officer to determine the agreement in question at any time without assigning any reason. They denied the allegations of mala fide made against the District Magistrate and took the stand that while cancelling petitioner's agreement the respondents were not obliged to hear him.

5. So far as the question whether the impugned order has been passed arbitrarily and in a mala fide manner is concerned, petitioner's case is that he had been carrying on the business as an authorised retailer in levy sugar for a long time. During this period his shop was regularly inspected by the authorities of the supply office and no illegality or irregularity in the business was ever found or pointed out. No consumer ever made any complaint against him. Villages Singhni and Barend had been included in the area for which the petitioner had been appointed as an authorised retailer. Balbhadra Singh and Udai Pal Singh are Pradhans of villages Singhni and Barend. Both the Pradhans belong to the Ruling Congress party and wield a great deal of influence in their own village as also in the district of Pratapgarh. In the month of July, 1974, Balbhadra Singh and Udai Pal Singh came to petitioner's shop for purchasing sugar and foodgrains on 25 to 35 ration cards each. The District Supply Officer had issued instructions that no authorised retailer was to sell sugar to one person on more than two ration cards. Accordingly, the petitioner refused to issue sugar and foodgrains to the two

Pradhans on the large number of ration cards brought by each of them. The two Pradhans accordingly threatened the petitioner with dire consequences and said that they would see that petitioner's fair price shop for selling Government foodgrains did not continue. The two Pradhans then made false complaint to the District Magistrate, with the result the Tehsildar Pratapgarh deputed Supervisor Kanungo to make an enquiry. The Supervisor Kanungo found that the petitioner neither contravened the provisions of the Control Order nor had there been any impropriety or irregularity in his dealings with the public. Accordingly he made a report on 3rd October, 1974, exonerating the petitioner completely and recommended that the petitioner be given the regular quota for being supplied through his shop. The two Pradhans then approached one Sri R. N. Shukla, the President of the District Congress Committee Pratapgarh. Sri R. N. Shukla along with the two Pradhans went and saw the District Magistrate. Shortly thereafter the Sub-Divisional Officer visited petitioner's shop on 14-10-1974 and checked his stock registers but he could not find any irregularity in his dealings. In spite of this the Sub-Divisional Officer seized petitioner's stock and sale register and instructed the petitioner not to sell sugar or foodgrains until further orders. Thereafter, the District Magistrate made the order terminating the agreement. In the circumstances, it is obvious that petitioner's agreement has been terminated by the District Magistrate arbitrarily and in a mala fide manner at the instance of the President of the District Congress Committee and the two Pradhans whom he did not oblige.

6. On behalf of the respondents the facts from which mala fides have been inferred by the petitioner are denied. In the counter-affidavit of the Supply Inspector Ram Charan Misra, it is stated that a number of complaints against the petitioner has been received from the residents of various Nyaya Panchyats. The earlier complaint was received as far back as 19th March, 1974. The Pradhans of Villages Singhani, Barend, Newada and Pipri also lodged a number of complaints on their behalf and on behalf of the residents of their Nyaya Panchayats alleging that the petitioner had been selling sugar in the open market and that the same was not being issued to bona fide card-holders. The District Magistrate by his order dated 24th September, 1974, directed the Sub-Divisional Magistrate, Sadar to enquire into the matter and to submit his report. Similar complaints had also been addressed to the District Supply Officer who sent them to the Tehsildar Sadar for enquiry and report and the Tehsildar in his turn

deputed the Supervisor Kanungo to submit a report after inspecting petitioner's shop. The action taken on the complaints made directly to the District Supply Officer was absolutely independent of the action which was being taken by the District Magistrate on the complaints received by him. As directed by the District Magistrate the Sub-Divisional Magistrate inspected petitioner's shop on 14-10-1974 in his presence and detected a number of irregularities in the distribution and sale of levy sugar. He submitted his report to the District Magistrate on 15th October, 1974. The report disclosed facts which indicated that it was not in the public interest to continue the petitioner as an authorised retailer of levy sugar. Accordingly, the District Magistrate made an order on 15th October, 1974, directing that the agreement for sale of levy sugar entered into with the petitioner be cancelled. The District Magistrate too filed a counter-affidavit denying that Sri R. N. Shukla, President of the District Congress Committee influenced him in the matter of cancellation of petitioner's agreement. He stated that Sri R. N. Shukla or the two Pradhans of Villages Singhani and Barend never met him in that connection. He passed the impugned order on the basis of the report of the Sub-Divisional Magistrate which indicated that the petitioner was found to have committed a number of serious irregularities in the sale and distribution of levy sugar. We have absolutely no reason to doubt the statement made by the District Magistrate that he passed the order dated 15th October, 1974 on the basis of the report submitted by the Sub-Divisional Magistrate and not because of any influence exerted upon him by Sri R. N. Shukla, President of the District Congress Committee or the two Pradhans. The only circumstance on which the petitioner relied in the writ petition to establish the plea of mala fides on the part of the district Magistrate was that the petitioner saw Sri R. N. Shukla the President of the District Congress Committee, visiting the house of the District Magistrate along with the two Pradhans of Villages Singhani and Barend and steps to cancel his agreement had been taken even though earlier enquiries made by the Supervisor Kanungo had revealed that petitioner's dealings had been fair and in order. The petitioner could not have any personal knowledge of what conversation took place between the Dist. Magistrate and the President of the Dist. Congress Committee when he visited his residence. He could also not know whether after entering the bungalow of the District Magistrate the President of the District Congress Committee saw the District Magistrate all alone or in the company of the two Pradhans. Merely because on an ear-

lier occasion the Supervisor Kanungo had reported that everything was all right with petitioner's dealing in sugar, it does not mean that the Sub-Divisional Magistrate stated incorrect facts in his report to the District Magistrate made on 15-10-74. In these circumstances, it cannot be said that the petitioner has succeeded in making out a case that the order of the District Magistrate deserves to be quashed on the ground that it was arbitrary or mala fide.

7. We now proceed to consider the other question which was argued before us at some length. According to the petitioner respondent's own case, is that there were serious irregularities in the distribution of levy sugar by the petitioner. He had contravened the directions issued by the authorities as also the terms and conditions of the agreement under which he had been appointed as an unauthorised retailer, to sell levy sugar to consumers.

A Sub-Divisional Magistrate was appointed to visit petitioner's shop and make on the spot enquiry in the presence of the petitioner. Here however, the respondents do not say that the Sub-Divisional Magistrate gave the petitioner any opportunity of explaining any of the allegations made against him. After the Sub-Divisional Magistrate submitted his report to the District Magistrate, the District Magistrate took immediate action by directing cancellations of petitioner's agreement without affording him any opportunity to have his say in the matter. It means that petitioner's agreement has been cancelled for the alleged contravention of the terms and conditions of the agreement as also for not obeying the directions issued by the District Magistrate, i.e., for the reasons mentioned in clause (19) of the agreement which entails forfeiture of his security deposit. In the circumstances, termination of the agreement is by way of punishment and the same having been done in gross violation of principles of natural justice, is liable to be set aside.

8. In support of his submission, learned Counsel for the petitioner strongly relied upon a Division Bench decision of this Court in Special Appeal No. 2 of 1973, decided by the Lucknow Bench on 13-2-1973 (All). In that case the District Magistrate took action to terminate an agreement, similar to that involved in the present case, on the finding that the dealer concerned had committed serious irregularities. He arrived at this conclusion after getting an enquiry made by a Sub-Divisional Magistrate but without affording an opportunity to the dealer to have his say in the matter. The Division Bench took the view that in the circumstances, the action against the dealer was one under Clause 19 and not under Clause 16

of the agreement. Since the action under Clause 19 had been taken by way of punishment, it could not be sustained as there had been violation of principles of natural justice.

9. Learned Counsel for the respondents, however, contends that the right which the petitioner derived under the agreement in question was purely contractual and no relief in respect of such right can be claimed or granted in a petition under Article 226 of the Constitution. In support of this submission he relied upon certain observations made in another Division Bench decision of this Court in Civil Misc. Writ No. 5057 of 1973, decided on 30-8-1973 (All).

10. Learned Counsel for the petitioner attempted to distinguish the decision of this Court in Civil Misc. Writ No. 5057 of 1973, D/- 30-8-1973 (All) and urged that in that case the agreement had been cancelled in exercise of the powers under Clause 16 of the agreement, which enabled the District Magistrate to terminate the same without assigning any reason and not by way of punishment for some fault under Clause 19. Accordingly, the following observations made in that judgment viz.:-

"At best the petitioner's grievance might be that there has been a breach of contract. If that be so the petitioner's remedy if at all might be a suit for damages. This petition under Art. 226 of the Constitution in any case is not maintainable."

do not apply to the facts of the present case. He urged that this distinction between the cancellation of an agreement under Cls. 16 and 19 was clearly brought out by another Division Bench of this Court in the case of *M/s. Ram Autar Santosh Kumar Ltd. v. B. B. Saksena*, Civil Misc. Writ No. 5123 of 1973, decided on 19-10-1973 (All), wherein a similar agreement had been cancelled by the District Magistrate in exercise of the powers conferred upon him by Clause 16 of the agreement. The Bench while approving the decision in *Pahari Sahu's* case in Civil Misc. Writ No. 5057 of 1973, decided on 30-8-1973 (All) observed, that any contravention of the agreement did not lead to any infringement of petitioner's rights guaranteed by Article 19 (1) (g) of the Constitution. It distinguished the decision in Special Appeal No. 2 of 1973, decided on 13-2-1973 (All) and pointed out that in that case the District Magistrate had cancelled an agreement relating to distribution of sugar by way of penal action under Clause 19 thereof and that such penal action under that clause could be taken only for the breach of, or non-observance of some terms and conditions stipulated in the agreement. There is thus no conflict in the observations made by

the learned Judges in the aforementioned three cases. The decision in cases of *Pahari Sahu* and *Ram Autar* are to apply to cases when an agreement is terminated under Clause 16 whereas the cases where agreements are terminated under clause 19 are to be governed by the decision in Spl. Appeal No. 2 of 1973, D/- 13-2-1973 (All).

11. In order to decide the aforesaid point raised on behalf of the petitioner it will be convenient to appreciate the provisions which led to the agreement Annexure 1.

12. Section 3 (1) of the Essential Commodities Act provides that if the Central Government is of opinion that it is necessary so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair price, or for securing any essential commodity for the defence of India or the efficient conduct of military operation, it may, by order provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Sub-section (2) (f) then provides that without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide for requiring any person holding stock of any essential commodities to sell the whole or specified part of the stock to the Central Government or a State Government or to an Officer or agent of such Government or to such other person or class of persons and in such circumstances as may be specified in the order. Section 5 of the Act then provides that the Central Government may by a notified order direct that the power to make orders or issue notifications under Section 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by State Government or authority subordinate thereto. It is not disputed that the Central Government has, by notified order, directed that its power under Section 3 of the Essential Commodities Act is also to be exercised by the State of U. P. and that sugar is an essential commodity in respect of which the State Government could make an order under Section 3 of the Act. One of the objects for which the State is to make an order under Section 3 (2) is to obtain sugar from the producers for supplying the same to the public at a fair price through its own agency. In order to achieve this object, the State of U. P. in exercise of its delegated powers under Sec. 3 of the Essential Commodities Act 1955 made an order known as U. P. Sugar Control Order, 1966. This order defined levy sugar as sugar sold by a vacuum pan sugar factory in pursuance of a direction issued by the Central Gov-

ernment or by an officer or authority subordinate to that Government under cl. (f) of sub-section (2) of Section 3 of the Essential Commodities Act 1955 for sale through authorised dealers or authorised retailers. The expression authorised retailers was defined in Clause 2 (a) of the order as meaning a person appointed as such by the District Magistrate to purchase, sell or distribute levy sugar in retail to the consumers. Clause 2 (1) defines 'authorised dealer' as a person licensed under the U. P. Sugar and Gur Dealers Licensing Order 1962 who is authorised by the District Magistrate to sell levy sugar and who has also executed an agreement in this regard. Under Clause 3 of the order an authorised retailer is required not to sell any sugar other than levy sugar. This clause further provides that no authorised dealers or authorised retailers shall within their respective areas sell levy sugar at a price higher than that specified by the District Magistrate for sale by wholesale or retail as the case may be. Clause 4 then requires the authorised dealers and authorised retailers to maintain such accounts, and submit statements and returns within such time as may from time to time be required by the District Magistrate. Under Clause 5 they have to display prominently the sale price of sugar according to the grades of sugar in stock with them at the entrance of the place of business or as near as possible thereto. Apart from the aforementioned restrictions mentioned in Clauses 3, 4 and 5 of the order, the Authorised dealers and authorised retailers are free to carry on their business including that in levy sugar in any manner that they like and they can enter into such contract in connection with such business as is permissible under the law. It is significant to note that the U. P. Sugar Control Order 1966 neither lays down the procedure for selecting an authorised retailer or for distributing levy sugar, nor does it lay down the terms and conditions on which such retailers are to supply the levy sugar to the public. The matter has been left to an agreement that may be entered into between the District Magistrate and the person who may agree to purchase, sell or distribute levy sugar. Of course, the contract is not to derogate from the provisions contained in the Sugar Control Order 1966 viz., that authorised retailer so appointed by the District Magistrate will not be in a position to deal in any other type of sugar excepting the levy sugar (Clause 3) and that he will have to keep such registers and submit such statements as the District Magistrate may direct from time to time and also display a price list (Clauses 4 and 5). Thus the rights and obligations of the person appointed as an authorised retailer including

the right to continue as such would flow only from the contract or agreement that may be entered into at the time of his appointment as authorised retailer and not from any statutory provision. The terms and conditions on which the petitioner was appointed as authorised retailer under the U. P. Sugar Control Order, 1966 and undertook to purchase, sell or distribute levy sugar in retail to the consumers are contained in Annexure '1' to the writ petition. According to the agreement the petitioner was to establish a retail shop in sugar at the place nominated by the authorities and was to indicate therein that the shop was for selling the Government controlled sugar. He was to obtain the sugar from such licensed sugar dealers or godowns of the District Co-operative Societies as may be indicated by the District Magistrate, and was to sell the same to the public at the price fixed by the Government. Once the authorised retailer lifted the allotted sugar from a licensed dealer or from the godown of the District Cooperative Society, the same was not liable to be returned in any circumstances. Under Clause 16 of the agreement, the District Magistrate or the Town Rationing Officer was authorised to cancel the agreement at any time without assigning any reason. Clause 18 of the agreement required the authorised retailer to deposit, in the post office savings Bank account, a sum of Rs. 200/- by way of security. This amount was to be returned to the depositor on termination of the agreement unless the same had been forfeited. Clause 19 of the agreement has been inartistically worded and it is difficult to interpret it literally. However, the parties are agreed that the sum and substance of the clause is, that it would be open to the District Magistrate or the Town Rationing Officer to terminate the agreement also in a case where the authorised retailer fails to carry out any direction issued by the District Magistrate or the Town Rationing Officer or contravenes any term of the agreement and in such a case to forfeit the security deposited by the retailer as well. The agreement nowhere provides that before terminating the agreement either under Cl. 16 or under Cl. 19, the District Magistrate, or the Town Rationing Officer will have to afford an opportunity to the dealer concerned to have his say in the matter.

13. Learned Counsel did not invite our attention to any provision which may indicate that any one has any legal or fundamental right to carry on trade in levy sugar. Indeed in the case of AIR 1974 SC 1543, the Supreme Court considered the nature of the right derived by persons appointed to distribute levy sugar under a similar Levy Sugar (Supply Con-

trol) Order, 1972, promulgated by the Central Govt., in exercise of its powers under Sec. 3 of the Essential Commodities Act. It held that the petitioners in that case had no legal right to trade in levy sugar. On the same principles it can be said that the petitioner in the present case also has no legal right to trade in levy sugar and if his agreement has been unjustifiably terminated the infringement if any is that of a pure and simple contractual right. Whether the contract is terminated under Clause 16 or Clause 19 of the agreement, it still results in cancellation of contract in pursuance of a right flowing from the contract. Such cancellation, if at all, infringes merely a contractual right and nothing else. The rights and the liabilities of the person who deals in levy sugar flow from the contract that he enters into with the District Magistrate. Both the Clauses 16 and 19 of the agreement provide that the District Magistrate or the Town Rationing Officer can unilaterally terminate the agreement between the parties. Clause 19 is a clause which we very often come across in various commercial contracts, providing for forfeiture of security deposits in certain contingencies. The liability accruing under the forfeiture clause in such contracts has to be enforced in accordance with the Contract Act. Even if the agreement is cancelled under Cl. 19 of the agreement as distinguished from its being determined under Clause 16 of the agreement nevertheless the power to determine the contract under that clause flows from the contract and not from any statute. If that power has been improperly exercised an action for breach of contract would undoubtedly lie.

14. In the case of C. K. Achutan v. State of Kerala, 1959 SC 490, the petitioner held a contract for supplying milk to the Government Hospital at Cannore. Later the District Medical Officer cancelled petitioner's contract for supply of milk and gave it to a Co-operative Society. The petitioner approached the Supreme Court contending that the rights guaranteed to him under Articles 14, 16 (1), 19 (1) (g) and 31 of the Constitution had been violated. While dealing with the submission made on behalf of the petitioner, the Supreme Court observed that the gist of the matter was the breach, if any, of the contract said to have been given to him which had been cancelled either for good or bad reasons. There was no discrimination because it was perfectly open to the Government, even as it was to a private party to choose, a person to their liking to fulfil the contract which they wished to be performed. When one person was chosen rather than another, no protection of Art. 14 could be claimed as the choice of the person to fulfil a particular con-

tract had to be left to the Government. Similarly a contract which is held from Government stands at no different footing from a contract held from a private party. The breach of the contract if any may entitle the person aggrieved to sue for damages or in appropriate cases even for specific performance, but he cannot complain that there has been deprivation of right to practice any profession or to carry on any occupation, trade or business such as is contemplated by Article 19 (1) (g), and provision of Article 13 of the Constitution could not be invoked to prevent cancellation of a contract in exercise of the powers conferred by one of the terms of the contract itself. Learned Judges of the Supreme Court further observed:—

"that a contract for supply of milk to a hospital could not be considered to be an employment under the State within the meaning of Article 16 of the Constitution either. Accordingly, the petitioner was not entitled to any relief in a petition under Article 32 of the Constitution." It is true that in Achutan's case, the Supreme Court declined to entertain a petition under Article 32 of the Constitution on the ground that the petitioner had not made out a case for invoking its jurisdiction under Article 32 of the Constitution as there was no contravention of any fundamental right guaranteed by the Constitution, but during the course of the judgment it very clearly pointed out that in the case of breach of contract pure and simple, remedy of an aggrieved party is to approach civil courts for damages or for the specific performance thereof and not to invoke the extraordinary jurisdiction of the Courts.

15. In the case of Lekhraj Satram Das Lalvani v. N. M. Shah, Dy. Custodian cum Managing Officer, AIR 1966 SC 334 the Supreme Court considered the question whether a manager appointed for carrying on the business of an evacuee under the provisions of Section 10 (2) (b) of the Administration of Evacuee Property Act, if removed from the Managership, could invoke the jurisdiction of a High Court under Article 226 of the Constitution or not. It came to the conclusion that notwithstanding the fact that the appointment of the Manager is made under Section 10 (2) (b) of the Administration of Evacuee Property Act, the appointment none-the-less is under a contract and if the contract is terminated, the Manager cannot invoke the jurisdiction of a High Court under Article 226 of the Constitution. In this connection the learned Judges observed thus:

"..... but even on the assumption that the order of the Deputy-Custodian terminating the management of the ap-

pellant is illegal, the appellant is not entitled to move the High Court for grant of a writ in the nature of Mandamus under Article 226 of the Constitution. The reason is that a writ of mandamus may be granted only in a case where there is statutory duty imposed upon the officer concerned and there is failure on the part of the officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties prescribed by statute and to keep the subordinate Tribunals and officers exercising public function within the limits of their jurisdiction. In the present case the appointment of the appellant as Manager of the Custodian by virtue of his power under Section 10 (2) (b) of the 1950 Act is contractual in its nature and there is no statutory obligation as between him and the appellant. In our opinion any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery in a writ under Article 226 of the Constitution."

This case in our opinion clearly shows that even if an appointment is made in the exercise of a statutory power of entering into a contract, no petition under Art. 226 of the Constitution would lie for enforcing the rights flowing from such contract. In the instant case also, even if it be accepted that the Sugar Control Order of 1966, which is a statutory order contemplates the appointment of an authorised retailer, the rights and obligation of an authorised retailer would flow only under the agreement entered into between him and the District Magistrate. Accordingly, as held in *Lekhraj Sathram Das's case* AIR 1966 SC 334, no petition under Article 226 of the Constitution would lie for enforcement of rights under a contract if the same had been determined in accordance with the terms of the agreement.

16. Learned Counsel for the petitioner placed strong reliance on the decision of the Supreme Court in the case of *K. N. Guruswamy v. State of Mysore*, AIR 1954 SC 592. In our opinion that decision does not at all help the petitioner's case. In that case the Supreme Court found that the liquor contracts were to be settled in accordance with certain statutory rules. In accordance with those rules, a liquor contract was settled with K. N. Guruswamy whose highest bid of Rupees 1,80,000/- a month had been accepted. Subsequently, on an offer made by one Thimmappa, the contract was settled by private negotiation with him on payment of Rs. 1,85,000/- per mensem. The Supreme Court observed that the contract with Thimmappa was not in accordance with statutory rules and that cancellation of contract in favour of K. N. Guruswamy was, in the circumstances, also justified.

However, the settlement of contract with Thimmappa was contrary to the Rules. Normally the petitioner K. N. Guruswamy would have been entitled to a writ for the setting aside of the contract in favour of Thimmappa which was contrary to Rules, which provided that the contract was to be settled by open auction and the petitioner under the Rules had the right to bid and obtain the contract, but in view of delay in disposal of the case, it would not be proper to grant him that relief. K. N. Guruswamy's case nowhere lays down that a petition under Article 226 of the Constitution can be filed for enforcing rights flowing from a contract.

17. Reliance was also placed on the case of *Boorchand v. Kurukshetra University*, AIR 1968 SC 292 wherein the validity of an order terminating the services of the Vice-Chancellor of the Kurukshetra University had been questioned. While considering the question whether in such circumstances a petition under Article 226 of the Constitution would lie, the Supreme Court made the following observations:—

"If the appointment of the Vice-Chancellor gave rise to the relation of master and servant governed by the terms of appointment, in the absence of special circumstances, the High Court would relegate a party complaining of wrongful termination of the contract to a suit for compensation and would not exercise its jurisdiction to issue a high prerogative writ, compelling the University to retain the services of the Vice-Chancellor whom the University does not wish to retain in service. But, the office of the Vice-Chancellor is created by the University Act and by his appointment the Vice-Chancellor is invested with statutory powers and authority under the Act. The petition filed by the appellant in the High Court is a confused document. Thereby the appellant did plead that the relation between him and the University was contractual but that was not the whole pleading. The appellant also pleaded with some circumlocution that since he was appointed to the office of Vice-Chancellor which is created by the Statute, the tenure of his appointment could not be determined without giving him an opportunity to explain why his appointment should not be terminated. The University Act, the Statute and the Ordinance do not lay down the conditions in which the appointment of Vice-Chancellor may be determined, nor does the Act prescribe any limitation upon the exercise of the power of the Chancellor to determine the employment. But once the appointment is made in pursuance of a statute, though the appointing authority is not precluded from determining the employment, the decision of the appointing authority

to terminate the appointment may be based only upon result of the enquiry held in a manner consistent with the basic concept of justice and fairplay."

While making the aforementioned observations, the learned Judges of the Supreme Court approved the following observations in the case of Ridge v. Baldwin, 1964 AC 40:—

"So I shall deal first with cases of dismissal. These appear to fall into three classes: dismissal of a servant by his master, dismissal from office held during pleasure and dismissal from an office where there must be something against a man to warrant his dismissal.

The law regarding master and servant is not in doubt. There cannot be a specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether master has heard servant in his own defence. It depends on whether the facts emerging at the trial prove breach of contract.

Then there are many cases where a man holds office at pleasure. Apart from Judges and others whose tenure of office is governed by statute, all servants and officers of the Crown hold office at pleasure and this has been held even to apply to a Colonial Judge: Terrel v. Secy. of State for the Colonies, (1953) 2 QB 482. It has always been held and I think rightly and the reason is clear. As the person having power of dismissal need not have anything against the officer he need not give any reason.

So I come to the third class which includes the present case. There I find an unknown line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation."

18. These observations make it clear that where appointment of a person under a contract is being terminated there is no question of following the principles of natural justice. But an exception has been created in respect of termination of service of a person holding a public office. Even though the service of a person, holding a public office, may be terminable at any time yet when it is being terminated by way of dismissal (punishment) the power to terminate the appointment is to be exercised only for some good reason and after informing the person concerned of the allegations made against him and affording him an opportunity to have his say in the matter. In the instant case, it cannot be said that the peti-

tioner, when he was appointed as authorised retailer, was appointed to hold any public or statutory office. Accordingly, the facts of Boolchand's case AIR 1968 SC 292 (supra) are distinguishable and the petitioner cannot derive any advantage from that decision.

19. The question as to in what cases, before making an order an authority has to adopt a procedure consistent with the principles of natural justice, came up for consideration before the Supreme Court in the case of A. K. Kraipak v. Union of India, AIR 1970 SC 150. In this case the Supreme Court observed thus:—

"The dividing line between an administrative power and a quasi judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi judicial power one has to look to the nature of the power conferred, the frame-work of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised in a welfare State like India which is regulated and controlled by the rule of laws it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentality of the State are not charged with the duty of discharging their function in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a fair and just decision. In recent years the concept of quasi judicial power has been undergoing radical change. What was considered as an administrative power some years back is now being considered as a quasi judicial power. The position as I see it is that the exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined. They have varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior Court. Later its ambit was extended to statutory Tribunals determining a lis inter partes. Later again it extended to cases where there was no lis in the strict sense of the words, but where immediate or subsequent rights of citizens were affected. The only constant limits throughout were that it was performing a public duty. Private or domestic Tribunals have always been outside the scope of certiorari since their authority is derived solely from contract

wife to file another petition under Section 9 of the Hindu Marriage Act for the same relief. But it is contended by Sri G. V. R. Mohan Rao, the learned counsel for the wife that the decree for restitution of conjugal rights passed by the Ranchi Court was satisfied by the wife going and living with the husband. Therefore that decree lapsed and is no longer in force and hence the wife can again file the petition under Section 9 of the Act. But it is not possible to accept this submission because nowhere in the petition filed under Section 9 the wife had alleged that the decree for restitution of conjugal rights was passed by the Ranchi Court and that it was satisfied. On the other hand the allegation made in para 9 of the petition is as follows:—

"The petition for restitution of conjugal rights filed by the respondent at Ranchi was withdrawn as the petitioner herein is only too anxious to live on amicable terms with her husband, but that did not help the respondent in changing his outlook and even that petition seems to have been conceived by the persons behind the present respondent as merely a stepping stone to securing ultimate dissolution of the marriage by divorce and was not at all bona fide."

These averments do not show in what manner the decree was satisfied. Sri G. V. R. Mohan Rao, the learned counsel also could not cite any authority in support of the said submission. Therefore there is no material in support of the contention raised by the learned counsel for the wife that the decree was satisfied. So long as that decree is in force there is no reason why the wife should resort once again to proceeding under Section 9 of the Hindu Marriage Act. Apparently this proceeding is intended to forestall the husband taking any further proceedings open to him. We therefore agree with the contention of Sri Rajeswara Rao, the learned counsel for the appellant that this petition under Section 9 cannot be sustained as the wife if anxious to get restitution of conjugal rights could have very well obeyed the earlier decree for restitution of conjugal rights passed by the Ranchi Court.

7. It is also contended by Sri Rajeswara Rao, the learned counsel for the appellant that under Hindu Law it is the duty of the wife to live with the husband and that she cannot stay away from him on the ground that she was employed in service in another place and that the very insistence of the wife in staying away and refusing to resign her job shows that it is the wife that has withdrawn from the society of the husband without just and sufficient cause and therefore she would not be entitled to claim

restitution of conjugal rights. We think this submission is also well founded. In *Smt. Tirath Kaur v. Kirpal Singh*, AIR 1964 Punj 28 it was held that where the wife refuses to resign her job which compels her to live away from her husband and join him, it cannot be said that she has not deserted him or has not withdrawn from his society without a reasonable cause and that the application of the husband for restitution of conjugal rights cannot be dismissed merely because she has expressed a desire that the marriage should continue and also consented to visit the husband and to allow him to visit her occasionally. In *Gaya Prasad v. Smt. Bhagavati*, AIR 1966 Madh Pra 212 where a wife accepted service without the consent of the husband at a place different from the husband's place to augment husband's family income and the husband called upon her to leave the service and live with him at his place and the wife refusing to obey and requesting the husband to come and live with her it was held that the wife had withdrawn from her husband's society without reasonable cause. To the same effect is the decision reported in *Smt. Surrinder Kaur v. Gurdeep Singh*, AIR 1973 Punj 134.

8. In *V. Pothuraju v. V. Radha*, AIR 1965 Andh Pra 407 it was held that it was the bounden duty of the wife to live with her husband wherever he chooses to reside and that it is the right of the husband to require his wife to live with him and courts cannot deprive him of this except for special circumstances which absolve the wife from that duty and an agreement entered into between the wife and the husband that they should live in the house of the wife's father does not affect the right of the husband to demand that his wife should live with him wherever he chooses to reside.

9. From these rulings it is therefore clear that the wife cannot insist on continuing in service in a place which is far away from the husband's place and refuse to live with the husband. The mere fact that the wife expressed her willingness to live with the husband by visiting him now and then would not amount to the wife performing her marital obligations to her husband. In the present case the conduct of the wife in insisting upon her continuing in service at a distant place away from her husband amounts to withdrawing from the society of the husband without just and sufficient cause. On this ground also the wife is not entitled to maintain the petition under Section 9. It may be mentioned that it is not the husband that has withdrawn from the society of the wife. On a consideration of the rival averments in the peti-

tion and the counter, we find that it is the wife that has withdrawn from the society of the husband without just cause. In this view we allow the appeal, set aside the order of the lower court and dismiss O. P. No. 134 of 1969. In the circumstances we direct the parties to bear their own costs here and in the lower court.

Appeal allowed.

AIR 1975 ANDHRA PRADESH 242

CHINNAPPA REDDY, J.

Mohd. Basha and others, Petitioners v. The Secretary, Regional Transport Authority and another, Respondents.

Writ Petns. No. 6771 of 1973 and 639, 983 and 1141 of 1974, D/- 25-3-1974.

(A) Motor Vehicles Act (1939), Ss. 63 (6), 2 (3) — Special permit — Application for — R.T.A. can insist on complete list of passengers being furnished along with application.

A combined reading of Ss. 63 (6) and 2 (3) shows that an applicant for a special permit must first enter into a contract for the use of the vehicle as a whole to carry specified passengers before he can apply for a special permit. S. 63 (6) contemplates that the identity of the passengers included in the contract must be definite and known before the grant of the permit. In order to satisfy itself that the application is a genuine application for the purposes mentioned in S. 63 (6) and is not intended to be a camouflage for using the vehicle unauthorisedly it is open to the R.T.A. to require the applicant to furnish the necessary information contemplated by S. 63 (6). The fact that the prescribed forms do not provide for the furnishing of a list of passengers does not mean that the transport authority is barred from seeking such information. Sec. 63 (6) does not itself prescribe the particulars to be mentioned in the application. The transport authority is, therefore, at liberty to ask for particulars necessary for the exercise of his power though no such particulars are required to be furnished by the form prescribed under the Rules. (Para 5)

Cases Referred: Chronological Paras

AIR 1965 SC-991 = (1965) 1 SCR 841 4

AIR 1944 PC 71 = (1944) 2 Mad LJ 25 5

AIR 1941 Mad 641 = (1941) 2 Mad LJ 189 5

P. Ramakoti (in W. Ps. Nos. 639 and 983 of 1974) and Smt. K. Amareswari (in W. P. Nos. 6771 of 1973 and 1141 of 1974), for Petitioners; S. Ranga Reddy for Govt. Pleader for Transport Cases, for Respondents in all Petitions.

ORDER:— The petitioners in these four applications under Article 226 of the Constitution are owners of Motor Vehicles hired from time to time as contract carriages. They contend that hitherto they used to apply for the grant of special permits under Section 63 (6) of the Motor Vehicles Act in the prescribed form 'PTOVA' and that special permits used to be granted in the prescribed form 'PTOV'. Neither the rules nor the prescribed forms require them to furnish the names of all the passengers who propose to utilise the contract carriage under the special permit. It was never considered necessary. Recently the Regional Transport Authorities of the District of Krishna, Kurnool, Guntur and West Godavari, have started insisting on the applicants for special permits submitting along with the applications for special permits complete lists of passengers proposed to be carried by the contract carriages under the special permits to be issued. The petitioners object to the insistence of the Transport Authorities to furnish a list of passengers. They have filed these applications under Article 226 of the Constitution to direct the Transport Authorities not to insist on the petitioners furnishing a list of passengers.

2. Sri P. Ramakoti, learned counsel for the petitioners in W. Ps. Nos. 639 and 983 of 1974 and Srimathi K. Amareswari, learned counsel for the petitioners in W. Ps. Nos. 6771 of 1973 and 1141 of 1974 argue that the transport authorities have no right to insist upon an applicant for a special permit furnishing a list of passengers. Neither the rules nor the prescribed forms require an applicant to furnish such a list. The act also does not contemplate it. It is argued that it is impracticable to furnish such a list since the names of all passengers who are likely to use the contract carriage may not be known till the last minute. According to the learned counsel, it is not necessary that the application for a special permit should be preceded by a contract. They contend that the contract between the owner of the vehicle and the parties proposing to travel may be entered into at any time before the contract carriage starts on its journey. They also argue that often times some tourist agency or an individual enters into a contract with the owner of the vehicle and the owner of the vehicle may not know the names of the passengers, until they board the vehicle. Therefore, they argue that if the authorities are anxious to prevent an abuse of the permit by contract carriages being used as stage carriages they may well insist on every contract carriage maintaining a list of passengers travelling in the vehicle as proposed in the pro-

posed amendment to Rule 213. The insistence on a complete list of passengers being furnished along with an application for a special permit, they claim, is illegal and unjustified.

3. Section 2 (3) of the Motor Vehicles Act defines 'Contract carriage' and is as follows:—

"(3) 'Contract carriage' means a motor vehicle which carries a passenger or passengers for hire or reward under a contract expressed or implied for the use of vehicle as a whole at or for a fixed or agreed rate or sum—

- (i) on a time basis whether or not with reference to any route or distance or,
- (ii) from one point to another, and in either case without stopping to pick up, or set down along the line of route passengers not included in the contract; and includes a motor cab notwithstanding that the passengers may pay separate fares."

Section 63 (6) which provides for the grant of a special permit is as follows:—

"Notwithstanding anything contained in sub-section (1), but subject to any rules that may be made under this Act, the Regional Transport Authority of any one region may, for the convenience of the public, grant a special permit in relation to a public service vehicle for carrying a passenger or passengers for hire or reward under a contract, express or implied for the use of the vehicle as a whole without stopping to pick up or set down along the line of route passengers not included in the contract, and in every case where such special permit is granted, the Regional Transport Authority shall assign to the vehicle, for display thereon, a special distinguishing mark in the form and manner specified by the Central Government and such special permit shall be valid in any other region or State without the counter-signature of the Regional Transport Authority of the other State, as the case may be."

These two provisions read together show that a special permit may be granted if (1) a passenger or passengers are proposed to be carried for hire under a contract, (2) the contract is for the use of the vehicle as a whole and (3) passengers not included in the contract are not to be picked up or set down along the line of the route. Clearly the contract must precede the grant of the permit. Equally clearly the identity of the passengers included in the contract must be definite and known before the grant of the permit; otherwise, the reference to 'passengers not included in the contract' becomes meaningless. Therefore, a person applying for a special permit must first enter into

a contract for the use of the vehicle as a whole to carry specified passengers before he can apply for a special permit. The definition of 'contract carriage' if contrasted with the definition of 'stage carriage' also brings out this position. 'Stage carriage' is defined by Section 2 (29) as follows:—

"Stage Carriage" means a motor vehicle carrying or adapted to carry more than six persons excluding the driver which carries passengers for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey."

4. In the case of a contract carriage, there must be a prior contract, the passengers are settled in advance and there is no stopping on the line to pick up or set down a passenger. In the case of a stage carriage, there is no prior contract, passengers are not settled in advance and passengers may be picked up or set down at intermediate stage. In *Roshan Lal v. State of U. P.*, AIR 1965 SC 991 the distinction between a contract carriage and a stage carriage was described as follows:—

"The distinction between the two is this: the contract carriage is engaged for the whole of the journey between two points for carriage of a person or persons hiring it but it has not the right to pick up other passengers en route. The stage carriage on the other hand, runs between two points irrespective of any prior contract and it is boarded by passengers en route who pay the fare for the distance they propose to travel."

5. Rule 205 (vi) of the Andhra Pradesh Motor Vehicles Rules prescribes that every application for a special permit under Section 63 (6) shall be in Form PTOVA. Rule 208 (viii) prescribes that a special permit under Section 63 (6) shall be in Form PTOV. Forms PTOVA and PTOV require that the name of the person entering into a contract with the owner of the vehicle should be mentioned, as also the number of persons constituting the party proposing to use the vehicle. The two forms do not, however, provide for the names of all the passengers included in the contract being mentioned. Therefore, it is argued by the learned counsel, the transport authorities cannot go beyond the requirements of the prescribed forms and insist on the names of all the passengers included in the contract being furnished along with the application for special permit. I do not agree with the submission of the learned counsel. I have already observed that the identity of passengers included in the contract must be definite and known before the grant of the permit. That is con-

templated by Section 63 (6) of the Act. If in order to satisfy itself that the application for the grant of a special permit is a genuine application for the purposes mentioned in Section 63 (6) of the Act and is not intended to be a camouflage for using the vehicle unauthorisedly it is open to the Regional Transport Authority to require the applicant to furnish the necessary information contemplated by Section 63 (6) of the Act. The fact that the prescribed forms do not provide for the furnishing of such information does not mean that the transport authority is barred from seeking such information. A regional transport authority receiving an application for a special permit in the prescribed form may be satisfied about the bona fides of the applicant and may straightway grant the permit. On the other hand, he may seek further information to satisfy himself about the bona fides of the applicant in relation to the requirements of Section 63 (6). Seeking of such information is not prohibited unless it is against the statute. All that the prescription of a form means is that the particulars prescribed in the form are bound to be furnished before the application can be considered and those are the minimum particulars required to be furnished. The mere fact that the form does not provide for certain particulars does not mean that the authority granting the permit cannot ask for those particulars. The prescription of forms is only for the convenience of the applicant and the authority. The form prescribed by the rules should not be treated as a questionnaire which alone need be answered and no more. The omission of the rule making authority to make rules at all or to make rules to meet certain situations does not bar a statutory authority from acting under the statute. (Vide *Madras and Southern Maharatta Railway Company Ltd. v. Municipal Council, Bezwada*, (1941) 2 Mad LJ 189 = (AIR 1941 Mad 641) approved by the Privy Council in *Madras and Southern Maharatta Railway Co. Ltd. v. Bezwada Municipality*, (1944) 2 Mad LJ 25 = (AIR 1944 PC 71). Similarly the failure of the rule making authority to prescribe a comprehensive form requiring all particulars necessary for the exercise of power by the statutory authority to be mentioned does not prohibit the statutory authority from requiring necessary further particulars to be furnished. It might be a different matter if the statute itself had mentioned what particulars should be furnished in the form and a form had been prescribed pursuant to the statutory direction. In the present case, Section 63 (6) does not itself prescribe the particulars to be mentioned in the application for a special permit. The transport authority is, there-

fore, at liberty to ask for particulars necessary for the exercise of his power though no such particulars are required to be furnished by the prescribed form. If the Regional Transport Authority seeks information not contemplated by Section 63 (6) the transport operators may legitimately complain. But if the Regional Transport Authority does not seek any information not contemplated by Section 63 (6) but seeks information contemplated by Section 63 (6) the transport operators cannot have any legitimate grievance.

6. It is said that insistence on the furnishing of the names of all the passengers included in the contract may not be practicable since changes are possible till the very last minute. That is the very thing which is sought to be prevented. Neither the person entering into an agreement with the owner of the vehicle nor the owner of the vehicle can be allowed to pick up passengers on the ground that seats are available. That is precisely what is expected to happen if the list of passengers included in the contract is not finalised at the time of the contract and before the application is submitted to the transport authorities. That is also precisely what leads to abuse of the permit. In the counter-affidavit filed on behalf of the respondents it is stated:

"the past experience of the Transport Department clearly proved that a contract carriage permit is obtained with the ostensible purpose of taking a contract party from one place to another place but very often persons who are not members of the contract party are picked up at the starting point itself or at intermediary stations collecting individual fares. Thus the contract vehicles ply contrary to the permit that is granted and are plied as stage carriages collecting individual fares, picking up passengers who are in no way connected with the contract party. The list of passengers is a very important piece of circumstantial evidence either to prove or disprove that a contract carriage is used as a stage carriage.

In this connection it may be relevant for me to state that the tax payable for a contract carriage is much less than the tax payable for a stage carriage and the operators of contract carriage are abusing the concession rate of tax given to them and are plying their vehicles as stage carriages. It is not always possible to check all the vehicles to detect the misuse. With a view to prevent the misuse of these vehicles as stage carriages, the contract carriage operators are required to furnish the list of the names of the persons of the contract party, so that it may be possible for any checking officer to verify whether

the persons that are travelling at the time of check are the members of the contract party that have originally engaged the vehicle, otherwise it would become difficult to verify whether the passengers really belong to the contract party or not as the owner of the vehicle always asserts falsely that the passengers that are found on a check are members of a contract party, but not the persons picked up on the way. When the misuse is detected and proceedings are taken under the M. V. Act and the M. V. T. Act the operators are insisting that the passengers should be examined and very often the passengers belong to different places in the State."

Further I do not see any insurmountable difficulty in having the names of passengers changed in genuine cases even after the grant of the permit by placing the necessary information before the authority concerned.

7. It is argued that even the proposed amendment of Rule 213 does not require a list of passengers to be furnished along with the application for the permits but only requires that a list should be maintained in the vehicle. That does not mean that a list need not be furnished to the authority granting the permit. The list to be maintained in the vehicle is for the purpose of checking at intermediate stages. The list to be furnished along with the application is for the information of the transport authority to satisfy itself that the application is a genuine application, under Section 63 (6). I am satisfied that the Regional Transport Authorities have not exceeded their authority in insisting upon the transport operators furnishing lists of passengers along with application for special permits. The Writ petitions are, therefore, dismissed with costs. Advocate's fee Rs. 100 in each.

Petitions dismissed.

AIR 1975 ANDHRA PRADESH 245

GOPAL RAO EKBOTE, C. J. AND
CHENNAKESAV REDDY, J.

The Warangal Chamber of Commerce, Petitioner v. Director of Marketing, Govt. of Andhra Pradesh, Hyderabad and others, Respondents.

Writ Petn. No. 1827 of 1972, D/- 6-2-1974.*

(A) Constitution of India, Art. 226 —
Mandamus — Locus Standi — Corporate

*(Order of reference made by Obul Reddi, J. on 20-11-1973.)

BS/ES/A526/75/MVJ

body — Locus Standi to file petition on behalf of its members.

To successfully maintain an application for the issue of a writ of mandamus, Courts have mainly laid down three tests (1) the applicant must have a legal right (2) the applicant must show that the duty which is sought to be enforced is owed to him, (3) the applicant must be able to establish an interest, the invasion of which has given rise to the action. Doubt or difficulty often arises in the application of the third test. (Para 15)

The petitioner, the Warangal Chamber of Commerce was a corporate body. The commission agents were all its members. One of the objects of the petitioner was to aid and protect trade and commerce. The commission agents assisted and advised also the vendors in the market area on matters of protection and insurance of agricultural produce and livestock. The existence of the petitioner chamber of commerce depended on its members. The commission agents demanded an increase in the percentage of commission for the service rendered by them but it was refused.

Held, that the refusal to increase the percentage of commission affected the real interest of the petitioner. Therefore the petitioner had real and sufficient interest in the matter to maintain the writ petition. (Para 20)

(B) Andhra Pradesh (Agricultural Produce and Livestock) Markets Act (16 of 1966), S. 33 (2) (xxv) and S. 34 (1) Proviso, Byelaws framed under Byelaw 35 — A. P. (Agricultural Produce and Livestock) Markets Rules, 1969, Rr. 45, 73 — Rates of commission to be paid to commission agents in market area — Power of fixing rates vests in Govt. exclusively — Increase in rate of commission ordered by Market Committee and approved by Director of Marketing — Government can set aside the increase — Petition seeking a direction declaring that it was the Director of Marketing and not the Government which had power to fix the market fee is not maintainable. (1972) 2 APLJ 275, Applied. (Constitution of India, Art. 226). (Para 21)

Cases Referred: Chronological Paras

AIR 1973 SC 2720 = 1974 Pat LJR 204	9
(1973) 1 All ER 689	19
AIR 1972 SC 2112 = 1972 SCD 558	8
ILR (1972) Andh Pra 955	10
(1972) 2 APLJ 275 = ILR (1972) Andh Pra 210	21
(1968) 1 All ER 763 = (1968) 2 WLR 893	19
AIR 1966 SC 828 = (1966) 2 SCR 172	7
AIR 1962 SC 1044 = 1962 Supp (3) SCR 1	7
(1957) 2 Andh WR 250	12
AIR 1952 SC 12 = 1952 SCR 28	6

A. Raghuvir, for Petitioner; Govt. Pleader for Transport (for Nos. 1 and 2) and D. V. Reddi Pantulu (for No. 3), for Respondents.

CHENNAKESAV REDDY, J.:— The problem that stands pre-eminently to the fore in this writ petition is whether the petitioner — The Warangal Chamber of Commerce, a corporate body, can maintain a writ of Mandamus on behalf of its members, under Article 226 of the Constitution. When the case came on for hearing before our learned brother, Obul Reddi, J. his Lordship referred the matter to a Division Bench in view of the importance of the issue involved in the case and the conflicting course of judicial authority obscuring the principles governing the same.

2. Before we proceed to set out our answer, the essential facts may be shortly stated. The petitioner is a corporate body registered as a non-trading company under the Andhra Pradesh Non-Trading Companies Act, 1962 (Act II of 1962). Several licensed commission agents, dealing in agricultural produce and livestock, are its members. The objects of the petitioner-Chamber of Commerce are: to promote, encourage, aid and protect trade, commerce and industries in Warangal District in general and within the municipal limits of Warangal town in particular in the State of Andhra Pradesh.

3. Under the Andhra Pradesh (Agricultural Produce and Livestock) Markets Act, 1966 (Act 16 of 1966), hereinafter referred to as the Act, Market Committees have been constituted by the Government for every notified area. Every Market Committee establishes such number of markets in the notified area as the Government may direct from time to time and declare the limits of several markets, for the purchase and sale of any agricultural produce, livestock or products of livestock. It is not necessary for the purpose of this writ petition to notice in detail the provisions of the Act relating to the constitution of Market Committees and establishment of markets. Under Section 32 of the Act, the Government have the power to regulate or prohibit the Commission Agents operating in the markets by a notification in that behalf until such time the Market Committee may issue licences to the Commission Agents. Under Section 33, the Government may make rules in any notified area or areas for carrying out the purposes of the Act. Under the proviso to Section 34, the Director of Marketing may make bye-laws in respect of a notified area for which a Market Committee is constituted for the regulation of the business and the condition of trading therein, if the Market Committee itself fails to make bye-

laws within two months from the date of its constitution. Under bye-law No. 35 of the Bye-laws so framed, a commission of 1-25% is prescribed as the commission for the Commission Agents towards their fees. It is the grievance of the Chamber of Commerce that the said fee prescribed is absolutely low and not commensurate with the service rendered by its members who are licensed Commission Agents. The Commission Agents, it is the submission of the petitioner, not only represent the interests of the vendor within the market area but also help the vendors in the matter of insurance and preservation of the produce in case the vendors decide not to sell the commodity immediately. The petitioner made representations on behalf of the members to the concerned authorities to enhance the commission charges to 2.50%. It appears that when the Director of Marketing enhanced the rate to 2.50% in similar cases, the Government issued a notification in the matter nullifying the said enhancement on the ground that the Director of Marketing had no power. Since it is not possible in the circumstances to get any relief from the Director of Marketing and have the bye-law amended for the enhancement of the rate of commission to the Commission Agents, the petitioner has filed this writ petition seeking a writ of Mandamus or any other appropriate Writ, order or direction declaring that the Director of Marketing has jurisdiction to amend the bye-laws effecting changes in the rates of commission to be paid to the Commission Agents in the Market area of the petitioner-Chamber of Commerce and also directing the Director of Marketing to fix the rate of commission to be paid to the Commission Agents at 2.50% in respect of agricultural produce. This, in brief, is the genesis of this writ petition.

4. In the counter-affidavit filed by the Secretary, Agricultural Market Committee, Warangal, an objection is taken as to the locus standi of the petitioner which is a corporate body to file a writ petition on behalf of its several members. It is submitted that each individual member should file a separate writ petition and a single writ petition on behalf of all the members is liable to be dismissed.

5. The question of locus standi under Article 226 is not *res integra*. It has been considered in several decisions of the Supreme Court and of this Court. To begin with, let us see the view expressed in the earliest decision of the Supreme Court with reference to Art. 226 of the Constitution.

6. In *State of Orissa v. Madan Gopal Rungta*, AIR 1952 SC 12 Kania, C. J. speaking for the court observed:—

"The language of the article shows that the issuing of writs or directions by the Court is founded only on its decision that a right of the aggrieved party under Part III of the Constitution (Fundamental Rights) had been infringed. It can also issue writs or give similar directions for any purpose. The concluding words of Article 226 have to be read in the context of what precedes the same. Therefore, the existence of the right is the foundation of the exercise of jurisdiction of the court under this article." Thus the basis for relief under Article 226 is the existence of a legal right.

7. In *Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal*, AIR 1962 SC 1044, Subba Rao, J. (as he then was) observed:

"Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental rights can also approach the court seeking a relief thereunder."

The same learned Judge again in *Goode Venkateswara Rao v. Government of Andhra Pradesh*, AIR 1966 SC 828 observed:

"A personal right need not be in respect of a proprietary interest: it can also relate to an interest of a trustee. That apart, in exceptional cases, as the expression "ordinarily" indicates, a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof."

8. It can immediately be seen that this decision widens the scope of judicial review. The question of locus standi again prominently came up before the Supreme Court in *State of Orissa v. R. C. Indrakumar*, AIR 1972 SC 2112. Mitter, J., speaking for the Court, held that, unless the infringement of the legal right is established, the High Court exercising writ jurisdiction cannot grant any relief to the party, approaching the Court.

9. The Supreme Court once again had occasion to consider the question in *Dr. Satya Narayana Sinha v. M/s. S. Lal and Co. (P.) Ltd.*, AIR 1973 SC 2720. Jaganmohan Reddy, J., speaking for the Court, after a review of the several earlier decisions, observed at page 2723 as follows:—

"In respect of persons who are strangers and who seek to invoke the jurisdiction of the High Court or of this Court, difficulty sometimes arises because of the nature and extent of the right or interest which is said to have been infringed and whether the infringement in some way

affects such persons. On this aspect there is no clear enunciation of principles on which the Court will exercise its jurisdiction.

In England also the Courts have taken the view that when the application is made by a party or by a person aggrieved the Court will intervene *ex debito justitiae* in justice to the applicant, and when it is made by a stranger the Court considers whether the public interest demands its intervention. In either case it is a matter which rests ultimately in the discretion of the Court."

10. A Division Bench of this Court in *T. Narayana Reddy v. The Government of Andhra Pradesh*, ILR (1972) Andh Pra 955 had considered the problem of locus standi at length, Ekbote, J. (as he then was) expressed the law lucidly and incisively as follows:—

"Now, the law relating to locus standi does not really lend itself to neat generalisations. Locus standi is understood to mean legal capacity to challenge an act or decision of an authority. The state of law on this subject is still fluid and it is difficult to lay down any law precisely which would apply to all the cases and in all the circumstances. Decisions on this topic in India as well as in England and America of late have shown a marked shift. There has been a blurring of some of the sharp technical distinctions which appeared to be well established, say ten years before. The rules governing locus standi to initiate proceedings for different remedies not only are different but they in themselves have undergone in some respects some change. It is, however, clear that the recent decisions reflect the judicial liberality in connection with standing to seek judicial review."

11. The learned Judge proceeded further to observe that Article 226 of the Constitution confers wide power on High Courts to issue certain Writs, directions, or orders but does not in terms describe the class of persons to whom the right to relief thereunder should be confined. Summarising the principles governing locus standi to seek certiorari, the learned Judge held at page 961:

"Now certiorari is a discretionary remedy and the discretion of the court as seen above extends to permitting an application made by any member of the public.

For the purpose of locus standi the decisions divide the members of public broadly speaking into three categories. Firstly the Attorney General or the Advocate-General is empowered to initiate remedies to prevent or cancel any administrative action or decision of an autho-

rity; secondly persons whose legal rights or interests are adversely affected; and thirdly, the persons whose legal rights or interests have not been directly or indirectly affected, nevertheless have been conferred with the status of 'person aggrieved' by Statute."

12. Jagannmohan Reddy, J., (as he then was) of this court in *Tobacco Merchants' Association v. Krishna Market Committee, Vijayawada*, (1957) 2 Andh WR 250, while dealing with the question of locus standi of the associations to maintain writ petitions held:—

"The Associations (by whom the writ petitions have been filed) have as such not been affected in any way and in so far as the associations which are unregistered (amongst them) are concerned, the individual applying for the writ is not authorised to take any action on behalf of the members. Even where the Society is registered, it is not the Society which is affected and therefore it cannot ask for any writ or order seeking relief in a representative capacity on behalf of its members. The individuals concerned can file the petitions. Even though the writ petitions on behalf of the Associations were signed by persons who are members of the association, that does not make them parties as such. Hence the writ petitions cannot be considered as petitions by the persons who signed on behalf of the associations."

In that view, the learned Judge dismissed the Writ Petition as not maintainable.

13. From the aforesaid decisions it can be seen that judicial opinion teetered on the problem of standing or locus standi to seek relief under Art. 226. The movement in the current of judicial decisions has been unsteady. One, however, can dimly discern from these decisions that the terrain over which judicial review is based has enlarged in recent years and not eroded.

14. The class of persons to whom locus standi should be confined to invoke the jurisdiction under Art. 226 is not enshrined in the Article itself. Hence, Courts have to determine whether the applicant is entitled to legal protection from the infringement of his legal injury (right?) by any administrative act or decision. That becomes a matter of judicial expedience and public policy.

15. Rules governing locus standi to claim relief under Article 226 vary according to the nature of the remedy sought. Each remedy has its own technicalities. In this case, we are concerned with *Mandamus*. To successfully maintain an application for the issue of a writ of *mandamus*, Courts have mainly laid down three tests (1) the applicant must have a legal right, (2) the applicant must show

that the duty which is sought to be enforced is owed to him, (3) the applicant must be able to establish an interest, the invasion of which has given rise to the action. Doubt or difficulty often arises in the application of the third test.

16. What then is the kind of interest that the applicant must establish to give him locus standi to impugn the administrative action? The view of Courts on locus standi must be dominantly ameliorative and not merely apocalyptic, and should serve the philosophy and purpose underlying Article 226.

17. A developing country involving itself in a large demanding and commanding effort to move forward in its economic and social developments has of necessity to take a number of legislative and administrative actions intensely affecting the interests of so many citizens. In a society in which there is massive State intervention the danger towards bureaucratic rule is posed. Problems will arise for which there are no precedents. There is thus an increasing necessity for Courts to see that popular action does not trespass upon right and justice as recognised in our constitution and natural law and that necessity should serve to swell rather than contract the scope of standing. Restrictive rules about locus standi are in general inimical to a fair and healthy system of administration. That does not mean that Courts should trespass on the work and fast development of the Government to bring large-scale social and economic changes. The passivity in the general run of men is waning — indeed a good trend. Where there was resignation and acquiescence before fate now there is a growing activity and aspiration for a full development of a better society. Therefore, Courts should view with liberality the question of standing to maintain a writ petition. Even a member of the public who has sufficient interest in the fit matter should be accorded locus standi to approach the Court for relief. No more restriction should be placed on what constitutes sufficient interest to see that administrative authorities act in accordance with law and natural justice. It is not possible to discover and formulate any hard and fast rules for this problem of locus standi. It ultimately resolves itself to one of discretion to be exercised in each case on the facts and circumstances of that case. The discretion of the Judge must be guided by what Newman called the 'illative sense'. It is not a cosmic vision that makes him spin out answers. He must rely more on instinct cultivated by long experience in a close corporation of minds rather than follow a logical argument with inexorable severity inviting to absurdity.

18. The well-known authors on Administrative Law M/s. Bernard Schwartz and H. W. R. Wade, Q. C. in their book "Legal Control of Government" dealing with the topic 'standing to sue: United States' at page 287 observed as follows:—

"In considering the subject of standing, one should bear in mind that, as the Supreme Court tells us, 'the trend is toward enlargement of the class of people who may protest administrative action'. Standing exists when plaintiff alleges that he has suffered harms as a result of the challenged agency action that it has caused him injury, economic or otherwise. Under the recent cases (we shall see) standing may stem from non-economic values as well as from economic injury.

The easiest cases are those where direct economic injury is alleged. A person who is directly affected in the economic interest by the administrative decision which he challenges does have the required standing, and this has long been recognized by the American Courts." The same authors dealing with 'standing to sue in Britain' observed:—

"In Britain it is a thing of shreds and patches, made up of various different rules which apply to various different remedies and procedures. It is a typical product of the untidy system of remedies, each with its own technicalities, which all British administrative lawyers would like to see reformed. On the other hand, some of these technicalities have beneficial (sic)."

19. In a recent case the law relating to locus standi of a private individual to maintain a writ petition against public authority is lucidly explained by Lord Denning in Attorney General v. Independent Broadcasting Authority, ((1973) 1 All ER 689). In that case the Independent Broadcasting Authority were proposing to broadcast, that very evening, a television film which did not comply with the statutory requirements laid down by Parliament. There was evidence which showed that the television film contained matter which offended against decency and likely to be offensive to public feeling. The Attorney General to whose notice the matter was brought by the applicant, McWhirter, declined to take action. Therefore, the applicant himself approached the Court to seek an injunction claiming that he had sufficient interest in the matter as he was himself the owner of a television set and he paid the licence fee. According to him, he was entitled to expect the programme to be in compliance with the statutory requirements when he switched on the set. There were thousands like him sitting

and watching and were all entitled to have their privacy respected. The Court granted an injunction. Dealing with the question of locus standi and the role of a private individual to maintain an action Lord Denning observed as follows:—

"In the present case Mr. McWhirter told us that the Attorney General refused to take action *ex officio*, and that he, Mr. McWhirter, considered the matter was so urgent that he came direct to this court. Was he entitled to come here? Test it by an extreme case. Suppose the Attorney-General refuses to give leave for no good reason or on entirely wrong grounds, mistaking, may be, the interpretation of a statute. Would a private individual be entitled to come to the Court? Such a situation was not in Lord Halsbury L. C.'s mind in 1902. But it happened in 1910. There was a great case then in which this Court, to quote a learned author, 'struck a blow which is still reverberating fifty years later.'"

In such a situation I am of opinion and I state as a matter of principle that the citizen who is aggrieved has a locus standi to come to the courts. He can at least seek a declaration. That is the view expressed in a resourceful book to which the Attorney-General himself referred us, Zamir on "the Declaratory Judgments."

Lord Denning ultimately concluded by observing:

"..... I am of opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can himself apply to the Court itself. He can apply for a declaration and, in a proper case, for an injunction joining the Attorney-General if need be as defendant. In these days when Government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizens of this country; so that they can see that those great powers and influences are exercised in accordance with law. I would not restrict the circumstances in which an individual may be held to have a sufficient interest. Take the recent cases when Mr. Raymond Blackburn applied to the court on the ground that the Commissioner of Police was not doing his duty in regard to gaming and pornography. Mr. Blackburn had a sufficient interest, even though it was shared with thousands of others. I doubt whether the Attorney-General would have given him leave to use his name: See *R v. Metropolitan Police Commissioner, Ex Parte Blackburn*, (1968) 1 All ER 763 (770). But we heard

Mr. Blackburn in his own name. His intervention was both timely and useful."

Thus, it can be seen that both in American and British democracies, the trend is towards the enlargement of the class of persons who may protest against arbitrary administrative actions.

20. Now turning to the facts of this case, the petitioner is a corporate body. The commission agents are all its members. One of the named objects of the petitioner—Chamber of Commerce is to aid and protect trade and commerce. It is not disputed that the Commission Agents assist and advise also the vendors in the market area on matters of protection and insurance of agricultural produce and livestock. The Commission Agents demanded an increase in the percentage of commission for the service rendered by them. The existence of the petitioner Chamber of Commerce depends on its members. In our opinion refusal to increase the commission, affects undoubtedly the real interest of the petitioner. We, therefore, hold that the petitioner has real and sufficient interest in the matter to maintain the writ petition.

21. That does not, however, conclude the matter in favour of the petitioner. There still remains the question whether the Government has the power to set aside the increase in the commission ordered by the Market Committee. We are relieved of the necessity to consider this question in view of the recent Division Bench decision of this Court in *M. Kalva Suryanarayana v. The State of Andhra Pradesh*, (1972) 2 APLJ 275. In that case, this court ruled that the Government had a right to put an end to the resolution passed by the Market Committee and approved by the Director of Marketing.

22. For the reasons above mentioned, the writ petition is dismissed with costs.

Petition dismissed.

AIR 1975 ANDHRA PRADESH 250

VENKATRAMA SASTRY, J.

Nelli Narasimha Reddy, Appellant v. Vadla Krishnaiah and others, Respondents.

Second Appeal No. 577 of 1972. D/- 24-12-1974.*

(A) Hindu Law — Alienation of specific property by coparcener — Alienee in possession — Suit by him for injunction restraining other coparceners from dis-

*(Against decree of Dist. J., Mahboobnagar in Appeal Suit No. 28 of 1971.)

turbing his possession is maintainable — (Specific Relief Act (1963), S. 38)—(Transfer of Property Act (1882), S. 53-A).

It is not the law that the non-alienating coparceners can straightway walk into the land and recover possession of the property without regard to the rights of the purchaser. The plaintiff can maintain his possession so long as there is no attempt made by the non-alienating coparceners to recover possession from him in due course of law. If the plaintiff is entitled to the benefit of S. 53-A of the Transfer of Property Act he is entitled to protect his possession till the general suit for partition is filed. If the non-alienating coparceners file a suit for recovery of possession the law is that they are entitled to a decree subject to a declaration in favour of the plaintiff. But until that is done, the plaintiff's possession could not be disturbed and he is entitled to an injunction. AIR 1926 Mad 774 and AIR 1926 Bom 399 and AIR 1957 Andh Pra 854, Relied on.

(Paras 12, 15, 16, 18)

Cases Referred: Chronological Paras

AIR 1957 Andh Pra 854 = 1956 Andh	
WR 830	6, 16
AIR 1955 Mad 288 = (1955) 1 Mad LJ	414
AIR 1953 SC 487 = 1954 SCR 177	13
AIR 1952 Mad 419 = (1952) 1 Mad LJ	308 (FB)
AIR 1926 Bom 399 = ILR 50 Bom 204	15
AIR 1926 Mad 774 = ILR 50 Mad 320	12, 15
AIR 1922 Mad 112 = 42 Mad LJ 372	14
(1883) ILR 10 Cal 626	14

Vasantha Rao Mukhedkar, for Appellant; K. Mahipathy Rao, for Respondents Nos. 1 and 2.

JUDGMENT:— Plaintiff is the appellant in this Second Appeal. He filed the suit for a perpetual injunction restraining the defendants from interfering with his possession of the suit land bearing R. S. No. 110 situate in Karpamula Village measuring 37 guntas. It was dismissed in the first court though many of the findings are in his favour and the decree has been confirmed in appeal. Hence the second appeal. A few facts are necessary to understand the point arising in this appeal.

2. The plaintiff purchased the suit land from Vadla Balanarayana, P.W. 4, who is the brother of the defendants 1 and 2 for Rs. 500 under an agreement of sale dated 6-12-1960 marked as Ex. A-1. P.W. 4 sold the property as manager of the joint family consisting of himself and his two brothers, according to the plaintiff, for a legal necessity. The plaintiff was put in possession of the suit land on the same date and he was in actual pos-

session paying land revenue to the Government. On 9th August, 1970, when he went to the suit land to plough the same for purposes of cultivation, all the defendants came there in a body without any authority and, taking the law into their own hands, unyoked the ploughs of the plaintiffs and did not allow him to plough the land. Hence the plaintiff filed the suit for an injunction restraining the defendants from interfering with his possession.

3. Defendants 3 to 6 remained *ex parte*. Defendants 1 and 2 pleaded that the plaintiff has not purchased the land from their brother Balanarayana, that Balanarayana had no authority to sell the land, that he was not the manager of the joint family, that the suit land is an ancestral balotha inam and the mother of the defendants 1 and 2 alone is the manager, that assuming that he was manager, there was no legal necessity, that the plaintiff colluded with the vendor and concocted the suit agreement, that as a matter of fact the plaintiff used to cultivate the suit land on lease on bathi basis, that as the plaintiff failed to cultivate the land, defendants 1 and 2 have sowed the seedlings in the suit land in Arudra Karthi, that the plaintiff was not in possession of the suit land in this year, that he did not go to the suit land on 9th August, 1970, that the defendants never unyoked his ploughs, that the plaintiff along with three others filed a petition in the Tahsil Office on 30-6-1970 that these defendants are interfering with his cultivation wherein he stated that he took the suit land on permanent lease some ten years back, that he has also filed another petition for the issue of a patta for the suit land on 10-2-1970 wherein he stated that he purchased the suit land on 6-12-1960, that it is not true that all inams are abolished and vested in the Government, that the Abolition of Inams Act of 1955 was repealed by 1967 Act and the same was struck down by the High Court on 31-3-1970; that the inam lands being Government lands cannot be alienated by the holder; that the relationship of the plaintiff and the defendants is that of landholder and tenant and therefore, the dispute has to be decided by the Revenue Court and the Civil Court has no jurisdiction to entertain the suit, that on the date of the filing of the suit, the plaintiff was not in possession of the suit land and so the suit for retention of possession does not lie, that the defendants are the owners of the land and so permanent injunction cannot be granted against the defendants, that the suit document is a sale deed and not an agreement and is inadmissible in evidence for want of proper stamp and registration

and, therefore, the defendants prayed for the dismissal of the suit.

4. On the above pleadings, the trial court framed the following issues:

1. Whether the plaintiff purchased the suit land from Vadla Bala Narayana for Rs. 500 under an agreement of sale on 6-12-1960 as manager of the family for legal necessity?

(2) Whether the suit land is a Balwatha Inam and whether Bala Narayana in the capacity of Manager of joint family has the authority to sell the land without the consent of other brothers and mother and he had any authority and sold the land for legal necessity?

(3) Whether the plaintiff is cultivating the suit land on lease since nine years?

(4) What is the effect of the Abolition of Inams Act over the suit?

(5) Whether the plaintiff was not in possession of suit land on the date of suit?

(6) Whether the transaction is sale or agreement of sale?

(7) Whether the deed dated 6-12-1960 is admissible in evidence?

(8) Whether the Court has jurisdiction to entertain the suit as the relationship between the plaintiff and defendants is that of tenant and landlord?

(9) If issue No. 3 is proved, whether this court is not competent to entertain the suit?

(10) To what relief?

5. The plaintiff examined P.Ws. 1 to 7 and filed his documents Exs. A-1 to A-3. On behalf of the defendants D.Ws. 1 to 7 were examined and Exs. B-1 to B-5 were marked. On the above evidence the trial court held that the sale by P.W. 4 of the suit land to the plaintiff is not for legal necessity and is, therefore, not binding upon the defendants 1 and 2 and that the plaintiff has not made even bona fide enquiry at the time of purchase of the suit land from P.W. 4 whether there was legal necessity for the said alienation. On the second issue, the learned District Munsif held that the suit land is an inam land which cannot be alienated by P.W. 4 and the plaintiff cannot, therefore, get any title over the suit land under Ex. A-1. On issue (3) relating to the question whether the plaintiff was holding the land as a lessee of the defendants, it was found that the defendants have not established that case. On issue (4) it was held that the suit land which is a balwatha inam was excluded by the Abolition Act, and, therefore, the Inams Abolition Act had no effect upon the present suit. On issue (5) relating to the material question arising in the suit, it was held that the plaintiff was in possession on the date of the suit and that the defendants

unlawfully interfered with his possession and unyoked the ploughs of the plaintiff which gave the cause of action for the suit. On issue (6) it was held on a prior occasion by the trial court that the suit transaction is only a sale but not an agreement of sale. On issue (7) it was held that Ex. A-1 is admissible in evidence for a collateral purposes viz., to show the nature of possession of the vendee. On issue (8), it was held that the lower court has jurisdiction to maintain the suit because the relationship of landlord and tenant has not been established. On issue (9), it was held that since the lease has not been proved, the Court was competent to entertain the suit. On issue (10) relating to the relief which the plaintiff was entitled to, the learned District Munsif held that since the alienation by P.W. 4 was not for legal necessity and therefore not binding upon the defendants 1 and 2 the plaintiff cannot invoke to his aid the benefit of Section 53-A of the Transfer of Property Act. In the end, the suit was dismissed. It is therefore, clear that though almost all the findings are in favour of the plaintiff, the suit was dismissed because of the finding that the alienation made by the manager of the family was not binding upon the defendants 1 and 2 in spite of the fact that it was found that the plaintiff was found in possession on the date of the suit.

6. The plaintiff carried the matter in appeal. The learned appellate Judge also confirmed the findings of the trial court relating to legal necessity and the binding nature of the same on defendants 1 and 2. It was also held that on the basis of Ex. A-1, the plaintiff cannot claim any right. As regards the plea under Section 53-A of the Transfer of Property Act in support of his right to maintain the suit, the learned Judge held that even if it is held on the authority of *Achayya v. Venkatasubbarao*, AIR 1957 Andh Pra 854 at p. 857 that though the plaintiff is entitled to the benefit of Section 53-A since the plaintiff was only a purchaser of a coparcener's undivided interest in a joint Hindu family, he is not entitled to a permanent injunction restraining the defendants 1 and 2 who are the other co-owners, from interfering with his possession of the suit land which is the common property of the vendor of the plaintiff and the defendants simply because he purchased it from the manager. It was also held that the plaintiff who would be entitled only to the extent of the undivided interest of the vendor in the suit land, is not entitled to possession of what he has purchased and, therefore, he is not entitled to be granted an injunction restraining the other coparceners from entering into the suit land. The learned

Judge directed that the best course for the plaintiff is to sue for partition of the suit land and ask for allotment to him of that which on partition might be found to fall to the share of P.W. 4 whose share he would be entitled to under Ex. A-1. With that observation, the appeal was dismissed.

7. In this second appeal preferred by the plaintiff, the learned counsel for the appellant submitted that in view of the finding that the plaintiff was in possession of the suit land on the date of the suit and in the absence of any suit by the defendants 1 and 2 to recover possession of the property from the plaintiff on the ground that the alienation is not binding upon them, the lower court should have granted him an injunction and a refusal of the injunction on the ground that even though the plaintiff is able to justify his stand under S. 53-A of the Transfer of Property Act is not warranted. The mere fact that the alienation is not binding on the defendants 1 and 2 is not a ground according to the learned counsel to refuse an injunction in his favour so long as he is in possession.

8. On the other hand, the learned counsel for the defendants 1 and 2 argued that the only right of the purchaser like the plaintiff in this case is only to sue in a suit for general partition for adjustment of his equities and he cannot retain possession as against the other coparceners. The learned counsel argued that if a coparcener cannot obtain an injunction against another coparcener, an alienee from the coparcener cannot stand in a better position. No person, according to the learned counsel, can file a suit against a true owner for injunction. The plaintiff also cannot invoke to his aid Section 53-A for purposes of sustaining the suit.

9. The finding given by the trial court that the plaintiff has been in possession on the date of suit has not been reversed by the Appellate Court. It must, therefore, be taken that the plaintiff was in possession when he came to court with a prayer for injunction. It has also been held that Ex. A-1 was treated as a sale deed and not having been stamped and registered, it was inadmissible in evidence. But it was held that it can be looked into for collateral purposes viz. for the purposes of ascertaining whether the plaintiff was in possession on the date of the suit. This is a case where the manager of a joint Hindu family has alienated a specific item of property to the alienee i.e. the plaintiff. The other coparceners, viz. the defendants 1 and 2, have not questioned this alienation from 1960 to 1970. The alienor, as P.W. 4, sup-

ported the alienation. The alienee has been in possession from 1960 to 1970. The case set up by the defendants 1 and 2 that the plaintiff was a lessee of the suit land has been negatived. It must, therefore, be upheld that the possession held by the plaintiff was as a purchaser under Ex. A-1 and not as a lessee.

10. The next question that arises is, whether the plaintiff can protect his possession by obtaining an injunction in a court of law against a non-alienating coparcener, when he tries to interfere with his possession. This depends upon the provisions of Hindu Law. Mulla, in his treatise on Hindu Law, 13th Edition, at pages 292 and 293 deals with the rights of the purchaser of coparceners' interest. According to the learned author, as per Mitakshara Law prevailing in Bombay, Madras and Madhya Pradesh, a coparcener may alienate his undivided interest in the entire joint family property, or his undivided interest in a specific property forming part of the joint family properties. But he has no right to alienate, as his interest, in any specific property belonging to the coparcenary, for no coparcener can before partition claim any such property as his own; and if he does alienate, the alienation is valid to the extent only of his own interest in the alienated property. The purchaser of an undivided interest of a coparcener in a specific property at a private sale or sale in execution does not acquire a right to joint possession with the other coparceners. He acquires merely the right to compel a partition which the coparcener whose interest he has purchased might have compelled, and had he been so minded, before the sale of his interest took place. That right which is obtained by the purchaser can only be enforced by a suit for a general partition to which all the coparceners must be joined as parties. In such a suit, the purchaser may ask the court to allot to his vendors the specific property sold to him and the Court may allot that property to him if the interests of the other coparceners are not thereby prejudiced. So far, the law in regard to sale of undivided interest in a coparcenary has been well settled.

11. Where the purchaser has not obtained possession, but claims the whole property as his own, the non-alienating coparceners may sue him for declaration that he is entitled to no more than the undivided interest of the alienating coparcener. The learned author continues as follows:—

"If the purchaser has obtained possession, the non-alienating coparceners are entitled to sue for and recover possession of the whole of the property for the benefit of the joint family including

the vendor. The purchaser is not entitled in such suit to an order for partition either of the specific property sold to him or of the joint family properties in general. He must, if he wants to realise his vendor's interest, bring a suit of own for a general partition. Where a suit therefore is brought by the non-alienating coparceners for possession, the proper decree to be passed would be an order directing the purchaser to deliver possession to the plaintiffs of the whole property, and declaring that the purchaser is entitled to a declaration that he has acquired the undivided interest of his vendor in the property and that he is entitled to take proceedings to have that interest ascertained by partition. But to protect the purchaser a further direction is added that the execution of the decree, so far as it directs the purchaser to deliver possession to the plaintiffs, be stayed for a specific period, and if before the expiry of that period the purchaser brings a suit for general partition against the plaintiffs then the stay should continue until the disposal of that suit, but if no such suit is brought within that period, then the stay of execution will stand cancelled."

12. We are now concerned with a situation which is discussed in the passage extracted supra. Here is a case where the purchaser had obtained possession and is now seeking to protect his possession. If the non-alienating coparceners had filed a suit against the plaintiff for recovery of the whole property, they would certainly have been granted a decree for recovery of the whole property after declaring the right of the plaintiff that he is entitled to the alienor's share and staying the execution of the decree for some time during which the plaintiff might bring a suit for general partition. It means that the possession of the plaintiff would have been continued even in the case of such a suit by the non-alienating coparceners for some time more in order to enable the plaintiff to file a suit for general partition. It is not the law that non-alienating coparceners can straightway walk into the land and recover possession of the property without regard to the rights of the purchaser in the suit land. The learned author cites, in support of the above proposition, the Bench decision in *Kandasamy Udayan v. Velayutha Udayan*, ILR 50 Mad 320 = (AIR 1928 Mad 774). In that decision, a direction was given in the following terms:—

"We therefore dismiss the Letters Patent Appeal with costs and direct that the execution of the decree in plaintiffs' favour be stayed for three months and if before the expiry of that period the

appellant brings a general suit for partition then the stay would continue till the disposal of the suit for partition but if no such suit for partition is brought then the stay of execution will stand cancelled."

The citation in the Mulla's treatise is, therefore, supported by ample authority.

13. The learned counsel for the respondents relied upon the Full Bench decision in *Permanayakam v. Sivaraman*, AIR 1952 Mad 419. It is true that the Full Bench discussed elaborately all the principles relating to the rights of the purchaser of a coparcener's interest. But we do not find the point arising in this case, viz. whether the purchaser can defend his possession so long as he was in possession, has arisen in that case, nor was it considered. The law is well settled as laid down in that decision and in *Sicheswar v. Bhubneswar*, AIR 1953 SC 487 and *V. C. Thani Chettiar v. Dhakshina Murthy Mudaliar*, AIR 1955 Mad 288.

14. In *Subbe Goundan v. Krishnamachari*, AIR 1922 Mad 112, their Lordships *Kumaraswami Sastri* and *Devados, JJ.* were also dealing with the case of a coparcener filing a suit for possession. Their Lordships held that possession must be decreed declaring the right of the purchaser to a partition. In the course of the discussion, at page 117, their Lordships referred to the decision of *Hardei Narain Sahu v. Ruder Perkash Misser*, (1883) ILR 10 Cal 626 wherein a decree was passed by the High Court permitting the alienee to retain one-third share of the land which was not upset in that decision.

15. In view of the aforesaid law as stated by Mulla and as supported by the decision of the Bench in (AIR 1926 Mad 774) (*supra*), I am of the view that the plaintiff, who is an alienee from one of the coparceners in respect of the specific item of property (not an undivided share but the whole of it) can maintain his possession so long as there is no attempt made by the non-alienating coparceners to recover possession of the property from him in due course of law. In *Bhau v. Budha Manku*, ILR 50 Bom 204 = (AIR 1926 Bom 399) it was held by a Bench of the Bombay High Court that a purchaser out of possession should not be given joint possession with the other coparceners but should be left to his remedy of a suit for partition. But, if he is already in possession and a suit for recovery of possession is brought by an excluded coparcener, the purchaser need not necessarily be ejected; the Court has discretion to declare him entitled to hold pending a partition as a tenant-in-common with the other coparceners. But this view as applied in our State that he is

entitled to joint possession does not appear to apply here. But the principle that he may be permitted to retain possession before a general suit for partition is filed seems to get support from this decision as well.

16. On the authority of AIR 1957 Andh Pra 854 the appellate Court also has held that the plaintiff is entitled to the benefits of Section 53-A of the Transfer of Property Act. If so, he is entitled to protect his possession till the general suit for partition is filed. As already stated, if the non-alienating coparceners file a suit for recovery of possession the law says that they are entitled to a decree subject to a declaration in favour of the plaintiff. But, until that is done, I do not see how the plaintiff's possession can be disturbed.

17. It is argued by Mr. Mahipathi Rao, learned counsel for the respondents, that pending the first appeal before the lower Appellate Court, on account of the expiry of the period of injunction his clients got into possession and, therefore, an injunction cannot now be granted. What has happened pending the appeal before the determination of the final appeal is not a matter that can be taken into consideration in deciding the rights of the parties.

18. In the above view, I am satisfied that the plaintiff is entitled to an injunction as prayed for against the defendants. The suit of the plaintiff has therefore, to be decreed with costs throughout. The Second Appeal is allowed accordingly. Leave granted.

Appeal allowed.

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SAMBASIVA RAO, J.

The Andhra Pradesh Paper Mills Ltd., Petitioner v. The Asstt. Collector Central Excise, Rajahmundry. Respondent.

Writ Petn. No. 653 of 1972. D/- 15-4-1974.

(A) Central Excises and Salt Act (1944), S. 3 and Sch. 1, Item 17 (3) — Notification No. 163/65 C.E., D/- 1-10-65 as amended by subsequent Notifications up to 23-8-69 — Concession in duty for enlargement of production capacity— Interpretation of Notification.

The intendment of the Notification is not to limit the benefit of the concession to enlarged capacities for the first time done. The words "whose production capacity has been enlarged and brought into operation on or after 1st March,

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1964" clearly show that the enlargement in production capacities, one or more, provided they are on or after 1st March, 1964 would be entitled to the benefit.

(Para 6)

B. C. Jain and M. N. Bung, for Petitioner; K. Subrahmanya Reddy, Central Govt. Standing Counsel, on behalf of the Respondent.

ORDER:— The petitioner is "The Andhra Pradesh Paper Mills Limited" a company incorporated under the Indian Companies Act. It has brought this writ petition for a Mandamus to the Assistant Collector, Central Excise, Rajahmundry directing him to extend to the company the benefits of the Notification No. 163/65 C. E. dated 1-10-1965 issued by the Government of India, Ministry of Finance (Department of Revenue) as subsequently amended by a number of Notifications. The principal Notification and the subsequent amending Notifications relate to the concession in excise duty given to enlarge capacities of production of paper mills.

2. A few material facts of the case are necessary. The mill originally belonged to the Government of Andhra Pradesh. Its then capacity was 3,000 tons per year. The Union Government gave a licence to expand the capacity to 18,000 tons per year. The State Government acquired the entire or part of the machinery necessary for enlarging the capacity of the mills. At that stage i.e. in or about July, 1964 the State Government sold the mill to the petitioner-Company. The licence relating to expansion also was transferred to it by the Union Government by its proceedings dated 26-11-1964. A Notification bearing No. 163/65 was issued by the Government of India giving certain concessions in the levy of excise duty leviable on any factory manufacturing paper commencing production from 1st March, 1964 or enlarging its productive capacity from that date. The company completed the enlargement of the capacity to 18,000 tons per year as originally sanctioned by the Union Government. It obtained another licence dated 11-5-1966 from the Union Government for a second expansion of the productive capacity by another 13,500 tons per year. The respondent, viz., the Assistant Collector, Central Excise, Rajahmundry was prepared to give the concession as per the Notification dated 1-10-1965 only in respect of the enlarged capacity installed on the first occasion and that concession he gave. He, however, refused to extend the same concession to the further expansion made by the company under the licence dated 11-5-1966 by 13,500 tons more per year. Aggrieved by this order the company preferred an

appeal on 28-7-1970 to the Deputy Collector, Central Excise, Guntur. It is stated in the petition that no hearing was fixed by the date the writ petition came to be filed in January, 1972. It is further alleged in paragraph 20 of the petition that the respondent is only acting under the instructions of the Central Board of Revenue and consequently the normal remedies of appeal and revision after the assessments were made at the enhanced rates would only be illusory and not serve any useful purpose. It is therefore maintained that the writ petition alone is the only available effective remedy.

3. This apprehension on the part of the company and its stand that in the circumstances of the case a writ petition alone is the proper and effective remedy, are demonstrated by the following circumstances as well. Records are now placed before me to show that on the earlier occasions also assessments were made on similar basis refusing to grant concession to the enlarged capacity effected on the second occasion. An appeal was preferred to the Collector of Central Excise, Guntur, by the company and it was dismissed on 22-4-1970. The company preferred a revision application to the Government of India, Ministry of Finance. By Order No. 1/74 dated 8-1-1974 the Government rejected the revision petition holding that

"according to the wordings of the above mentioned Notification (i.e., Notification No. 163/65 dated 1-10-1965) a factory existing before 1-3-1964 but whose production capacity has been enlarged on or after 1-3-1964 will be entitled for concessional slab rate of duty under column 5 thereof only for first time when the production capacity is enlarged and not every time whenever production capacity is enlarged. The revision application is therefore rejected."

It is thus abundantly clear that not only the respondent but also the Collector of Central Excise as well as the Government of India have made up their minds by adopting the construction given to the Notification by the respondent in this case. Their construction, to put it briefly, is that the concession given under the Notification is not available to capacities enlarged for the second or further time. It is thus manifest that there would not be any useful purpose by referring the petitioner Company to an appeal and a further revision to the Government though those remedies are available to him. The attitude of the concerned authorities is clearly beyond doubt. I am thus satisfied that the writ petition alone is an effective remedy open to the petitioner-Company.

4. In the counter-affidavit as well as in the arguments addressed before me by the standing counsel for the respondent it is stated that the concession under the G. O. is limited only to the first enlarged capacity. It is not available and not intended to be made available to any second or further enlargement of the capacity. If such benefits are given, it will result in giving double benefit to the factories.

5. I will now examine the relative merits of the claim and counter-claim of the petitioner and the respondent. In order to do so it is necessary to read the material portion of Notification No. 163/65 dated 1-10-1965:

"..... the Central Government hereby exempts paper, all sorts, falling under this Item and specified in column 2 of the Table annexed hereto from so much of the excise duty leviable thereon under the said Item, read with any Notification for the time being in force issued by the Central Government in relation to the duty as leviable, as is specified in the corresponding entry in columns 3, 4, 5 (a), 5 (b) and 5 (c) of the said Table as the case may be."

Then follows the Table which gives the different columns. In column 1 descriptions of the paper are given, first of which is "Printing and writing paper falling under sub-item (3) of Item No. 17 of the First Schedule to the Central Excises and Salt Act, 1944". It is common ground that the paper produced by the company comes under one of the categories mentioned in column (1). We are not here concerned with any other column, excepting columns 5 (a), 5 (b), and 5 (c). These sub-columns occur under the following headings:

"Any factory commencing production for the first time on or after the 1st March, 1964 or any factory existing immediately before the 1st March, 1964 whose production capacity has been enlarged and brought into operation on or after the 1st March, 1964 to the extent such production is attributable to the enlarged capacity."

Columns 5 (a), 5 (b) and 5 (c) occur under the following headings:

Column 5 (a):

"During the first 12 months of the Commencement of Production."

Column 5 (b):

"During the second 12 months of the commencement of production."

Column 5 (c):

"During the period subsequent to the first 24 months of the commencement of production."

The concessions that are given to the factories under these columns vary from equality to quality of paper described in

column 1. The actual quality of the paper is not in dispute, as I have already said. The only point in controversy between the parties is whether the benefit given under column 5 and detailed in sub-columns (a), (b) and (c), is available to the production capacity enlarged on the second occasion also. To briefly recall the facts, on the first occasion the production capacity of the company Mills was increased from 3,000 tons to 18,000 tons to 31,500 tons. There is no dispute in regard to making to the petitioner available the benefit of the concession in regard to the first enlargement of 18,000 tons. It is denied only to the second enlargement of the capacity by 13,500 tons. While the petitioner claims that under the language of the Notification the concession is available to this enlargement also, the Revenue says that the benefit is limited only to the first enlargement. Both sides rely on the language of the Notification for their respective contentions.

6. That material portion I have already extracted. The heading to column 5 is the most important portion of the Notification which has to be understood for the purpose of the present controversy. According to it, if a factory commences production on or after 1-3-1964 for the first time, it gets the benefit. Likewise if any factory which had been existing before that day but whose production capacity has been enlarged and brought into operation on or after 1-3-1964, it will also get the benefit of the concession, but only to the extent such production is attributable to the enlarged capacity. Thus, 1st March, 1964 is made crucial. There cannot be any iota of doubt that the second enlargement in the production capacity of the company's paper has been planned and brought into operation after 1st March, 1964. Thus on a plain reading of the language this concession should apply to this enlargement as well. But it is contended that the company has enjoyed the benefit of the concession once when it enlarged its capacity to 18,000 tons after 1st March, 1964 and so it is not entitled to the same benefit for the second time. To put the contention of the respondent in other words, the concession postulated by the notification is intended to be given only to a first enlargement, i.e. to a single enlargement alone. It is argued that otherwise the Notification would have mentioned that enlargement in the production capacity "from time to time" would enable the factory to get the benefit. When those words are absent particularly in a Notification which relates to finance and taxation, it should be construed strictly. I am unable to uphold this construction which, in my view, is not only not warranted by the language

employed, but also appears to be opposed to it. The Notification has not hesitated to use the words "for the first time" when it has referred to factories commencing production on or after 1st March, 1964. If its intention is to limit the concession to enlarged capacities for the first time alone, then it would have clearly said so. When these specific words are used in one part and not used in another, the intention of the Government is quite manifest and beyond any doubt. It did not want to limit the scope only to the first enlargement or a single enlargement. The words "Whose production capacity has been enlarged and brought into operation on or after the 1st March, 1964" are very clear in disclosing the intention behind the Notification that enlargement in production capacities, one or more, provided they are on or after 1st March, 1964 would be entitled to the benefit. To read some other meaning into it would in my opinion be doing violence to the language of the Notification.

7. Even otherwise the contention of the respondent appears to be against the intendment and the policy behind the Notification. The intendment appears to be to give encouragement to new production of paper or new enlargements in production capacities of paper factories. If that be the intendment, there would be no point in limiting the benefit only to the first or a single enlargement.

8. I do not find any justification for the apprehension expressed by the learned Standing Counsel for the Central Government that if the Notification is read in this way, it would result in giving the benefit twice over to the paper mills. The first enlargement will get its benefit according to sub-columns 5 (a), 5 (b) and 5 (c) of four years to the extent the increased production is attributable to the enlargement. When the second enlargement takes place, only the enhanced production that is attributable to it alone would get the benefit of the concession mentioned by sub-columns (a), (b) and (c). I fail to see how a double benefit would accrue to the factory.

9. For the reasons aforesaid, I do not think that the respondent or the Government of India are correct in interpreting the Notification in question in the way in which they have done by limiting the benefits thereunder only to the first enlargement. By virtue of the Notification, a right has vested in the petitioner to the benefit enunciated in it and the respondent is bound to give effect to it. I am therefore satisfied that the petitioner is entitled to a writ of Mandamus and I consequently direct a writ to be issued directing the respondent to give the benefit of the Notification No. 163/65

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dated 1-10-1965 to the second enlargement of 13,500 tons of paper per year as per the provisions of sub-columns 5 (a), 5 (b) and 5 (c) of the Notification. The Writ petition is thus allowed with costs.
Petition allowed.

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VENKATRAMA SASTRY, J.

Chittoori Suryarao, Petitioner v. Chittoori Ramachandra Rao, Respondent.

Civil Revn. Petn. No. 1078 of 1974. D/- 19-12-1974.*

(A) Civil P. C. (1908), O. 9, R. 13 — Transfer of territorial jurisdiction — Application under O. 9, R. 13 lies only in new court — (Ibid, S. 150).

In the case of original applications under O. 9, R. 13 which require after the setting aside the ex parte decree a trial of the suit afresh, the Court should have territorial jurisdiction over the subject-matter and so when the territorial jurisdiction has been transferred by virtue of a notification to another court, the application under O. 9, R. 13 cannot be entertained by the Court which originally passed the ex parte decree. The cases relating to execution stand altogether on a different footing, because the wording in Sections 37 to 39, C.P.C. contain a specific provision that they can be filed only in the Court which passed the decree. (1969) 2 APLJ 342 and AIR 1925 Mad 117, Distinguished; AIR 1922 Mad 10 and AIR 1923 Mad 92, Relied on.

(Para 13)

Cases Referred: Chronological Paras

(1974) L. P. A. No. 193 of 1972, D/- 21-1-1974 (Andh Pra)	12
(1969) 2 APLJ 342 = (1970) 2 Andh LT 17	7
AIR 1964 Andh Pra 68 = (1963) 2 Andh WR 324	10
AIR 1962 Ker 105 = 1961 Ker LJ 1361	12
AIR 1958 Andh Pra 763 = (1958) 2 Andh WR 511	8
AIR 1957 Pat 73 = ILR 35 Pat 639	12
AIR 1943 Mad 617 = (1943) 2 Mad LJ 31	11
AIR 1932 Mad 260 = 61 Mad LJ 307	11
AIR 1932 Mad 418 = ILR 55 Mad 801 (FB)	10, 11
AIR 1928 Mad 746 = 28 Mad LW 885	10, 11
AIR 1925 Mad 117 = 47 Mad LJ 448	8, 13
AIR 1923 Mad 92 = 43 Mad LJ 713	11, 12, 13

*(Against order of Sub-J., Tanuku in I. A. No. 370 of 1974, D/- 17-6-1974.)

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AIR 1922 Mad 10 = 42 Mad LJ 344 11, 12, 13

AIR 1920 Mad 427 = ILR 42 Mad 821 (FB) 11, 12

AIR 1917 Mad 448 = ILR 39 Mad 907 11

T. Veerabhadrayya, for Petitioner;
C. V. N. Sastry, for Respondent.

ORDER :— This is an application to revise the order of the learned Subordinate Judge, Tanuku disposing of a preliminary objection regarding jurisdiction raised by the petitioner herein to the entertainment of an application under Order 9, Rule 13, C.P.C. by the lower court arising in the following circumstances:

2. An extent of one acre of land was acquired by the Government and in O. P. 69 of 1966 on the file of the Sub-Court, Eluru a sum of Rs. 6340.52 was deposited by the Government towards compensation. The first claimant in the said O. P. was one Chittoori Ramachandra Rao. He was set ex parte. The amount was paid to other claimants by the order in the O. P. dated 17-2-1967.

3. On 10-12-1968 by G. O. Rt. No. 4550 a new Sub-Court at Tanuku was constituted. It came into existence on and from 10-1-1969. By virtue of Notification No. 3 in the said G. O. given under S. 10 of the Andhra Pradesh (Andhra Area) Civil Courts Act, 1873, the local limits of the jurisdiction of the District Court and the Subordinate Judge Courts in West Godavari were refixed as per the table mentioned therein. Against the entry No. 2 Sub-Court Eluru, the following has been mentioned in Col. 3 as its territorial jurisdiction.

"Original Jurisdiction: Area covered by the territorial jurisdiction of the District Munsifs of Eluru, Chintalapudi and Tadepalligudem.

Appellate Jurisdiction: Such of the appeals as are transferred by the District Court, West Godavari over to the Munsifs of Eluru, Chintalapudi and Tadepalligudem."

Against entry No. 4 relating to Sub-Court, Tanuku (Temporary) the following has been mentioned to be its territorial jurisdiction.

"Original and Appellate Jurisdiction: Over the areas covered by the territorial jurisdiction of the Munsifs of Tanuku and Kovvur."

The respondent herein filed I. A. No. 619 of 1969 on 8-8-1969 for setting aside the ex parte decree passed in O. P. No. 69 of 1966 as against him. The petitioner herein who was the contesting respondent in that application filed I. A. 370/74 under Order 14, Rule 2 and Section 151, C.P.C. praying to hear about the maintainability of the above petition on the question of

jurisdictional issue in the first instance. In the affidavit filed in support of that application it was stated that the respondent herein has no manner of right to file I. A. No. 619 of 1969 in the Sub-Court, Tanuku and it is not maintainable according to law in that court. The said application was contested by the respondent by filing a counter wherein he stated that that court has jurisdiction which was established on 10-1-1969 and all the business of Eluru Sub-Court so far as jurisdiction of Tanuku Taluk is concerned was transferred to that court (Sub-Court, Tanuku) from 10-1-1969 onwards. Therefore, the Sub-Court Tanuku to which the business is so transferred has the same power and was performing the same duties as those of Eluru Sub-Court previously. It was, therefore, stated that the petitioner has no right to question the jurisdiction of that Court.

4. The lower court took up the point about the jurisdiction as follows:

"Whether this court has jurisdiction to entertain the petition I. A. 618/69 in O. P. No. 69 of 1966."

The lower court held that the Sub-Court Tanuku had jurisdiction to entertain the said petition. In that view the said application was dismissed.

5. In this revision preferred against the order Mr. T. Veerabhadraiah, learned counsel for the petitioner, made the following submissions. Section 150, C.P.C. speaks of a transfer of business of any court to another court. Where the notification in question does not transfer the business pending as well as disposed of — the new court can have jurisdiction only in regard to new business, but not in regard to old business. When once a court has jurisdiction to entertain a suit at a time when it had territorial jurisdiction, it continues to have that jurisdiction to pass a final decree in that proceeding irrespective of the fact of transfer of jurisdiction in the meanwhile. In the present case, the notification does not in so many terms transfer the pending or closed matters and therefore there can be no application for setting aside an ex parte decree in regard to a matter which is disposed of. The learned counsel also argued that the Sub-Court Eluru still continues to have jurisdiction to try and dispose of the O. P. even if the application under Order 9, Rule 13, C.P.C. is allowed and the case is set down for hearing. He has relied upon a few decisions which will be presently referred to.

6. On the other hand, Mr. C. V. N. Sastry, learned counsel for the respondent, contended that where the new court is constituted with a new territorial jurisdiction, it amounts to transferr-

ing the business of the court which previously handled such business and therefore there need not be a specific mention in the notification of the pending and old matters; Section 150, C.P.C. is, therefore, applicable to this case. Even otherwise he has argued that this principle has not been applied to cases of new and independent applications like applications to set aside *ex parte* decree etc. in various Bench decisions of the Madras High Court and this Court. The said principle if at all is applicable only to cases for execution of the decrees passed by the Court because they depend upon the wording of Sections 37 to 39 of the C.P.C. which contain specific expressions like 'Court which passed the decree'. I would now consider the validity of the respective contentions.

7. Mr. Veerabhadriah, learned counsel for the petitioner, very strongly relied upon the decision of their Lordships Gopal Rao Ekbote and Alladi Kuppuswami, JJ. in *S. N. Prasanna Kumar v. Zabirabee*, (1969) 2 APLJ 342. That was a case where a decree was passed by the District Court at Bangalore. A fresh court was constituted at Tanuku. There the execution petition which was pending before the District Court was transferred to the Civil Judge, Tumkur. The District Court, Bangalore did not cease to exist. In those circumstances, their Lordships held that the creation of a new jurisdiction does not by itself affect previously existing jurisdiction in the absence of express provision and that where a decree was passed in respect of certain property and subsequent thereto the area within which such property is situate is transferred to the jurisdiction of another court, the Court which actually passed a decree nevertheless does not cease to have jurisdiction to execute it and can therefore entertain an application for execution thereof. It was held that the Tumkur Court to whose jurisdiction the subject-matter of the decree was transferred did not become the Court which passed the decree for the purpose of execution.

8. Their Lordships repelled the argument of the learned counsel for the respondent based upon Section 150, C.P.C. The argument was that where a particular area is transferred from the jurisdiction of one Court to another Court it would also amount to transfer of the business of that court to the other within the meaning of Section 150. Dealing with this argument their Lordships say that the answer would depend upon what is exactly meant by the 'transfer of business'. Their Lordships held that a business cannot be said to have been removed or transferred from one Court to another if the original Court continues to have

the power to deal with that business. They relied upon the principle laid down in *Chokkalinga v. Velayudha*, AIR 1925 Mad 117 and *Lalithamba v. Mangamma*, AIR 1958 Andh Pra 763 for the proposition that where a Court has jurisdiction to entertain the suit at the time of its institution, such jurisdiction is not lost by a subsequent transfer of an area or territory with reference to which the suit was instituted. In that connection their Lordships observed that if the notification merely transferred the area without anything more, then what must follow is that only new business which may thereafter arise, would be deemed to have been transferred to the new jurisdiction. But if the notification in clear terms also transferred the pending and old cases, then the new court can also exercise that jurisdiction. It was, therefore, held by their Lordships that in the absence of specific notification to that effect it cannot be held on the facts of that case that the Tumkur Court had any jurisdiction to entertain the execution application.

9. This is no doubt an authority for the proposition that in applying S. 150 C.P.C., we have to see if there was a transfer of business within the meaning of Section 150, C.P.C. If the transferor court does not cease to exist and is still capable of functioning, it cannot be held that the business has been transferred unless the notification in specific and clear terms transfers the business of that court as a whole. It may no doubt be necessary to look into the notification for that purpose. The true principle of that decision appears to me to be that where the District Court has still got power to execute the decree and it has not ceased to exist, the creation of a new court at Tumkur within the jurisdiction of that District Court would not take away the jurisdiction of the District Court at Bangalore to execute the decree passed by it, in spite of the transfer of territorial jurisdiction to the new court.

10. In my opinion, the above decision has no application to the facts of the present case. Here by virtue of the notification, the territorial jurisdiction has been transferred from Sub-Court, Eluru to the Sub-Court, Tanuku. The entire business of the Sub-Court, Eluru relating to that territorial jurisdiction has been transferred to the Sub-Court, Tanuku. Hence it is only the Sub-Court Tanuku that can entertain any matter relating to that territorial jurisdiction after that notification. Even if I am not correct in my interpretation about the effect of notification, the cases relating to execution under Section 150, C.P.C. have always been distinguished from the cases

arising under independent and new applications like Order 9, Rule 13, C.P.C. in a number of other decisions. Before I advert to those decisions, I may also mention that in various decisions of the Madras High Court it was held that where the territorial jurisdiction was transferred after the decree has been passed, the Court to which jurisdiction had been transferred had no power to execute the decree under Section 150 as that section is limited to cases where specific business is transferred. It was so decided in *Subramanya v. Swaminatha*, AIR 1928 Mad 746. This case was approved by a Full Bench of the Madras High Court in *Ramier v. Muthu*, ILR 55 Mad 801 = (AIR 1932 Mad 418) (FB) which also was a case relating to execution. This principle was also applied by our High Court in *Hanumayya v. Venkatasubbiah*, (1963) 2 Andh WR 324 = (AIR 1964 Andh Pra 68) by their Lordships Chandra Reddy, C. J. and Gopalakrishnan Nair, J. It was held in that decision that the decree-holder could not file an execution petition in the court having territorial jurisdiction so long as the court which passed the decree exists and so long as there is no transfer of business by the District Court to that Court or an order passed under Section 24 or Section 39 of the C.P.C. It must, therefore, be taken to be established that, in the case of execution of decree the transfer of territorial jurisdiction may not affect the jurisdiction of a court to entertain an application for execution.

11. But in the case of applications under Order 9, Rule 13, C.P.C. the decisions have taken a contrary view. In *Srinivasa v. Hanumantha*, AIR 1922 Mad 10 the petitioner was the plaintiff in C. S. 1230/1919 on the file of the District Munsif's Court, Penukonda. He obtained an ex parte decree against the respondent and others. Subsequently there was a readjustment of territorial jurisdiction between that court and the District Munsif's court of Anantapur as a result of which all the properties included in the decree were transferred to the jurisdiction of the Anantapur Court. The respondent in that petition applied to the Anantapur court to set aside the ex parte decree passed against him. The said application was granted. A revision petition was preferred against that order. The argument was that it was the Penukonda Court as the court which passed the decree that had jurisdiction to entertain an application under Order 9, Rule 13, C.P.C. and the Anantapur court had no jurisdiction to do so. Their Lordships Spencer and Krishnan, JJ., held that the decree was valid one. Spencer, J., based his decision on the reasoning that a libe-

ral construction on the wording of Section 150 and O. 9, R. 13, C.P.C. should be placed because under O. 9, R. 13, C.P.C. a Court after setting aside the ex parte decree should appoint a day for proceeding with the trial of the suit and those words would be meaningless if such application alone were to be disposed of by the Court which had ceased to have a jurisdiction over the suit itself. Krishnan, J. considered the applicability of Section 150, C.P.C. also. It was held that there is as much reason to apply the section to cases of transfer of defined local areas as to cases of transfer of the whole jurisdiction and the observations of Ayling, J., in *Seeni Nadan v. Muthuswami Pillai*, ILR 42 Mad 821 = (AIR 1920 Mad 427) (FB) were followed in that connection. The learned Judge also has laid great stress upon the words "Save as otherwise provided" in Section 150 as preventing its applicability to the present case as it was argued that O. 9, R. 13, C.P.C. requires that an application should be made to the court which passed the decree, and to no other court. The rule was held to be an enabling one which prescribes what is to be done in the ordinary course to get an ex parte decree set aside, but does not say that the court that passed the decree is the only court that can set it aside. Nor is there anything restrictive in the wording. The observations of Srinivasa Aiyengar, J. in *Suppi v. Kunhi Koya*, ILR 39 Mad 907 = (AIR 1917 Mad 448) to the following effect "where the business of one court is transferred to another, the court to which the business is so transferred may, I think under Section 150, entertain an original application for attachment or arrest under cl. (3) of Rule 2 of Order 39" were followed and it was held that original application can therefore lie in the transferee court. This decision is, therefore, an authority for the proposition that where there is a transfer of territorial jurisdiction an application under Order 9, Rule 13, C.P.C. lies in the new court. This decision was followed in *M. Guruswamy Naicker v. Sheikh Muhammadhu Rowther*, AIR 1923 Mad 92. The question that arose in that decision was about the right of the transferee court to give punishment for the breach of an injunction granted by the original court. It was held by their Lordships Krishnan and Venkatasubba Rao, JJ., that it could be done. The two decisions in (AIR 1922 Mad 10) and (AIR 1917 Mad 448) were followed. In *Narasimharaju v. Brundavanasahu*, AIR 1943 Mad 617 their Lordships Abdur Rahaman and Somayya JJ. were dealing with an application under Section 19 of the Act 4 of 1938 in the transferee court. There, the original Court was Erhampore Court and the

new Court was Chicacole Court. It was held that whatever might have been said in regard to the execution applications to which Section 37, C.P.C. in terms applied the question as to fresh and independent applications, as the application under Section 19 of the Act 4 of 1938, was a very different one. Their Lordships then referred to the two decisions in (AIR 1922 Mad 10) and (AIR 1923 Mad 92) and followed them. Same view was also expressed in *Muthukumara Pillai v. Thyrunarayana Pillai*, 61 Mad LJ 307 = (AIR 1932 Mad 260) which is also approved in this case. Their Lordships distinguished the two decisions in (AIR 1928 Mad 746) and (AIR 1932 Mad 418) (FB) referred to supra and held that they cannot be held to be in conflict with what was decided in the other cases viz. (AIR 1922 Mad 10) and (AIR 1923 Mad 92). The Full Bench case was explained as a case relating to execution of a decree and it was so distinguished by Mulla in his Commentary under Section 150, C.P.C. Applying the principle, therefore, of the other two decisions, their Lordships held that the Chicacole Court must be, for the purpose of new and independent applications and which are not those of execution, deemed to be a proper Court.

12. In L. P. A. No. 193/1972 my learned brothers Kondiah and Madhava Rao, JJ., in judgment dated 21-1-1974 (Andh. Pra.) also followed the two decisions in (AIR 1922 Mad 10) and (AIR 1923 Mad 92) and also approved the observations of Ayling, J., in (AIR 1920 Mad 427) (FB). Their Lordships also followed two other decisions in *Achuthan v. Karthiyanani Amma*, AIR 1962 Ker 105 and *Sheobrich Singh v. Basgit Singh*, AIR 1957 Pat 73. In the case before Kondiah and Madhava Rao, JJ. the suit was originally filed in the Sub-Court Visakhapatnam as O. S. No. 29/1960. It was later on withdrawn by the District Court, Visakapatnam and numbered there as O. S. No. 13/61 on its file and an ex parte decree was passed therein. Subsequently the jurisdiction over the area was transferred to the Sub-Court, Vizianagaram where the suit which was transferred was numbered as O. S. No. 17/1967. In that suit an application under Order 9, Rule 13, C.P.C. has been filed. Their Lordships after discussing the aforesaid decisions and following the principle laid down therein held that the application under Order 9, Rule 13, C.P.C. was maintainable in the Sub-Court, at Vizianagaram.

13. Mr. T. Veerabhadriah, learned counsel for the petitioner sought to distinguish the two cases in (AIR 1922 Mad 10) and (AIR 1923 Mad 92) on the ground that there was no specific order of transfer of business and in the other case the

transfer was presumed. I do not think that they can be distinguished on that ground. The principle laid down in the aforesaid cases which has been followed in the latter decisions is that in the case of original applications under Order 9, Rule 13, C.P.C. which require after the setting aside the ex parte decree a trial of the suit afresh, the Court should have territorial jurisdiction over the subject-matter and so when the territorial jurisdiction has been transferred by virtue of a notification to the other court, the application under Order 9, Rule 13, C.P.C. cannot be entertained by the Court which originally passed the ex parte decree. This seems to be the principle on which the aforesaid decisions proceeded. The cases relating to execution stand altogether on a different footing, because the wording in Sections 37 to 39, C.P.C. contain a specific provision that they can be filed only in the Court which passed the decree. Those cases are, therefore distinguishable and have also been distinguished in various cases mentioned by me supra. So long as the Court which passed the decree is not abolished but is still existing, it has got power to execute the decree in spite of the subsequent transfer of its territorial jurisdiction. This principle is now well established. Learned counsel then places great reliance upon the observations in (AIR 1925 Mad 117) to the effect that the court will have jurisdiction to pass a final decree in the matter in spite of transfer of territorial jurisdiction. But it may be noted that that case related to the passing of a preliminary decree and a transfer of territorial jurisdiction thereafter. In spite of the transfer, the same Court passed the final decree. That decree was sought to be attached in a separate suit. Their Lordships in that connection made the observations that once the Court has seized of the case it had jurisdiction to try it to its conclusion unless there is any reason for holding that that jurisdiction has been removed though the subject-matter of the suit may be transferred to another court in the meanwhile. I do not think that that decision can be of any assistance in the circumstances of this case to the petitioner herein. Here we have got a case where a final decree was passed in the O. P. It is now sought to be set aside. After setting aside, the Sub-Court, Eluru cannot, in view of the transfer of jurisdiction to the Sub-Court, Tanuku have jurisdiction over the property, and entertain the O. P. any further. Hence it cannot be said that it can entertain an application under Order 9, Rule 13, C.P.C. on that basis.

14. In the above view, I am satisfied that the view held by the lower Court is correct and that this revision is

devoid of merits. It is therefore, dismissed with costs.

Revision dismissed.

AIR 1975 ANDHRA PRADESH 262

KUPPUSWAMI AND SHIV
SHANKER, JJ.

Gayatri Salt Works and another, Petitioners v. The Government of Andhra Pradesh, Respondent.

Writ Petn. No. 723 of 1974, D/- 2-12-1974.

(A) Andhra Pradesh Agricultural Lands (Prohibition of Alienation) Act (13 of 1972), S. 3 (c) — Definition of 'land' in consonance with entry 18 of List II, Sch. 7 of Constitution — Definition affecting Salt Manufacture and Salt Act will not make Act ultra vires — Act is intra vires the State Legislature — (Constitution of India, Art. 246 (2) and Sch. VII, List II, Entry 18).

Section 3 (c) defines 'land' as land which is used or is capable of being used for purpose of agriculture including horticulture. This definition is in consonance with the meaning of the term 'agricultural land' in Entry 18 of List II of the Constitution. The pith and substance of the Act is to prohibit transfer of agricultural lands. This falls squarely within item 18 of List II and hence the State Legislature was entitled to enact the impugned legislation. (Para 10)

The mere fact that the impugned legislation would have the effect of preventing the persons carrying on business of manufacture of salt, from alienating their lands and thus affect to some extent the regulation, manufacture and control of salt under the Salt Act passed by the Central Legislation, would not make the State Legislation ultra vires. AIR 1972 SC 2301, Rel. on. (Para 13)

(B) Andhra Pradesh Agricultural Lands (Prohibition of Alienation) Act (13 of 1972), S. 3 (c) — 'Capable of being used for agriculture' — Meaning of — (Constitution of India, Sch. VII, List II Entry 18).

"Capable of being used" means reasonably capable of being used. If it is capable of being used without incurring large expenditure out of proportion to the value of the land, taking into account the purpose to which it has to be put to use, or without much effort on the part of the petitioners it can be said to be a land which is capable of being used. On the other hand, if it involves enormous expenditure or effort, though in theory it may be possible to

put it to agricultural use it cannot be said by any reasonable person that it is capable of being put to agricultural use.

(Para 15)

(C) Andhra Pradesh Agricultural Lands (Prohibition of Alienation) Act (13 of 1972), S. 3 (c) — Question whether land is 'capable of being used for agriculture' — Registration of land as 'agricultural land' is not determinative of the question.

The mere fact that a land is entered in the Revenue Record as agricultural land is not determinative of the question whether it is capable of being used. It may be one of the factors in considering the question whether it can be treated as 'capable of being used for agriculture'.

(Para 15)

Cases Referred: Chronological Paras

AIR 1972 SC 2301 = (1973) 1 SCR 356 13

AIR 1969 Andh Pra 345 = (1969) 2 Andh

WR 388 (FB) 8, 15

AIR 1967 SC 1110 = (1967) 1 SCR 602 10

AIR 1961 SC 652 = (1961) 3 SCR 242 10

AIR 1958 SC 560 = 1959 SCR 379 10

AIR 1947 PC 60 = 74 Ind App 23 13

AIR 1944 Cal 421 = 48 Cal WN 759 8

AIR 1944 Mad 401 = (1944) 1 Mad LJ 361 8

K. Kameswara Raju, for Petitioners;
Advocate-General, for Respondent.

ALLADI KUPPUSWAMI, J.:— The petitioners are two firms carrying on the business of salt production at Polekurru, Kakinada taluk, East Godavari District. The first petitioner was granted a licence to manufacture salt in an extent of Ac. 607-52 and the second petitioner in an extent of Ac. 572-41. The licences were issued from year to year pending alignment of the salt pans as per the plan, to be approved by the Salt Department. Accordingly, realignment plans were submitted and applications were made for the grant of permanent licences. Approval of the re-alignment plan was communicated and the firms were directed to take up the work of realignment as per the approved plans.

2. As large sums of money were required for undertaking the various works in accordance with the approved realignment plans and due to shortage of funds the petitioners decided to sell some of the lands covered by the licences in order to raise the required funds. The firms therefore, entered into negotiations with buyers and having entered into contracts with them were considering the execution of the sale deeds in respect of those lands. They were however, informed that under the provisions of the Andhra Pradesh Agricultural Lands (Prohibition of Alienation) Act, 1972 (referred to in this judgment as 'the Act'), the lands could not be alienated as the petitioners

owned lands in excess of the limit specified in the Act, namely 4 hectares of wet land and 10 hectares of dry land and any document of sale could not be registered.

3. The petitioners therefore, filed this writ petition praying that this court may declare that the Act does not apply to the petitioners' lands and that a direction may be given that the sale-deeds in respect of those lands may be registered. The case of the petitioners is that the Act applies only to land which is used or is capable of being used for the purpose of agriculture, including horticulture. The lands which the petitioners intend to sell are lands in which salt is being produced and are neither used for the purpose of agriculture nor are they capable of being used for that purpose. Hence, they are free to alienate those lands and the sale deeds in respect of those lands have to be registered. Subsequently, a petition to amend the writ petition by adding paragraphs 6 (a) to 6 (e) was filed and was ordered as it was not opposed. In the amended writ petition it was contended that as the lands were actually under use for manufacture of salt they cannot be treated as agricultural lands or capable of being used for agricultural purpose, nor can they be so treated on the ground that sometime ago some of these lands were used for agriculture. Conversion of the petitioners' lands into salt lands became inescapable due to the tidal wave in the year 1963 which completely submerged these lands with sea water. It was further contended that in case the petitioners' salt lands are to be treated as agricultural lands, the definition of 'land' in the Act so as to bring within its fold 'salt lands' licenced as a salt factory under the Central Excises and Salt Act, which provides that such salt lands shall be held only for the purpose of manufacturing salt and for no other purpose, is ultra vires the State Legislature as the subject of manufacture, regulation and control of manufacture of salt is a union subject falling under Entry 52 of List I of the Constitution. The definition of 'Land' in such manner is repugnant to the Central Excises and Salt Act, 1944. The State Legislature has enacted the Act by virtue of Entry 18, List II, but as the Central Excises and Salt Act is a law enacted by Parliament under Entry 58, the State Act would be wholly repugnant to the Central Act if it should be applicable to salt lands. The definition of 'land' in the Act, in so far as it seeks to include 'salt lands' is wider and different from the expression 'agricultural land' which is the subject of Entry 18, List II and it is not open to the State Legislature to legislate with respect to lands which are not agricultural lands by merely enlarging the definition of 'agricultural land'.

4. In view of the allegations in the writ petition as subsequently amended, the following questions fall for consideration:

- (1) Whether the impugned Act is within the powers of the State Legislature?
- (2) If the expression 'land' is interpreted so as to include lands used for the manufacture of salt, whether the Act is to that extent repugnant to the Central Excises and Salt Act and is therefore ultra vires?
- (3) Whether the lands belonging to the petitioners are lands to which the provisions of the impugned Act are applicable?

5. Before dealing with these contentions it is necessary to briefly set out the relevant provisions of the impugned Act. The impugned Act, namely, Act 13/72 was enacted with a view to prohibit alienation of agricultural lands by certain persons in the State of Andhra Pradesh.

6. Section 5 (1) is as follows:—

"No person whose holding as on the date of commencement of this Act or at any time thereafter exceeded the specified limit shall alienate such holding or any part thereof by way of sale, lease for a period exceeding six years, gift, exchange, usufructuary mortgage or otherwise or effect a partition or create a trust of such holding or any part thereof and any alienation made or partition effected or trust created in contravention of this section shall be null and void."

Section 5 (2) is in similar terms and deals with alienation by a member of a family. 'Holding' is defined in Section 3 (b) as the entire land held by a person as owner. Section 3 (c) defines 'land' as land which is used or is capable of being used for the purpose of agriculture including horticulture. Section 3 (e) defines 'specified limit' as the extent of land specified in Section 4 as the specified limit. Section 4 prescribes the specified limit for the purposes of Section 5 as 4 hectares in the case of wet land and 10 hectares in the case of dry land. From a reading of these provisions together it is seen that no person whose holding exceeds 4 hectares in the case of wet land or 10 hectares in the case of dry land shall alienate such holding. The 'land' referred to is the land which is used or is capable of being used for the purpose of agriculture including horticulture. It is only such type of land that cannot be alienated. Section 6 prohibits the registration of any document relating to alienation of land contrary to the provisions of the Act. It is admitted that the petitioners' holding exceeds the specified limit referred to in

Section 4. But it is contended that the land is not land which is used or is capable of being used for the purpose of agriculture including horticulture within the meaning of Section 3 (c) and hence the provisions of Section 5 do not apply to such land.

7. Dealing now with the first contention regarding the powers of the legislature to pass the impugned Act, it is seen that the Act is passed in exercise of the powers conferred under Art. 246 (2) of the Constitution read with List II, Entry 18. Entry 18 of List II, which is in the State List, is as follows:

"Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land, land improvement and agricultural loans colonisation."

It is clear from this entry that the State Legislature is entitled to enact a legislation dealing with the transfer and alienation of agricultural land. The impugned Act is one prohibiting alienation of land which is defined under the Act as land used or is capable of being used for the purpose of agriculture including horticulture. If, land which is defined under the Act is agricultural land within the meaning of Entry 18 there can be no doubt that it is within the competence of the State Legislature to enact the legislation in question.

8. Though the expression 'agricultural land' is not defined in the Constitution or the Government of India Act, the expression 'agricultural land' in Entry 18, List II, Schedule VII of the Constitution and the corresponding entry in the Government of India Act, 1935 have been the subject-matter of interpretation in a number of decisions. In *Sarojini Devi v. Sri Krishna*, AIR 1944 Mad 401 it was held that the expression 'agricultural lands' in Lists II and III of Sch. 7 of the Government of India Act must receive the widest meaning and the expression 'agricultural lands' must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry. In this connection it may be noticed that Entry 18 of List II of the Constitution corresponds to Entry 21 of List II of the Government of India Act which was the subject-matter of consideration in AIR 1944 Mad 401 (supra). In *Nil Govinda Misra v. Rukmini Deby*, AIR 1944 Cal 421 also it was held that the phrase 'agricultural land' in Item 21 of List II of the Government of India Act would include not only lands actually used for raising by cultivation, foodgrains and other crops, but would

also include lands not being actually used and are lying waste. A piece of fallow land in the middle of agricultural fields would have to be taken as agricultural land, for it is capable of being brought under tillage and would in all probability be brought under tillage. Land so used or land though lying unused, but capable of being used, having regard to its general nature and character, for raising food for men and beasts, foodgrains and vegetables and fodder etc. Should be regarded as agricultural lands. In *Court of Wards Paigah v. Commr. of Wealth Tax*, AIR 1969 Andh Pra 345 (FB) a Full Bench of this court had to consider the meaning of the words 'agricultural land' in the Wealth Tax Act. It held that it should be given the same meaning as the said expression bears in Entry 86 of List II of the Constitution and given the widest meaning. Approving the decision in AIR 1944 Mad 401 (supra) it was held that land which is left barren but which is capable of being cultivated can also be 'agricultural land'. It was observed that every land which is presently or prospectively capable of cultivation, can be said to be 'agricultural land'.

9. It is clear from the aforesaid decisions that the expression 'agricultural land' as used in the Constitution and in the Government of India Act of 1935 has been interpreted as including land not only used for agriculture, but also land capable of being used for agriculture. The definition of 'land' in the impugned Act is in consonance with the interpretation given to 'agricultural land' by the above decisions.

10. It is true that when a legislature is empowered to enact legislation with respect to a particular subject mentioned in the list it cannot enlarge its powers by giving its own definition. It was held in *State of Madras v. Gannon Dunkerley & Co. Ltd.*, 1959 SCR 379 = (AIR 1958 SC 560) that in Entry 48, List II, Sch. 7 of the Government of India Act, 1935, the State Legislature had power to legislate with respect to tax on sale of goods and the legislature cannot enlarge its power by defining 'sale' so as to include 'a works contract' which does not amount to a sale and hence the Madras General Sales Tax (Amendment) Act, 1947 defining a sale to include 'a works contract' was ultra vires. Similarly, it was held in *Diamond Sugar Mills Ltd. v. State of Uttar Pradesh*, 1961 (3) SCR 242 = (AIR 1961 SC 652) that the U. P. Sugarcane Cess Act, 1956 which authorised the State Government to impose a cess on the entry of cane into the premises of a factory for use, was beyond the competence of the legislature as the premises of the factory was not a local area with-

in the meaning of Entry 52, List II, Schedule 7. Again, in *Gulabbhai v. Union of India*, AIR 1967 SC 1110 it was held that the definition of 'land' in Section 2 (g) of the Daman (Abolition of Proprietorship of Villages) Regulation (7 of 1962), was wider than definition of 'estate' in Art. 31-A and hence, being at variance with definition of 'estate' cannot stand with it. If, therefore, the definition of 'land' in the impugned Act is at variance with the meaning of 'Agricultural Land' in Entry 18 of List II, Sch. VII it would no doubt follow that such a definition would be ultra vires the powers of the State Legislature. But in this case, it is seen that the definition of 'land' in the impugned Act is in consonance with the meaning given to the expression 'agricultural land' in Entry 18 in the decisions of the various courts referred to above. We are therefore, of the view that the contention that the Act is ultra vires the State Legislature cannot be accepted.

11. The next submission is that the provisions of the impugned Act are repugnant to the Central Excises and Salt Act if the expression 'land' is construed so as to include lands in which salt is being manufactured.

12. It was argued that in such an event prohibition of alienation of such land would seriously interfere with the manufacture and production of salt. As the Central Legislature has already legislated on the subject, regulation and control of manufacture, supply and distribution of salt under Item 58 of List I, it is not open to the State Legislature to legislate so as to interfere with the powers of the Central Legislature. Reference is also made to certain rules in the Central Excise Rules, 1944. Under Rule 102 no salt shall be manufactured and no natural salt and except under the provisions of Rule 106, no salt-earth shall be excavated or collected or removed, otherwise than by the authority and subject to the terms and conditions of a licence to be granted by the Collector. Under Rule 112 salt works for which licences have been cancelled or relinquished shall be at the disposal of the Collector who shall determine whether the salt works shall be retained with the factory or not. If the Collector directs that the salt works shall be retained within the factory, the proprietary right of other persons therein, if any, shall thereupon vest in the Government and the Collector shall pay the value of such proprietary right to the licensee. Under Rule 130, if the licensee fails to execute the works or whenever it appears desirable that any such work should be undertaken by the Central Excise Department, the Collector may cause such works to be executed. It

was therefore, argued that if the petitioners are prevented from alienating the lands, it will not only interfere with their right to manufacture salt but also with the right of the Central Government under the Act. We are unable to see how the impugned Act in any way impinges on the Central Government's power to regulate and control the manufacture and production of salt. It merely prohibits the owner from alienating the lands. The power of the Central Government to regulate and control the manufacture of salt is untouched. Even assuming that the prohibition of alienation has to some extent the effect of interfering with the production, and manufacture of salt or the Central Government's power to regulate and control such manufacture and production, we do not agree that the definition of 'land' in the impugned Act is ultra vires for that reason.

13. The pith and substance of the impugned legislation is to prohibit transfer of agricultural lands. This falls squarely within Item 18 of List II, Sch. VII and hence the State Legislature is entitled to enact that legislation. Even assuming in some respects it affects the Central Legislation namely the Salt Act, it cannot in any way render the State Act ultra vires. Once a law 'in pith and substance' falls within a legislative entry, an incidental encroachment on an entry in another List does not affect its validity. In *Prafulla Kumar v. Bank of Commerce Ltd., Khulna*, (1947) 74 Ind App 23 = 1947 FCR 28 = (AIR 1947 PC 60), the Privy Council held that the Bengal Money Lenders Act, 1940 was in pith and substance a law in respect of 'money lending and money lenders' (Entry 27, List II of the Government of India Act) and was valid even though it trench ed incidentally on 'promissory notes' and 'banking' (Entries 28 and 38 respectively of List I). In the recent decision of the Supreme Court in *K. D. H. P. Co. v. State of Kerala*, AIR 1972 SC 2301 dealing with Kannan Devan Hills (Resumption of Lands) Act it was held by the Supreme Court that the State had legislative competence to legislate on Entry 18, List II, and Entry 42, List III. This power cannot be denied on the ground that it has some effect on an industry controlled under Entry 52, List I. It was observed that effect is not the same thing as 'subject-matter'. If a State Act otherwise valid, has effect on a matter in List I it does not cease to be a legislation with respect to an entry in List II or List III. This decision, in our view, applies to the facts of this case. The mere fact that the impugned legislation would have the effect of preventing the persons carrying on business of manufacture of salt, from

alienating their lands and thus affect to some extent the regulation, manufacture and control of salt under the Salt Act passed by the Central Legislation, would not make the State Legislation ultra vires. This contention is also therefore, negatived.

14. Lastly it is contended that the petitioners' lands are not lands used or capable of being used for agriculture and therefore the act is not applicable to them. It is seen that the land in question was not used for the purpose of agriculture on the date when the Act came into force, namely 2nd May, 1972. By that time, the lands had been converted into salt pans and salt was being manufactured on the said lands. Licences had been obtained for the purpose of manufacture and the provisions of the Salt Act prevented the petitioners from using the lands for any purpose other than the purpose of manufacture of salt. It is therefore clear that the land cannot be said to be land used for the purpose of agriculture within the meaning of the first part of Section 3 (c). It was however, contended on behalf of the respondents that it is capable of being used for the purpose of agriculture. It is submitted that though the land was inundated by sea water and was therefore converted into salt pans, it can still be used for purpose of agriculture at any time when the petitioners desire to do so. It may be that during the time when they hold a licence for the purpose of manufacture of salt they are prevented from using it for any purpose other than manufacture of salt. But it is always open to the petitioners to desist from manufacturing salt and use the land for the purpose of agriculture. The petitioners on the other hand contend that the land is not capable of being used for the purpose of agriculture. They rely upon condition 4 of the conditions of licence which says that the licensee shall not use the land for any purpose unconnected with the manufacture and storage of salt. It is further submitted that after the land is used for the purpose of manufacture of salt it would require enormous amount of money and effort to bring the land to cultivation.

15. It is therefore, necessary to consider what is the meaning of the expression 'capable of being used' for the purpose of agriculture. In AIR 1969 Andh Pra 345 (FB) (supra) it was observed as follows:

"Every land which is presently or prospectively capable of cultivation can be said to be 'agricultural land'. If it is shown that the land is actually cultivated either presently or in the immediate past or if it is shown that it is lying fallow, but is capable of being cultivated,

so long as the land has not been actually diverted to purposes other than agricultural purposes by construction of buildings thereon and other operations which render the land itself incapable of being cultivated without undertaking some other operations for making it fit for carrying on agricultural operations, it can be said to answer the description, of agricultural land in its widest significance."

Again at page 355 summarising the position it is said:

- "(1) The words 'agricultural land' occurring in Section 2 (3) (i) of the Wealth Tax Act should be given the same meaning as the said expression bears in Entry 86 of List I and given the widest meaning;
- (2) The said expression not having been defined in the Constitution, it must be given the meaning which it ordinarily bears in the English language and as understood in ordinary parlance;
- (3) The actual user of the land for agriculture is one of the indicia for determining the character of the land, as agricultural land;
- (4) Land which is left barren but which is capable of being cultivated can also be 'agricultural land' unless the said land is actually put to some other non-agricultural purpose, like construction of buildings or an aerodrome runway etc. thereon, which alters the physical character of the land rendering it unfit for immediate cultivation;
- (5) If land is assessed to land revenue as agricultural land under the State Revenue Law, it is a strong piece of evidence of its character as agricultural land;"

(Nos. 6, 7 and 8 are omitted as they are unnecessary.)

Though some of the considerations which should weigh in deciding whether a land is capable of being used for the purpose of agriculture are set out in the above decision it is difficult to lay down precisely the various circumstances in which it can be held that a land is one which is capable of being used for the purpose of agriculture. That would depend upon the facts and circumstances of each case. It was sought to be argued by the learned counsel for the petitioners that it is only in case where the land is kept fallow it can be said to be capable of being used for the purpose of agriculture. If it is already converted for use other than agriculture it ceases to be a land which is capable of being used for the purpose of agriculture. We are unable to agree with

this contention. Even if a land is being used for purposes other than agriculture it is possible that it can again be used for the purpose of agriculture. In our view 'capable of being used' means reasonably capable of being used. If it is capable of being used without incurring large expenditure out of proportion to the value of the land, taking into account the purpose to which it has to be put to use, or without much effort on the part of the petitioners it can be said to be a land which is capable of being used. On the other hand, if it involves enormous expenditure or effort, though in theory it may be possible to put it to agriculture use it cannot be said by any reasonable person that it is capable of being put to agricultural use. Bearing these principles in mind it has to be decided in each case whether a land is capable of being used for the purpose of agriculture. We are not inclined to agree with the petitioners' contention that merely because one of the conditions of the licence that the land should not be used for any purpose other than manufacture and storage of salt it must be held that the land is not capable of being used for agriculture. That condition subsists only during the period of the licence. In this particular case it may be noted that the licence is only from year to year though, of course, it was intended that the permanent licence would be granted after the approval of the realignment plans. But on the date on which the Act came into force there was no permanent licence in favour of the petitioners. It was contended on behalf of the Government even if there was a permanent licence the land is still capable of being used for the purpose of agriculture in future. For instance, if the licence is cancelled or if the licensee gives up manufacture of salt under the licence. It is however, unnecessary for us to go into that question in this writ petition. We may also point out that the learned Advocate-General sought to contend that as the land was registered as agricultural land in the revenue records, it must be deemed to be a land which is capable of being used for the purpose of agriculture. We do not agree with this contention. The mere fact that a land is entered in the Revenue Record as agricultural land is not determinative of the question whether it is capable of being used. It may be one of the factors in considering the question whether it can be treated as 'capable of being used for agriculture'. But it is not difficult to imagine cases where lands though entered in Revenue Records as agriculture lands have been diverted for other purposes like building purposes and thereafter they have become incapable of being used for agricultural purposes. It

therefore, depends upon the facts of each case as to whether a land is capable of being used for agricultural purpose or not. This is a question of fact which cannot be properly decided in a writ petition. The proper remedy for the petitioner is to institute a suit in a civil court for a declaration that the Act is not applicable to his lands as the lands are not capable of being used for agricultural purposes. There was a discussion as to whether the burden of proof lies upon the petitioners to show that the lands are not capable of being used for agricultural purposes and hence the provisions of the Act are not attracted or whether the burden of proof lies upon the parties who seek to apply the provisions of the Act to the petitioners to show that the lands are capable of being used for agricultural purpose and thus fall within the net of the enactment. It is unnecessary for us to express any opinion on this question at this stage.

16. The writ petition is dismissed for the reasons above stated with costs.

Petition dismissed.

AIR 1975 ANDHRA PRADESH 267

RAGHUVIR, J.

In re Mandadi Narayanamma and others, Petitioners.

Civil Revn. Petn. No. 1657 of 1973, D/- 18-11-1974.*

(A) Succession Act (1925), S. 372 — Rules framed under Act, R. 13-A — Succession certificate on behalf of minor — Succession certificate to guardian of minor without his being appointed as such under the Guardians and Wards Act (1890) — Condition of appointment as guardian prescribed by R. 13-A when may be dispensed with.

Where the guardian of the minor, has filed an affidavit before the court stating that he is prepared to give immovable security to the extent of the share of the minor and the minor's interest is thus safeguarded under R. 13-A an order dispensing with the appointment as guardian under the Guardians and Wards Act should be passed and succession certificate granted. (1912) ILR 36 Mad 214, Rel. on; AIR 1933 Bom 436, Explained. (Para 7)

Cases Referred: Chronological Paras
AIR 1933 Bom 436 = 35 Bom LR 950 5
(1912) ILR 36 Mad 214 = 1912 Mad WN 411 6

*(Against order of Dist. Munsiff, Kandukur, in C. F. No. 2877 of 1972, D/- 25-9-1972.)

DS/DS/B392/75/DRG

(1900) ILR 25 Bom 523 = 3 Bom LR 795
5

M. B. Rama Sarma, for Petitioners;
B. S. A. Swamy, Amicus Curiae, assisting
the Court.

ORDER:— This is a petition under Section 115, C.P.C. to revise the order dated 25-9-1972 made in C. F. No. 2877/72 on the file of the District Munsif, Kandukur, directing the petitioner to present the Succession Certificate Application under Section 372 of the Indian Succession Act to the proper court.

2. The 1st petitioner is a minor represented by her paternal uncle as next friend and guardian and petitioners 2 and 3 are majors and sisters of the 1st petitioner. The learned District Munsif, relying on Rule 13-A of the rules framed under the Indian Succession Act, held that unless the guardian representing the minor 1st petitioner obtains an order from a competent court under the Guardians and Wards Act, appointing him as a guardian the petition cannot be entertained.

3. Shri M. B. Rama Sarma, the learned counsel for the petitioners, assails the above order as not proper.

4. Rule 13-A has been added in the year 1947, which is as follows:—

"13-A. Where any person applies for the issue of a succession certificate on behalf of a minor, such person shall unless the aggregate amount or value of the debts or securities specified in the application does not exceed five hundred rupees or the court otherwise orders, present an application under Guardians and Wards Act praying for his appointment as guardian of the property of the minor. Unless the court otherwise orders no succession certificate shall be granted to him unless he has been appointed as such guardian."

According to this rule, in all cases where a succession certificate is sought for on behalf of a minor, unless the court otherwise orders, the guardian has to present an application under the Guardians and Wards Act, seeking for the appointment of a guardian and then the succession certificate could be issued.

5. The learned District Munsif, placing reliance upon the decision in *In Re Narayan Khanderao*, AIR 1933 Bom 436, held it is mandatory that in all cases where the succession certificate is sought for on behalf of a minor the guardian must first go before the appropriate Court for his appointment as guardian and then, subsequently seek for the certificate. On a closer reading of this judgment, it would be clear that the Bombay High Court in the judgment did not hold that a minor cannot be given a succession

certificate without his guardian obtaining an appointment order under the Guardians and Wards Act. By reading the following sentences it does not appear to have been so held:

"In that case the Court held that a succession certificate can be granted to the guardian of a minor who had been appointed as such under the Guardians and Wards Act; but the case did not decide that a certificate could not be granted in the absence of such an appointment."

Later on, they posed the question:

"The question then remains whether a certificate in that form should be granted to a guardian who has not been appointed under the Act."

In answering this question, they relied upon the practice of the Bombay High Court and the judgment in *Gulabchand v. Moti*, (1900) ILR 25 Bom 523 = (3 Bom LR 795) and directed the guardian to be appointed under the Guardians and Wards Act before a certificate is granted to her. Therefore, it is not an authority for the proposition that in the absence of an appointment order under the Guardians and Wards Act no succession certificate could be granted to an applicant under Section 372 of the Indian Succession Act.

6. I have also been referred to a judgment of the Madras High Court in *Krishnam Charlu v. Venkammah*, (1912) ILR 36 Mad 214 by a reading of which it is possible to state that even in the absence of an appointment order under the Guardians and Wards Act, the minor represented by the next friend-guardian, could be granted a Succession Certificate.

7. In this case, the paternal uncle filed affidavit before the Court stating that he is prepared to give immovable security to the extent of the share of the minor, and I am satisfied that if the share of the minor's interest is thus safe-guarded by the security tendered by the guardian under Rule 13-A, an order dispensing with the appointment as guardian under the Guardians and Wards Act should have been passed.

8. In the result, the order of the District Munsif is set aside. The Civil Revision Petition is allowed. There shall, however, be no order as to costs. The lower Court is directed to register the petition under Section 372 of the Indian Succession Act. This is a matter of the year 1972. The learned District Munsif would dispose of this matter expeditiously.

Revision allowed.

AIR 1975 ANDHRA PRADESH 269

CHINNAPPA REDDY, J.

Kasireddy Papaiah (died) and others,
Petitioners v. The Govt. of Andhra Pradesh
and others, Respondents.

Writ Petn. No. 3513 of 1971, D/-
25-11-1974.

(A) Land Acquisition Act (1894), Ss. 17 (4), 4 (1) — Emergency power under — Absence of urgency cannot be pleaded, only because of subsequent long delay or inaction by officials — Absence of notice under S. 4 (1) — Acquisition proceedings held were bad.

Notification dated 19-5-1970, issued under S. 4 (1) regarding acquisition of land for housing of the Harijans and also containing invocation of emergency power under S. 17 (4) dispensing enquiry contemplated by S. 5-A, came to be published in Gazette on 24-9-1970. Thereafter draft declaration under S. 6 was approved by the Government on 22-12-1970 and the same was published in the Gazette on 25-2-1971. No steps had yet been taken regarding taking possession of the land and the petitioners under the circumstances challenged the exercise of power under S. 17 (4) on the ground that the circumstances showed that there was no urgency at all.

Held that there was no allegation that acquisition or exercise of power under Section 17 (4) was mala fide and that the existence of urgency at that time could not be negated by subsequent tardy or negligent action by the officials. Further held that since mandatory public notice as required by S. 4 (1) was not given the acquisition proceedings were bad. W. P. No. 61/73, Referred to; AIR 1967 SC 1074, Followed.

(Paras 2 to 4)

Cases Referred: Chronological Paras
(1973) W. P. No. 61 of 1973 = (1974)

2 Andh WR 357	2
(1973) 2 APLJ 408	2
(1970) 1 Andh WR 43	2
AIR 1967 SC 1074 = (1967) 1 SCR 120	3

S. Venkat Reddy, for Petitioners;
Govt. Pleader for Revenue, for Respondents.

ORDER :— The petitioners own small extents of land altogether of the extent of 3 acres and 17 cents in Reddipalli Village, Bheemunipatnam Taluk, Visakhapatnam District. A notification under Section 4 (1) of the Land Acquisition Act proposing to acquire the lands of the petitioners for the purpose of providing house sites for Harijans was published in the Andhra Pradesh Gazette on 24-9-1970. The notification itself bore the date 19-5-1970. By the same notification

the power under Section 17 (4) of the Act was invoked and the enquiry contemplated by Section 5-A was dispensed with. Thereafter, the draft declaration under Section 6 of the Act was approved by the Government in G. O. Rt. No. 2283 Education (S.W.) Department dated 22-12-1970 and was published in the Andhra Pradesh Gazette on 25-2-1971. No steps were, however, taken to take possession of the lands. On 16-9-1971 the petitioners filed the present application for the issue of a writ to quash the notification dated 19-5-1970.

2. The learned counsel for the petitioners submitted that the very fact that the Government took the decision to acquire the lands on 19-5-1970 but did not publish the notification in the gazette till 24-9-1970, the further fact that the notification under Section 6 was only published on 25-2-1971 and the circumstances that no steps have so far been taken to take possession of the land clearly demonstrated that there was no urgency whatever and that the invocation of the power under Section 17 (4) of the Act to dispense with the enquiry under Section 5-A was made in a mechanical fashion because of a memorandum issued by the Government in 1954 to the effect that the emergency provision should be invoked whenever land was acquired for providing house sites for Harijans. I am not prepared to agree with the submission that delay on the part of tardy officials to take the further action in the matter is sufficient to nullify the urgency which existed at the time of the issue of the notification and to hold that there was never any urgency. It may be a relevant circumstance to be taken into consideration in deciding whether there was any urgency at all or whether the emergency provision was invoked without the Government applying its mind to the circumstances of the case. That the housing conditions of Harijans all over the country continue to be miserable even today is a fact of which courts are bound to take judicial notice. History has made it urgent that, among other problems, the problem of housing Harijans should be solved expeditiously. The greater the delay the more urgent becomes the problem. Therefore, one can never venture to say that the invocation of the emergency provisions of the Land Acquisition Act for providing house sites for Harijans is bad merely because the officials entrusted with the task of taking further action in the matter are negligent or tardy in the discharge of their duties, unless, of course, it can be established that the acquisition itself is made with an oblique motive. The urgent pressures of history are not to be undone by the inaction of the bureaucracy. I am not try-

ing to make any pontific pronouncements. But I am at great pains to point out that provision for house sites for Harijans is an urgent and pressing necessity and that the invocation of the emergency provisions of the Land Acquisition Act cannot be said to be improper, in the absence of mala fides, merely because of the delay on the part of some Government officials. As already observed by me, the greater the delay the greater the urgency. Of course, there may be cases where the very acquisition is mala fide and so too the invocation of the urgency provisions. We are not concerned with such a situation here as there are no allegations of mala fides. The learned counsel for the petitioners stated that the land of the petitioners was low lying land, that the Harijans themselves did not want this land and that there was other land on a higher level which the Harijans wanted and which could be acquired instead of the land of the petitioners. That is not a matter about which I am competent to express an opinion. But a perusal of the counter-affidavit shows that all these matters were considered both before and after the notification under Section 4 (1) was published. The learned counsel for the petitioners relied on the decision of Ramachandra Rao, J. in W. P. 61/73* where the learned Judge observed:—

"It has been held by this Court in Madhusudan Reddy v. State of Andhra Pradesh, (1970-1 Andh WR 43) and K. Yenandi Reddy v. State of Andhra Pradesh, (1973-2 APLJ 408) that when there is a long delay in taking possession of the lands proposed to be acquired it demonstrates that there was no real urgency for the acquisition and that the order dispensing with the enquiry under Section 5-A by exercising the power under Section 17 (4) was passed mechanically and that the exercise of power under Section 17 (4) dispensing with the enquiry under Section 5-A is not proper or valid."

In my view, the question whether the power under Section 17 (4) was exercised mechanically or otherwise is a question of fact which can be decided on a consideration of all the relevant circumstances and no universal proposition can be laid down that long delay by itself is sufficient to prove that the power was exercised mechanically. I do not think that my brother Ramachandra Rao, J. laid down any such proposition. All that he appeared to decide was that it is a strong circumstance to be taken into consideration. In every case, apart from the delay, there are several other circumstances, such as the very object of the acquisition, the reasons for the delay, etc. which must necessarily be considered be-

fore the Court can decide the question of fact. I do not agree with the first submission of the learned counsel.

3. The learned counsel next submitted that the mandatory requirements of Section 4 (1) of the Land Acquisition Act had not been observed in that, the Collector did not cause public notice of the substance of the notification to be given at convenient places in the locality and, therefore, the entire proceedings were void. He relied on the decision of the Supreme Court in Khubchand v. State of Rajasthan, AIR 1967 SC 1074 where it was observed:

"The object underlying the said direction in Section 4 is obvious. Under sub-section (2) of Section 4 of the Act, after such a notice was given, the officer authorised by the Government in that behalf could enter the land and interfere with the possession of the owner in the manner prescribed thereunder. The legislature thought that it was absolutely necessary that before such officer can enter the land of another, the owner thereof should have a clear notice of the intended entry..... The non-compliance with the said condition makes the entry of the officer or his servants unlawful on the express terms of sub-section (2), the officer or his servants can enter the land to be acquired only if that condition is complied with. If it is not complied, he or his servants cannot exercise the power of entry under Section 4 (2) with the result that if the expression 'shall' is construed as 'may', the object of the sub-section itself will be defeated. The statutory intention is, therefore, clear, namely, that the giving of public notice is mandatory. If so, the notification issued under Section 4 without complying with the said mandatory direction would be void and the land acquisition proceedings taken pursuant thereto would be equally void."

4. It is clear from the above observations that the requirement regarding public notice contemplated by Section 4 (1) was considered by the Supreme Court to be mandatory. I am bound by what the Supreme Court has said, though I would like to say that if the public notice contemplated by Section 4 (1) was intended to appraise owners of the land of the proposed acquisition, there does not appear to be sufficient reason why the failure to comply with the requirement regarding public notice should vitiate the entire proceedings if the persons, for whose benefit the public notice is required to be given have full knowledge of the notification published in the gazette under Section 4 (1). In the present case, the petitioners stated that there was no pub-

*Reported in (1974) 2 Andh WR 357.

lic notice as contemplated by Section 4 (1). That statement was not denied in the counter-affidavit. But the affidavit filed on behalf of the petitioner shows that despite the fact that there was no public notice the petitioners had full knowledge of the notification under Section 4 (1) of the Act. On that ground I would have rejected the submission of the learned counsel for the petitioners. But in view of the judgment of the Supreme Court by which I am bound I hold that the proceedings are bad. The Writ Petition is, therefore, allowed, in the circumstances, without costs. Advocate's fee Rs. 100.

Petition allowed.

AIR 1975 ANDHRA PRADESH 271

VENKATRAMA SASTRY, J.

Chota Uddandu Sahib, Appellant v. Masthan Bi (died) and others, Respondents.

Appeal No. 75 of 1971, D/- 1-11-1974.*

(A) T. P. Act (1882), S. 129 — Gifts — Saving of Muhammadan Law — Distinction between secular and non-secular gifts not valid — Oral gift — Subsequent document need not be registered. AIR 1972 Ker 27, Dissented from. AIR 1936 Rang 430 (FB) held no longer good law. (Muhammadan Law — Gift).

After amendment in 1929 in S. 129, the operation of the provisions of Chapter VII have been excluded in regard to gifts made by persons professing muslim faith and made under that law. There is also no justification for making any distinction between secular and non-secular gifts. Hence if all the formalities, as prescribed by Muslim Law, regarding the making of gifts, are satisfied, the gift is valid notwithstanding the fact that it is oral and without any instrument. If there is a contemporaneous document it should be registered. But if the gift is antecedent and the deed is subsequent merely evidencing the past transaction, it does not require registration, because it does not by itself make or complete the gift. (1972) 2 Andh WR (S. N.) 5 and AIR 1963 Pat 229 and AIR 1974 J & K 59 (FB). Rel. on; AIR 1936 Rang 430 (FB) Held no longer good law; AIR 1972 Ker 27, Dissented from. (Para 10)

(B) Mohammadan Law — Gift — Essentials.

According to the Mohammedan Law, there can be a valid gift, if three essen-

* (Against decree of 1st Addl. Sub-J., Vijayawada in O. S. No. 179 of 1968, D/- 12-3-1970.)

tials of the gift are satisfied. (1) a declaration of the gift by the donor, (2) the acceptance of the gift express or implied by or on behalf of the donee and (3) delivery of possession of the subject of gift by the donor to the donee. It is not necessary that there should be deed of gift to make it a valid gift. (Para 10)

The present possession of the defendant alleging to be a donee or the fact that the plaintiff who disputed the oral gift kept silent for one year and allowed the defendant to enjoy the property or the fact that defendant had discharged the debts of the donor and was managing the properties of the donor or that he had spent moneys for the ceremonies after the death of the donor or the fact that the Panchayat Board had issued notices to him to pay house tax is not decisive of the question of validity and binding nature of the oral gift. (Para 40)

Cases Referred: Chronological Paras

AIR 1974 Andh Pra 23 = (1973) 1 Andh WR 337	13
AIR 1974 J & K 59 = 1974 Kash LJ 103 (FB)	10
(1972) 2 Andh WR (SN) 5	10
AIR 1972 Ker 27 = 1971 Ker LJ 659	9, 10
AIR 1970 All 170 = ILR (1970) 2 All 507	14
AIR 1966 SC 1194 = (1966) 3 SCR 479	11
AIR 1963 Pat 229	10
AIR 1962 Andh Pra 199 = (1962) 1 Andh WR 16 (FB)	12
1956 Andh WR 771	14
AIR 1947 PC 97 = 1947 All LJ 372	14
AIR 1936 Rang 430 = ILR 14 Rang 439 (FB)	10
AIR 1935 Cal 393 = 39 Cal WN 882	14
AIR 1934 Bom 21 = 35 Bom LR 1148	14
AIR 1932 Cal 497 = ILR 59 Cal 557	14
AIR 1928 PC 108 = 55 Ind App 171	14
AIR 1923 Pat 481 = 4 Pat LT 397	14
AIR 1922 PC 281 = 49 Ind App 195	14
(1885) 2 Ind App 87 (PC)	14

N. V. S. R. Gopalakrishnamacharyulu, for Appellant; K. F. Baba, for Respondents Nos. 2 and 4.

JUDGMENT:— Plaintiff is the appellant herein. This appeal arises out of the suit, for partition and separate possession of his 3/8th share filed by the appellant. The few facts, which are necessary for considering the respective contentions in this case are the following:—

2. Plaintiff, the third defendant and one Pullu Sahab were brothers. Pullu Sahab married first defendant. As she bore no children he married the second defendant, who is no other than the brother's daughter of the first defendant. 4th defendant is the son of the third defendant.

3. Pullu Saheb died on 17-6-1957, within three years after his second marriage with the second defendant, without any issues. He left behind A and B Schedule properties. Plaintiff and the 3rd defendant are entitled to 3/8th share each in the properties of Pullu Saheb, while his widows defendants 1 and 2 are entitled to 1/8th share each in his estate.

4. Plaintiff issued the notice on 13-6-68 to the defendants to partition the properties according to the above shares. The third defendant gave a reply on 25-6-68 stating that his son the 4th defendant was adopted by Pullu Saheb and therefore the plaintiff cannot have any share. Defendants 1 and 2 sent a reply on 9-7-1968 stating that the properties were gifted by Pullu Saheb before his death to the 4th defendant. The plaintiff attacks the said gift as a false and fraudulent one, resorted to by the defendants in collusion in order to deprive the plaintiff of his just rights in the properties. Hence he has filed the suit for partition of the suit properties on 7-8-1968.

5. Third defendant remained ex parte. Defendants 1, 2 and 4 filed a common written statement. According to them late Pullu Saheb gifted, before his death, his properties to the 4th defendant in the presence of V. Komarayya, G. Seetharamulu, Shaik Abdul Shakoor and other elders and ever since the 4th defendant alone has been in exclusive possession and enjoyment of the properties in his own rights as a donee. As per one of the conditions of the said gift, the defendants 1 and 2 are each entitled to be provided with 1/3rd share of the net income of the properties during their lifetime. The fourth defendant discharged the debts of late Pullu Saheb and is enjoying the properties subject to the conditions in the gift. They therefore denied the plaintiff's right to a partition.

6. This written statement was filed on 12-10-1968. Issues were framed on 26-10-1968 giving one month's time for filing documents. No documents were filed during that given time. On 8-8-1969 the defendants 1, 2 and 4 filed several documents, of which Ex. B-29 is said to be the gift confirmation deed dated 5-6-1967, said to have been executed by late Pullu Saheb, in favour of the 4th defendant. On 30-9-1969 the defendants filed I. A. 2881 of 1969 to amend their written statement. The 4th defendant who filed the affidavit in support of that application stated that the gift in his favour was made at the time of his marriage in the presence of V. Komarayya, G. Seetharamulu and Shaik Abdul Shukoor and other elders. He therefore wanted to amend paragraph 2 of his written statement by adding the words "at the time of

the marriage of the 4th defendant" after the words "other elders". He has also asked for amendment of paragraph 3 of the written statement by introducing the words as follows:—

"Late Shaik Pullu Saheb has confirmed the above fact of gifting the suit properties by executing a confirmation deed on 5-6-1967 in the presence of the said persons."

This petition was allowed and the suit was tried.

7. Plaintiff examined himself as P.W. 1 and five other witnesses as P.Ws. 2 to 6. According to them there was no oral gift announced by Pullu Saheb at the time of the marriage of 4th defendant. Exs. A-1 to A-28 have been marked on behalf of the plaintiff. The defendants examined D.Ws. 1 to 12 and marked Exs. B-1 to B-35 on their behalf. 4th defendant gave evidence as D.W. 1 while the second defendant appeared as D.W. 2. Third defendant remained ex parte.

8. The lower court framed appropriate issues and after trial held that the gift pleaded by the defendants 1, 2 and 4 was true, valid, and binding on the plaintiff, that the 4th defendant got the properties under the oral gift, the Pullu Saheb died leaving no estate available for partition, that out of B Schedule properties only items 3, 5 and 6 which were found in the house of defendants 1 and 2 alone are movable properties of late Pullu Saheb, that the 4th defendant is in possession of the entire estate of late Pullu Saheb as a donee by the time of the death of Pullu Saheb and in view of the above findings the lower Court dismissed the suit with costs, by its judgment dated 12-3-1970.

9. In this appeal, preferred by the plaintiff the learned counsel for the appellant Mr. N. V. S. R. Gopalakrishnamacharyulu has raised the following points. (1) The gift pleaded in this case by the defendants is opposed to the Mohammedan Law and is therefore invalid and (2) Even otherwise the gift has not been proved to be true. In support of his first contention the learned counsel wanted to rely upon the decision of his Lordship Sri Krishna Iyyer J., of Kerala High Court in Assan Ravther v. M. Charayil, (AIR 1972 Ker 27) where the learned Judge held as follows:—

"The conclusion that I reach about the construction of Section 129 of the Act, against the backdrop of Art. 44 and inseminated by Articles 14 and 15 (1) is that such gifts as are non-secular will be exempt from the operation of Chapter VII of the Transfer of Property Act, but no other."

Relying upon this decision, the learned counsel argued that as this is a secular

either disposed of by the District Judge himself or by any Judge not lower in rank than an Assistant Judge to whom the case may be referred to by the District Judge. The decision of the District Judge on appeal under this rule and subject only to such decision, the decision of the Returning Officer accepting or rejecting the nomination of a candidate, shall be final and conclusive and shall not be called in question in any Court. Under Section 321 all rules made under the Act shall be subject to the condition of previous publication. Sub-section (4) thereof provides that every rule made under this Act shall be laid as soon as may be after it is made before each House of the State Legislature while it is in session for a total period of 30 days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made and notify such decision in the Official Gazette, the rule shall from the date of publication of such notification have effect only in such modified form or be of no effect as the case may be.

10. The first contention of Mr. Deshpande on behalf of the applicant is that having regard to the provision of Section 21 of the Act the election can only be challenged on the ground that the successful candidate is guilty of corrupt practice. Section 21 makes common provision for challenging the validity of an election or co-option or nomination of a Councillor and the procedure for challenging election, co-option or nomination is by a petition presented to the District Court by a candidate at the election or by any person entitled to vote at the election. It is obligatory upon the petitioner to furnish in the petition, inter alia, with sufficient particulars of ground or grounds on which election, co-option or nomination is called in question. Such petition has to be enquired into and disposed of by the District Judge or by any Judge not lower in rank than an Assistant Judge to whom the case may be referred to by the District Judge. For the trial of such petition the Judge shall have the power of a Civil Court including those which are enumerated in sub-section (7) of Section 21 mentioned above. The Judge after such inquiry as he deems necessary may pass suitable order and his order shall be conclusive. Looking to the scheme of Section 21 it does not contain any specific provision limiting the ground on which an election or co-option or nomination of a Councillor can be challenged. In the absence of such limi-

tation, the election, co-option or nomination of any Councillor can be challenged on any ground which is permissible under law for challenging the validity of such election, co-option or nomination. Reference was, however, made by Mr. Deshpande to sub-section (10) and sub-section (12) of Section 21 for contending that the election of a Councillor can only be challenged on the ground that the successful candidate has been guilty of corrupt practice. Both sub-section (10) and sub-section (12) do refer to corrupt practice by the successful candidate whose election is declared void but there is nothing in the language of any of these two sub-sections to limit the scope of an election petition only to corrupt practice as contended. Sub-section (10) deals with a case where apart from challenging the election of the returned candidate, the petitioner substantially wants a declaration that he himself or any other candidate should be declared to be duly elected Councillor. While dealing with this question, clause (b) of sub-section (10) provides that if the Judge is satisfied that but for the votes obtained by the returning candidate by corrupt practices the petitioner or such other candidate would have obtained a sufficient number of valid votes to have been elected the Judge may, after declaring the election of the returned candidate void, declare the petitioner or such other candidate to have been duly elected. Sub-section (12) deals with cases of disqualification to be imposed upon the returned candidate when his election is set aside with a view to prevent him from becoming a Councillor or member of any other local authority. Under the sub-section if the Judge sets aside the election of a candidate on the ground that a corrupt practice has been committed by the returned candidate or his election agent or by any other person with the consent of the candidate or his election agent, the Judge shall declare such candidate disqualified for becoming a Councillor or member of any other local authority for such period not exceeding six years but not less than two years from the date of the order as the Judge may specify in the order. There is nothing in the language of sub-section (10) or sub-section (12) to restrict the ground of challenge to the validity of an election to a mere corrupt practice. These sub-sections provide for specific things which can be done or should be done in specified contingencies. That this is the correct interpretation of the provision of Section 21 also appears from an earlier decision of the Division Bench of this Court dealing with similar provision of the Bombay Village Panchayats Act, 1958. The Division Bench of Abhyankar and Wagle, JJ. in Spl. Civil

Appln. No. 345 of 1962. (Radhabai Bajranglal Jaiswal v. State of Maharashtra) decided on 11-2-1964 (Bom.), while considering the ground on which the validity of an election can be challenged under the Bombay Village Panchayats Act, took the view that the right created by Section 15 (1) of that Act in every person qualified to vote at an election to bring in question the validity of an election by filing an application within 15 days after the date of the declaration of the result of the election is an unqualified right which includes a right to challenge the election on every ground on which an election can generally be challenged, which will of course include improper acceptance or rejection of a nomination paper, may be corrupt practice as defined in Section 15 (6) and/or any other illegality or irregularity materially affecting the result of the election. Sub-section (5) of Section 15 provides for two contingencies and indicates the action to be taken by the Election Tribunal in those contingencies. But from this provision it cannot be said that an election of a Panchayat member is not liable to be challenged or called in question on any other ground on which an election can usually be challenged. The ambit of enquiry provided by Section 15 (2) is in no way restricted or limited by anything stated or indicated in that sub-section which created the jurisdiction in the Election Tribunal to make the enquiry. An election cannot be called in question only on grounds to which reference is made in clause (a) or (b) of sub-section (5) of Section 15. It should not be overlooked that Section 21 contains a general provision for challenging the validity of an election, co-option and nomination and if under the scheme of this section the election can be challenged only on the ground that the returned candidate has been guilty of corrupt practice, it will not fit in with challenging the validity of co-option or nomination of a Councillor.

11. The question then arises whether it is permissible to the petitioner filing an election petition challenging the validity of an election to urge as a ground that the successful candidate is disqualified as contemplated by Section 16 and that is why his election should be set aside. The argument of Mr. Deshpande is that having regard to the provisions of Section 17 of the Act read with Rule 15 (10) of the Rules and Section 44 of the Act the ground as regards acceptance or rejection of the nomination paper of any candidate including the returned candidate on the ground that he is disqualified under Section 16 cannot be taken up for challenging the validity of an election of the returned candidate. He has also contended that if the ground of challenge is

disqualification, then, the only permissible remedy is the one provided in Section 44 of the Act. In exercise of the powers conferred by Section 17 rules have been made by the State Government in relation to nomination of candidates, form of nomination paper, objections to nomination, scrutiny of nomination papers and appeal against the acceptance or rejection of nomination papers. Under Rule 12 any person may be nominated as a candidate for election to fill a seat, if he is qualified to be chosen to fill that seat under the provisions of the Act. Rule 13 provides for scrutiny of nomination papers. Sub-rule (i) thereof provides for class of persons who can remain present at the time when the nomination paper is to be scrutinised. Under that sub-rule the candidates, one proposer of each candidate and one other person duly authorised in writing by his candidate but no other person may attend at the time and place fixed for the scrutiny of the nomination papers and the Returning Officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered as required by sub-rule (2) of Rule 12. The nature of inquiry and the ground on which the nomination paper may be rejected are provided in sub-rule (2). Under that sub-rule the Returning Officer shall examine the nomination papers and decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination paper on any of the following grounds, that is to say:

"(a) that the candidate is not qualified or is disqualified for election under the Act.

- | | | |
|--------|----|----|
| (b) xx | xx | xx |
| (c) xx | xx | xx |
| (d) xx | xx | xx |
| (e) xx | xx | xx |

It is obligatory upon the Returning Officer under sub-rule (6) to endorse his decision on each nomination paper either accepting or rejecting the same and if the nomination paper is rejected, he has to record in writing a brief statement of his reasons for such rejection. Under sub-rule (8) immediately after all the nomination papers have been scrutinised and decisions accepting or rejecting the same have been recorded, the Returning Officer shall prepare a list of validly nominated candidates. It is clear from the provision of Rule 13 that only a limited class of persons are intended to remain present when the nomination papers are to be scrutinised; only the candidates, one proposer of each candidate and one other person duly authorised in writing by each

candidate can remain present. A voter as such is not entitled under this rule to remain present at the time of scrutiny of the nomination papers. Further it is clear that the nature of inquiry that has to be conducted by the Returning Officer before either accepting or rejecting the nomination papers on the ground of objections raised or suo motu is described to be a summary inquiry. An appeal against the decision of the Returning Officer either accepting or rejecting the nomination paper is provided in Rule 15 and such appeal lies to the District Judge of the District in which the municipal area is situate. The right to prefer such an appeal is only conferred upon the candidate who is aggrieved by the decision of the Returning Officer accepting or rejecting the nomination paper. Thus, under R. 15 a person other than the candidate including the voter has no right to prefer an appeal against the decision of the Returning Officer. An appeal presented, under Rule 15 can be disposed of either by the District Judge himself or it may be disposed of by any Judge not lower in rank than an Assistant Judge to whom the case may be referred to by the District Judge. Such Judge not lower in rank than an Assistant Judge is for the purpose of suit regarded as District Judge. Sub-rule (10) of Rule 15 provides that the decision of the District Judge on appeal under this rule, and subject only to such decision, the decision of the Returning Officer, accepting or rejecting the nomination of a candidate shall be final and conclusive and shall not be called in question in any Court. Relying upon the language of sub-rule (10) of Rule 15 the argument of Mr. Deshpande is that when specific provision is made as regards conclusiveness of the decision of the Returning Officer and that of the District Judge on appeal, it is not permissible to any person to go behind the said decision and urge, by way of a ground for challenging the validity of an election, any plea like disqualification which could be urged at the stage of scrutiny of the nomination papers. Great emphasis is laid by him upon the provision saying that the decision is final and conclusive and shall not be called in question in any Court. His submission is that when a decision is made final and conclusive, the jurisdiction of every Civil Court as well as the Election Tribunal is thereby taken away to go into any question which are considered either by the Returning Officer or the District Judge while accepting or rejecting the nomination paper. Undoubtedly sub-rule (10) makes the decision final and conclusive and further provides that the said decision cannot be called in question in any court. But it shall not be overlooked that this is a provision contained in Rules made under the provisions contained in Section 17 of the Act. It is well settled that the provisions of the Act are always superior and the rules that are made in exercise of the power conferred by statute cannot be incon-

sistent with the provisions of the Act and cannot override or take away the right which had been conferred by the provisions of the statute itself. After all making of rules is in the nature of subordinate legislation and that cannot have greater force than the provisions of the statute itself or the effect of overriding its provisions. Such rules can neither be inconsistent with the Act nor derogatory from the provisions thereof.

12. Ordinarily every effort should be made to reconcile various provisions that occur in the statute and the rules made in exercise of the powers conferred thereby. If such reconciliation is not possible and the rules are inconsistent with the provisions of the statute, then the rules to that extent will be bad and the provisions of the statute will prevail. In Section 21 a specific right is conferred upon an elector or a voter to challenge the validity of the election, co-option or nomination of a Councillor. That section does not limit the ground on which the validity of such election, co-option or nomination can be challenged. So it is open to an elector to challenge the validity on any ground on which such an election, co-option or nomination can be challenged in law. A voter or an elector has no right to appear either before the Returning Officer or the District Judge hearing an appeal under Rule 15 while considering the question of acceptance or rejection of the nomination paper. In our opinion, Rule 15 (10) cannot be given such overriding effect as to take away completely the right of an elector or a voter to challenge the validity of an election, inter alia, on the ground of wrongful acceptance or rejection of the nomination paper of a candidate. It is clear from the language of Section 15 that one of the ingredients necessary by way of qualification for a candidate is that he is not disqualified for being elected a Councillor under the provisions of the Act or any other law for the time being in force. Thus if a candidate is disqualified either under the Act or under any other law, then, it is always open to an elector or a voter to challenge the validity of his election on the ground of such disqualification. That this is the correct view is clear from the decision of *Abhyankar and Wagle*, JJ. Spl. Civil Appln. No. 345 of 1962 (Bom) above referred. While considering similar question in relation to rejection of nomination paper under the provisions of the Bombay Village Panchayats Act and rules made thereunder, the Division Bench took the view that, "the finality that is given to the appellate decision of the Mamlatdar in the matter of rejection of a nomination paper is given by the Rules. The Rule made under the Act cannot have the effect of cutting down or restricting the statutory right given to an elector of bringing in question an election under Section 15 (1) or the ambit of jurisdiction given to the Judge appointed on an election tribunal in making enquiry into a challenge to such an

election. The mere fact that a candidate whose nomination paper has been rejected has challenged the rejection by an appeal and that order has become final cannot possibly restrict the right of an elector to bring in question the election of a returned candidate under Section 15 on that ground. The candidate is not deprived of that right when he is entitled to file an election petition in his capacity as an elector as well.

13. Reliance is placed upon another decision of the Division Bench of this Court in *Venkatrao Vithalrao v. Vithal Sambhaji*, reported in (1963) 1 Mah. L.J. 834. This was a case relating to validity of an election under the Maharashtra Zilla Parishads and Panchayat Samities Act, 1962. In that case the election of a returned candidate to the Zilla Parishad was challenged by a voter in an election petition under Section 27 of that Act on the ground that he was disqualified under Section 16 (i) (h) of the Act, being a Police Patel. The voter could not challenge the nomination at the time of scrutiny as he was not a candidate himself. It was found that the returned candidate was a Police Patel at the time of nomination. The Division Bench of this Court (Tambe and Palekar, JJ.) took the view that, "though the voter has a right to challenge the validity of the election of the returned candidate, he cannot challenge it on the ground which could have been raised before the Returning Officer at the time of the scrutiny." An argument similar to the one advanced by Mr. Deshpande was accepted by this Court in that decision. In that case one of the contentions that was urged on behalf of the petitioner was that the finality and conclusiveness which is given in sub-rule (8) of Rule 20 operates only against the candidates and other persons mentioned in sub-rule (i) of Rule 19, who have been given a right to appear before the Returning Officer and challenge the nomination of any candidate. It was urged that Section 27 of the Act conferred an unqualified right on a voter to challenge the validity of election of a returned candidate, that there was no limitation placed on his right by Section 27 and therefore the Court could not be justified in placing any restriction on that right by holding that it was not open to a voter to challenge the election of a returned candidate on the ground of improper acceptance of his nomination paper. That contention was not accepted by this Court and this Court observed as under:

"It is true that Section 27 read by itself indicates that an unqualified right is conferred on a voter to challenge an election. In other words, Section 27 read by itself would show that a voter could challenge the election of a returned candidate on any ground available to him under the law. But then, it is a well settled rule of construction that a statute has to be considered as a whole, and the intention of the Legislature has to be gathered not from reading one section isolated

from other sections having relevance to the subject-matter of the legislation. Chapter II deals with the constitution of Zilla Parishads; and has been divided under different heads. Sections 10 to 37 fall under the head "Election of Councillors." Sections 14 and 27 fall under this head. They both relate to the same subject-matter. The intention of the Legislature in respect of this subject-matter has to be gathered from the various provisions contained in the sections falling under this head and as already stated, the Legislature while dealing with the subject-matter has, in clear terms expressed in sub-section (2) of S. 14 its intention of giving finality to the decision of the Returning Officer either accepting or rejecting the nomination paper. It is, therefore, that the Legislature has directed that the appeal to be provided against such a decision of the Returning Officer should lie to a Judge not below in rank of a District Judge, and it is to this decision of such a high Judicial Officer that the Legislature has directed that finality should be given. These two Sections, 14 (2) and 27 (2), will have to be read together in construing, and when so construed, it becomes apparent that though the voter has been given a right to challenge the validity of the returned candidate, he cannot challenge that election on the ground which could have been raised before the Returning Officer at the time of the scrutiny of the nomination paper. And the relevant rule, viz clause (a) of sub-rule (2) of Rule 19 shows that the nomination of a candidate could be challenged on the ground that he was disqualified for being chosen to fill the seat by or under the Act. This ground, therefore, would not be open to the voter for challenging the election under Section 27 of the Act. It is true that voters other than the candidate, i.e. the agents and proposers of each candidate and one other person authorised in writing by each candidate only, have not been given a right to appear at the time of the scrutiny of the nomination paper and raise objections to the acceptance of the nomination paper, and the voters apart from these persons would not have the opportunity of objecting to the nomination paper. But from that it does not necessarily follow that voters other than those mentioned in sub-rule (2) of Rule 19 would have or must have that right by filing an election petition, and therefore, we must read that right in Section 27, or we must hold that that right is not taken away by the rules framed to give effect to the intention of the Legislature disclosed in sub-section (2) of S. 14 of the Act. It has to be kept in view that in matters of election, there are no common law or inherent rights as such. The rights in relation thereto are only those as can be inferred from the provisions of the Act.

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The fact, therefore, that a voter other than those mentioned in sub-rule (2) of R. 19

has no right to challenge the validity of the nomination paper, would be no ground for holding that he has a right to raise that challenge in an election petition."

14. The well recognised distinction that exists between the provisions of the statute and those of rules made in exercise of the power of subordinate legislation was overlooked in this case. If rules cannot be reconciled with the provisions of the statute under which they are framed, then, the provisions of the statute must always prevail, though every possible attempt should be made to reconcile if it could be done, but if they cannot be reconciled, then, to the extent to which the provisions of rules are inconsistent with the provisions of statute or derogatory from the provisions the rules to that extent will be bad and they cannot be given overriding effect over the provisions of the statute. This aspect of the matter which was considered by the earlier Division Bench in Radhabai's case Spl. Civil Appln. No. 345 of 1962, D/- 11-2-1964 (Bom.) was overlooked. Apart from this, even the language of Section 14 (2) of Maharashtra Zilla Parishads and Panchayat Samities Act is materially different from that of Section 17 of the Act. In our view, the view taken in Radhabai's case is preferable to the view that has been taken in Venkat-rao's case 1963 Mah LJ 834 by the Division Bench.

15. Under Section 21 of the Act the validity of election, co-option or nomination can be challenged either by a candidate at the election or by any person entitled to vote at the election. The grounds on which the validity of such election can be challenged are not different to a candidate on the one hand and to a person entitled to vote at the election on the other. The language of Sec. 21 being uniform, the grounds of challenge to the validity of an election will be the same, either it is at the instance of a voter or at the instance of a candidate. If in view of the provisions of Rule 15 (10) the right of a voter to challenge the validity of an election on the ground of disqualification of a candidate is taken away, it will result in substantially taking away the right of a voter to challenge the validity of election of a returned candidate on such grounds as are permissible to him in law. The fact that a candidate is not disqualified is one of the necessary qualifications before he can file his nomination paper. Now a voter can, in an election petition to set aside the election of a returned candidate, take various grounds including the ground of disqualification. He may either urge that the candidate whose nomination paper was filed was wrongfully rejected at the time of scrutiny or he may as well urge that even one of the defeated candidates whose nomination paper was accepted was wrongfully accepted, because in either of the two cases the result of election will be materially affected if the decision of the Returning Officer or the District Judge in appeal

therefrom is treated as erroneous. When the nomination paper of a candidate has been wrongfully rejected, then, it will be a pure surmise to think how many votes he could have secured if he was in the field at the time when the poll took place; so also, when the nomination paper of any defeated candidate has been wrongfully accepted, another defeated candidate or a voter can equally contend that the nomination of paper of such defeated candidate was wrongfully accepted and if he was not in the field, then, even the defeated candidate would have secured the votes which were cast in favour of the defeated candidate. This will be a ground on which the validity of an election of a returned candidate can be challenged having regard to the scope and ambit of Section 21 and the decision arrived at is the result of summary inquiry cannot be so treated as to deprive a voter or a candidate to have a proper and fuller inquiry at the trial of an election petition. Thus, in our opinion, it is not possible to take the view that on proper construction of Rule 15 (10) read with Section 17 of the Act it is not permissible either to a candidate or to an elector to challenge the validity of an election of a returned candidate on the ground that he was disqualified under the provisions of Section 16 (1) of the Act.

16. The argument of Mr. Deshpande, then, was that Section 44 contains a specific provision for making an inquiry whether a Councillor becomes subject to disqualification during the tenure of his office which ultimately results in his office becoming vacant. The material part of Section 44 for our purpose is as under:

"44 (1): A Councillor shall be disqualified to hold office as such if at any time during his term of office, he—

- (a) is or becomes subject to any of the disqualifications specified in S. 16 except the disqualification specified in clause (h) of sub-section (1) of that section;

and he shall be disabled subject to the provisions of sub-section (3) from continuing to be a Councillor and his office shall become vacant:

(2) When a Councillor whether elected, co-opted or nominated incurs any of the disqualifications in sub-section (1), it shall be the duty of the Chief Officer to submit a report to the Collector within one month of his becoming aware of disqualification through any source whatsoever:

(3) In every case the authority to decide whether a vacancy has arisen shall be the Collector. The Collector may give his decision on receipt of the report of the Chief Officer under sub-s. (2), or on his own motion or on an application made to him by a voter and such decision shall be communicated to the Councillor concerned, the Chief

Officer and the applicant, if any. Until the Collector decides that a vacancy has arisen and such decision is communicated as provided above, the Councillor shall not be deemed to have ceased to hold office.

(4) Any person aggrieved by the decision of the Collector may within a period of fifteen days from the date of receipt of the decision of the Collector by him, appeal to the State Government and the orders passed by the State Government shall be final;

Provided that, no order shall be passed under sub-section (3) by the Collector or under sub-section (4) by the State Government in appeal, against any Councillor without giving him a reasonable opportunity of being heard.

Explanation:— If any elected, co-opted or nominated Councillor were subject to any disqualification specified in Section 16, at the time of his election, co-option or nomination, as the case may be, and continues to be so disqualified, the disqualification shall, for the purposes of this section, be deemed to have been incurred during the term for which he is elected, co-opted or nominated."

Section 44 contains a specific provision for declaring that a Councillor is disqualified from continuing to be as such on the ground of disqualification therein provided and thereupon his office shall become vacant. The sphere over which Section 44 operates is not the same as the sphere over which Sec. 21 operates, though to a certain extent the field may overlap. For challenging the validity of an election a petition has to be presented under Section 21 within ten days after the publication of the names of the Councillors while petition under Section 44 can be taken at any time during the term of office of a Councillor. The underlying object of the provision of Section 21 is to give an opportunity to a candidate or a voter to challenge the validity, inter alia, of an election. If the petitioner is successful in such challenge, then, the election will be declared void with the result that even though the returned candidate was declared as successful candidate, he in law at no time became a councillor as such, while under Section 44 until a declaration is made that the Councillor is disqualified and is disabled from continuing to be a councillor having regard to the provisions of sub-section (3) of S. 44 he continues to hold the office of Councillor and it is only upon a final decision of the Collector that vacancy arises and when such decision is communicated to the Councillor concerned, he ceases to hold the office of Councillor and his office becomes vacant from and after that date. It should not be overlooked that every conceivable ground for challenging the validity of an election by reason of disqualification is permissible under Section 44, if regard be had to the explanation thereto. Undoubtedly the effect of the explanation to Section 44 is to widen the scope of operative part of the

section itself, but that too to a limited extent. The explanation provides that if any elected, co-opted or nominated Councillor were subject to any disqualification specified in Section 16, at the time of his election, co-option or nomination, as the case may be, and continues to be so disqualified, the disqualification shall, for the purpose of this section, be deemed to have been incurred during the term for which he is elected, co-opted or nominated. The words "continues to be so disqualified" contemplate that such disqualification must be existing at least at the point of time of the election, or co-option or nomination. A candidate might have incurred a disqualification under Section 16 at the time when he files his nomination papers even if it might have continued when the nomination papers were scrutinised, but such disqualification may not exist at the time when the polling takes place and the result of poll is declared. Such a case can never be covered by Section 44. But the validity of an election of a returned candidate can on such ground be also challenged either by a candidate or by a voter in a petition under Section 21.

17. It was, however, strenuously contended by Mr. Deshpande that under Sec. 21 the order passed by the District Judge after inquiry is made conclusive. So also under Section 44 the order passed by the State Government has been made final. The argument was that the authorities trying the election petition under Section 21 and the authorities dealing with disqualification under Section 44 are entirely different and as they have power to act upon the same field, they may come to inconsistent judgment and controversy will arise which decision will prevail over the other. Therefore, implied limitation should be read in the language of Section 21. When a ground of disqualification is taken in an election petition to challenge the validity of an election of a returned candidate, the inquiry is pertaining to the disqualification existing from the date of the nomination upto the date of announcement of the result and not thereafter because any disqualification which has arisen for the first time, after declaration of the result cannot be a ground for challenging the validity of an election under Section 21. Primarily the election tribunal constituted under Section 21 is an authority which is empowered to go into this question after exercising judicial powers of a Civil Court. The jurisdiction under Section 21 is not conferred upon the District Judge as a person designate but that jurisdiction is conferred upon the District Court and that is why the decision given under Section 21 is subject to revision by the High Court as it is a decision of a subordinate Court. Ordinarily one will expect that when in a petition under Section 21 the validity of an election of a returned candidate is challenged on the ground, inter alia, of disqualification, the authority clothed with the power under Section 44 will normally not proceed with the

enquiry until the matter is finally decided by the Court. If, however, notwithstanding the proceedings under Section 21 either the Collector or the State Government proceeds to go into the question of disqualification, then, undoubtedly the decision of a judicial forum conferred with the power of a Court must always prevail.

18. Reliance was placed by Mr. Deshpande upon several decisions of the Supreme Court. He referred us to the case of Ravanna Subbanna v. G. S. Kaggeerappa, AIR 1954 SC 653. In this case the provisions of Sections 14 and 20 of Mysore Town Municipalities Act, 1951 came up for consideration. Upon interpretation of Section 14 the Supreme Court took the view that,

"Where a person is elected as a Councillor in contravention of the provisions relating to disqualification as contained in Section 14, the election of such a councillor automatically becomes void without requiring it to be set aside by an election petition under Section 20 of the Act. At any rate, if the seat becomes vacant and if under sub-section (5) of S. 14 the Government is made the final authority to determine such dispute, it would be unreasonable to hold that the same matter could be also agitated before the Election Commissioner under Section 20, with the attendant risk of a conflict of decision between the two authorities."

At the outset it may be stated that the language of Section 14, which came up for consideration before the Supreme Court, is materially different from that of Section 44 with which we are concerned. That section enumerated different grounds of disqualification and thereafter provided that, "if any person is elected as a councillor in contravention of these provisions, his seat shall be deemed to be vacant." Having regard to the language, the Supreme Court took the view that in such cases the election automatically becomes void without requiring it to be set aside by an election petition under Section 20 of the Act. However, on the question of interpretation of Sections 14 and 20, no opinion was expressed by the Supreme Court. It is observed that to reconcile the provisions of Section 20 with those of Section 14 of the Act it would be necessary either to put a restricted interpretation upon sub-section (3) of S. 14 or on sub-section (5) of S. 20, but on that question no opinion was expressed by the Supreme Court. Whether two remedies under the two sections are cumulative the Court observed that it will not be a reasonable assumption to consider the two sections as cumulative. Under Section 44 of the Act with which we are concerned by reason of disqualification the Councillor does not automatically cease to be councillor. On the contrary, the provision of sub-section (5) of S. 44 clearly indicates that until the Collector decides that vacancy has arisen and such decision is communicated as provided in the section, the Councillor shall not be

deemed to have ceased to hold office. Thus, the provisions which came up for consideration before the Supreme Court not being similar to those of Section 44, the decision of the Supreme Court will not be of any assistance to us in putting correct interpretation on the provisions of Section 44.

19. Reference was also made by Mr. Deshpande to the decision of the Supreme Court in Election Commission, India v. Saka Venkata Subba Rao, 1953 SCR, 1144 = (AIR 1953 SC 210). In that case the respondent, who had been convicted and sentenced to rigorous imprisonment for 7 years, was elected a member of the Madras Legislative Assembly. At the instance of the Speaker of the Assembly, the Governor of Madras referred to the Election Commission, which had its offices permanently located at New Delhi, the question whether the respondent was disqualified and could be allowed to sit and vote in the Assembly. The respondent thereupon applied to the High Court of Madras under Article 226 of the Constitution for a writ restraining the Election Commission from enquiring into his alleged disqualification for membership of the Assembly. While considering this question, the provisions of Articles 190 (3) and 192 (1) were considered by the Supreme Court and it was held that these articles are applicable only to disqualifications to which a member becomes subject after he is elected as such, and neither the Governor nor the Election Commission had jurisdiction to enquire into the respondent's disqualification which arose long before his election. The provisions of Articles 190 (3) and 192 (1) are not in pari materia to those of Section 44 of the Act with which we are concerned. In Art. 190 (3) the words used are "becomes subject" and in Art. 192 (1) they are "has become subject" and these words were interpreted to indicate a change in the position of the member after he was elected, but the provision that his seat is to become thereupon vacant, that is to say, the seat which the member was filling theretofore becomes vacant on his becoming disqualified reinforces the view that the article contemplates only a sitting member incurring the disability while so sitting. Incidentally while dealing with the contention of the Attorney-General in this case the Supreme Court pointed out that if that contention was accepted, it will lead to conflicting decisions by the Governor dealing with a reference under Art. 192 and by the Election Tribunal inquiring into an election petition under Sec. 100 of the Parliamentary statute. The provisions of Section 44 of the Act are materially different from those of Articles 190 (3) and 192 (1). Moreover, we are concerned with the ambit of jurisdiction of the Election Tribunal which is clothed with the power to decide the election petition under Section 21 and in the absence of any limitation or restrictions imposed upon the grounds on which an election can be set aside, normal rule must prevail, namely, that

on every legal and justified ground on which an election can be challenged in law will be open to the petitioner to urge for challenging the validity of an election of the successful candidate.

20. Reference was also made to the decision of the Supreme Court in *Kabul Singh v. Kundan Singh*, AIR 1970 SC 340. The effect of Section 30 of Representation of the People Act, 1950 came only for consideration. Having regard to the provisions of the said statute it was held that the finality of the electoral roll cannot be challenged in a proceeding challenging the validity of the election. Right to vote being purely a statutory right, validity of any vote is to be examined on basis of provisions of the Act. The entries found in the electoral roll are final and they are not open to challenge either before a Civil Court or before a Tribunal which considers the validity of any election. While examining the scheme of the Act and especially Sections 14 to 24 by themselves in the matter of preparation and maintenance of electoral rolls, it is clear from those provisions that the entries found in the electoral roll are final and they are not open to challenge either before a Civil Court or before a Tribunal which considers the validity of any election. The principle laid down by the Supreme Court in this case cannot be attracted if we have to scrutinise and examine various provisions of one and the same Act. The provisions of the Act, inter alia, deal with election co-option and nomination of Councillors, and all the relevant provisions which need have to be taken into account. If this is the position in law, then, every attempt should be made to reconcile various provisions of the Act and if need there be a restricted effect has to be given to the provisions thereof in order that the provisions are harmonised with each other. Upon such interpretation we have taken the view that the provisions of Rule 15 (1) as they relate to summary inquiry are final at that stage but the right to agitate the same question in an election petition either at the instance of a candidate or a voter is not lost in a petition under Section 21. We have equally pointed out that the provisions of Section 44 and Section 21 of the Act operate upon different field, though to a certain extent there is a possibility of overlapping. This is not a case where any particular section should be regarded by itself as a complete code exhausting the remedies of a party for agitating any controversy. Thus, this decision of the Supreme Court is not of any assistance in interpreting the scheme of Section 21 and the grounds which can be taken for the purpose of challenging the validity of an election. Reference was also made by Mr. Deshpande to the decision of the Bombay High Court in *Narayan Maruti v. District Judge, Kolaba*, AIR 1953 Bom 288. Section 15 of Bombay Municipal Act, was construed by the Divi-

sion Bench in *Narayan Maruti* case. Its provisions were similar to those of Mysore Town Municipalities Act, which were considered by Supreme Court in AIR 1954 SC 653, and having regard to these provisions the Division Bench took the view that no jurisdiction is conferred upon the District Judge to decide whether any disqualification attaches to the councillor under Section 15. His jurisdiction is confined to deal with election petitions and an election petition by its very nature must be restricted to bringing before the Court either a mal-practice or a corrupt practice or an irregularity, that takes place in the course of the election. The provisions of this section were, however, later on amended and they again came up for consideration before the Division Bench of this Court in *Keshav Govind Kulkarni v. Extra Asst. Judge, South Bombay*, 61 Bom LR 1151 = (AIR 1960 Bom 127). The provisions of sub-sections (1A) and (1B) of Section 15 of Bombay District Municipal Act, 1901 which were considered in *Narayan Maruti*'s case having been deleted when this case was decided the Division Bench took the view that in an election petition filed under Section 22 of the Bombay District Municipal Act, 1901, the petitioner can challenge the validity of the nomination of the opponents on the ground that they were disqualified from standing for election under Section 15 (1) of the Act. Thus, it is quite apparent that the question whether a ground of disqualification of a candidate can be urged for challenging the validity of an election will depend upon the language of the statute and upon proper interpretation of Section 21. In our opinion, such a ground is always open either to a candidate or to a voter who is entitled to challenge the validity of election.

21. This brings us to the next contention of Mr. Deshpande that the Applicant has not incurred disqualification prescribed by Section 16 (1) (i) of the Act. That section provides that "no person shall be qualified to become a Councillor whether by election, co-option or nomination who save as hereinafter provided, has directly or indirectly, by himself or his partner, any share or interest in any work done by order of a Council or in any contract with or under or by or on behalf of a Council. Two arguments were advanced for contending that the case of the Applicant does not fall within this provision. Firstly it was contended that the word "contract" used in this section is not wide enough to include "employment" with the Municipal Council and secondly, it was stated that merely because the wife of the Applicant is Head-Mistress of the Municipal School it cannot be said that thereby the Applicant had any direct or indirect interest in contract with or under or by or on behalf of the Council. In support of his first plea our attention was invited to the provisions of earlier statute and especially those of Section 15 (1) (f) of Bombay District Municipal Act, 1901. It pro-

vides that, "no person may be a councillor, who save as hereinafter provided has directly or indirectly by himself or his partner, any share or interest in any work done by order of a municipality or in any contract or employment with or under, or by, or on behalf of, a Municipality." The argument was that employment was intended to be regarded as a disqualification the Legislature has done so by express words and it was further stated that since the word 'contract' or 'employment' is used by Section 15 (1) of the Bombay District Municipal Act, it shows that the word 'contract' by itself is not wide enough to include within its scope 'employment' with the Municipality. It is undoubtedly true that while enumerating disqualification under Section 16 of the Act the word 'employment' has been deleted. But sometimes simply because an alteration is made in the language of the statute it does not automatically follow that the provisions are materially altered. Such an alteration may become necessary if it is found that the word was superfluous and the word 'contract' was wide enough to include within its scope also 'employment.' It should not be overlooked that the provisions of the Act were made with a view to consolidate the position and if reference be made to the provisions of Section 15 (b) of C. P. & Berar Municipalities Act, 1922 it is quite clear that the language is similar to that of Section 16 (1) (i) of the Act. Under Section 15 (1) of the C. P. and Berar Municipalities Act, 1922 no person shall be eligible for election or nomination as a member of a committee, if such person has directly or indirectly any share or interest in any contract with; by or on behalf of the committee, while owning such share or interest. As the object of the present Act is to unify, consolidate and amend the law relating to municipalities prevailing in different parts of the State of Maharashtra prior to reorganisation of States (sic) were considered and provisions of Sec. 16 (1) (i) are incorporated for uniform legislation for the whole of the State. It is not disputed that the wife of the Applicant is the Head-Mistress of the Municipal School conducted by Amravati Municipal Council. Such an employment presupposes a contract between the wife of the Applicant on the one hand and the Municipal Council on the other. Under the terms of contract the Municipal Council can call upon the wife of the Applicant to discharge obligations as the Head-Mistress while on the other his wife as an employee can insist on payment of or remuneration to which she may be entitled to having regard to the terms of the contract. Thus, a contract subsists right from the employment till her termination and if that is so, omitting unnecessary words it can be said that the applicant has direct or indirect interest in any contract with or under or by or on behalf of a Council. It was urged that in case of employment like Head-Mistress of a Municipal School there cannot be con-

tract because she occupies a particular status and reliance was placed upon the observation of the Supreme Court in *Roshan Lal Tandon v. Union of India*, AIR 1967 SC 1889. The Supreme Court had occasion to consider the position of a Government servant under Union of India and it was held that the Government servant acquired a status. The argument was once the status is acquired the contractual obligation is obliterated. That is not borne out by the decision of the Supreme Court in this case. Actually it was pointed out that it (status) is much more than a purely contractual relationship voluntarily entered into between the parties. Thus, while considering the position of a Government servant the Supreme Court held that undoubtedly he has acquired a status having regard to the rights created by the various provisions and rules made under Articles 309, 310 and 311 of the Constitution of India. But it is not possible to take the view that simply because an employee has acquired a status there ceases to be contractual relationship of master and servant between employee and employer.

22. The contention then was that merely because a wife is an employee with the Municipal Council it cannot be said that the husband has direct or indirect interest in the contract with or under or by or on behalf of the Municipal Council. Reference was made to the decision of the Supreme Court in *Gulam Yasin Khan v. Sahebrao Yeshwant-rao Walaskar*, 1966 Mah LJ 269 = (AIR 1966 SC 1339). The Supreme Court in this case has taken the view that mere relationship of a person with an employee of the Municipal Committee will not justify the inference that such person has interest, direct or indirect, to the employment under the Municipal Committee and he cannot become disqualified with reference to the provisions of Section 15 (1) of the C. P. and Berar Municipalities Act, 1922. The fact whether the petitioner has interest, direct or indirect, in the contract under or on behalf of a council will depend upon facts of each case. In *Gulam's* case the son of a candidate was employed under the Municipal Committee but he was staying entirely separate from his father. That is not the position in the present case. It is admitted that the wife of the Applicant is staying with him. When such is the position, then both husband and wife have mutual interest in the earning of each other. On the contrary, if a view was taken that the husband has no direct or indirect interest in the contract of his wife with the Municipal Council, there is likely to be a conflict of interest and duty between the two. If any action is contemplated against the wife by reason of any misconduct or default on the part of the Head-Mistress, then, it will be the duty of the Municipal Council to see that the case is decided on its own merits irrespective of other considerations. Placed in such a situation, the husband will naturally

be faced with a conflict between interest and duty. Even likelihood of conflict, in our opinion, will suffice. Thus, in our opinion, it is not possible to accept the contention of Mr. Deshpande that the Applicant has not incurred disqualification prescribed by Section 16 (1) (i) of the Act.

23. In the result, Revision Application fails and rule is discharged with costs. Application dismissed.

AIR 1975 BOMBAY 218

(NAGPUR BENCH)

DHARMADHIKARI, J.

Ratilal Narbheram, Appellant v. Welji Nagji, trading in the name of "Nagji Ghelabhai" and another, Respondents.

Second Appeal No. 168 of 1965 D/- 5-9-1974.*

(A) C. P. and Berar Letting of Houses and Rent Control Order (1949), Cl. 13 — Civil P. C. (1908), Ss. 47, 9 and O. 23, R. 3 — Suit to recover possession of shop after obtaining necessary permission from Rent Controller — Compromise — Consent decree providing for execution of decree in case of default in payment of future rent — Whether a new tenancy created — Default — Decree if can be executed without taking recourse to provisions of Rent Control Order. (T. P. Act (1882), S. 116).

A suit to recover possession of certain shop was filed by the landlord after obtaining necessary permission from the House Rent Controller to issue notice of ejectment and the notice was actually served on the tenant. Ultimately the suit ended in compromise and compromise decree was passed on 18-8-1954. The landlord accepted the judgment debtor to be his sole tenant. The judgment-debtor also admitted that he was the monthly tenant of the plaintiff. It was also agreed that the defendant shall pay rent at the rate of Rs. 25/- per month from 1-7-1953 towards the past rent. So far as payment of future rent was concerned, it was agreed between the parties that if the judgment-debtor fails to pay his rent for any three months after 1-9-1954 then the plaintiff will be at liberty to obtain possession of the suit shop by applying for execution. The defendant paid rent till November 1962 and the plaintiff had accepted the said amount as rent. As the defendant did not pay the amount of rent, as agreed after November 1962, the decree holder filed application for execution of the decree. It was alleged that the defendant had not paid rent for three months i.e. November and December 1962

and January 1963 and hence possession of the demised property should be given to him from the defendants. He also claimed for recovery of arrears of rent for three months.

Held that reading the consent decree as well as the recitals in the compromise deed as a whole it was clear that the old tenancy between the parties was continued by the compromise decree or in any case new tenancy was created. Thus it was not open for the plaintiff decree-holder to execute the decree in view of the provisions of C. P. and Berar Rent Control Order. It was not open for the landlord to have terminated the tenancy of the tenant or to have taken possession of the property without taking recourse to the provisions of the Rent Control Order over again. From the conduct of the parties it was quite clear that it was the intention of the landlord to treat the tenancy as subsisting and that was done with the express consent of the parties as incorporated in the compromise application as well as the consent decree. By bilateral contract between the parties the notice of termination was not only waived but it was agreed that the old tenancy will continue on the terms and conditions incorporated in consent decree and a new contract of tenancy was created between the parties. (Para 4)

The assent of the landlord to the continuance of possession after the determination of the tenancy created a new tenancy in view of the provisions of Section 116, T. P. Act.

(Para 4)

New contract of tenancy created between the parties by virtue of the compromise decree was protected by the provisions of Rent Control Order and it was not open for the parties to waive the said right conferred upon the tenant by the Rent Control Legislation. Such contracting out, though not specifically prohibited by the Rent Control Order, was prohibited by necessary implication and it was not open for the parties to have given a go-bye to the said provisions of the Rent Control Order. (Case law discussed). (Para 4)

If the notice of termination given by the plaintiff was waived and, a new contract of tenancy was created between the parties, then it was not open for the Court to have passed the decree relating to the possession of the suit property unless the plaintiff has followed the procedure as laid down by the Rent Control Order. A fresh tenancy was created under the compromise decree. The tenancy was not terminated nor the permission was sought from the Rent Controller by the plaintiff in that behalf. Therefore, obviously the decree which was in contravention of the provisions of the Rent Control Order was ultra vires. It was a nullity and could not be executed. (Paras 5, 6)

It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be

* (Against decision L. J. Manjrekar Dist. J., Akola, in Civil Appeal No. 23 of 1964).

enforced or relied upon even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. AIR 1954 SC 340, Foll. (Para 5)

Cases Referred :	Chronological	Paras
AIR 1974 SC 471 = (1974) 2 SCR 544	4	
AIR 1973 SC 1311 = (1973) 1 SCC 761	4	
AIR 1972 SC 819 = (1972) 2 SCR 890	4	
AIR 1971 SC 102 = (1970) 2 SCR 554	4	
AIR 1971 SC 1081 = (1971) 2 SCR 171	4	
(1971) 12 Guj LR 1012	4	
AIR 1961 SC 1067 = (1961) 3 SCR 813	4	
(1961) 63 Bom LR 148 = ILR (1961) Bom 718	2, 4	
AIR 1959 Bom 292 = 1958 Nag LJ 250	4	
AIR 1954 SC 340 = 1955 SCR 117	5	
AIR 1954 Bom 370 = 56 Bom LR 365	2, 4	
AIR 1951 Bom 290 = 53 Bom LR 100	2, 4	
AIR 1950 Bom 252 = 52 Bom LR 143	3, 4	
AIR 1949 FC 124 = 1949 FCR 262	4	
AIR 1949 Bom 97 = 50 Bom LR 688 (FB)	2, 4	
(1921) 2 KB 291 = 90 LKJB 451	4	
(1911) 13 Bom LR 154 = ILR 35 Bom 239	4	
(1906) 8 Bom LR 813 = ILR 31 Bom 15	4	

S. N. Kherdekar, for Appellant; J. N. Chandurkar, for Respondents.

JUDGMENT:— The appellant decree-holder filed a Civil Suit No. 183-A of 1953 in the Civil Court, Akola, against the respondents to recover possession of certain shop premises situated in Mangaldas Market, Akola, alleging that he had leased out the said shop to respondent No. 1 on a monthly tenancy and that the respondent No. 1 had defaulted in payment of rent. It is also contended therein that he had also sub-let a part of the premises to respondent No. 2 without his permission. Before institution of this suit the landholder had obtained necessary permission from the House Rent Controller, Akola, to issue notice of ejectment against the opponents and had actually served a notice on them. The suit was resisted by the judgment-debtor respondent only and the other opponent remained absent. Ultimately that suit ended in compromise between the appellant and the respondent on 18-8-1954. As the controversy involved in this appeal is based on the recitals of this compromise decree, it will be useful to reproduce the relevant portion of the same at this stage which is as under:—

"It is ordered and decreed in terms of compromise between the plaintiff and defendant No. 1 and ex parte against the defendant No. 2 that (The defendant No. 1) shall pay rent to the plaintiff from 1-7-1953 at the rate of Rs. 25-0-0 per month and if he fails to pay his rent for any three months after 1-9-1954 the plaintiff will be at liberty to obtain possession of the suit shop by ap-

plying for execution. Parties shall bear their own costs as shown on overleaf. Defendant No. 2 shall vacate the suit portion."

As the respondents before this Court did not pay the amount of the rent as agreed, the decree-holder filed Darkhast application for execution of the decree. It was alleged in the said application that the defendant has not paid rent for three months, i.e. November and December, 1962 and January, 1963 and hence possession of the demised premises should be given to him from the defendants. He also claimed recovery of the arrears of rent for three months. A notice was issued to the judgment-debtor in this behalf. It was contended by the judgment-debtor in his reply that he had gone to Mansukhlal — the elder brother of the decree-holder who manages the estate at Akola — and offered an amount of Rs. 25/- on account of rent for the month of November, 1962 but Mansukhlal told him that he would receive that amount and will appropriate it towards the education cess which was being imposed by the Municipality and as that suggestion was not acceptable to the judgment-debtor and as he insisted that the amount of Rs. 25/- should be accepted towards the rent, Mansukhlal refused to do so. He further contended that the amount of Rs. 25/- was sent by money-order to the decree-holder but he wrongfully refused to accept that money-order. Therefore, it was the case of the judgment-debtor that since he had tendered the amount of rent it should be held that the rent for three months had not fallen in arrears and as such the decree-holder was not entitled to recover possession. He further contended that he had sent an amount of Rs. 25/- by money-order on account of the rent for the month of December 1962 and he was prepared to pay the rent which became due and hence the decree-holder was not entitled to claim the possession. The learned Civil Judge held that the judgment-debtor has failed to prove that he had tendered the amount in time and, therefore, passed an order that the decree-holder is entitled to the possession of the suit property. Being aggrieved by this order passed by the Second Joint Civil Judge, Junior Division, Akola, the judgment-debtor filed an appeal before the District Court. The District Judge, Akola, vide his judgment dated 30th of September, 1964 allowed the appeal and set aside the order of the lower Court directing execution of the decree for possession of the suit premises. The learned District Judge held that the decree-holder was not entitled to recover possession of the premises mentioned in the decree by seeking to execute that decree. Against this judgment of the District Judge, Akola, the present second appeal has been filed by the original decree-holder.

2. Shri Kherdekar, the learned counsel for the appellant, contended before me that the judgment of the lower appellate Court is

without jurisdiction because it is not open for the executing Court to go behind the decree. If the executing Court cannot go behind the decree then it is not open for the appellate Court also to go behind the decree in an appeal filed against the order passed by the trial Court in the execution proceeding. He further contended that merely concession was shown to the judgment-debtor and the said compromise between the parties did not create any new tenancy nor the old tenancy between the parties was continued to subsist. It was also contended by him that there was no question of granting relief against forfeiture and, therefore, the learned Judge of the first appellate Court committed an error in allowing the appeal and in holding that a fresh tenancy was created between the parties. In support of his contentions Shri Kherdekar has relied upon various decisions of this Court, viz., Ramjibhai v. Goverdhandas, 56 Bom LR 365 = (AIR 1954 Bom 370); Gajanan Govind v. Pandurang Keshao, 53 Bom LR 100 = (AIR 1951 Bom 290); Dattatraya v. Padmakar, ((1961), 63 Bom LR 148) and Waman v. Yeshwant, 50 Bom LR 688 = (AIR 1949 Bom 97) (FB).

3. On the other hand it is contended by Shri Chandurkar, the learned counsel for the respondent, that by the said compromise between the parties the landlord admitted that the defendant judgment-debtor was a monthly tenant of the plaintiff and he was to continue in possession of the house as a monthly tenant. He further contended that the terms of compromise further indicated that the landlord accepted the judgment-debtor to be his tenant and permitted him to continue in that capacity even after the passing of the decree. The judgment-debtor was held liable to pay past rent as well as future rent. Therefore, according to Shri Chandurkar the old tenancy between the parties was continued on new terms and the previous notice of termination given by the landlord was specifically waived. In substance a fresh contract of tenancy was created. In this view of the matter, according to Shri Chandurkar, unless the landlord took recourse to the provisions of the Rent Control Order over again it was not open for him to terminate the tenancy of the judgment-debtor, the tenant. Shri Chandurkar further contended that in view of the provisions of C. P. & Berar Rent Control Order and the specific recitals in the compromise deed as well as consent decree it is not open for the decree-holder to execute the decree. In support of his contention Shri Chandurkar has relied upon another decision of this Court in Gurupadappa v. Sayad Akbar 52 Bom LR 143 = (AIR 1950 Bom 252).

4. It is contended by Shri Kherdekar that merely an indulgence was shown to the judgment-debtor by way of concession which was incorporated in the consent decree. Though the judgment-debtor was liable to immediate eviction, the decree-holder allowed

him to continue in possession for a certain period from the date of decree in view of the compromise between the parties. In this view of the matter, therefore, according to the learned counsel, the terms of the consent decree neither amounted to creation of new tenancy nor the old tenancy was continued, therefore, it was open for the decree-holder to execute the decree. It is not possible for me to accept this contention of Shri Kherdekar. In the cases referred to by Shri Kherdekar when the matter was compromised between the parties only concession was given to the judgment-debtor and then a conditional decree was passed. In none of these cases future rent was claimed by the decree-holder landlord. In 50 BLR 688 = (AIR 1949 Bom 97) (FB) it was held by this Court that where a decree, passed either by consent or in invitum, permits payment of the decretal amount in instalments and provides that on failure in payment of one or more instalments the whole amount of the decree would become payable at once, Courts are bound, in the event of such failure, to execute the decree in accordance with its terms, and are not at liberty to relieve against the consequences of failure on equitable considerations. In that case plaintiff Waman had advanced a sum of Rs. 4,000/- to the defendant Yeshwant and his mother on the security of immovable property. A very little amount was paid towards the mortgage. Thereafter the dispute was referred to the arbitrator who gave his award and a decree was passed. The said decree provided payment of the decretal amount by instalments and it was then provided by the decree that in default of payment of any of these two instalments the plaintiff, if so desired, can take actual possession of the mortgaged property. Therefore, in my opinion, the said case is not useful for deciding the controversy involved in the present appeal. In 53 Bom LR 100 = (AIR 1951 Bom 290) i.e. Gajanan v. Pandurang a question came for consideration before this Court as to whether in a case where the relationship of landlord and tenant is created or continued between the parties by a compromise decree, the judgment-debtor who is a tenant would be entitled to relief against forfeiture resulting from his failure to pay the rent at the stipulated time. Plaintiff Gajanan had filed a suit against his tenant Pandurang to recover possession of the premises let out to him and for arrears of rent. Initially ex parte decree was passed against the defendant by which possession and right to recover Rs. 84/- on account of arrears of rent was given to the plaintiff. Thereafter the defendant filed an application to set aside the decree and to restore the suit to file and then a compromise decree was passed, which was in the following terms:

"According to the plaintiff's claim the defendant had to pay an amount of Rs. 84/- and the costs of the suit Rs. 30/- and further compensation in lieu of rent upto the

end of August 1947 Rs. 74/-, making in all Rs. 188/-. Out of this amount the defendant had paid to the plaintiff Rs. 100/- in cash to-day. The remaining amount of Rs. 88/- is agreed to be paid at the end of September, 1947, and the defendant should pay to the plaintiff the said amount of Rs. 88/- and the compensation in lieu of rent for the month of September Rs. 4-8-0 making it all Rupees 92-8-0 at the end of September 1947.

It is agreed that if the defendant pays to the plaintiff the amount mentioned above he is to stay in the suit premises as a tenant on previous terms. If the defendant fails to pay the said amount the plaintiff should take possession of the suit property "through Court." As the defendant failed to pay the amount, the plaintiff filed Darkhast. The question which was required to be determined in the said case was as to whether the defendant can be granted relief even though he has not complied with the terms of the decree. When the matter came in before the single Judge of this Court, a conflict between the view expressed by the Full Bench of this Court in *Waman v. Yeshwant*, 50 Bom LR 688 = (AIR 1949 Bom 97) (FB) and *Krishna Bai v. Hari*, ((1906) 8 Bom LR 813) and also in *Balambhat v. Vinayak*, ((1911) 13 Bom LR 154) was pointed out and so the matter was referred to the Division Bench. After making a reference to these two decisions the Division Bench found that there was no substance in the appellant's contention that the decision in *Krishnabai's* case is in any way inconsistent with the subsequent decision in *Waman's* case and then the Division Bench further observed that the Courts below were right in granting relief to the judgment-debtor. The Division Bench further found that the default made by the judgment-debtor in that case in the payment of rent was purely technical since the amount in question was paid by him only a day later than the stipulated period. Therefore, the question involved in the present appeal was not also considered in the said decision by this Court in (AIR 1954 Bom 370) on which reliance is placed by *Shri Kherdekar*, on the construction of the compromise between the parties, it was held by this Court:

"that the scheme of the agreement, the absence of any words indicating demise as such, the emphasis on the defendant's undertaking to vacate on or before the specified date, the use of the words 'mesne profits', liberty left to the defendant to vacate as soon as he liked coupled with the circumstances under which the contract came to be made, led to the inference that the document did not evidence the creation of a leasehold right; it only enabled the defendant to remain in possession of the property permissively at the latest until 22-10-1949 and on the expiration of the said period the decree-holder was entitled to execute the decree."

Therefore, on the terms and conditions as incorporated in the compromise decree it was

held that no new lease has been created and hence the decree-holder was entitled to execute the decree. Similarly in *Dattatraya v. Padmakar*, ((1961) 63 Bom LR 148) it was held by this Court that where a conditional decree for eviction either by consent or in invitum is passed by the Court the landlord's right to eviction becoming effective on the failure of tenant to pay the amount of rent mentioned in the decree within a stipulated time, the tenant cannot become a statutory tenant under Section 5 (11) (b) of the Bombay Rents Act, during the time granted to him to make the payment. Therefore, it was held that he was liable to be evicted on his failure to comply with the terms of the decree. In the said case decree granted did not require the judgment-debtor to pay future rent or the rent which had fallen due during the pendency of the suit. It was also not contemplated in the decree that the defendant was to continue in possession as tenant for an indefinite period. In substance there the defendant was directed to surrender possession to the landlord but only the tenant was permitted to remain in possession till the day specified in the decree. It was further observed by this Court that reading the decree as a whole, what was granted to the defendant was a concession, and the direction that the plaintiff-landlord was to recover possession on failure of the defendant to pay the specified amount within a specified time, was not by way of penalty and therefore, the question of granting any relief to the judgment-debtor will not arise. Therefore from the bare reading of the decisions referred to hereinbefore it is quite clear that all these decisions were based on the facts and circumstances of those cases, and much depended upon the language used in the consent decree. There is a distinction between the consent decree whereunder the tenancy is continued and a consent decree for eviction, whereunder an ex-tenant is allowed to retain possession for a specified period by way of concession. In such cases the landlord's right to take possession is postponed and no new tenancy is created, nor the old tenancy is continued. On the other hand, in (52 Bom LR 143 = (AIR 1950 Bom 252) this Court has taken a view that by virtue of the consent decree, the defendant can become a contractual tenant of the plaintiff. In that case by a consent decree the tenant admitted that he was a monthly tenant and agreed to deliver possession of the demised premises to the plaintiff on January 31, 1948 and to pay rent every month till the expiry of the period. In these circumstances this Court held that by virtue of the consent decree the defendant became a contractual tenant of the plaintiff and was, therefore, entitled to claim the benefit of Section 12 (1) of the 1947 Act. Position in this behalf was also considered by the Supreme Court in *Bai Chanchal v. Syed Jalaluddin*, (AIR 1971 SC 1081). In that case a decree for eviction of lessee from

leased lands on the basis of consent decree was passed. Though the judgment-debtor was liable to immediate eviction, the landlord allowed him to continue in possession for about five years from the date of decree as a concession. Mesne profits at a higher rate was required to be paid by the judgment-debtor. A clause was incorporated in the decree that in case of default of payment of mesne profits the judgment-debtor could be immediately called upon to deliver possession and in these circumstances the Supreme Court held that the terms of the consent decree neither constituted a new tenancy nor licence. The decision of this Court in 52 Bom LR 143 = (AIR 1950 Bom 252) was referred to by the Supreme Court and was distinguished. While distinguishing the said decision it was observed by the Supreme Court:

"Reference was made by learned counsel for the appellants, in support of his argument to a decision of the Bombay High Court in Gurupadappa 52 Bom LR 143 = (AIR 1952 Bom 252) but that case in our opinion, has no application. In that case in the consent decree itself, the first clause was that the defendant admits that he is a monthly tenant of the plaintiff and is to continue in possession till January 31, 1948. This clause specifically and clearly, in the language used made it manifest that the defendant was a monthly tenant and was to continue in that capacity in possession. It was in these circumstances that it was held that a new tenancy had been created from the date of the consent decree. In the case before us, the terms of the consent decree are in no way comparable with the terms used in the consent decree in that case. The language used in the consent decree in the present case contains no indication of any intention to create a tenancy so that the Bombay Rent Control Act, 1947 could never apply to the case of the appellants."

In the case before me the landlord accepted the judgment-debtor to be his sole tenant. The judgment-debtor also admitted that he is the monthly tenant of the plaintiff. Then it was also agreed between the parties that the defendant shall pay rent to the plaintiff from 1-7-1953 at the rate of Rs. 25/- per month, which payment was towards the past rent. So far as payment of future rent is concerned, it was agreed between the parties that if the judgment-debtor fails to pay his rent for any three months after 1-9-1954 then the plaintiff will be at liberty to obtain possession of the suit shop by applying for execution. From the compromise application filed before the Court it seems that there was dispute between the parties, as to whether the defendant is the sole tenant or not. In the compromise petition it was admitted by the defendant that he is monthly tenant of the plaintiff and he is withdrawing all the adverse allegations made by him in his written statement wherein he has stated that somebody else was also a tenant. As per this compro-

mise petition it was agreed between the parties that defendant No. 1 will pay to the landlord Rs. 25/- per month as rent from 1-7-1953. It was also agreed between the parties that if the defendant-tenant will remain in arrears of rent for any three months after 1-9-1954, then the plaintiff will be entitled to apply for execution of the decree and get possession of the tenement and in view of this compromise between the parties, a consent decree was passed. From the record it is further clear that the judgment-debtor continued to be a tenant and paid the rent regularly till November, 1962. In the Darkhast application filed by the decree-holder before the executing Court it was contended by the plaintiff that he had not received from the defendant rent for three months, i.e. for November and December 1962 and January 1963 and, therefore, possession of the demised premises should be given to him. It was specifically agreed between the parties that the defendant, the present judgment-debtor, is the tenant of the suit premises and he will continue to be a tenant even after the decree. This relationship of the landlord and tenant between the parties continued till the year 1963, when a default was committed by the judgment-debtor. Therefore, from the material placed by the parties before the Courts in this case, it is quite clear that it was intended by the parties that the relationship of landlord and tenant will continue and by the said consent decree in fact, the old tenancy was continued on new terms and a new contract of tenancy was entered into by the parties. Such an inference is inevitable having regard to the recitals of the compromise application as well as the consent decree and the conduct of the parties. As observed by the Supreme Court in Bhawanji v. Himatlal, (AIR 1972 SC 819), the assent of the landlord to the continuance of possession after the determination of the tenancy will create a new tenancy in view of the provisions of Section 116 of the Transfer of Property Act. What the section contemplates is that on one side there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term is over and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise. Reference in that case was made to the decision of Federal Court in Kai Khushroo Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden, (AIR 1949 FC 124) and then it was observed by the Supreme Court:

"The Federal Court had occasion to consider the question of the nature of the tenancy created under Section 116 of the Transfer of Property Act and Mukherjee, J. speaking for the majority said, that the tenancy which is created by the 'holding over' of a lessee or under-lessee is a new tenancy in law even though many of the terms of the old lease might be continued in it, by impli-

cation; and that to bring a new tenancy into existence, there must be a bilateral act. It was further held that the assent of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it. Patanjali Sastri, J. in his dissenting judgment, has substantially agreed with the majority as regards the nature of the tenancy created by Section 116 of the Transfer of Property Act, and that is evident from the following observations:—

“Turning now to the main point, it will be seen that the section postulates the lessee remaining in possession after the determination of the lease which is conduct indicative, in ordinary circumstances, of his desire to continue as a tenant under the lessor and implies a tacit offer to take a new tenancy from the expiration of the old on the same terms so far as they are applicable to the new situation, and when the lessor assents to the lessee so continuing in possession, he tacitly accepts the latter's offer and a fresh tenancy results by the implied agreement of the parties. When, further, the lessee in that situation tenders rent and the lessor accepts it, their conduct raises more readily and clearly the implication of an agreement between the parties to create a fresh tenancy

.....”

We have already shown that the basis of the section is a bilateral contract between the erstwhile landlord and the erstwhile tenant, if the tenant has the statutory right to remain in possession, and if he pays the rent that will not normally be referable to an offer for his continuing in possession which can be converted into a contract by acceptance thereof by the landlord. We do not say that the operation of Section 116 is always excluded whatever might be the circumstances under which the tenant pays the rent and the landlord accepts it. We have earlier referred to the observations of this Court in AIR 1961 SC 1067 regarding some of the circumstances in which a fresh contract of tenancy may be inferred. We have already held the whole basis of Section 116 of the Transfer of Property Act is that, in case of normal tenancy, a landlord is entitled, where he does not accept the rent after the notice to quit, to file a suit in ejectment and obtain a decree for possession, and so his acceptance of rent is an unequivocal act referable only to his desire to assent to the tenancy continuing in possession. That is not so where Rent Act exists; and if the tenant says that landlord accepted the rent not as statutory tenant but only as legal rent indicating his assent to the tenant's continuing in possession, it is for the tenant to establish it. No attempt has been made to establish it in this case and there is no evidence, apart from the acceptance of the rent by the landlord, to indicate even remotely that he desired the appellants to continue in possession after the termination of

the tenancy. Besides, as we have already indicated the animus of the tenant in tendering the rent is also material. If he tenders the rent as the rent payable under the statutory tenancy, the landlord cannot, by accepting it as rent, create a tenancy by holding over. In such a case the parties would not be *id idem* and there will be no consensus. The decision in AIR 1961 SC 1067 which followed the principles laid down by the Federal Court in 1949 FCR 262 = (AIR 1949 PC 124) is correct and does not require re-consideration.”

From these observations of the Federal Court as well as Supreme Court it is quite clear that Section 116 contemplates a bilateral contract between the parties. In the present case by the compromise between the parties and consent decree in pursuance of the said compromise a fresh contract was created. By virtue of this contract it was agreed that the defendant will continue to be in possession of the suit premises as a tenant. As a matter of fact, by the said compromise application the parties accepted that the defendant was the sole tenant of the suit premises. Then the defendant undertook to pay past rent from 1-7-1953. What was agreed to be paid between the parties was not mesne profits or an amount equal to the rent for use and occupation of the premises, but the parties specifically agreed that what the defendant will pay will be the rent. This is further clear from further recitals of the compromise deed as well as the consent decree. An obligation was cast upon the defendant to pay past rent as well as future rent and then it was agreed between the parties that if the defendant fails to pay rent for any three months after 1-9-1954 then the plaintiff will be at liberty to obtain possession by applying for execution. This consent decree was passed on 18th August, 1954. In spite of this a term was incorporated in this consent decree that if the defendant fails to pay his rent for any three months after 1-9-1954 then alone the plaintiff will be at liberty to obtain possession. From the material placed on record it is quite clear that the defendant paid rent till November 1962 and the plaintiff had accepted the said amount as rent. What was paid by the defendant to the plaintiff was a rent as per agreement between the parties. By the said agreement between the parties the old tenancy was continued on the terms and conditions incorporated in the consent decree and a new tenancy was created which admittedly continued till November 1962, i.e. for more than 8 years. Therefore, reading the consent decree as well as the recitals in the compromise deed as a whole, in my opinion the learned District Judge was right in coming to the conclusion that the old tenancy between the parties was continued by the said compromise decree or in any case new tenancy was created. Once this finding is recorded then it was not open for the plaintiff decreeholder, to execute the decree in view of the

provisions of C. P. and Berar Rent Control Order. It was not open for the landlord to have terminated the tenancy of the tenant or to have taken possession of the property without taking recourse to the provisions of the Rent Control Order over again. Such a view has been taken in *Chaturbhuj v. Manjibhai*, 1958 Nag LJ 250 = (AIR 1959 Bom 292); In the said case the landlord obtained permission of the Rent Controller and served notice of ejectment on the tenant calling upon him to vacate the premises. After service of notice the landlord accepted rent for the period subsequent to the notice and then served another notice asking the tenant to vacate, without taking fresh permission from the Rent Controller and then he filed a suit for ejectment. In these circumstances it was held by the Division Bench of this Court that the first notice was waived and since no permission was obtained from the Rent Controller to serve a fresh notice of ejectment, the notice was invalid and the suit was not maintainable. It was further observed that waiver can be inferred from the conduct shown by serving a notice indicating intention to treat the lease subsisting. In the absence of any other circumstance, acceptance of rent which has become due since the expiration of notice amounts to waiver of notice. A similar view was taken by the Supreme Court in *Tayabali Jaferbhai Tankiwala v. M/s. Ahsan and Co.*, (AIR 1971 SC 102). In that case landlord giving first notice to quit on grounds of arrears of rent, tenant did not vacate. Second notice was given after about a year demanding rent for a period between first and second notice. In the suit for ejectment the landlord claimed damages for use and occupation for a period subsequent to second notice, showing that the landlord was aware of distinction between rent and compensation for use and occupation. In this context it was held by the Supreme Court:

"In the present case there can be no doubt that the serving of the second notice and what was stated therein together with the claim as laid and amplified in the plaint showed that the landlord waived the first notice by showing an intention to treat the tenancy as subsisting and that this was with the express or implied consent of the tenant to whom the first notice had been given because he had even made payment of the rent which had been demanded though it was after the expiration of the period of one month given in the notice."

In the present case also from the conduct of the parties it is quite clear that it was the intention of the landlord to treat the tenancy as subsisting and this was done with express consent of the parties as incorporated in the compromise application as well as the consent decree. By bilateral contract between the parties the notice of termination was not only waived but it was agreed that the old tenancy will continue on the terms and conditions incorporated in consent decree and a new

contract of tenancy was created between the parties. Therefore, it was not open for the landlord to have secured possession of the house without taking recourse to the provisions of the Rent Control Order. However, it was contended by Shri Kherdekar that even if it is assumed that new tenancy was created which could not be terminated without seeking permission of the Rent Controller, it was open for the parties to enter into a contract to waive the said protection and right conferred upon the tenant under the Rent Control Order. It is not possible for me to accept this contention. In my opinion, new contract of tenancy created between the parties by virtue of the compromise decree was protected by the provisions of Rent Control Order and it was not open for the parties to waive the said right conferred upon the tenant by the Rent Control Legislation. Such contracting out, though not specifically prohibited by the Rent Control Order, was prohibited by necessary implication and it was not open for the parties to have given a go-bye to the said provisions of the Rent Control Order. From the provisions of clause 13 (3) (i) of the Rent Control Order it is quite clear that one of the grounds on which permission could be granted by the Rent Controller to give notice to determine the lease is, that the tenant is in arrears of rent for an aggregate period of three months and that he failed to deposit with the Controller, the amount of arrears ordered to be deposited by the Controller within such time as may be fixed by him. On this ground it is open for the landlord to approach the Rent Controller to seek permission to give notice to determine the lease of the tenant. Reference can usefully be made in this behalf to the observations of the Supreme Court in *Nagindas Ramdas v. Dalpatram Iccharam*, (AIR 1974 SC 471). After referring to the decision of a Gujarat High Court in *Rasiklal Chunilal's case* the Supreme Court observed:

"In *Rasiklal Chunilal's case* (1971) 12 Guj LR 1012 (supra), a Division Bench of the Gujarat High Court has taken the view that in spite of the fact that there is no express provision in the Bombay Rent Act prohibiting contracting out, such a prohibition would have to be read by implication consistently with the public policy underlying this welfare measure. If we may say so with respect, this is a correct approach to the problem."

Construing the provisions of Section 12, 13 and 28 of the Bombay Rent Act in the light of the public policy which permeates the entire scheme and structure of the Act, there is no escape from the conclusion that the Rent Court under this Act is not competent to pass a decree for possession either in invitum or with the consent of the parties on a ground which is de hors the Act or ultra vires the Act. The existence of one of the statutory grounds mentioned in Sections 12 and 13 is a sine qua non to the exercise of jurisdiction by the Rent Court under those provisions.

Even parties cannot by their consent confer such jurisdiction on the Rent Court to do something which, according to the legislative mandate, it could not do.

In the view we take, we are fortified by the ratio of the decision in *Barton v. Fincham*, (1921) 2 KB 291 at p. 299. Therein the Court of Appeal was considering the scheme of the Rent Restrictions Act, 1920, the language of Section 5 of which was similar to Section 13 of the Delhi Rent Act. In that context, Atkin, L. J. stated the law on the point thus :

"the section appears to me to limit definitely the jurisdiction of the Courts in making ejectment orders in the case of premises to which the Act applies. Parties cannot by agreement give the Courts jurisdiction which the Legislature has enacted they are not to have. If the parties before the Court admit that one of the events has happened which give the Court jurisdiction, and there is no reason to doubt the bona fides of the admission, the Court is under no obligation to make further inquiry as to the question of fact; but apart from such an admission the Court cannot give effect to an agreement, whether by way of compromise or otherwise, inconsistent with the provisions of the Act."

It is true that in *Barton's* case (1921) 2 KB 291 at p. 299 just as in *Seshadri's* case, (1973) 1 SCC 761 = (AIR 1973 SC 1311) (supra), the statute under consideration expressly prohibited the Court from passing a decree on a ground which was not covered by the statute but the principle is equally applicable to cases under statutes which place such a fetter on the jurisdiction of the Court, by necessary implication.

5. In the present case, once it is held that the notice of termination given by the plaintiff was waived and, a new contract of tenancy was created between the parties, then it was not open for the Court to have passed the decree relating to the possession of the suit property unless the plaintiff has followed the procedure as laid down by the Rent Control Order. A fresh tenancy was created under the compromise decree. This tenancy was not terminated nor the permission was sought from the Rent Controller by the plaintiff in that behalf. Therefore, obviously the decree which was in contravention of the provisions of the Rent Control Order was ultra vires. It was a nullity and could not be executed. As observed by the Supreme Court in *Kiran Singh v. Chaman Paswan*, (AIR 1954 SC 340) it is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court

to pass any decree, and such a defect cannot be cured even by consent of parties.

6. If this is so, then in my opinion, even by the compromise between the parties such defect could not have been cured. It was not disputed by Shri Kherdekar that once it is held that new tenancy was created between the parties then the plaintiff was not entitled to execute the decree. In this view of the matter, in my opinion, the learned Judge of the first appellate Court was right in coming to the conclusion that the present decree cannot be executed. In the result, therefore, the second appeal fails and is dismissed. However, in the circumstances of the case, there will be no order as to costs.

Appeal dismissed.

AIR 1975 BOMBAY 225

(NAGPUR BENCH)

PADHYE, J.

Ganpat Bapurao Bibekat, Petitioner v. Rameshwar Shalligram Pitambarwale and another, Respondents.

Special Civil Appln. No. 73 of 1972, D/-24-4-1974.*

(A) C. P. and Berar Letting of Houses and Rent Control Order, 1949, Cl. 13 (3) (ii) — Application under Cl. 13 (3) (ii) for determining lease for habitual default — Habitual default not made out — Appellate Court not in error in setting aside permission granted by Rent Controller. (Para 2)

(B) C. P. and Berar Letting of Houses and Rent Control Order, 1949, Cl. 13³(3) (v) — Alternative accommodation — Houses owned by tenant not available for his occupation on date of application — Requirements of sub-clause (v) not fulfilled. (Para 3)

(C) C. P. and Berar Letting of Houses and Rent Control Order, 1949, Cl. 13 (3) (v), Explanation — Securing alternative accommodation — Tenant owning houses — Sub-clause (v) does not require tenant to apply for eviction of his tenants and make accommodation for himself.

A tenant who owns his own houses though occupied by tenants cannot make an application to evict those tenants and secure alternative accommodation for him. That, however, is not the scope of clause 13 (3) (v). The Explanation to clause 13 (3) is not applicable to the premises constructed on a vacant plot after 1-1-1951. When the houses owned by the tenant are let out for business purposes and are not available for residence, a tenant cannot be taken to have secured

*(For quashing and setting aside order of V. M. Indurkar Dy. Collector with Rent Control Appellate Powers, Akola, D/-31-5-1971).

alternative accommodation for which permission could be granted against him. The order of the appellate court setting aside the order of the Rent Controller under clause 13 (3) (v) granting permission on ground of alternative accommodation was quite legal and justified.

(Para 3)

(D) C. P. and Berar Letting of Houses and Rent Control Order, 1949, Cl. 13 (3) (vi) — Requirements — Mere statement of landlord that he requires accommodation for bona fide needs is not enough — Details showing his needs must be given. (Para 4)

H. N. Vaidya, for Petitioner; M. V. Oke, for Respondent No. 1.

JUDGMENT:— The petitioner as a landlord filed before the Rent Controller, Akot, an application under clause 13 (3) (ii), (v) and (vi) of the C. P. and Berar Letting of Houses and Rent Control Order, 1949 for permission to give notice to the respondent No. 1 determining his lease, i.e. on the grounds of habitual default, tenant securing an alternative accommodation and the landlord needing the house for his bona fide occupation. The Rent Controller allowed the application of the landlord on all the three grounds. In appeal, the order of the Rent Controller was reversed and the application of the landlord was rejected on all the grounds. The landlord has, therefore, filed this petition.

2. Along with the application a Schedule was filed by the landlord showing the dates on which amounts were paid. In this Schedule it is not shown as to for which month the particular amount of rent was paid. This is Exhibit A in the record. The respondent No. 1 tenant had stated that he has been paying the rent every month and thus he was not habitual defaulter. The Schedule also shows that the rents are paid almost every month except on a few occasions. The last amount of Rs. 120/- was sent by money order. That cannot be considered to be a default as the landlord was refusing to accept the amount. The Schedule which has been filed by the landlord itself shows that the respondent No. 1 tenant was not in the habit of not paying the rent regularly every month. From this Schedule it cannot be gathered for what particular month the particular rent is being paid. It, however, appears that at a later stage and much after the written statement was filed by the respondent No. 1 the petitioner filed another Schedule, which is Exhibit A-2 showing the months for which the particular rent was paid. This Schedule was filed on 3-5-1970 when the case had already been posted for evidence and adjourned from time to time. There was, therefore, no opportunity for the respondent No. 1 to meet this Schedule Exh. A-2. The appellate Court has found that on the basis of these payments which have been made by the tenant, he could not be termed to be a habitual defaulter. I do

not see any illegality in the view taken by the appellate authority on the facts found in this case. The appellate authority, therefore, was not in error in setting aside the order of the Rent Controller and rejecting the application of the landlord on that count.

3. As regards the ground under clause 13 (3) (v) of the Rent Control Order, it is urged that the tenant has got two houses in the town and, therefore, he must be taken to have secured alternative accommodation within the meaning of clause 13 (3) (v) and, therefore the landlord was entitled to permission. It has not been brought out as to when the houses were let out by the tenant. Securing an alternative accommodation gives a cause of action to the landlord to claim permission to give notice. Evidently, therefore it must mean that after the tenancy in question was created, another accommodation must have become available to the tenant which he can occupy. For that purpose, therefore, it must be shown that on the date of the application, there was a house which was available for the tenant as an alternative accommodation. No material has been placed in this case in that respect. It is not the case of the petitioner that either on the date the lease was created in favour of the respondent No. 1 these houses owned by the respondent No. 1 were vacant or that they became vacant any time thereafter or that they were vacant on the date of the application so that they were available for his occupation. In the absence of any such material, the petitioner-landlord cannot claim permission under clause 13 (3) (v) of the Rent Control Order. It was contended on behalf of the petitioner that the tenant who owns his own houses, though occupied by his tenants, could make an application to evict those tenants and make that accommodation available for him. That, however, is not the scope of clause 13 (3) (v). The explanation to clause 13 (3) also is not applicable because the premises owned by the respondent No. 1 are not constructed on a vacant plot after 1-1-1951. It is not disputed that the premises are constructed much prior to 1951. Further it is also stated that those premises are let out for business purposes and are not suitable for residence. It cannot, therefore, be said that the tenant has secured an alternative accommodation for which permission could be granted against him. In this respect also, the order of the appellate authority was quite legal and justified.

4. The last ground was that the petitioner needed these premises for his bona fide occupation. In the application for permission a vague ground was given that it is required for his bona fide occupation. No details have been given in the application as to whether it was required for his residence or for his business or for godown or for any other purpose. It has also not been stated as to what kind of business he wants to do or the kind of business he has been doing

and if he wants the premises for residence, how many members he has got in his family and how he requires this accommodation for his purpose. It has also not (sic) been brought out in the evidence that the petitioner owns besides this house a number of other houses in the same town. No details have been given as to why his need cannot be satisfied by those other houses, whether they are all occupied, or some of them are vacant and if so why they are not available. Unless these details were given the tenant could not be expected to properly meet the case of the landlord. It is the landlord who has to make out a case for his need for bona fide occupation. For this purpose he must put before the Court all the necessary details which are required for granting him relief. On such vague allegation as made in the present application, the petitioner cannot expect to get relief on the ground of his bona fide occupation. Not only this, but the petitioner has taken different stands at different times as observed by the appellate authority. In the application he takes one stand, a vague stand, without giving any details. In the examination-in-chief at the time of evidence he has taken second stand whereas in the cross-examination he takes third stand. That itself shows that the application is lacking in bona fides and it cannot be said that the petitioner has established his bona fide need for occupation. A mere ipse dixit of the petitioner that he requires the accommodation for his personal occupation is not enough. It must be supported by valid reasons as to how his need is genuine. That is lacking in the present case. The appellate authority, therefore, could not be said to be in error in rejecting his application on this ground also.

5. In the result, the appeal was rightly allowed by the Resident Deputy Collector. This petition, therefore, must fail and is dismissed with costs.

Petition dismissed.

AIR 1975 BOMBAY 227

(AT NAGPUR)

MASODKAR, J.

Shriram Hari Tambey, Appellant v. Diwakar Ramchandra Kharabe and others, Respondents.

First Appeal No. 41 of 1964, D/- 11-7-1974.*

(A) Fatal Accidents Act (1855), Ss. 1-A, 2 — Scope — Death of minor child in motor accident — Calculation of damages — Mode of — Test indicated.

*(Against decision of H. K. Khan, Civil J., Sr. Division at Nagpur in Spl. Civil Suit No. 1-B of 1960).

As a mode of calculation of damages in favour of the parents on account of the death of their minor child in a motor (truck) accident, the guiding principles are: Firstly, the parents are entitled to recover the cash value of the services of the deceased minor. Secondly, they are further entitled to have compensation for the loss of pecuniary benefits that can reasonably be expected after the child might have attained the majority.

(Para 28)

The capitalised value of the reasonable services rendered to the dependants can be given under Section 1-A, while the award can be made for the loss of fairly happy and healthy life under Section 2. The conditions in a given family of the child should be taken note of. The judicial approach to the death of a child below the age of ten upon proof of normal family conditions is to assess damages within the range of Rs. 5,000/- to Rs. 6,000/- during the period till about 1970. That is how reasonable desideratum on quantum itself is furnished and once basic facts are established, that would constitute fair quantification. Every case may have, however, its own facts either requiring increase or decrease in this ratio.

(Para 39)

Under the scheme of the Fatal Accidents Act the life that is lost has to be treated as "an economic unit." That subserves the needs of those who depend reasonably on such life and further it has the potentiality of happiness and as well to earn an estate by reasonable means of livelihood to itself. The test is to offset together all "the imponderables", but that is no reason why full probable and possible pecuniary circumstances and factors out of a given case cannot be constructed to find the restitutive measure in favour of a suitor. AIR 1962 SC 1 and AIR 1970 SC 376, Rel. on. Case law discussed.

(Para 41)

On facts and circumstances of the case, the claim of Rs. 5,000/- by the father (who was 54 and about to retire from his services) on account of the death of the youngest daughter (10) having brilliant academic career was held to be not in any way excessive. Claim of Rs. 2,500/- on account of loss of life to itself was also allowed.

(Paras 42, 43)

Cases Referred: Chronological Paris

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AIR 1925 Lah 636 = ILR 6 Lah 451 27

V. R. Thakur, for Appellant; M. N. Belekar (for Nos. 1 and 2) and M. T. Dharmadhikari (for No. 3), for Respondents.

JUDGMENT:— 1-22. (After discussing the evidence, his Lordship proceeded) These positions having been ascertained, then comes the question as to the award of damages, which in principle is in the nature of restitution to those who depended on the deceased, and, secondly, for the loss of the life of the deceased itself. It is not punitive in any manner and the Court is called upon to balance every interest as much as possible and to arrive at a reasonable sum which will meet not only the expectation of life but commensurate the demands of those who expect to depend on such life.

23. As far as the present appeal is concerned there are two divergent approaches canvassed before me. On behalf of the appellant-plaintiff who is the head of the family who was expecting Sulabha to grow up and help in the waning years of the father, it is said there is a good case made out for granting damages both under Section 1-A as well under Section 2 of the Fatal Accidents Act and that Rs. 10,000/- is the minimum measure put by the father on the loss of this brilliant life.

24. On the other hand, the respondents submit that life and the facts of life are to be kept in view while determining the question of damages. It was for the plaintiff to establish as to what would have been the probable life's span and what would have been the probable earnings of the deceased. The evidence, the learned counsel submits, is absolutely wanting and mere guess-work cannot be the substitute for the proof that is required in these matters. At any rate, it is submitted that this being an appeal against the quantum of damages, the figures arrived at by the trial Judge should be treated as standard and there is no case for its enhancement. Certain decisions were cited at the Bar on behalf of both sides and they will be noticed in the later part of this judgment.

25. Suffice it to say, therefore, the approach of both the parties is diametrically opposite. In fact at one stage it was canvassed by the respondents that the trial Judge's judgment is not based on any evidence and is purely a guess-work which is not in accordance with law.

26. Now in the matters of damages of such kind, there cannot be any hard and fast rule nor the estimates given by the witnesses can conclude with accuracy the damages and its award. It appears to be well intended in the provisions of the Act itself to leave the matter to be worked out upon the facts and circumstances of each case and there is no rule of rigidity indicated. As I said earlier, it is for the Court to balance all the circumstances and to work out the sum which will answer

a sort of restitution for the loss of life because of an accident caused by negligence. Under Section 1-A of the Fatal Accidents Act, it is provided by the legislature advisedly that the Court may give such damages as it may think proportionate to the loss resulting from such death to the parties respectively. Thus the matter rests in the discretion of the Court to be worked out by balancing out of all interest and further taking an overall view of the whole matter. But the principle underlying Section 1-A is the loss resultant because of the death to the parties claiming the damages. Section 2 is more or less a proviso, though independently enacted, to Section 1-A. By the first part of Section 2 only one action or one suit is contemplated and by the second part it is made clear that in such action or suit the executor, the administrator or the representative of the deceased could insert a claim for and recovery of any pecuniary loss to the estate of the deceased. The distinction between the two sections is obviously clear. Section 1-A speaks of loss resulting from such death to the parties claiming in such a suit while Section 2 speaks of pecuniary loss to the estate of the deceased.

27. The nature of these provisions have been the subject-matter of consideration by the Supreme Court in *Gobald Motor Service Ltd. v. Veluswami*, (AIR 1962 SC 1) as well in *C. K. Subraminia Iyer v. T. Kunhi Kuttan Nair*, (AIR 1970 SC 376 = 1970 ACJ 110). The distinction between these types of losses has been clearly brought out in the former case by referring to the judgment of Lahore High Court in *Secretary of State v. Gokal Chand*, (ILR 6 Lah 451 = (AIR 1925 Lah 636) and quoting the observations from the judgment of Sir Shadi Lal, Chief Justice (as he then was) by the Supreme Court with approval. The learned Chief Justice had observed:

"The law contemplates two sorts of damages: the one is the pecuniary loss to the estate of the deceased resulting from the accident; the other is the pecuniary loss sustained by the members of his family through his death. The action for the latter is brought by the legal representatives, not for the estate but as trustees for the relatives beneficially entitled; while the damages for the loss caused to the estate are claimed on behalf of the estate and when recovered form part of the assets of the estate."

In *Gobald Motor Service Ltd.'s* case the Supreme Court further observed with reference to Sections 1 and 2 of the Act as follows:—

"The law on this branch of the subject may be briefly stated thus: The rights of action under Sections 1 and 2 of the Act are quite distinct and independent. If a person taking benefit under both the sections is the same, he cannot be permitted to recover twice over for the same loss. In award-

ing damages under both the heads, there shall not be duplication of the same claim, that is, if any part of the compensation representing the loss to the estate goes into the calculation of the personal loss under Section 1 of the Act, that portion shall be excluded in giving compensation under Section 2 and vice versa." It is to be observed that in the case before the Supreme Court in Gobald Motor Service Ltd.'s case, a sum of Rs. 25,200/- was given as the damages under Section 1 being the reasonable provision which the deceased would have made if alive, while a sum of Rupees 5,000/- was awarded for the loss to the estate representing the damages for the mental agony, suffering and loss of expectation of life. All that was taken to be covered by the provisions of Section 2 of the Act. Therefore, it appears that the words of Section 2 which permit recovery of any pecuniary loss to the estate of the deceased occasioned by the wrongful act, has been understood to include the damages of the kind which were upheld in Gobald Motor Service Ltd.'s case, the same being for the mental agony, suffering and loss of expectation of life to the deceased. The said case and the principles thereunder were further applied in the latter case mentioned supra (C. K. Subramania Iyer's case). There a boy of about 8 years was killed in a motor accident. After noting the passage of law in England and difficulties in assessment of damages, the Court observed:

"The mode of assessment of damage is not free from doubt. It is beset with certain difficulties. It depends on many imponderables. The English Courts have formulated certain basis for calculating damages under Lord Campbell's Acts. The rules ascertained by the English Courts are set out in Winfield on Torts 7th Edn. at pp. 135 and 136 as follows:

"The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a number of years' purchase. That sum, however, has to be taxed down by having regard to the uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt."

The number of years' purchase is left fluid, from twelve to fifteen has been quite a common multiple in the case of a healthy man, and the number should not be materially reduced by reason of the hazardous nature of the occupation of the deceased man. These principles are however, only appropriate where the deceased was the breadwinner of the family. Obviously they cannot be applied, for example, where the claim is in respect

of a mere expectation of the pecuniary benefit from the deceased or where the deceased's contribution to the family was in kind and not in cash. In truth, each case must depend upon its own facts. In *Dolbey v. Godwin*, 1955-1 WLR 553 at p. 1103(?), the plaintiff was the widowed mother of the deceased, an unmarried man 29 years of age, and he had contributed substantially to her upkeep. The Court of appeal held that it would be wrong to assess the damages on the same basis as if the plaintiff were the widow of the deceased, principally on the ground that it was likely that he would have married in due course and that then his contributions to his mother would have been reduced." From this paragraph which appears to have been approved as a mode of calculation of damages, it appears that it is permissible first to take into account the earning capacity of the deceased, taking into account the regularity of his employment and taking the reasonable personal expenditure of his, to work out a balance and by taking a number of years' purchase make out a figure in lump sum. All this is said with a qualification that everything must depend on its own facts. Referring to another English decision in *Nance v. British Columbia Electric Ry. Co. Ltd.*, (1951 AC 601) the Supreme Court referred to another modality of arriving at damages by observing:—

"(1) First estimate what was the deceased man's expectation of life if he had not been killed when he was and (2) what sums during those years, he would have probably applied to the support of the dependent." Referring to *Gobald Motor Services Ltd.'s case* (supra), the Supreme Court observed:—
".....The general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependent by the death must be ascertained."

The law was summarised as follows by stating:—

"Compulsory damages under Section 1-A of the Act for wrongful death must be limited strictly to the pecuniary loss to the beneficiaries and that under Section 2, the measure of damages is the economic loss sustained by the estate. There can be no exact uniform rule for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical calculations but the amount recoverable depends on the particular facts and circumstances of each case. The life expectancy of the deceased or of the beneficiaries whichever is shorter is an important factor. Since the elements which go to make up the value of the life of the deceased to the designated beneficiaries are necessarily personal to each case, in the very nature of things, there can

be no exact or uniform rule for measuring the value of human life. In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable. As a general rule parents are entitled to recover the present cash value of the prospective service of the deceased minor child. In addition they may receive compensation for loss of pecuniary benefits reasonably to be expected after the child attains majority."

On the facts of that case, the Supreme Court further observed that the deceased child was only 8 years old and the father was a substantial person being in a prosperous business, that the father needed no assistance from his son and it was not likely that the son would have been of any financial assistance to the parents till the age of twenty. There was no evidence to indicate what was the age of the parents, there was no material to indicate as to how old the parents of the deceased at the time of the death were nor there was any evidence about the state of health. In those circumstances, the appeal to increase the damage which were quantified by the High Court under Section 1-A at Rs. 5,000/- and under Section 2 at Rupees 1,000/-, was negatived.

28. These two cases thus lay down the guiding principles in this regard. Firstly, the parents are entitled to recover the cash value of the services of the deceased minor. Secondly, they are further entitled to have compensation for the loss of pecuniary benefits that can reasonably be expected after the child might have attained the majority.

29. I have already indicated in the present case that there is evidence coming from Shriram who was aged about 54 years that within a period of three years he would be out of service. There was firm evidence that Sulabha was about 12 years of age and was expected to help the family. In fact she was helping like any other member her mother in her works in the family. I have also referred to various ages of the other members of the family and the reasonable expectation in the matters of education of the said family. Sulabha was in 5th standard at the age of ten and she would have been Matriculate by the age of sixteen and Graduated herself by the age of twenty if everything had been all right. There is evidence to show that at the age of twenty-three one of her sisters was taking M. A. education. Putting the reasonable expectation Sulabha would have had the same sort of career of being the Graduate at the age of twenty. Her mother was of 48 years age and father 54 years. After graduation, it is possible to conceive that Sulabha would have been of an obvious pecuniary help to the family and all that was a loss to this family which was immediately in need of the support and services for the father, as he stated, was going to retire within a period of

three years. It is however, conceivable that there being other earning members like sons and daughters, Sulabha might not have been the only source for the purpose of dependence by the father and mother, but that is all a matter of guess in this regard.

30. Thus taking the life period of Sulabha as it is, by 1969 she would have been an earning member if graduated. These are the facts which are logically inferable as emanating from the evidence of Shriram. As is often said there is no possible accuracy available in this regard and everything must be conceived subject to possibilities of its version.

31. Therefore, the standard applied and upheld by the Supreme Court in maintaining Rs. 6,000/- upon the death of 8 years' boy, where there was no evidence about the need of the help of such a boy to the family, can also furnish a relevant clue while considering the present case.

32. I may briefly consider the other cases which have been brought to my notice to arrive at some such figures, though every case has to be considered on its own merits and facts.

33. In the case reported in Concord of India Insurance Co. Ltd. v. L. J. Machado, 1966 ACJ 321 = (AIR 1966 Mys 346) the Mysore High Court was considering a case of the loss of a boy of eight years and awarded his father and mother Rs. 5,000/- as loss of expectation of life and Rs. 1,000/- as compensation for pain and agony caused to the claimants themselves. The facts taken into account were that the boy was a sufficiently bright one and was enjoying good health. His father was earning Rs. 3/- to Rs. 4/- per day and his mother Rs. 34/- per month. There were three members in the family. Applying the test of normal expectation, it was assumed that the educational career of the deceased would have been satisfactorily terminated and after that he would have been able to acquire sufficient earning power. Relying on the decision and considerations available in Krishna Gounder v. Narsingam Pillai, (AIR 1962 Mad 309), where the death of 7 years' old child was considered, the Court found that these facts indicate that the victim would have easily earned Rs. 50/- to Rs. 60/- per month, and had he been appointed to Class IV post or clerical post, that earning would have gone to Rs. 100/- per month. After considering the English Cases on the point, the Court found that the award in that sum was a proper assessment as the circumstances of the life of the deceased were calculated to lead on balance to a positive measure of happiness of which he has been deprived. Therefore, under Section 1-A the Court was pleased to grant Rs. 1,000/- while under the latter Rs. 5,000/-.

34. In Shiv Prasad Gupta v. S. M. Sabirzaidi, 1967 ACJ 321 = (AIR 1968 All

186) the Allahabad High Court was concerned with the death of a eighteen-year old young man. There the Court found that the average Indian span of life should be put at 70 years and taking that the deceased would have started earning at the age of 25, made an award in the sum of Rs. 12,000/-, calculating the pecuniary assistance from the deceased to the family of Rs. 100/- per month for a period of 12 years. The Court took into account the circumstances of the family, the position which the deceased occupied in his family, the mental and physical equipment of the deceased, his age, also the age of the plaintiff and the standard of living of the particular family. There the plaintiff was 52 years of age and the deceased of 18 years. The earning age was treated to start with 25 and ending with 60 years and taking the mean, the sum of Rs. 12,000/- was calculated.

35. In *Perumal v. State of Madras*, (1971 ACJ 144 (Mad)) again, the Madras High Court was considering the death of a child of 8 years, and the claimants were the parents. While considering the principles of assessment, the Court took into account the change of attitude of the courts in England itself because of the depreciation of the value of the money and increased the damages from Rs. 3,000/- to Rs. 5,000/-. While fixing the damages it was observed that neither wealth nor the status of the child should be regarded as relevant in fixing the quantum. The English case: *Benham v. Gamling*, (1941 AC 157) was concerned with the death of a child of 2½ years. The Court applying the principles followed by the English Courts after that decision was minded to raise the amount of compensation. The High Court of Delhi considered in the earlier case *W. S. Bhansingh & Sons v. Om Prakash Kaith*, (1971 ACJ 324 (Delhi)) a case of a child of five years killed in an accident and upheld an award in the sum of Rs. 6,000/-. The Court observed that the potential earning capacity of the deceased, the normal expectation of his life, the status of the family of the deceased and the estimate of the financial assistance which the petitioners expected from the deceased if he had lived, his normal age, were all the relevant considerations.

36. In *P. S. Kothandani v. V. N. S. Pothi Naikar*, (1971 ACJ 456 (Mad)), the Madras High Court again granted Rs. 5,000/- for the death of a girl of the age of eight years. She was from a very ordinary family. It was a family of having daughters only and the victim girl was second. The evidence was that she was active and intelligent. On those facts the award of Rs. 5,000/- was held to be reasonable. In *Hirji Virji Transport v. Basiram Bibi*, (1971 ACJ 458 (Guj)), the Gujarat High Court considering the case of a deceased at the age of 45 having earning capacity of Rs. 4,500/- per annum and awarded Rs. 45,975/-. There the Court found even at the age of 45, he being an active person the maximum purchases year should

be fixed at 15. Thus for the purpose of computing the compensation the reasonable earning age was put at 60. The Court further clarified that under the Act the loss to the dependants is synonymous to the loss of maintenance to the dependants, while the loss to the estate is the loss of savings that the deceased could have made during his life and the damages for mental agony, suffering and loss of expectation of life and all include in the second head, i.e. in Section 2 of the Act. The method that found favour with the Gujarat High Court appears to be to determine the basic annual dependency of the family and then to multiply it by years' purchase factor ranging between 12 to 15.

37. There is yet another decision of the Delhi High Court in 1970 ACJ 110 = (AIR 1970 SC 376) where that Court granted Rs. 5,000/- under Section 1-A and Rs. 1,000/- under Section 2 of the Act as compensation upon the death of a son aged about 8 years.

38. As far as this Court is concerned, a Division Bench of this Court in *Abdulkadar Ebrahim v. Kashinath Moreshwar Chandani*, 1968 ACJ 78 = (AIR 1968 Bom 267) was considering a case of loss due to death of a wife to her husband at the age of 60 and one of the tests laid down was that loss under the head of loss of expectation of life should be assessed by applying an objective test of whether the deceased would have led a predominantly happy life and in doing so all relevant circumstances such as the social position of the deceased should be taken into consideration. There also the Court observed that the present value of the rupee is also a valid consideration while assessing the damages. In *Abdul Mahomed v. Petter Leo D'Mello*, 66 Bom LR 551 = (AIR 1965 Bom 21) a boy of six was done to death. The total amount of compensation was Rs. 6,000/- which was affirmed by this Court. On account of loss of expectation of life, a sum of Rs. 5,000/- was treated to be reasonable and the Court observed that the evidence of the father of the boy shows that the circumstances of the family and the standard of life were reasonably good, the parents took interest in their life and the child had a fair chance of having a happy life.

39. All these cases in India indicate certain basic principles to be followed in assessing the damages under both Section 1-A as well as Section 2, of the Act. The capitalised value of the reasonable services rendered to the dependants can thus be given under Section 1-A, while the award can be made for the loss of fairly happy and healthy life under Section 2 of the Act. The cases range as I have noted above between the age group of 5 to 8 and the assessment of damages under both counts has been Rupees 5,000/- to Rs. 6,000/-. More or less the conditions in a given family of the child has been taken note of. The case of this Court referred to above, i.e. *Abdul Mahomed's* case

(AIR 1965 Bom 21) dealt with a child of six years and awarded Rs. 1,000/- for the loss of service and Rs. 5,000/- for the loss of expectation of life. From this, judicial approach to the death of a child below the age of ten in this country upon proof of normal family conditions is to assess damages within the range of Rs. 5,000/- to Rs. 6,000/- during the period till about 1970. That is how reasonable desideratum or quantum itself is furnished and once basic facts are established, that would constitute fair quantification. Every case may have however its own facts either requiring increase or decrease in this ratio.

40. Coming to the present matter, the learned Judge has not made any such effort to find out what should be the reasonable assessment of damages awardable to the plaintiff. The method does not disclose any foundation. It does not take into account the say of the plaintiff about the circumstances in which deceased Sulabha was placed and the possible indications how she might have grown and become an earning member. The approach clearly suffers from the charge of pure guess work.

41. It has to be remembered that under the scheme of the Fatal Accidents Act the life that is lost has to be treated as "an economic unit." That subserves the needs of those who depend reasonably on such life and further it has the potentiality of happiness and as well to earn an estate by reasonable means of livelihood to itself. Therefore, at the outset the attempt should be to find out the basic circumstances in which the life lost was set and by taking in the reasonable measure to arrive at a possible expectation in the matters of succour or help which might have occurred to those who claim and further the matters of savings which may have been gained by enjoying the life-span with its possible utility. On and oft it has been said that the test is to offset together all "the imponderables", but that is no reason why full probable and possible pecuniary circumstances and factors out of a given case cannot be constructed to find the restitutive measure in favour of a suitor.

42. Looking to the present case, it does appear that the family expects the children to learn and earn. The evidence of Shriram is clear in this matter. As I have said earlier therefore it can be easily expected that Sulabha would have embarked upon a career of economic utility both for her benefit as well as for the benefit of her family. Starting with the age of 20, even till the age of 25, and leaving all other possible period of her life expecting that she would have married by that time, she can be expected to be a source of earning at least for five years. I am making all allowances for vicissitudes both till the age of 20 and beyond 25 though it is clear that parents are entitled to claim even for services to family. The learned trial Judge has put her earnings at Rs. 150/- per month on an ad hoc basis. That is obviously

a very low estimate in the year 1969. I am inclined therefore to fix the value of the remunerations of a graduate in the year 1969 at Rs. 300/- per month. Taking that figure, the family could have expected from that amount for both the retired father and the aged mother at least one-third, i.e. Rs. 100/- per month. If even on the reasonable basis only of five years that is the benefit to which these aged parents have been deprived, they would be entitled to be compensated to that extent. Thus on the count of loss suffered by dependents, the measure would work to Rs. 1200/- per year and for five years it would be Rs. 6,000/-. The claim of the plaintiff had been Rs. 5,000/-. Thus taking all the factors into account, I do not think that the claim made by the plaintiff in the sum of Rs. 5,000/- on that account is in any manner excessive or unreasonable. In fact that takes in the entire period of life and including services expected of the parted soul and as calculated above the sum claimed is entirely fair and equitable.

43. That leaves the question of award on account of loss of life to itself. It is eminently clear that Sulabha was having good health and there was reasonable expectation of good happy, healthy life. She was deprived of all that happiness and enjoyment and in awarding damages on that count, applying the tests of Section 2, it appears on a reasonable view that she could have saved for herself at least Rs. 50/- per month, spending Rs. 150/- for her own self-maintenance; even during the period of five years if that can be treated to be the active period of service. If that is so, she would be saving about Rupees 600/- per year and that would mean within a period of five years a sum of Rs. 3,000/- would have been earned and saved by an active healthy economic employee. I find that on these counts the plaintiffs are claiming two items—one in the sum of Rs. 2,500/- and again in the sum of Rs. 2,500/- though they have differently described the same said items, but the total claim is to the tune of Rs. 5,000/-. On a fair calculation of the active earning life which is the minimum that can be granted to a Graduate in this country I am inclined to grant Rs. 2,500/- on account of loss of life of Sulabha and thus loss of estate that could have been earned by reasonable expectations, had Sulabha been available as an earning unit.

44. Now this working, no doubt, involves little but building up the premises on the matters available on record. That is, however, a permissible mode. The total thus works out to Rs. 7,500/-. Even the ratio of the reasonable grant indicated by the various precedents mentioned by me above in the past five years indicate that the Courts have assessed the value on child-death between Rs. 5,000/- to Rs. 6,000/- where the loss was at ages 6 to 8. The economic conditions prevailing which is also a relevant factor including the value of rupee would have the

upset increase in this assessment. Thus taking the life of Sulabha as it is and it emerges from the evidence and even assessing five years as the best earning years of her life. I am inclined to hold that both under Section 1-A and under Section 2 of the Act, an award of Rs. 7,500/- would meet the ends of justice.

45. In the result, the decree of the learned Judge in the sum of Rs. 3150/- will be modified and substituted by the figure of Rs. 7,500/- and decree in this term shall be made. Appellant to get proportionate costs throughout. As the result of the above findings the cross-objection filed would stand dismissed with costs.

Appeal allowed and cross-objection dismissed.

AIR 1975 BOMBAY 233

SHAH, J.

Bhau Martand Shelar, Petitioner v. Hajabai Bala Nadaf and another, Opponents.
Special Civil Appln. No. 2606 of 1970,
D/- 16-4-1974.*

(A) Civil P. C. (1908), S. 11 — *Res judicata* — No question of *res judicata* when question of jurisdiction is involved. (Bombay Tenancy and Agricultural Lands Act (67 of 1948), Ss. 32-G and 32-F).

A decision on an issue of law will operate as *res judicata* in a subsequent proceeding between the same parties if the cause of the subsequent proceedings is the same as in the previous proceedings. It will not, however, operate as *res judicata* when the cause of action is different nor when the law has since the earlier decision been altered by a competent authority. However, these broad principles relating to the application of the bar of *res judicata* even on a point of law cannot apply when the decision relates to the jurisdiction of the court to try earlier proceedings. AIR 1971 SC 2355, Rel. on; AIR 1926 Bom 481, Distinguished. (Para 7)

Where any authority empowered to deal with matters under the provisions of a statute passes an order refusing to act or exercise jurisdiction over the subject-matter on a misconception of the interpretation of the statutory provisions or otherwise, such an order passed by it refusing to exercise powers cannot operate as *res judicata* and fresh proceeding in respect of the same subject-matter is maintainable. There is no question of *res judicata* when the question of jurisdiction is involved and the authority is competent to start fresh proceedings on the assumption that it had jurisdiction to proceed with the matter and pass appropriate orders. (Para 10)

*(To set aside order of Maharashtra Revenue Tribunal, Kolhapur, D/- 24-10-1970).

GS/GS/C434/75/VSS

Thus, where the Agricultural Lands Tribunal on an erroneous interpretation of law dropped the proceedings under Section 32-G of the Bombay Tenancy and Agricultural Lands Act on the ground that it has no jurisdiction to hold an enquiry under S. 32-G because the tenant was a widow on the tiller's day and her right to purchase the lands was postponed under Section 32-F (1) (b), such a decision cannot operate as *res judicata* and fresh proceedings under Section 32-G at the instance of the widow are maintainable.

(Para 11)

Cases Referred: Chronological Paras

AIR 1971 SC 2355 = (1970) 1 SCC 613 7

AIR 1957 Bom 94 = ILR (1956) Bom 827 7

AIR 1926 Bom 481 = 28 Bom LR 879 7, 9

N. D. Hambalkar, for Petitioner; R. G. Samant, for Opponent No. 1.

ORDER:— This Special Civil Application filed by the petitioner who is the landlord, under Article 227 of the Constitution of India raises a question of law as to whether the order of the Agricultural Lands Tribunal dropping the proceedings under Section 32-G of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the Act) on the ground that the tenant was a widow on the tiller's day and her right to purchase the land was postponed under Section 32-F (1) (b) of the Act, which order was confirmed by the Revenue Tribunal, operates as *res judicata*, and, therefore, fresh proceedings under Section 32-G of the Act at the instance of the widow were not maintainable.

2. The facts of the case are few and are no longer in dispute. The lands bearing Survey Nos. 340-2B, 341-1A, 341-2, 340-2C and 341-1B of village Soni in Miraj Taluka belong to the petitioner. The respondent is a widow since before April 1, 1957, the tiller's day. She is in possession of the said lands as a tenant since before the tiller's day. The Agricultural Land's Tribunal *Suo motu* commenced proceedings under Section 32-G of the Act in respect of the said lands and by its order dated November 16, 1960, held that the respondent No. 1 being a widow on the tiller's day, her right to purchase the lands was postponed under Section 32-F (1) (b) of the Act and in this view of the matter dropped the proceedings. This order of the Agricultural Lands Tribunal was challenged in appeal by the respondent No. 1. The Special Deputy Collector who heard the appeal disagreed with the view of the Agricultural Lands Tribunal and took the view that the widow-tenant is entitled to exercise her right to purchase the land during her lifetime. He, therefore, allowed her appeal and remanded the case for fresh inquiry to the Agricultural Land's Tribunal. In a revisional application filed by the petitioner, the Revenue Tribunal set aside the order passed in appeal and restored that of the Agricultural Lands Tribunal. The Revenue Tribunal

followed the view taken by the Bench of the Maharashtra Revenue Tribunal and restored the order passed by the Agricultural Lands Tribunal. This order was passed by the Revenue Tribunal on August 12, 1964. It appears that after this decision of the Revenue Tribunal, a view was taken by the Revenue Tribunal that the provisions of Section 32-F (1) (b) were optional and the rights conferred on the widow or a minor by the said provision were independent of and in addition to their right under Section 32 of the Act. The respondent No. 1, therefore, filed another application to the Agricultural Lands Tribunal to start proceedings under Section 32-G for determining the price of the said lands. The Agricultural Lands Tribunal, however, was of the view that the final order was passed by the Revenue Tribunal and the remedy of respondent No. 1 was to approach the Revenue Tribunal, for review of the order passed by it. The Agricultural Lands Tribunal, therefore, directed respondent No. 1 to approach the Revenue Tribunal for review of its order. This order of the Agricultural Lands Tribunal was confirmed in appeal by the Collector. In a revision filed by the respondent No. 1 challenging the order of the Collector, the Revenue Tribunal held that in the circumstances of the case, the previous order did not stand in the way of the petitioner for starting fresh proceedings under Section 32-G. The Revenue Tribunal, therefore, set aside the orders passed by the two authorities below and the case was remanded back to the Agricultural Lands Tribunal for taking proceedings under Section 32-G of the Act.

3. The short question for consideration that arises in this petition, therefore, is whether the order passed by the Agricultural Lands Tribunal dropping the proceedings which was confirmed by the Revenue Tribunal by its order dated August 12, 1964, bars initiation of fresh proceedings for determination of price of the land at the instance of the widow-tenant.

4. Mr. Paranjpe, the learned Counsel appearing for the petitioner contends that the previous order dropping the proceedings under Section 32-G would operate as *res judicata*, and, therefore, proceedings on the application of the respondent No. 1 could not be entertained. He submits that in effect, the Revenue Tribunal has reviewed its own previous order on the ground that the earlier view which disentitled the widow-tenant to purchase the land under Section 32 was later on not accepted, and a view was taken that it was optional to the widow-tenant to exercise her right under Section 32 to purchase the land. According to him, a review on such a ground is incompetent.

5. In order to appreciate the contention raised by Mr. Paranjpe, it would be necessary to consider the scheme of Sections 32 and 32-G of the Act. It is not dis-

puted before me that the correct position in law is that the provisions of Section 32-F (1) (b) of the Act were optional and the widow can, if she so chooses, claim to take advantage of Section 32-G and become a deemed purchaser under Section 32-G. It would be open to a widow not to claim the benefit conferred on the tenant under Section 32 of the Act and in that event, the right to purchase the land could be exercised by a successor-in-title within the prescribed time under Section 32-F (1) (b). It is, therefore, not disputed before me that the view taken by the Revenue Tribunal relying on its order dated August 12, 1964 was not in accordance with law. The question then arises as to what is the effect of the previous orders passed by the Agricultural Lands Tribunal and the Revenue Tribunal dropping the proceedings under Section 32-G on the ground that the right of purchase is postponed under Section 32-F (1) (b). Section 32 *inter alia* provides that on the 1st of April, 1957, which is called "the tillers' day", every tenant shall subject to the other provisions contained in the very section and the provisions of the next succeeding section be deemed to have purchased from his landlord, free of all encumbrances subsisting thereof on the said day, the land held by him as a tenant. It is unnecessary to refer to the other provisions as it is not disputed that a widow-tenant has a right to claim the benefit of Section 32 of the Act by becoming a deemed purchaser on April 1, 1957. In the case of a deemed purchaser, the Agricultural Lands Tribunal is enjoined to take proceedings under Sec. 32-G by following the procedure thereunder. Such proceedings have to be commenced by the Agricultural Lands Tribunal *suo motu*, and the landlord or the tenant need not make an application for taking proceedings under Section 32-G. It would, therefore, be necessary to consider the scheme of Section 32-G. Sub-section (1) thereof *inter alia* provides for publication of a public notice calling on the persons interested in the land including the tenant who is deemed to have purchased the land and the landlord, to appear before it on the specified date. In addition, the Tribunal has to give a notice individually to each such tenant, landlord and also, as far as practicable other persons interested in the land to appear before it on the date specified in the public notice. The next step which is contained in sub-section (2) provides that the Tribunal shall record in the prescribed manner the statement of the tenant whether he is or is not willing to purchase the land held by him as the tenant. Under sub-section (3), where any tenant fails to appear or makes a statement that he is not willing to purchase the land, the Tribunal shall by an order in writing declare that such tenant is not willing to purchase the land and that the purchase is ineffective. There is also a proviso to sub-section (3) which gives a further opportunity to the tenant who has failed to appear before

the Tribunal on the due date to review the order passed by the Tribunal declaring that the tenant is not willing to purchase the land and that the purchase is ineffective. If the tenant has shown his willingness to purchase the land under sub-section (4), the Tribunal is required to determine the purchase price of the land. Section 32-H provides the manner in which the purchase price be determined by the Tribunal. Section 32-K provides the mode of payment of price payable by the tenant-purchaser as also the power of the Tribunal to recover the purchase price. On the deposit of the price fixed by the Tribunal, the Tribunal has to issue a certificate of purchase to the tenant-purchaser in respect of the land under sub-section (1) of S. 32-F. It also provides for the consequences of non-deposit of the purchase price, viz. that the purchase shall become ineffective and the land shall be at the disposal of the Tribunal under Section 32-P. It would thus appear from the scheme of the said relevant provisions that duty is cast on the Tribunal to act suo motu and take the necessary proceedings under Section 32-G and the other relevant provisions of the Act.

6. Now, let us see what is the effect of the earlier order passed by the Agricultural Lands Tribunal. On a perusal of the order, it is quite obvious that the Tribunal refused to exercise the powers conferred on it under Section 32-G on the assumption that the tenant being a widow, her right to purchase the land was postponed by virtue of the provisions of Section 32-F (1) (b). The order clearly shows that the Tribunal was of the view that it had no jurisdiction whatsoever to proceed under Section 32-G in view of the fact that the tenant was a widow on the tillers' day, and she had no powers to commence the proceedings contemplated by Section 32-G. The said view of the Agricultural Lands Tribunal was confirmed by the Revenue Tribunal as indicated above. In other words, what has been done in this case is to refuse to start proceedings under Section 32-G on the ground that the Agricultural Lands Tribunal would have no jurisdiction to do so. In the present case, there was no dispute over the fact that the tenant was a widow on April 1, 1957 and the primary question that was required to be decided by the Agricultural Lands Tribunal was whether in view of the provisions of the Act it had jurisdiction to initiate the proceedings under Section 32-G or not. This is exactly what is done by the Agricultural Lands Tribunal in this case. There is no proceeding under Section 32-G which has been actually held nor any final order has been passed as contemplated by Section 32-G. The order of the Agricultural Lands Tribunal does not show that the procedure regarding the publication of the public notice or giving individual notices as required by sub-sec. (1) of S. 32-G was taken by it. It is also quite clear that in the view taken by the Agricultural Lands Tribunal, no statement of the

tenant as to whether she was or was not willing to purchase the land was recorded nor was any price of the land fixed. It would, therefore, be obvious that this is a case where the Agricultural Lands Tribunal dropped the proceedings on the basis that it had no jurisdiction to take such proceedings under Section 32-G. The decision of the Agricultural Lands Tribunal or the Revenue Tribunal was based on an erroneous interpretation of the provisions of the Act that the tenant who is a widow is not entitled to purchase the land and her right to purchase the land is postponed in accordance with provisions of Section 32-F (1) (b) and the right of purchase could only be exercised by the successor-in-title of the widow. After the said decision, the view has been changed and it has been held that the provisions of Section 32-F (1) (b) are optional and those provisions do not prevent the tenant who is a widow to purchase the land under S. 32-G, and that the right conferred under S. 32-F (1) (b) is in addition to the right of the widow-tenant to purchase the land herself.

7. It is urged by Mr. Paranjpe that merely because the judgment is based on an erroneous interpretation of the provisions of law, it cannot be said that the principles of res judicata are not applicable. He submits that a wrong decision even on a point of law would operate as res judicata between the parties. In support of his contention, he has cited several decisions of various High Courts, and in particular, reliance has been placed on a decision of this court in *Rajaram Tukaram v. The Central Bank of India, Ltd.*, 28 Bom LR 879=(AIR 1926 Bom 481). I shall have an occasion to refer to this decision later. For the present, I may observe that the counsel is right when he says that a decision on an issue of law will operate as res judicata in a subsequent proceedings between the same parties if the cause of the subsequent proceedings is the same as in the previous proceedings. It will not, however, operate as res judicata when the cause of action is different nor when the law has since the earlier decision been altered by a competent authority. However, these broad principles relating to the application of the bar of res judicata even on a point of law cannot apply when the decision relates to the jurisdiction of the court to try earlier proceedings. If the Agricultural Lands Tribunal on an erroneous interpretation of law dropped the proceedings on the ground that it has no jurisdiction to hold an inquiry under Section 32-G, such a decision cannot operate as res judicata. Just as a decision given by a court which has no jurisdiction to try the suit is a nullity and will not operate as res judicata for a fresh suit, similarly, refusal to exercise jurisdiction on a wrong view of law would not, in my opinion, operate as res judicata in a subsequent proceedings. In this connection, I may refer to a decision of the Supreme Court in *Mathura Prasad Bajoo*

Jaiswal v. Dossibai N. B. Jeejeebhoy, (1970) 1 SCC 613 = (AIR 1971 SC 2355) where it is observed—

"The doctrine of res judicata belongs to the domain of procedure: it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision of a competent court on a matter in issue may be res judicata in another proceeding between the same parties: the 'matter in issue' may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent court is finally determined between the parties and cannot be re-opened between them in another proceeding.

The previous decision on a matter in issue alone is res judicata: the reasons for the decision are not res judicata. A matter on issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision: the decision on law cannot be dissociated from the decision on facts on which the right is founded.

A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties; if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declared valid a transaction which is prohibited by law."

It is further observed by the Supreme Court that the question, relating to the jurisdiction of the Court cannot be deemed to have been finally determined by an erroneous decision of the court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not operate as res judicata. Similarly, by an

erroneous decision if the court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise. The facts of the case before the Supreme Court were that the tenant made an application to the court of the Civil Judge for determination of standard rent under Section 11 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. This application was dismissed on the ground that the Act did not apply to open land let for constructing buildings, and this order was affirmed in revision. However, in view of another decision of this court in *Vinayak Gopal Limaye v. Laxman Kashinath Athavale*, ILR (1956) Bom 827 = (AIR 1957 Bom 94) the tenant filed a fresh petition in the court of Small Causes as the area was included within the limits of Greater Bombay. The trial Court rejected the application on the ground that the question whether the Act applied to the case was res judicata since it had been finally decided by the High Court between the same parties in respect of the same land in the earlier proceedings, for fixation of standard rent. The decision of the High Court was challenged in appeal before the Supreme Court. The Supreme Court took the view that the earlier decision did not operate as res judicata and a fresh application for fixation of standard rent was maintainable as the question relating to jurisdiction of the court cannot be deemed to have been finally determined by an erroneous decision of the court.

8. In the instant case also the Agricultural Lands Tribunal refuses to exercise jurisdiction and powers under Section 32-G on an erroneous interpretation of the provisions of the Act holding that it had no jurisdiction to take proceedings under Sec. 32-G as the respondent No. 1 was a widow on the tillers' day.

9. Reliance was placed by Mr. Paranjpe on a decision of this court in 28 Bom LR 879 = (AIR 1926 Bom 481). This decision far from supporting the contention of the petitioner supports the view that on the question of jurisdiction there can be no res judicata. In this connection, it would be worthwhile to refer to the following observations of Fawcett, J. at p. 895 of Bom LR = (at p. 490 of AIR) of the report:—

"Therefore, so far as any argument may be raised that in any case the judgment on a point of law cannot be res judicata. I hold that in a case like the present the principle of res judicata does apply, although there was an adjudication on a point of law. I fully realize the distinction between cases where an erroneous decision on a point of law may be one which does not affect the Court's jurisdiction and cases where the point of law is one which does affect it, ..."

10. The position in law on the point raised can be summed up thus. Where the

Agricultural Lands Tribunal or any other authority empowered to deal with matters under the provisions of the statute passes an order refusing to act or exercise jurisdiction over the subject-matter on a misconception of the interpretation of the statutory provisions or otherwise, such an order passed by it refusing to exercise powers cannot operate as res judicata and fresh proceedings in respect of the same subject-matter is maintainable. There is no question of res judicata when the question of jurisdiction is involved, and the authority is competent to start fresh proceedings on the assumption that it had jurisdiction to proceed with the matter and pass the appropriate orders.

11. In view of the above discussion, it is not possible to accept the contention of Mr. Paranjpe and the orders passed by the Agricultural Lands Tribunal on November 16, 1960 and the Revenue Tribunal on August 12, 1964 refusing to take proceedings under Section 32-G in respect of the suit lands cannot operate as res judicata, and the fresh proceedings for fixation of the price under Section 32-G at the instance of respondent No. 1 would be maintainable in law. In the view of the matter I am taking, it is not necessary to consider the other contention raised by Mr. Paranjpe regarding the powers of review which can be exercised by the Revenue Tribunal or the Agricultural Lands Tribunal.

12. In the result, the Tribunal was right in quashing the orders passed by the two authorities below and remanding the matter to the Agricultural Lands Tribunal for taking proceedings under Section 32-G of the Act.

13. Rule discharged. In the circumstances of the case, there shall be no order as to costs.

Rule discharged.

AIR 1975 BOMBAY 237

JOSHI, J.

Dr. Martand Ramchandra Potdar, Appellant v. Dr. Dattatraya Ramchandra Potdar, Respondent.

A. F. A. D. No. 187 of 1969, D/- 19-1-1974.*

(A) Civil P. C. (1908), S. 144 — Restitution — Connotation of — Right when arises — Decree must have been varied or reversed — Interpretation — Duty and powers of Court.

The word 'restitution' in Section 144 connotes restoration to a party, on the variation or reversal of decree, what has been lost to

him in execution of the decree or directly in consequence of that decree, though not through proceedings under it. The right arises automatically on the reversal or modification of a decree on appeal and necessarily carries with it the right to restitution of all that has been done under the erroneous decree.

Even if it be held in the instant case, that an application under Section 144 would not lie, still such powers could be exercised by the Court under Section 151. (Paras 8, 9)

In a suit for declaration and injunction, the trial Court by an ad interim order directed the defendant to deposit in Court certain sums for payment to plaintiff till the disposal of the suit. This direction was maintained in the decree of the trial Court wherein there was no order as to the amount deposited by the defendant and withdrawn by the plaintiff. On appeal preferred by the defendant the decree of the trial Court was partially modified and the amount of deposits was ordered to be refunded to the defendant. The defendant applied under Section 144 for restitution and prayed for a direction to plaintiff to produce in Court the amount withdrawn by him:

Held that since the trial Court had allowed the plaintiff to retain the amount which he had withdrawn but the appellate Court gave him specific direction to refund the amount there was variation and reversal of the decree of the trial Court within the meaning of Section 144 and the application under Section 144 was maintainable. AIR 1922 PC 269 & (1871) 3 PC 465 & AIR 1953 SC 136 and AIR 1966 SC 948 and AIR 1962 SC 527, Rel. on. (Para 7)

(B) Civil P. C. (1908), S. 144 and O. 21, R. 11 (2) (j) — Restitution under S. 144 — Whether execution proceedings — Mode of execution — Details of, not set out in such application — Effect.

When an application for restitution does not prescribe any specific form, a prayer simpliciter for the recovery of the property lost to the applicant is an adequate compliance. It is only when regular execution proceedings are taken out under Order XXI that Rule 11 comes into play.

No doubt, sub-clause (j) is somewhat omnipotent and the decree-holder can seek assistance of the Court by simply saying that assistance should be granted as the nature of the relief would require, but he has to specify something in making such a request. Orders made in restitution proceedings are decrees within the meaning of Section 2 (2) and even on the bare passing of such a decree the judgment-debtor may choose to obey the same and an application to take further execution proceedings may not arise. If he does not prefer to adopt such a measure, it would be still open to the party to execute the order as a decree by resorting to the provisions of Order XXI of the Civil P. C. The doors of execution would be open to him till they are closed by the law of limitation. AIR

*(Against decision of N. A. Athalve Dist. J. at Nasik, in Civil Misc. Appeal No. 30 of 1967).

1965 SC 1477; AIR 1966 SC 1194, Rel. on; (1895) ILR 19 Bom 34 and AIR 1959 Raj 107, Disting. (Para 13)

Cases Referred: Chronological Paras

AIR 1966 SC 948 = (1966) 3 SCR 24	8
AIR 1966 SC 1194 = (1966) 3 SCR 479	10
AIR 1965 SC 1477 = (1965) 2 SCR 436	10
AIR 1962 SC 527 = 1962 Supp (1) SCR 540	9
AIR 1959 Raj 107 = ILR (1958) 8 Raj 1091	11
AIR 1953 SC 136 = 1953 SCR 559	8
AIR 1922 PC 269 = 49 Ind App 351	8
AIR 1921 Bom 67 = 23 Bom LR 480	10
AIR 1917 Bom 210 = ILR 41 Bom 625	10
(1895) ILR 19 Bom 34	11
(1871) 3 PC 465 = 17 ER 120	8

T. K. Verlekar, for Appellant; M. D. Gangakhedkar for R. A. Jahagirdar, for Respondent.

JUDGMENT:— The Second Appeal raises two important questions of law as to whether on the facts and circumstances in this case an application for restitution is tenable and if not, whether it could be treated as an application in execution; if so, whether such an application in the absence of mode of execution being stated, could be valid. The facts giving rise to these points could be briefly stated thus.

2. Dr. M. R. Potdar (the appellant), a dentist by profession, brought Civil Suit No. 502 of 1960 against his elder brother Dr. D. R. Potdar, also a dentist by profession, for a declaration that the clinic run by them was a joint concern, that accounts be taken and that the defendant (respondent) be restrained from carrying on the profession in the name and style of "D. R. Naik and Brothers." The suit came to be instituted on October 5, 1960. On the very day the plaintiff moved the Court for an ad interim injunction restraining the defendant from obstructing him in entering and conducting the said clinic run in Municipal House No. 40 of Nasik City. An ex parte rule was granted, but on the date fixed for the hearing of the application the parties arrived at certain terms and on the strength of the consent terms the learned trial Judge proceeded to vacate the interim injunction, but directed the defendant to pay to the plaintiff Rs. 100/- per month till the disposal of the suit. Certain other directions were given which are not relevant. This order came to be passed on February 22, 1961. The parties then proceeded to trial and the learned Judge who heard the suit finally allowed only one prayer restraining the defendant from preventing the plaintiff in taking part and conducting the clinic in dispute, but rejected the rest of the claim. However on the interim rule which directed the defendant to make certain deposits and which were withdrawn, he intended to maintain the status quo by adding the last clause in the decree which reads thus: "No order as to the amount deposited in Court by the defendant."

3. The defendant preferred Regular Civil Appeal No. 493 of 1962 impugning the entire decree. The learned Assistant Judge who heard the appeal, allowed it partially and modified the trial Court's decree on February 5, 1965. He declared that the joint business carried on by the plaintiff and the defendant in the name of "Dattatraya Ramchandra and Bros." had come to an end with effect from September 22, 1960. It is needless to detail out the other clauses, but on the point of the deposits made the effective order was: "The amount deposited by the defendant in Court will be refunded to him."

4. After the decree was modified and virtually reversed on the point of deposits made by the defendant pursuant to the interim order, the Defendant made an application being Miscellaneous Application No. 197 of 1965 in the Court of the Civil Judge, Senior Division, Nasik, under Section 144 of the Civil P. C. for restitution. On setting out the above undisputed facts he prayed for a direction to the plaintiff to produce the amount withdrawn by him, in Court, and for its recovery. He further pressed for interest thereon at 9 p. c. p. a. from the date of default till the date of payment. This application was preferred on November 16, 1965. In answer to this application numerous contentions were raised by the original plaintiff (present appellant) by his written statement filed at Ex. 27.

5. Mr. Verlekar for the appellant did not reiterate them in extenso, but pressed only three of the contentions viz. the application for restitution was not tenable; secondly, it could not be treated as an application for execution as has been done by the District Court in an appeal against the trial Court's order and thirdly, the amount was deposited for the maintenance of the appellant during the pendency of the proceedings; therefore, it cannot be claimed back. The learned trial Judge repelled these contentions and on holding that an application for restitution was the proper remedy, directed the appellant to pay to the respondent Rs. 2,200/- with future interest at 6 per cent. per annum from February 5, 1965 till realisation and costs of the application. This order was made on March 10, 1967. Against this order the original plaintiff preferred Civil Appeal No. 30 of 1967. When the matter came up for hearing before the learned District Judge, an exception was taken to the maintainability of the application under Section 144 of the Civil Procedure Code, but when the learned advocate for the respondent found it difficult to sustain the order of the trial Court on this ground, he seems to have urged in the alternative before the learned District Judge that this application could be treated as an application in execution; therefore, it came to be numbered as Civil Miscellaneous Appeal No. 30 of 1967. The learned District Judge was unable to share the views of the learned trial Judge that the application would lie under

Section 144, Civil P. C. and in his opinion the question of restitution did not arise. He accepted the contention raised for the appellant that there has been no decree which has been passed and which was either varied or altered within the meaning of Section 144 of the Civil P. C. However, on repelling this principal contention he considered the alternative argument that these proceedings should be treated as execution proceedings. This argument prevailed with him and he proceeded to decide the matter on the footing that it could be converted into execution proceedings. In doing so he overruled the technical objection raised for the appellant that the petition was not given in the printed form nor did it comply with the provisions in Rr. 11 to 14 of Order XXI which deals with the presentation of such execution petitions, the mode of relief etc. Ultimately he dismissed the appeal without any order as to costs but confirmed the trial Court's order. However, he deleted the direction granting interest at 6 p. c. p. a. Subject to this modification the trial Court's order was maintained although on different grounds. It is this order which has been made by the learned District Judge on July 10, 1968 that has been impugned before me.

6. The first point raised by Mr. Verlekar for the appellant was that the application for restitution is not tenable as there was no decree which has been passed and which has been varied by the learned Assistant Judge. In support of his submissions he further pointed out that although the decree of the lower Court was challenged before the learned Assistant Judge, no court-fees on the amount of Rs. 2,200/- which was admittedly withdrawn by the appellants, were paid, nor was that point argued and finally decided. It is only when the lower Court's decree is varied or reversed by the appellate Court, an application for restitution would lie under Section 144, Civil P. C.

7. This argument does not appeal to me as the very reading of the orders passed by the trial Court in the original suit and by the learned Assistant Judge in appeal against it, make the point quite explicit. At the cost of repetition I may mention that the learned trial Judge made no order as to the amount deposited in Court by the defendant (respondent). Virtually he allowed the appellant to retain that amount which he had already withdrawn or in his opinion he was entitled to it under some right or the other. But it is worthy to note that the order of the learned Assistant Judge in Civil Appeal No. 493 of 1962 which questioned the correctness of this entire decree, has given a specific direction to the appellant asking him to refund the amount. The relevant portion may be reproduced at the cost of repetition. It runs thus:

"The amount deposited by the Defendant in Court will be refunded to him."

This decree has become conclusive and there is nothing on the record to show that it has been varied or set aside by any superior Court. Now the parties cannot go behind this decree and the appellant will have to submit to the commands of the learned Assistant Judge. A comparative reading of both these decrees would make it quite clear that the lower Court allowed this amount to be retained by the appellant whereas the appellate Court directed him to refund the same to the respondent. Therefore, it follows that the lower Court's order has been varied or reversed to this extent by the appellate Court within the meaning of Section 144 and from this point of view the application under Section 144 would be tenable. I am unable to share the reasoning of the learned District Judge that there is no decree which has been either varied or altered as a consequence of which the amounts paid have become liable to be restituted.

8. In this context I may point out that the word 'restitution' used in Section 144 of the Civil P. C. connotes restoration to a party, on the variation or reversal of a decree, what has been lost to him in execution of the decree or directly in consequence of that decree, though not through proceedings under it. The right to claim restitution is founded on the reversal of a decree in appeal and the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This right arises automatically on the reversal or modification and necessarily carries with it the right to restitution of all that has been done under the erroneous decree. Dealing with this question on first principles it has been pointed out by their Lordships of the Privy Council in *Jai Berham v. Kedar Nath*, AIR 1922 PC 269 that it is the duty of the Court under Section 144 of the Civil P. C. to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved." Quoting from an earlier English case in *Rodger v. Comptoir*, (1871) LR 3 PC 465, they pointed out,

"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression, the act of the Court is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter upto the highest Court which finally disposes of the case."

This principle has been followed in the case of *Lal Bhagwant Singh v. Sri Kishen Das*,

AIR 1953 SC 136 and *Binayak Swain v. Ramesh Chandra*, AIR 1966 SC 948. The ratio of these authorities is that on the reversal of a judgment the law raises an obligation on the party to the record, who received the benefit of the erroneous judgment, to make restitution to the other party for what he had lost and it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the interests of justice of the case." These authorities are a complete answer to the technical objection raised by Mr. Verlekar. It is patent from the facts placed on the record that the appellant has no manner of right to retain Rs. 2,200/- which were deposited by the respondent from time to time and withdrawn by the appellant in view of the specific order made by the learned Assistant Judge.

9. Even if it be held, accepting the line of reasoning of Mr. Verlekar, that an application under Section 144 would not lie, still such powers could be exercised by the Court under Section 151 of the Code of Civil Procedure. It is needless to refer to the numerous authorities which lay down the proposition that the power of a Court to grant restitution is not confined to the cases covered by the provisions of Section 144, Civil P. C., it extends also to cases which do not come strictly within this section. The reason is that a Court has an inherent power under Sec. 151 irrespective of this section to order restitution. While dealing with and defining the ambit of Section 151, Civil P. C. their Lordships of the Supreme Court have pointed out in *Manoharlal v. Rai Bahadur Rao Raja Seth Hiralal*, AIR 1962 SC 527 that "Section 151 itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. Further, when the Code itself recognizes the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code." Therefore, even if for a moment one were to accept the contention of Mr. Verlekar, on the facts it is difficult to sustain his submissions. Such powers could be exercised under Section 151; but to this extent I need not go as the learned Assistant Judge's order is quite explicit on the face of it.

10. This takes me on to the next point as to the nature and scope of an application under Section 144 of the Civil P. C., whether it is for all intents and purposes an application for execution of the decree or something else; but I do not think it necessary to dilate on this point as it is concluded by a couple

of authorities of our High Court and of the Supreme Court. This Court has taken the view in *Kurgodigauda v. Ningangauda*, ILR 41 Bom 625 = (AIR 1917 Bom 210) and *Hamidalli Kadamalli v. Ahmadalli Mhibuballi*, AIR 1921 Bom 67, that the proceedings under Section 144 are proceedings in execution. In the recent pronouncement of the Supreme Court in *Mahijibhai v. Manibhai*, AIR 1965 SC 1477 it has been observed that the application under Section 144 could be treated as an application for execution of a decree. This has been pointed out with reference to the history of the various provisions and their effect. The party who has lost the property is entitled to the relief of restitution because the appellate decree enables him to obtain that relief either expressly or by necessary implication. He is recovering the fruits of the appellate decree and is claiming nothing more. The same principle has been reiterated in *Magbool Alam Khan v. Mst. Khodaija*, AIR 1966 SC 1194. Therefore, these two authorities are a sound answer to the next contention raised by Mr. Verlekar before me that the learned District Judge was not justified in treating the application made for restitution as an application in execution or an execution petition. As a matter of fact the authorities consistently point out that by whatever name they are called, all these applications are virtually in the nature of execution proceedings. Therefore, I find little substance in the next contention. The learned District Judge, to my mind, was not justified in treating the original application which was filed under Section 144 of the Civil P. C. and which was perfectly tenable, as an execution petition or in converting the regular appeal before him into a miscellaneous appeal. But that makes no difference to the merits of the case.

11. Adopting the reasoning of the learned District Judge, Mr. Verlekar for the appellant tried to defeat the claim of the respondent on a technical ground in contending before me that if the application is treated to be an application in execution, then it should specify the mode of the execution of the decree as required by Rule 11, Order XXI of the Civil P. C. In the entire petition made for the refund of this amount, nowhere the mode is referred to nor was any attempt made before the learned District Judge when the appeal was being argued and when the learned District Judge indicated that it could be treated as an execution petition. At least at that stage the mode of execution viz. the relief sought ought to have been specified. In the absence of these details, the application will have to be rejected. In support of such a line of reasoning he relied upon the rulings in *Shekaramchand v. Ghelabhai*, (1895) ILR 19 Bom 34 and *Harakchand v. Khetdan*, AIR 1959 Raj 107. The first case was under the old Code and it arose out of execution proceedings. The plaintiff who had obtained a decree against the defendants, the managing

"It is further ordered and decreed that Mr. R. P. Sanyal, Advocate be and he is hereby appointed Special Referee on usual remuneration to enquire into the secret profits, if any, made by the defendant with regard to the sale of coal which is the subject-matter of this suit, and it is further ordered and decreed that the said Special Referee do file his report within the eleventh day of February one thousand nine hundred and seventy-three. And it is further ordered and decreed that all costs, charges and expenses in connection with the said reference by the said Special Referee (to be taxed by the Taxing Officer of this Court) be borne and paid by the plaintiff. And this court doth reserve the consideration of all further directions as to such enquiry until after the said Special Referee making the aforesaid enquiry shall have made his report. And the parties shall be at liberty to apply to this Court from time to time as they may have occasion."

13. On July 4, 1972, application was made by the society for setting aside the ex parte decree. On August 30, 1972, the said application was dismissed with costs. The society has preferred an appeal against the said order and the appeal is now pending for final disposal.

14. On August 11, 1972, upon the matter being mentioned, T. K. Basu, J. directed all parties to act on the signed copy of the minutes.

15. Mr. R. P. Sanyal, an advocate of this Court who was appointed Special Referee under the decree dated June 5, 1972 filed a preliminary report on September 4, 1972. He filed a final report on January 15, 1973. In the final report he stated that the society has made secret profits of Rs. 2,81,232. On March 23, 1973, the firm made an application, inter alia, that (a) final decree be passed in terms of the findings of the Special Referee appointed in this suit for Rs. 2,81,232 being the secret profits made by the society by sale of coal supplied by the firm, be confirmed and (b) alternatively, the suit be set down in the peremptory list for further consideration.

16. On September 5, 1973, the society made an application inter alia for an order that the purported final report of the Special Referee alleged to have been filed in this Court on 15th January, 1973 be declared null and void and/or be set aside. In the petition the society states that on perusal of the application of the plaintiff firm verified by an affidavit of Muralidhar Gupta affirmed on March 20, 1973 for passing the final decree in terms of the finding of the Special Referee, the society came to know for the first time that the Special Reference on 7th January, 1973 settled the draft report in presence of the plaintiff's representative and filed his report on 15th January, 1973. The society states that the said report was settled by

the Special Referee without any notice to the society.

17. The application by the society for an order that the final report of the Special Referee be declared null and void and/or be set aside was argued first and I shall deal with the said application now.

18. Mrs. S. Pal, Advocate appearing for the firm took the preliminary point that the society is precluded from challenging the report of the Special Referee as the report has become and stands confirmed by efflux of time. Mrs. S. Pal relied on Chapter XXVI, Rules 89 and 90 of the Original Side Rules and submitted that an application to discharge or vary a certificate or report has to be made within fourteen days from the date of the filing thereof or within such further time as may be obtained for that purpose. As the application has not been made within the time limited by Rule 89, the certificate or report will be taken as conclusive evidence of the facts found therein.

19. In answer to the preliminary point, Mr. T. K. Biswas on behalf of the society first submitted that Chapter XXVI of the Original Side Rules does not apply in the instant case as the reference was directed to a Special Referee who is a member of the Bar. He has argued that Chapter XXVI will apply only in those cases of reference which appear in the printed cause list of the Original Side for each day.

20. In view of the arguments advanced by the learned Advocates for the parties on this point, the question is whether Reference Rules in Chapter XXVI of the Rules of the High Court at Calcutta, Original Side will apply when such Reference has been directed to a member of the Bar.

21. In references directed to officers of the Court, the provisions laid down in Rr. 4 to 10 of Chap. XXVI have to be followed before such references can be placed in the printed list of the day for hearing. On the other hand, in references directed to persons who are not officers, the normal practice is that an office copy of the order or decree is served upon the Referee who thereafter proceeds to hear the matter upon giving notice to the parties. In several Rules under Chapter XXVI the word "Officer" appears. In Chapter XXVI, Rule 17, the mode of proceeding before an officer on a reference shall be by Summons (Form No. 1) to be taken out by the party having the carriage of the reference. Under Rule 22 the "officer" gives preliminary directions. Under Rule 26 the "officer" may proceed ex parte on default of party summoned. Under R. 27 the "officer" shall be at liberty to proceed ex parte on default of filing statement of account etc. The "officer" may direct any cost of fees to be paid (Rule 29). Under Rule 48 the "officer" shall at the commencement of each daily sitting, hear applications with regard to pending reference. Under Rule 48 in all

matters referred to him an "officer" shall be at liberty upon an application of any party interested to make a separate report or reports from time to time. Under Rule 49 in all matters referred to him an officer shall be at liberty, upon an application of any party interested to make a separate report or reports from time to time. Under Rule 50 any "officer" taking a reference may at any time pending the reference or on its conclusion apply for the opinion of the Court on any question which may arise on the reference. Under Rule 51 in case an "officer" refuses or declines to make a special report where requested by a party to do so, such party may apply to the Judge in Chambers for an order requiring the officer to report specially. Under Rule 52 if any party prosecuting a reference does not proceed with due diligence the conduct of the reference may be committed by the "officer" to any other party. Under Rule 53 the "officer" to whom the reference is directed may, here he thinks fit, strike the same out of his list and the same shall also be struck out of the List of Reference. Under Rule 54 where an "officer" strikes a reference out of his list he shall forthwith certify the fact to the Registrar. Under R. 56 where a suit referred to an 'officer', is finally disposed of without his report or is referred by the order of the Court the parties may forthwith notify the same to the 'officer' who shall thereupon strike out the reference from his list. Under Rule 57 each officer shall at the beginning of every quarter report to the senior Judge presiding on the Original Side all the cases in which he considers that there has been any undue delay in the proceedings before him. Under Rule 58 where it shall appear to the Court or a Judge on the representation of any officer or otherwise, that there is any undue delay in the prosecution of account or inquiries, the Court or Judge may require any party to explain the delay and give necessary directions for expediting the proceedings. Rule 82 provides for proceedings where a separate report is made by an officer. Rule 88 provides for filing of the certificate of the report of an officer made on reference in the Registrar's office on payment of all necessary fees of Court. Under Rule 90 a certificate or report of an 'officer' unless discharged or varied shall be taken as conclusive evidence of the facts found therein.

22. Now the question is who is an officer of the Court? Is Mr. R. P. Sanyal, a practising advocate of this Court an 'Officer' of the Court within the meaning of the word in Chapter XXVI (Reference Rules of the Original Side)?

23. So far as I have been able to ascertain the point whether Rules 90 and 91 of Chapter XXVI are applicable to references directed to persons who are not officers of the Court, has not been directly decided in any previous case. In the judgment delivered by me on 8-6-1973 in the case of Sm.

Amar Latika Dassi v. Administrator General of West Bengal (Administration Suit No. 1408 of 1965 (Cal)) which was specially assigned to a Bench consisting of A. N. Sen, J. and myself by the learned Chief Justice on a reference made under Chapter V, Rule 2 of the Original Side Rules by Ramendra Nath Datta, J. I expressed my doubts as to the applicability of such rules, but in the particular circumstances of that case I was not called upon to express my decision on the point. This point has now been argued before me.

24. Clause 8 of the Letters Patent (1865) relates to appointment of officers. The relevant portion of clause 8 of Letters Patent (1865) is as follows:

"And we do hereby authorise and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor General in Council, to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted and committed to the said High Court by these our Letters Patent. And it is our further will and pleasure and we do hereby give, grant, direct, and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time, appoint for each office and place respectively, and as the Governor General in Council shall approve of"

25. Clause 37 of the Letters Patent states that it shall be lawful for the High Court to make rules and orders for the purpose regulating all proceedings brought before the High Court provided that the High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure.

26. Under Section 122 of the Code of Civil Procedure 1908, the High Court may from time to time make rules regulating their own procedure and procedure of the Civil Courts subject to their superintendence. Under Section 128 of the Code of Civil Procedure matters for which rules may provide are enumerated. Such rules shall not be inconsistent with the provisions of the body of the Code, but subject thereto, may provide for any matters relating to the procedure of Civil Courts. Section 128, sub-section (2) says:

"in particular, and without prejudice to the generality of the powers conferred by clause (i) such rules may provide for all or any of the following matters:

(i) delegation to any Registrar, Prothonotary or Master or other official of the court of any Judicial, quasi-judicial and non-judicial duties;"

So, under Section 128 (2) (i), High Court may make rules for delegation to any particular officer named in that rule or other official of the Court of any judicial, quasi judicial or non-judicial duties.

27. According to Shorter Oxford Dictionary, the meaning of the words 'Officer' and 'Official' is: One who holds a public office is an official. One who holds an office or post is an officer. An officer is a functionary authoritatively appointed to exercise some public municipal or corporate function.

28. I may observe, in passing, that although the word "Officer" has not been defined in the rules of the Court, Chapter IV contains rules laying down the duties of the various officers of the Court and the liabilities to which the officers in general are subject.

29. I am inclined to take the view that the provisions contained in Chapter XXVI of the Rules of the Original Side do not strictly apply when reference is directed to a practising lawyer or an advocate of this Court. Mr. R. P. Sanyal a practising advocate of this Court is not an "officer" of this Court within the meaning of the word used in Chapter XXVI. There are many rules in Chapter XXVI which are wholly inapplicable to references directed to persons who are not officers of this Court. When a practising lawyer or an advocate of this Court is appointed as Special Referee such reference does not appear in the daily cause list but Rules 10 and 11 provide that each day's cause list shall contain list of reference for that day and no reference shall be placed in the list until ripe for hearing.

30. Mr. Dipankar Gupta, the learned counsel for the firm admitted that certain rules of chapter 26 of the Original Side Rules cannot apply unless it is done by the Officer of the Court, but Mr. Gupta referred to Chapter 40, Rule 3 of the Original Side Rules, which provides that where no other provision is made by the Code or by these rules the present procedure and practice shall remain in force and submitted that even in those cases where a member of the Bar is appointed as Special Referee, the rules under Chapter 26 of the Original Side Rules are followed as a matter of practice.

31. It may be noted in this connection that the words "special referee" do not appear in Chapter 26, but the word "referee" appears in Chapter 10, Rule 29, sub-rule (c) of the Original Side Rules.

32. Mr. Gupta cited the case of Union of India v. Kshetro Mohan Banerjee, reported in AIR 1960 Cal 190 and referred to the observation of H. K. Bose, J. at page 198 of the report which is as follows:—

"It is a long standing practice of the original side of this High Court to pass decrees in the nature of preliminary decrees directing references or inquiries which involve questions of detail which it would be wasting the time of the Court to investigate. Chap-

ter XXVI of the Original Side Rules is designed to meet such a purpose. In the case of D. N. Ghose and Bros. v. Popat Narain Bros., ILR 42 Cal 819 = (AIR 1916 Cal 566) Jenkins, C. J. and Woodroffe, J. pointed out that as a general rule splitting up of the trial into two enquiries first as to the right and secondly as to the amount of damages was not desirable but sending an action to a referee might be necessary in some cases where an inquiry would involve questions of detail and investigation by the Court would entail considerable loss of time of the Court."

33. There is no doubt that when a decree is passed in the original side of this Court directing reference in an appropriate case, to an officer of this Court the provisions of Chapter XXVI (Reference Rules) of the High Court at Calcutta (Original Side) will apply; but the point which has been argued before me, namely, whether the reference rules under Chapter XXVI will apply when reference is directed to a practising lawyer or an advocate of this Court was not argued or decided in that case (AIR 1960 Cal 190). The said observation of the learned Judge is not an authority for the said point which has been raised before me.

34. Even if it is assumed (contrary to my view) that Chapter XXVI of the Rules of the Original Side is applicable in case where reference is directed to a practising advocate of this Court, it has been argued before me by Mr. Biswas that the Reference Rules in Chapter XXVI have not been followed or adopted in the instant case. I accept the argument on this point. Chapter 26, R. 17 of the Original Side Rules which provides for the mode of proceeding has not been followed in the instant case. Chapter 26, Rule 17 says:

"The mode of proceeding before an officer on a reference shall be by summons (Form No. 1) to be taken out by the party having the carriage of the reference appointing a time for the purpose of taking into consideration the matter of the decree or order directing the reference."

35. The summons in Form No. 1 has been prescribed in Appendix I at page 416 of the Rules of the High Court, Original Side 5th Edition, Vol. 1. It says:

"Let all parties concerned attend before the Registrar (or other officer conducting the reference) at the Court house, to take into consideration the matter of the reference directed."

36. The provision seems to be mandatory on the part of the officer to whom the reference is made by the court or a judge. This rule has not been followed in the instant case.

37. Again under the reference rules where the object of the reference is an enquiry as to matters of fact a statement shall be filed (Rule 37). Every objection to a statement of fact shall be made by a counter statement (Rule 39). Where any accounts,

statements or objections or any statement or counter statement of facts required to be filed on a reference is not in accordance with these rules or with the directions given or where the affidavit in verification thereof be insufficient a further account, statement, counter statement or affidavit may be called for and the officer may give such directions as to the payment of any costs thrown away as he may think fit. (Rule 41). These are matters which have not been followed or complied with in the instant case. The certificate or report shall be settled on notice to the parties who have appeared on the reference. (R. 87). The society states that the special referee in the instant case settled the draft report on January 7, 1973 in the presence of the firm's representative and behind the back of the society's representative and filed his report on January 15, 1973 in violation of the Rule 87. It seems to me that the certificate or report has not been settled on notice to the society. The special referee did not follow or adopt the procedures laid down in Chapter 26 of the rules of the Original Side.

38. Mr. Biswas then argued that the provisions contained in Order 26 of the Code of Civil Procedure will apply in the instant case. His submission is that there is no provision in the Code of Civil Procedure about limitation of time for taking objection to the report. Under the provision of the Code of Civil Procedure, the report does not become binding upon the Court or the party. He contended that in the instant case when the report is before the Court he is entitled to raise objections to the report and there is no question of limitation. The report shall be evidence in the suit and where the Court is dissatisfied with the report the Court will direct further enquiry. He referred to Order 26, Rule 12 of the Code of Civil Procedure. I accept the argument of Mr. Biswas on this point. I am of opinion that O. 26, R. 11 of the Code of Civil Procedure is the material provision of the Code under which the reference has been made. Order 26, Rule 11 reads as follows:—

"In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment."

39. I will quote here the observation of Shah, J. in the case of Biharilal Ramcharan Cotton Mills Ltd. v. China Cotton Exporters a firm, reported in AIR 1963 Bom 59 (at page 60) which is as follows:

"Where, therefore, an order for issue of a commission and appointment of a commissioner for the purpose of taking accounts in any suit is directed to be made, the High Court has to be guided by the provisions of the Code of Civil Procedure in that behalf as enacted by clause 37 of the Letters Patent and Order 26, Rule 11 is the only provision in the Code under which a Commissioner for taking accounts can be appointed."

40. I agree with the said observation of the learned Judge.

41. I think I shall note here the Calcutta case Kashiram Budhia v. Chajuram Budhia, (ILR 61 Cal 488 = AIR 1934 Cal 737) decided by Panckridge, J. which is referred to in the said Bombay decision (AIR 1963 Bom 59). The head note of the report ILR 61 Cal 488 = (AIR 1934 Cal 737) runs thus:—

"In proceedings conducted by a Commissioner of partition and Special Referee appointed by the Original Side of the High Court, the provisions of Rules 5 and 6 of Order XVIII of the Code of Civil Procedure apply and the deposition of a witness should be read over and explained to him after it is completed and, if necessary, translated into language which he understands."

42. In the premises, I am not inclined to accept the preliminary point that the report of Mr. R. P. Sanyal as Special Referee has become binding automatically by efflux of time. If I accept the contention of Mrs. Pal I shall have to hold that although the various provisions of Chapter XXVI are inapplicable to references directed to persons who are not officers of the Court, only Rules 90, 91 and 92 are so applicable. I am unable to do so. In my view, Chapter XXVI, Rule 89 or 90 will not apply in the instant case.

43. Assuming however that the said rules apply, even then under Chapter XXVI, Rule 91, question of law may be raised at the hearing of the suit on further consideration and an application to discharge or vary the certificate or report as to such question need not be made. Under Chapter XXVI, Rule 92, again an application to re-open certificate or report after it has become binding can be made by motion on the ground of fraud, suppression or mistake or such other grounds as may be allowed by the Court. Therefore, it may be necessary to consider whether there are other grounds on which the certificate or report may be re-opened.

44. Mr. Biswas then contended that the report of the special referee is illegal because Order 26, Rule 18 of the Code of Civil Procedure has not been followed in the instant case and therefore the report should be set aside without going into the merits. His argument is that under Order 26, Rule 18 of the Code of Civil Procedure unless a writ of Commission is issued by the Court the Commissioner is not empowered to enter into the reference. He further argued that the Court has no power to issue Commission *ex parte*. Mr. Biswas referred to the decision of Latchman Naidu v. Ram Krishna Ranga Rao, (AIR 1934 Mad 548) and relied on the observation of Cornish, J. at page 549 of the report:—

"Rule 18 is mandatory, and is intended to ensure that parties have notice of the appointment of the Commissioner and that they

must attend his investigation. Therefore, there is no power in the court to issue an ex parte commission."

45. Mr. Biswas cited several cases which followed AIR 1934 Mad 548. He cited; Labanya Debi v. Govinda Malik, (AIR 1960 Ori 66); Seetharamappa v. Appaiah, (AIR 1962 Andh Pra 84) and Jamil Ahmed Taban v. Must. Khair-ul-Nisa, (AIR 1970 Delhi 205).

46. I do not think that an order by Court appointing a Commission ex parte without issuing notice to the defendant will make the order illegal as it does not seem to be opposed to Order 26, Rule 18 of the Code of Civil Procedure. I will quote here the observation of Ramaswami, J. in re P. Moosa Kutty, (AIR 1953 Mad 717) at page 718 (Para 5):

"This issue of Commission can be made 'ex parte' and in fact it stands to common sense has often got to be made 'ex parte'."

47. In view of the above matter I am unable to accept the contention of Mr. Biswas that the Court has no power to make an ex parte order issuing commission. I agree with the observation made by A. Narayana Pai, J. in M. Shivarama Bhat v. Mahabala Bhatt Muliya, (AIR 1970 Mys 45 at p. 46):

"The general statement that the Court has no power to make an ex parte order issuing commission cannot of course be accepted."

48. I will quote in this connection the note given in Mulla's Code of Civil Procedure 13th edition at p. 1332 which is as follows:—

"Notice of commission to be given to the parties. Though there is an observation in a Madras case that "there is no power in the Court to issue an ex parte commission" (AIR 1934 Mad 548), it has since been clearly laid down that there is no provision in the Code which bars the Court from issuing a commission ex parte." (AIR 1953 Mad 717).

Mr. Biswas however relied very much on the further note given in Mulla's Code of Civil Procedure at page 1332 which is as follows:—

"But this rule comes into operation after an order appointing a Commission has been made and it requires that the Court should give notice to the parties to appear before the Commissioner and where that is not done, the proceedings before him are illegal. A notice given by the commission is not sufficient."

49. I cannot accept this part of the argument of Mr. Biswas under the special facts and circumstances of this case as set out below:—

It appears that on August 11, 1972 the learned Judge directed all parties to act on the signed copy of the minutes. The minutes of the Court dated August 11, 1970 are as follows:—

"Before the Hon'ble Mr. Justice T. K. Basu, Dated the 11th day of August, 1972.

Suit No. 107 of 1970
Jaiswal Coal Company
v.

Fatehgunj Co-operative
Marketing Society Ltd.

Mrs. Pal mentions for the plaintiff.

Mr. B. R. Lodge for the defendant.

The Court: Let the suit appear in the list on 25-8-72 for hearing. Special Referee to file his report within 6 months from date. Let this order be incorporated in the decree dated 5-6-1972. Special Referee and all parties to act on a signed copy of the minutes.

Sd/- Illegible

11-8-1972

Assistant Registrar,
High Court, Original Side,
Calcutta."

50. The order dated August 11, 1972 was passed in the presence of the Solicitor for the society. It seems to me that by reason of the said order the special referee can act before writ of commission, was issued to him. In the Original Side of this Court it may be necessary to pass order that a Commissioner or special referee or receiver appointed by the Court to act on signed copy of the minutes and very often learned Judges pass such order. Whenever such order is passed the person appointed acts on the signed copy of the minutes before the writ of commission or certified copy of the order is issued or served on him and this practice is followed in the Original Side. Therefore, I am unable to accept the argument of Mr. Biswas that the report is illegal because no commission was issued by the Court. In the premises I decide to go into the merits of the report. I will now consider what the special referee did after the order dated August 11, 1972.

51. It may be noted that in the preliminary decree dated June 5, 1972 no direction was given by the Court as to the mode in which reference would be conducted but it is provided that the parties would be at liberty to apply to Court from time to time as the occasion may arise. The special referee or the firm did not take any direction from the Court as to the mode in which the special referee has to enquire into the secret profits and without taking such direction from the Court what the Special Referee did was as follows:—

On August 18, 1972, the Special Referee Mr. Sanyal started for Mogulsarai and from there he proceeded to Varanasi. In the petition, the society states that the office of the plaintiff is also situate at Varanasi. This statement of the society is not specifically denied by the firm. From Varanasi, the special referee started for Faizabad and went to the office of the society. He met the Baldeo Prasad Pathak, Accountant and Sri Ram Prasad Singh, President of the defend-

ant society. There he served a notice dated 18th August, 1972 upon the defendant society asking the society to produce before him certain documents for his examination. It is stated in the report by the special referee, the particulars of documents he wanted from the defendant society. These are :

- (1) Cash Books;
- (2) Stock Registers;
- (3) Sale Registers;
- (4) Counter foils of Cash Memo Books;
- (5) Registers containing the names of the buyers;
- (6) Correspondences, and
- (7) Other necessary papers all relating to the dealings between the parties from January 19, 1965 to March 31, 1967.

It is stated that the President of the society accepted the said notice of the Special Referee.

52. With regard to this part of the first report of the Special Referee dated 4th September, 1972, Mr. Biswas, the learned counsel for the society contended that the Special Referee acted in disregard to Chapter 26, Rule 17 of the Original Side Rules. He did not hold meeting in the court house. He went to Faizabad and himself went to the office of the defendant and thereafter, he went to the office of the Registrar of Co-operative Societies Government of Uttar Pradesh and met the District Registrar and sought his co-operation. It is stated by the special referee in his first report that at that time, the partner of the plaintiff firm and the Secretary of the defendant were present there. Shri Mishra, the District Assistant Registrar of Co-operative Societies, Government of Uttar Pradesh told him that police has seized some papers of the society including the relevant paper concerning a criminal case pending against the Ex-secretary of the society. Shri Mishra suggested to the special referee to go to Gorakhpur and contact Sheo Prosad Sirgh, the Inspector who is investigating the case. He then saw Mr. Md. Rafi, advocate, Director and Legal Advisor of the society and asked him to produce certain documents. But Md. Rafi told him that he was not in a position to produce any papers. Then it is stated in the first report that in course of his enquiry the special referee contacted some of the local dealers dealing in coal and also other persons. He names five of such persons and states certain facts.

53. In paragraph 32 of the petition of the society filed on 5th September, 1973 it is stated that the special referee did not give any notice to the society to appear before him at Varanasi or in Faizabad and the Special Referee examined the said persons in course of the enquiry behind the back of the defendant society. The names of the persons whom the special referee examined has been mentioned in his first report and the statements of those persons, namely, Ram Murti Singh; Locus Singh; Surya Pal Tewari;

K. K. Singh and Jagat Narayan Panda are recorded in the report. While going through the first report it seems to me that the special referee made a private enquiry disregarding the rules of this Court and the procedure laid down in the Code of Civil Procedure. He examined the witnesses behind the back of the society. He did not follow the rules of the Code of Civil Procedure laid down in Order 18, Rules 5 and 6. He did not take down evidence as provided under Section 138 of the Evidence Act.

54. In paragraph 33 of the affidavit-in-opposition of Gorakh Nath Jaiswal filed on November 27, 1973 it is denied that notices were not given to the society as alleged and it is stated that the society was given ample opportunity to cross-examine all witnesses examined by the special referee. In the report, however, it is stated by the special referee "in course of my enquiry I contacted some of the local dealers in coal and also other persons" and then the special referee sets out the names of other persons whom he contacted and made enquiries. There is nothing to indicate that he took evidence of the above persons in the presence of anyone representing the society. It seems to me that he himself made enquiries from those persons and stated in the report the result of such enquiry made by him. The first report of the Special Referee dated the 4th September, 1972 was filed in this Court on March 8, 1973. There are no minutes annexed with the first report filed in Court to indicate how, where and in whose presence, the special Referee made the enquiries. The words "I contacted the persons" mentioned in the first report indicate that he himself contacted these persons. It seems to me that the Special Referee has exceeded the limits of his power and authority. He cannot make any personal enquiry or secret enquiry himself and contact people and state in his report the result of his personal enquiry and what he found on his own enquiry. The final report was made by the Special Referee on 15th January, 1973 and the same was filed on 8th March, 1973. In the final report he states that on September 6, 1972 he started by Bombay Mail from Howrah and arrived at Moghalsarai on September 7, 1972; and proceeded towards Varanasi. Immediately thereafter, he started for Gorakhpur and went to the office of C. I. D. Police. He states that the society did not attend in spite of his notice. The Police Officer produced before him certain documents of the society as seized by them. The Special Referee copied some of the entries in some books produced before him by the police officer. He put his initial in the Register. He copied out the names of buyers and he records his views on the papers and books which were produced before him. He himself copied out certain portions from these books and papers. It appears that some of the books were written in Hindi. While reading the report it seems to me that

Special Referee exceeded his power, authority and jurisdiction. He cannot himself go to the office of C. I. D. Police and himself make copies of the entries of the books lying there. In the final report it is further stated by the Special Referee: "I visited again the office of the C. I. D. branch on September 8, 1973 and examined the said documents in details. Thereafter I proceeded towards Faizabad. At about 6 P. M. I went to the office of the defendant society and met with its President Sri Ram Prosad Singh, Secretary Mr. Jogendra Pandey and Director-cum-Legal Adviser Mr. Mohammad Rafi, Advocate."

55. In the minutes of September 8, 1972 which is annexed to the second and final report it is recorded that the place where the sitting was held was the office of the C. I. D. Police, Gorakhpur at 8-30 P. M. and it is recorded that none appears for the defendant. It is not recorded in the minutes that notice was given to the defendant for holding a sitting of the special referee at the office of the C. I. D. Police, Gorakhpur. On the same day, namely on September 8, 1972, at 6 P. M. a sitting was held in the office of the Society. It is stated in the minutes by the special referee that he offered the society copies of the papers brought by the police. Ram Prosad Singh suggested that they should go to the house of Mr. Rafi Advocate. At 6-20 P. M. on the same day he goes to the house of Mr. Rafi, advocate and in the minutes, the special referee records that Mr. Rafi submitted that the society was not prepared to co-operate with this reference as advised by his solicitor and he also refused to put his signature on the minutes. Then the Special Referee came to the office of the plaintiff on September 9, 1972 and examined several persons ex parte. The names of those persons are given in the report. He also examined several person on September 10, 1972 at Faizabad. From the minutes dated September 9, 1972, which is annexed to the second report, it appears that the special referee contacted several persons while he was travelling by car, namely, Mr. Chiranjee Lal Jaiswal, Mr. Thakur Sahib and Amrita Lal Jaiswal. He has recorded what happened on September 10, 1972 on car at Faizabad. He contacted several persons from whom he collected the information regarding quantity of coal purchased and price paid per M/ton. I should state here that I am very much surprised with the manner in which the Special Referee proceeded with the reference as recorded by him. He makes enquiries himself in the car and meets people from whom he collects information while travelling in car. After collecting the said information the special referee comes back to Calcutta on September 11, 1972. It is clear that the special referee has exceeded the limits of his authority and power. Thereafter, what the special referee did has been stated in the second and final report. On

October 22, 1972 he arrived at Varanasi. Immediately thereafter he proceeded towards Faizabad to contact respective co-operative societies to whom the defendant society sold out coal. He collected the names of the said societies from the coal registers of the defendant society then in possession with the C. B. I. Criminal Branch, Government of Uttar Pradesh at Gorakhpur. On enquiry he came to know that some of the co-operative societies whose names do appear in the Coal Register of the defendant society were already defunct long time ago. The special referee mentions in his report the names of some of the co-operative societies whom he contacted. He also contacted several other persons. It is stated in the report that Md. Rafi, Advocate and Director and Legal Advisor of the defendant society requested him to allow the defendant society an opportunity to cross-examine the persons whose evidences were recorded by him before the submission of his Report. On December 29, 1972, he arrives at Faizabad and immediately, thereafter, he contacted Mr. Md. Rafi, and it is stated in the report that Md. Rafi requested him to hold the meeting on December 31, 1972 at the office of the defendant society. It is stated that on the next morning he sent a notice to the office of the defendant accordingly, but the defendant society refused to accept the same. Then he personally went to the office of the defendant society to serve the copy of his notice along with the copies of statements of the persons recorded by him when the defendant society refused to accept the same. The special referee returned back to Calcutta on January 2, 1973.

56. The learned counsel for the society commented that what is recorded in the minutes of the special referee dated September 9, 1972 is different from what is recorded in the report. In the report it is stated that he merely contacted 41 persons on September 9 and 10, 1972. He records "some other persons are willing to give evidence, but I should go to their respective places. I agreed." Then he goes to Faizabad and records names of 10 persons. Here he contacted several persons while he was travelling in the car and also records the names of 17 persons whom he contacted on car at Faizabad. Mr. Biswas submitted that this cannot be the evidence or admissible as evidence. None of those persons produced any receipt or books of accounts and the statement of any persons made on car to the special referee is not evidence on which the special referee can rely. Mr. Biswas pointed out that in the minutes of the meeting dated September 10, 1972 it is recorded: "sitting adjourned for six weeks", but the special referee did not give the place or time when the next meeting will be held. The next meeting was held on October 25, 1972, at the office of D. C. D. F. Protapgarh. It is submitted before me that the meeting held on October 25, 1972 was without any notice to the society. It is also submitted

that the society had no opportunity to cross-examine the witnesses whom the special referee contacted. The minutes dated October 26, 1972 show that there was a sitting, but Mr. Biswas stated that the society was not notified of that sitting or the next sitting which was held on October 27, 1972.

57. It is submitted that the report of the special referee in the reference proceedings is based on no evidence on record on the basis of which a report can be made and the report is perverse. The facts contained in such a report cannot be conclusive evidence and the report is perverse and illegal on the face of it and ought to be set aside. The conclusions arrived at by the special referee are not on the basis of any legal evidence. He has given his reasons as to the question whether the defendant society has really made any secret profits not on the basis of any legal evidence. It is also submitted before me that no evidence has been laid by the plaintiff as to the price at which the defendant society was required to sell. The selling price of coal at 46.72 stated by the Special Referee in his report is based on supposition, surmises and conjectures and on inadmissible evidence. Special Referee also refers to certain resolutions. It is stated that the said resolutions were in Hindi script and the same were not proved before the special referee. It is submitted that the scope of the enquiry was made beyond what is stated by the plaintiff in paragraph 14 of the plaint. There is no material on which the special referee can come to the conclusion that the plaintiff is entitled to get the difference of Rs. 8/- per ton of coal and it is submitted that there is no material to arrive at the conclusion that the defendant society made secret profits to the tune of Rs. 2,21,220/- as found by the special referee in his report.

58. In the premises, it is submitted that this Court will set aside the report of the special referee dated January 15, 1973.

59. I accept the submissions of Mr. Biswas on these points. Considering the report of the special referee which was placed before me, there is no doubt in my mind that the special referee has acted beyond the scope of his power, authority and jurisdiction. He based his report and arrived at his conclusion in the report in disregard of the law and procedure of this Court and without legal or admissible evidence before him. He has taken evidence in the absence of one party and received secret information himself. The report of the Special Referee is perverse and should be set aside.

60. The view of the matter which I have already taken is sufficient to dispose of the applications, before me but I think I shall deal with another branch of the argument which has been advanced before me. Mr. T. K. Biswas in course of argument took the point that the Court has no power to appoint

a Commissioner whether it is called a special referee or by any other description for the purpose of enquiry into secret profits. The court can only issue commission for the purpose specified in Section 75 of the Code of Civil Procedure and for no other purpose. His argument is that the Court can appoint a Commissioner to enquire into account but not as to secret profits. Mr. Biswas is challenging only that part of the order and decree by which the special referee is appointed "to enquire into secret profits, if any" as without jurisdiction and nullity. His contention is that this part of the decree is without jurisdiction and the report of the special referee dated 15th January, 1973 should therefore be declared as null and void. In support of his argument Mr. Biswas referred to Section 75, sub-section (c) of the Code of Civil Procedure and relied on the decision of the Supreme Court in Padam Sen v. State of Uttar Pradesh, (AIR 1961 SC 218) and the subsequent decision of the Supreme Court in Monoharlal Chopra v. Seth Hiralal, (AIR 1962 SC 527 at p. 538). Mr. Biswas also referred to Order 20, Rule 16 of the Code of Civil Procedure and stressed on the words "directing such accounts to be taken as it thinks fit" mentioned in that rule and argued that the decree in the instant case does not say account be taken but says enquiry into secret profits and submitted that there is no scope for such an enquiry. The Court has jurisdiction to direct Mr. Sanyal to take accounts. Under Order 20, Rule 17 the Court may give such direction as to the mode in which the account is to be taken or vouched in a particular case. In the instant case direction is not given in the decree and no such direction was taken as to the mode of accounting. The mode in which the account is to be taken may be directed by the Court either in the decree or by any subsequent order (Order 20, Rule 17). Here the Court did not give such direction nor the Special Referee took any direction from the Court and he is not entitled to adopt any procedure he likes.

61. Mr. Biswas submitted that the order directing accounts as to the secret profits is without jurisdiction and nullity and referred to the decision of the Supreme Court in Official Trustee, West Bengal v. Sachindra Nath, reported in (AIR 1969 SC 823) and my own judgment in Sisir Kumar v. Monorama, (AIR 1972 Cal 283) and also referred to the decision of Arjun Singh v. Mohindra Kumar, reported in (AIR 1964 SC 993) and relied on the observation of the Supreme Court at 1003.

62. Mr. Dipankar Gupta, learned Counsel for the firm argued that Section 75 of the Code lays down the substantive power of the court to issue commissions and O. 26 lays down the procedure. Rule 11 and Order 26 relate to commission to examine accounts. Examination of accounts is not synonymous with examination of "books of accounts." Mr. Gupta referred to Section 211

of the Indian Contract Act and submitted that an agent is bound to conduct the business of his principal according to the directions given by the principal, and when the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it. An agent is bound to conduct the business of his agency with skill and diligence. Under Section 216 of the Contract Act if an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction. The case of the secret profits comes under Section 217 of the Indian Contract Act. The duty of the agent is to render proper accounts and, therefore, the court can direct proper accounts to be taken in a suit by the principal against the agent. Ascertaining of secret profits made by the agent is according to Mr. Gupta, a process of accounting. It is a case of ascertaining proper accounts under Section 213 of the Contract Act. Mr. Gupta referred to Halsbury's Laws of England Vol. I, 3rd, Edition, Article 444, page 192 also Article 440, p. 189. He also relied on Bowstead on Agency 13th Edition page 150, Article 58 and page 159 Article 60. He referred to the English case *Regier v. Campbell Stuart*, (1939) 1 Ch 766. He submitted that agent is liable for secret profits. Enquiry into secret profits is a process of rendition of accounts and Order 20, Rule 16 applies in the instant case. The decree was not without jurisdiction and the Court was competent to pass the decree. He also referred to the case of (AIR 1960 Cal 190) as to the practice of the Court regarding Special Referee. He argued that O. 20 is not exhaustive and the Court has jurisdiction to appoint Special Referee to enquire into secret profits.

63. In view of the arguments of the learned Counsel for the parties the points which arise are:— Whether that part of the order and decree dated 5th June, 1972 which provides that the Special Referee is appointed to enquire into secret profits if any, is null and void and without jurisdiction and whether the report of the Special Referee should be declared null and void.

64. In a suit filed by the principal against the agent for account the jurisdiction, authority and power of the Court to decide the question of liability of the agent to account cannot be disputed. If the agent fails to keep proper accounts or conceals the true nature of the transaction from the principal fraudulently or receives secret profit the agent is liable to the principal in a suit for account. The Court can decide the question in a proper proceeding whether the agent would be liable or not. In (1939-1 Ch 766) the principal (*Regier*) brought an action against the agent for damages for fraudulent misrepresentation

and for account of all profits obtained by the defendant without her knowledge or consent in his capacity as her agent and Farwell, J. held:

"That, accordingly, the defendant, having concealed the true nature of the transaction from the plaintiff by fraud, had acted in breach of his duty as agent and, was liable to account to the plaintiff for all profits obtained by him without her knowledge and consent in his capacity as agent for her."

The principle of English Law on the point will appear from Halsbury's Laws of England 3rd Edition Vol. I, Article 444 at page 192 and Article 440 at page 189. See also *Bowstead on Agency*, 13th Edition Article 58 at page 150 and Article 60 at page 159. There is no difference in this respect between the English Law and the Indian Law. (As to Indian Law see Sections 211, 213 and 216 of the Indian Contract Act, 1872)

65. But can the Court issue commission and ask the Commissioner or Special Referee to enquire into secret profits, if any? Can the Court ask him to decide the question of liability of the agent for secret profits? The general powers of the Court to issue commissions have been summarised in Section 75 of the Code. Section 75 (c) of the Code says that the Court may issue commission to examine or adjust accounts. This power of the Court to issue commission is subject to "such conditions and limitation as may be prescribed." The detailed provisions are set forth in O. 26 of the Code. Order 26, Rules 11 and 12 relate to commissions to examine accounts and Order 26, Rules 15, 16, 17 and 18 relate to general provisions. These rules do not amplify the scope of Section 75 (c). The words in Section 75 (c) are: "to examine or to adjust accounts." So the Court can appoint a Commissioner or Special Referee for accounts only for the purposes specified in Section 75 (c). Has the Court inherent power to issue commission for accounts for purposes other than those mentioned in S. 75 (c)? In (AIR 1961 SC 218) the question arose before the Supreme Court whether the order passed by the learned Munsif appointing a person as Commissioner for seizing 'books of accounts' of the plaintiff in that case can be said to be an order which was passed by the Court in exercise of its inherent jurisdiction. The Supreme Court held that the Court has no inherent powers under Section 151 (of the Code of Civil Procedure) to appoint a Commissioner to seize account books in the possession of the plaintiff, upon an application by the defendant that he has apprehension that they would be tampered with. At page 219 of the report *Raghubar Dayal*, J. delivering the judgment of the Supreme Court observed:—

"Specific powers have to be conferred on the Courts for passing such orders which would affect such rights of a party. Such

powers cannot come within the scope of inherent powers of the Court in the matters of procedure, which powers have their source in the Court possessing all the essential powers to regulate its practice and procedure.

... .. Even in such cases where the Court summons a document from a party, the Court has not been given any power to get hold of the document forcibly from the possession of the defaulting party."

66. Padam Sen's case came up for consideration before the Supreme Court in (AIR 1962 SC 527) and Shah, J. observed at page 538:

"Section 75 empowers the Court to issue a commission for purposes specified therein: even though it is not so expressly stated that there is no power to appoint a commissioner for other purposes, a prohibition to that effect is in view of the Court in Padam Sen's case (AIR 1961 SC 218) implicit in Section 75."

67. In (AIR 1964 SC 993 at p. 1003) the Supreme Court observed:—

"It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates."

Having regard to the principles of law laid down by the Supreme Court, in my view, the Court can issue commission to examine the account only for the purposes specified in Section 75 sub-section (c) and there is no inherent power of the Court to issue commission for any other purposes. The Commissioner or Special Referee cannot decide the question of liability of the agent for payment of secret profits to the principal. This is a matter for the Court to decide. In (AIR 1960 Cal 190) what happened was that in a suit brought by the contractors against Union of India for monies said to be due for work done in accordance with contract the trial Judge (J. P. Mitter, J.) directed reference, for ascertainment of the amount due and payable by the defendant to the plaintiff after (1) ascertaining on evidence the market rate for certain items of work done by the contractor; (2) ascertaining the increase in labour charges in respect of the excess quantities of work done under certain items; (3) determining the quantity of work done under the different items on the basis of the measurement books. In the appeal from the decision of the learned Judge one of the points urged was that the learned Judge was

not entitled to ask the referee to ascertain the market rate. At page 194 of the report (AIR 1960 Cal 190) K. C. Das Gupta, C. J. observed:—

"Looking at the contents of the order that was made by Mitter, J. in this case, I am of opinion that in so far the order directed a reference for the ascertainment of the market rate and also in so far as it made a reference for the ascertainment of the extent of the rise in labour rates, if any, and thus deliberately refrained from deciding the cardinal matter in controversy, namely, as regards the rates at which the contractor was entitled to payment, there was no adjudication of the real matters in controversy, and so the decision was not a judgment within the rule laid down by Sir Richard Couch."

At page 198 of the report (AIR 1960 Cal 190) H. K. Bose, J. observed:

"It may be that the directions upon the Special Referee to determine the market rate or as to whether there has been an increase in the rate of labour charges are matters which cannot strictly form the subject-matter of a preliminary decree but those directions having been incorporated in the decree part of which clearly satisfies the test of a preliminary decree, are to be deemed as part of that decree, and an appeal lies from the entire decree."

The order however held to be a judgment as part of the order was in accordance with Order 20, Rule 16 of the Code.

68. In ILR 42 Cal 819 = (AIR 1916 Cal 566) it was held by the Appeal Court consisting of Jenkins, C. J. and Woodroffe, J. that a reference should be directed by the Court to assess damages only when the enquiry would involve questions of detail which would be wasting the time of the Court to investigate. In the judgment delivered by Jenkins, C. J. the learned Judge protested against the reference of this nature and quoted with approval the observation of Lord Justice Bowen:—

"Cases ought only to be referred to other persons to assess the damages where the injury involves question of detail which would be wasting the time of the Court to investigate."

If a Court passes an order directing a reference for accounts outside the limit of Section 75 (c) of the Code, the order, in my view, would be without jurisdiction. On this matter, reference may be made to the principle of law laid down in (AIR 1969 SC 823) and the view I have taken in (AIR 1972 Cal 283). But it is not necessary for me to decide this question for the purpose of this application and declare the report to be void as I have already expressed the view that the report of the Special Referee should be set aside for reasons stated in my judgment. Considering the manner in which the reference was conducted by Mr. R. P. Sanyal, I do not think he should act as Special Referee any further in this matter.

69. In view of the above matter, I pass the following order in this application :

- (a) The report of the Special Referee dated the 15th January, 1973 is set aside.
- (b) The respondent firm shall pay to the applicant society the costs of and incidental to the application.
- (c) Mr. R. P. Sanyal will not act as Special Referee any further. The parties are given liberty to apply, if so advised, for appointment of a Special Referee in place of Mr. Sanyal after the decision of the Court of Appeal in Appeal No. 273 of 1972 (Cal) (Fatehganj Co-operative Marketing Society Ltd. v. Jaiswal Coal Co.) preferred by the society which is now pending for final disposal, or earlier if the parties so desire. The respondent firm shall pay the fees and other charges of the Special Referee.

70. As regards the application by the plaintiff firm, the same is dismissed. The parties will bear and pay their respective costs of and incidental to this application.

Order accordingly.

AIR 1975 CALCUTTA 315

ANIL KUMAR SINHA AND
PARIMAL KUMAR CHANDA, JJ.

Pran Ballav Saha, Petitioner v. Sm. Maleka Bibi and others, Opposite Parties.

Civil Rule No. 4008 of 1973, D/- 30-7-1974.*

(A) Land Acquisition Act (1894), S. 18 —
Question of jurisdiction — Cannot be referred to Civil Court for adjudication.

All questions ancillary or incidental to the principal dispute should be decided by the Court to which the power of determining the question of appointment is entrusted. This power, will include the power to determine the question whether there was a proper petition of reference under Section 18. To decide that question the Tribunal would alone be competent to determine whether the application of withdrawal made by the claimant-opposite parties was bona fide or genuine application. This cannot be delegated or referred to Civil Court for adjudication. AIR 1968 SC 366, Relied on. (Para 7)

Cases Referred : Chronological Paras
AIR 1968 SC 366 = (1968) 1 SCR 362 7

Bhabani Prasun Chatterjee and Moni Mohan Mukherjee, for Petitioner.

A. K. SINHA, J.:— This is an application under Section 115 of the Code of Civil Procedure preferred by one of the claimant-

petitioners in an apportionment case started before the Calcutta Improvement Tribunal in connection with acquisition of certain plots and the consequential award made thereon by the Collector.

2. What happened was that the opposite parties made an application for reference after the award was made under Section 18 of the Land Acquisition Act (Act I of 1894) for apportionment of the award made in favour of the present petitioner although no award was made in their favour. Their claim was that they are entitled to 39/64th share in the acquired plots and at least a sum of Rs. 15,000/- out of the total compensation should have been awarded by the Collector in their favour. This application, it appears, under Section 18, was followed by another application by the same petitioners-claimants for withdrawal of the application for reference. What the Collector did was that he transmitted both the applications under Section 18 as also application for withdrawal of that petition for reference on question of apportionment to the Tribunal and after deducting a sum of Rs. 15,000/- out of the total compensation money remitted that amount also to the Tribunal.

3. In the proceedings so started before the Tribunal in the written statement the claimant opposite parties took the plea that they are the joint owners having certain share in the disputed property and in substance they denied the right, title and interest of the present petitioner to get the entire amount of compensation and that in any case they were entitled to 39/64th share of the compensation money awarded by the Collector.

4. A written statement was equally filed by the present petitioner denying the right, title and interest of the opposite parties in the property acquired or in the compensation money. His further case was that in view of the fact that referring claimant withdrew the petition of reference the Tribunal had no jurisdiction to try the apportionment case. He denied the share of the claimant-opposite parties and asserted that he was entitled to get the entire compensation money awarded by the Collector.

5. The learned Tribunal took the view that since the genuineness of the application for withdrawal of the petition of reference was seriously contested by the claimant opposite parties the Tribunal had no jurisdiction to decide that question in an apportionment proceeding and therefore the parties were referred to Civil Court for adjudication of that question as to whether there was a valid application for withdrawal and the effect thereof upon the petition of reference. The Tribunal also directed that a sum of Rs. 15,000/- would remain in deposit with the Tribunal and the payment thereof will abide by the result of the Civil Court's decision. That is how, in short, the petitioner felt aggrieved and obtained the present Rule.

* (Against order of President Calcutta Improvement Tribunal in Case No. 42 of 1972(A), D/- 20-7-1973).

6. The short point involved in this Rule is whether there was a proper application for withdrawal and if so, the question whether there was any petition of reference at all or not ought to have been decided by the Tribunal, for, if there is no proper application for reference the Tribunal could not have any seisin of the matter and proceed to determine the question of apportionment on merits. It seems to us that the question whether there was any proper application for reference before the Tribunal or not was merely incidental to the main question whether any relief ought to have been granted to the claimants on determination of the question of apportionment. In such an apportionment proceeding it is not really a question of merely apportionment of the money awarded by the Collector as between the rival claimants but a question involving the rights and interests of the parties to claim such amount. In other words, upon an application for reference under Section 18 of the Land Acquisition Act on question as to apportionment of the compensation money the Court must proceed to adjudicate the right, title and interest of the parties and then determine as to what amount, if there be any, will be available to the parties claiming such amount on apportionment. It is, therefore, clear that in order to adjudicate that question of title the Court will have also to look into the other question as to whether it has jurisdiction to decide that question at all. It is well-established that on question of absence of jurisdiction the Court in which the suit or proceeding is pending will be competent to examine that question and decide at the first instance whether the court has jurisdiction to adjudicate the issues involved in the suit or to entertain the suit or proceeding at all. For determination of that preliminary point on question of jurisdiction the Court cannot refer the matter to any other Civil Court or Tribunal for adjudication. The principle will equally apply to the Tribunal concerned which under the law is authorised to adjudicate on the question of valuation and apportionment under the Calcutta Improvement Act as if it is a Court or at any rate it has the trappings of a Court. For it is further provided that appeal against such decision will lie to this Court.

7. Mr. Chatterjee, learned Advocate for the petitioner, has relied on a decision of the Supreme Court, we think, rightly, reported in (1968) 1 SCR 362 = (AIR 1968 SC 366), (*Sunder Lal v. Paramsukhdas*) and drawn our attention to the observation amongst other things of the Supreme Court that:

"the scheme of the Land Acquisition Act is that all disputes about the quantum of compensation must be decided by resort to the procedure prescribed by the Act; it is also intended that disputes about the rights of owners to compensation being ancillary to the principal dispute should be decided by the Court to which power is entrusted. Jurisdiction of the Court in this behalf is not res-

tricted to cases of apportionment, but extends to adjudication of disputes as to the person who are entitled to receive compensation, and there is nothing in Section 30 which excludes a reference to the Court of a dispute raised by a person on whom the title of the owner of land has, since the award, devolved."

From the above observations it seems clear that all questions ancillary or incidental to the principal dispute should be decided by the Court to which the power of determining the question of apportionment is entrusted. This power, in our opinion, will include the power to determine the question whether there was a proper petition of reference under Section 18 of the Land Acquisition Act. To decide that question the Tribunal would be alone competent to determine whether the application of withdrawal made by the claimant-opposite parties was bona fide or genuine application. This, in our opinion, cannot be delegated or referred to Civil Court for adjudication. This is a clear case where, in our opinion, the Tribunal has failed to exercise jurisdiction vested in it by law by referring the matter for determination by a Civil Court. It is clear, therefore, that the impugned order passed by the Tribunal suffers from serious infirmities and cannot be sustained as valid.

8. Accordingly, the Rule is made absolute. We set aside the order complained at and remit the case back to the Tribunal for deciding firstly, the preliminary point, as indicated above, and then if necessary, to determine the question of apportionment on merits in accordance with law and in the light of the observations made above. As this Rule is not opposed we do not make any order as to costs.

Let the records be sent down to the Tribunal below as quickly as possible.

CHANDA, J.:— I agree.

Order accordingly.

AIR 1975 CALCUTTA 316

AMIYA KUMAR MOOKERJI, J.

Satyanarayan Murarka, Petitioner v. Union of India, Respondent.

C. R. Nos. 556(W), 3239(W), 2533(W), 684(W), 629(W), 621(W), 1629(W), 937(W), 1110(W), 221(W), 582(W), 1633(W), 1634(W), 1813(W), 691(W) to 693(W), 686(W), 687(W), 2412(W), 1460(W) of 1973, D/- 24-6-1974.

(A) Railways Act (1890), Ss. 28, 54 — Restriction on booking of coal in 'smalls' — Similar restriction not imposed on booking of other articles — Validity. (Constitution of India, Arts. 14, 19 (1)).

The Eastern railway administration imposed condition on booking coal in 'smalls' as of 5 quintals per day from all stations though no conditions whatsoever were imposed on various other non-essential or less essential articles. Three reasons viz.:

GR/IR/D96/74/RSK.

(1) limited availability of transport capacity, (2) optimum utilization of available capacity and (3) that coal was being booked in wagon loads from colliery sidings to the consumers, were assigned for imposing the conditions on carrying of coal. No material was placed to show that during the relevant period any exceptional circumstances had arisen creating shortage of wagons and for showing why coal alone was subjected to restrictions. It was also not true that coal was being supplied by wagons to all consumers. Only sponsored consumers like Coke Ovens, Electric Supply Corporations, Steel Plants etc. were getting coal booked in wagon loads.

Held the impugned circular was inconsistent with the last part of Section 28 and of Rule 301 of the Goods Tariff No. 33, Part I, as such it was beyond the powers of the Railway Administration to impose such conditions under Section 54 of the Act. Further the circular also violated Articles 14 and 19 (1) (g) of the Constitution in so far as the classification amongst the same class of traders of booking in 'smalls' between traders in coal and other articles had no rational basis and nexus with the object of optimum utilization of wagons in view of limited availability and in absence of material to show that these restrictions were imposed in the interests of the general public the circular also offended Article 19 (1) (g) of the Constitution.

(Paras 14, 15, 27, 34, 45)

Cases Referred: Chronological Paras

AIR 1970 SC 564 = (1970) 3 SCR 580	44
AIR 1960 SC 430 = (1960) 2 SCR 375	37
AIR 1958 SC 525 = 1959 SCR 236	21
AIR 1958 SC 538 = 1959 SCR 279	31
AIR 1954 SC 634	41, 42
(1904) ILR 31 Cal 951 = 8 Cal WN 725	20
(1898) 2 QB 91 = 67 LJQB 782	22

Saktinath Mukherjee, Soumen Ghose, K. P. Sahay, Madhusudan Banerjee, Tapande Nandi and Ashoke Kr. Ganguli, for Petitioner; S. D. Banerjee and P. K. Ghose, for Respondent.

ORDER:— Common questions are involved in all these rules and the reliefs prayed for are the same. These rules have all been heard together as prayed for by the parties.

2. The petitioners are traders in coal and coke. They have to despatch coal and coke through railways from one part of India to the other. On April 2, 1972, restrictions on booking of coal in wagon loads from stations other than colliery sidings were imposed by the Railway Board. The Central Government amended Rule 302 (1) (a) of the Goods Tariff No. 33, Part I issued by the Indian Railway Conference Association. The alphabetical list of railway stations in India was also amended by the Railway Board whereby an additional Entry GX had been inserted below the abbreviation G on the list of abbreviations at page 14, Chap. VI of the Alphabetical list of Railway Stations in India corrected upto 31st March, 1970. The Cen-

tral Government also amended Rules 1 and 2 of the Eastern Railway Coal Tariff, Part I. Although by aforesaid amendments booking of coal in wagon load has been restricted, there has been no restriction on booking of coal in "smalls" from stations in the Eastern Railway. The petitioners in order to carry on their trades and business, book coal consignments in "smalls" from various stations in Eastern Railway. On the 17th February, 1973, the Divisional Operating Superintendent (T), Howrah and the Divisional Commercial Superintendent (L), Howrah, jointly issued a circular directing that quota of coal to be booked in "smalls" from all stations will be 5 quintals a day. The said order was issued in supersession of an earlier order dated the 17th January, 1973, by which maximum limit of 220 quintals per day was fixed with respect to certain stations and 110 quintals with respect to others. It appears from the said order dated 7-2-1973 that it was issued in view of the limited availability of wagons and to ensure optimum utilisation of wagons. One of the petitioners being aggrieved by the said circular, moved this Court in an application under Article 226 of the Constitution and obtained C. R. 556(W)/73 on 12-3-1973. On the 16th March, 1973, the petitioners in C. R. Nos. 556(W), 621(W) and 684(W)/73 filed applications praying for interim injunction restraining the respondents from enforcing the impugned order dated 7-2-73 against the petitioners and to allow the petitioners to book coal consignments in "smalls" from stations in Eastern Railway. During the pendency of the said applications, an order was made on April 23, 1974, by the General Manager, Eastern Railway, to the following effect:—

"In view of the limited availability of transport capacity of this railway, and in order to ensure the optimum utilisation of the transport capacity available, it is necessary to limit the booking of coal, coal shales, coke, lignite and patent fuel in "smalls" to 5 quintals per day from every station on this railway, as such commodities are already being booked in wagon loads from collieries sidings to the consumers. This limitation in booking will hold good till the availability of the transport capacity of this railway improves to a satisfactory level.

All concerned stations should be advised."

3. Thereafter on the 2nd August, 1973, applications for amendment of the petitions were made and those applications were allowed by an order of A. K. Sen, J. dated 13-8-1973. On the 14th May, 1973, the petitioners' applications for interim orders were allowed. The respondents were directed not to implement the circular dated 17-2-1973 and the circular dated 23-4-1973 issued by the General Manager, Eastern Railway, in the matter of booking coal in "smalls" by the petitioners and further directing them subject to the availability of wagons and subject to the preference introduced by the Central Government in the preferential tariff schedule dated 8-1-73

to book coal in "smalls" along with other articles in the same order of preference in which they are offered for booking without any particular discrimination against coal as such as envisaged by the impugned circulars. The respondents took appeals against the said order. The Appeal Court confirmed the order of the learned Trial Judge and directed expeditious hearing of these rules.

4. The petitioners in these rules challenge the impugned order dated 23-4-1973 passed by the General Manager, Eastern Railway, on the ground, that such restriction is arbitrary and unreasonable inasmuch as no special circumstances have arisen under which such restriction can be imposed by the Railway Authorities.

5. In the affidavit-in-opposition filed on behalf of the respondents Nos. 1, 2 and 17 affirmed by Ratnaswamy Srinivasan, Chief Operating Superintendent, Eastern Railway, it is stated that provision which has been introduced in the Coal Tariff, permitting booking of coal from also stations other than colliery sidings, if it is in "smalls", does not contemplate large scale booking of coal in "smalls" from such stations by traders. Despatch of coal on a large scale even if it be in smalls, from road side stations cannot be allowed for the same reason for which despatch of coal in wagon load from such stations is not permitted. Moreover, approximately, 4400 wagons per day, on average are programmed in this railway for loading and despatching coal, coke etc. from collieries, coke oven plants and washeries. Availability of wagons was not adequate even for meeting high priority sponsored items according to the preferential tariff schedule (under S. 27-A of the Railways Act), and that position has not changed. In the context of the inadequate availability of wagons, administration decided that booking of coal, coke etc. in "smalls" of this railway should be restricted to 5 quintals per station per day as the consignments can be handled during the existing system for clearing small traffic regularly from stations in Vans. It was decided that this limit i.e. 5 quintals per station per day would remain in force till the availability of transport improves to a satisfactory level. The provisions in the coal tariff as also in such rules and conditions as are imposed by the Railway Administration from time to time are in exercise of Railway Administration's power under Section 54 of the Railways Act to impose conditions of receiving, forwarding and delivery of goods. In paragraph 201 of the Goods Tariff No. 33, Part I, it is provided that railway administration can make any variations to the general rules regarding registration and indenting of wagons and consignments as they consider fit, to meet any exceptional circumstances or to prevent misuse. It is stated that the imposed restriction is reasonable and it has been imposed in public interest. There is no reason why traders should not despatch coal to their con-

signees, by booking coal from collieries from which they purchase such coal where elaborate arrangements exist for such purpose.

6. It is contended by Mr. Mukherji appearing on behalf of the petitioner in one of the rules, that railways as a common carrier are bound to act in respect of such goods as they profess to carry and have accommodation to carry of such goods being tendered to them to be carried without subjecting the person tendering them to any unreasonable condition. A statutory duty is imposed under Section 27 of the Indian Railways Act to offer all reasonable facilities for receiving, forwarding and delivery of traffic without unreasonable delay and without partiality. Section 28 of the Act, Mr. Mukherjee submits prohibits the railway administration to cause undue and unreasonable prejudice or disadvantage with respect to any particular description of traffic. It is contended that the impugned circular is ultra vires Sections 27 and 28 of the Act.

7. Mr. Banerjee, appearing on behalf of the respondents contends that these restrictions in booking in "smalls" of coal were imposed by the railway administration under Section 54 of the Act read with paragraph 201 of the Goods Tariff No. 33, Part I.

8. Section 47 of the Act provides that the Central Government has power to frame rules. Rule 301 of the Goods Tariff No. 33, Part I, deals with booking of coal in "smalls". It is not disputed that the said rules have not been amended. So, the rules and conditions of carriage for booking of coal in "smalls" will be the same as those notified for general goods.

9. Section 54 (1) of the Act empowers the Railway Administration subject to the control of the Central Government to impose conditions, not inconsistent with the Act or with any general rule thereunder, with respect to receiving, forwarding or delivery of any animals or goods. Section 27 of the Act imposes a duty on railway administration to offer all reasonable facilities for receiving, forwarding and delivering traffic according to its powers. Section 28 of the Act prohibits undue preference. The railway authority shall not cause any undue or unreasonable prejudice or disadvantage with respect to particular description of traffic in any respect whatsoever. It is contended by the petitioners that with respect to various other commodities there is no restriction by limiting the quantity for the purpose of booking in "smalls." Coal, a particular description of traffic has been singled out and the traders dealing in coal have been put to undue, unreasonable prejudice and disadvantage without any justification.

10. In view of the limitation imposed by the impugned circular, traders are compelled to pay surcharge of 20% of freight on small consignments weighing less than 50 quintals as provided in sub-rule (2) of R. 301.

11. I asked Mr. Banerjee that what are the reasons behind these restrictions which practically amount to total prohibition of booking of coal in "smalls" from all stations in Eastern Railway? Mr. Banerjee candidly replied "Kindly look to the impugned circular, the reasons are stated therein. Nothing I can add or supplement to it."

12. In the circular, three reasons are stated :—

- (i) Limited availability of transport capacity in this railway.
- (ii) To ensure optimum utilisation of transport capacity available.
- (iii) Such commodities have already been booked in wagon loads from collieries sidings to the consumers.

13. Lastly it is stated that this limitation is temporary until the transport capacity improves to a satisfactory level.

14. No material was placed before me to show that between 7th January, 1973, and 15th February, 1973, any exceptional circumstances had arisen or there was an acute shortage of wagons or the wagons have been misused which necessitated the railway administration to impose such conditions on booking coal in "smalls" as of 5 quintals per day from all stations. Under the existing arrangement various non-essential articles or articles less essential than coal like stone-chips, wood etc. can be freely booked in "smalls" and in spite of scarcity of wagons, no such restriction and/or condition has been imposed on any other articles whatsoever. If the transport capacity of the railway is limited, that limited availability should be distributed equally amongst all the traders similarly situated. No special case has been made out that why this particular commodity, viz. coal should be singled out and subjected to unreasonable restrictions.

15. Booking of coal in "smalls" and in wagon loads are not the same thing. Except collieries sidings, booking of wagon loads of coal is prohibited. It is not disputed that only high priority sponsored consumers like Coke ovens, Electric Supply Corporation, Steel Plants etc. are getting coal being booked in wagon loads from collieries sidings. So it is not correct to say that all consumers are getting coal being booked, in wagon loads from collieries sidings. Availability of wagons was not adequate even to meet the demands of the sponsored consumers. Substantial quantity of demand of ordinary consumers in neighbouring States is met by despatching coal in Trucks by roads. To carry coal to distant places of northern India by road, costs of transport is about 5 to 6 times higher than the railway freight. It is contended that traders

is 220 Quintals and for booking of coal in "smalls" to the full capacity of one wagon it will take about 44 days. That statement has not been denied by the respondents in the Affidavit-in-opposition. In this context it is difficult to appreciate how the impugned circular would ensure the optimum utilisation of transport capacity.

17. Rule 201 of the Goods Tariff No. 33, Part I lays down the procedure for the registration of indents for wagons and of consignments in "smalls" in the Indian Railways. The Railway Administration, after due notice, can make such temporary local variation of any of these rules as they consider fit, to meet any exceptional circumstances or to prevent misuse. So, the Railway Administration in an exceptional circumstances can make temporary variation of those rules which are enumerated therein.

18. Sub-rule (3) of R. 201 provides that a limit may be placed by the Railways on the quantity of goods permitted to be registered at a time by one indenter. It is contended by Mr. Banerjee that the impugned condition has been imposed under that sub-rule.

19. In my view, that rule does not permit the Railway Administration to place the limit of 5 quintals per day from all stations on the Eastern Railway upon all indentors of booking of coal in "smalls."

20. My attention was drawn by Mr. Mukherji to a decision of this Court, *Jalim Singh Kothari v. Secretary of State for India*, (1904) ILR 31 Cal 951 = (8 Cal WN 725), wherein it is held that the rules framed by the Railway Company under Sections 47 and 54 of the Railways Act whereby goods were sent at owner's risk and the Railway Company were not liable therefor until a receipt had been given by them, are inconsistent with the Act and unreasonable.

21. The question of undue preference and the scope and effect of Section 28 of the Indian Railways Act came up for decision before the Supreme Court in *Raigarh Jute Mills v. Eastern Railway*, (AIR 1958 SC 525). The Supreme Court observed that Section 28 is obviously based on the principle that the power derived from the monopoly of railway carriage must be used in fair and just manner in respect of all persons and all description of traffic passing over the railway area.

22. Mr. Banerjee relied upon the observations of Lord Russell, C. J. in *Kruse v. Johnson*, (1898) 2 QB 91 wherein it is said bye-laws are to be benevolently interpreted and credit ought to be given to those who have to administer them that they will be

23. By Section 23 of the Municipal Corporations Act, 1882, the Council may from time to time make such bye-laws as to them seem meet for the good rule and government of the borough, and for the prevention and suppression of nuisances. At pages 99-100 of the report Lord Russel of Killowen observed that the court might condemn bye-laws made under the authority of this provision as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say "Parliament never intended to give authority to make such rules, they are unreasonable and ultra vires."

24. In the instant case the impugned circular is found unequal in its operation, it involves oppressive interference with the rights of the traders like petitioners in the matter of booking of coal in "smalls." So, in my view, the decision referred to by Mr. Banerjee is of no assistance to the respondents.

25. It is rightly contended by Mr. Mukherji that the petitioners cannot demand that all wagons should be placed at their disposal or the Railway must carry goods beyond its power or capacity or the petitioners must have preference over booking of all other commodities. But if accommodation in wagons is available, persons intending to have a booking, should be permitted to have the same on the basis of the principle, first come — first served.

26. True, that the limitation in the quantity of booking in "smalls" is a temporary measure until the transport capacity improves to a satisfactory level, but when it is found that the conditions imposed are inconsistent with the provisions of the Act, it becomes invalid from the moment of its imposition. Duration of a short period is of no consideration. That will not cure its inconsistency.

27. Considering the facts and circumstances of these cases, I hold that the impugned circular of the General Manager dated the 23rd April, 1974, being inconsistent with the last part of Section 28 of the Act and of Rule 301 of the Goods Tariff No. 33, Part I, as such it is beyond the powers of the Railway Administration to impose such conditions under Section 54 of the Act. Accordingly the impugned circular is ultra vires Section 28 of the Act.

28. Upon my findings that Railway Administration has exceeded its powers to impose the conditions as contained in the impugned circular under Section 54 of the Act, the petitioners are entitled to get relief in these Rules, but as other constitutional points

have been raised by the petitioners in these rules, I propose to deal with them also.

29. It is contended on behalf of the petitioners that the impugned circular offends Article 14 of the Constitution as discrimination has sought to be created with respect to a particular commodity like coal and amongst same class of traders of booking in "smalls", a classification is sought to be made between traders in coals and traders in other commodities without any intelligible differentia. That so-called classification has got no nexus with the object sought to be achieved by the impugned circular.

30. Section 28 of the Indian Railways Act incorporates the same principle as laid down in Article 14 of the Constitution. The only difference is, that while Article 14 is general in terms, Section 28 of the Act is specific in its application.

31. In order to sustain the presumption of constitutionality, the Court may take into consideration matters of common knowledge matters of common report and the history of the times and may assume every state of facts, which can be conceived existing at the time of legislation — this is one of the six major principles laid down by the Supreme Court in *Dalmia's case* AIR 1958 SC 538.

32. No facts were disclosed in the affidavit-in-opposition; no explanation was offered in the course of argument to justify the discrimination and the basis of the classification. This particular point has not even been dealt with by the respondents.

33. The classification amongst the same class of traders of booking in "smalls" between traders in coal and other articles has got no rational basis. There is no nexus with the object of "optimum utilisation of wagons in view of limited availability." The impugned circular made a discrimination amongst the same class of traders viz. traders of booking in "smalls" and put the traders in coal in a disadvantageous position with regard to booking of coal where no such restriction has been imposed upon the same class of traders in respect of booking in "smalls" in respect of other commodities. There should be no discrimination between one person and other regarding the subject-matter of booking when their position is the same.

34. In my view, this classification has got no intelligible differentia and has no nexus with the object of the impugned circular. Accordingly, I hold that the impugned circular violates Article 14 of the Constitution as it is discriminatory and it must be struck down.

35. It is next contended that the impugned circular infringes the petitioners' fundamental right guaranteed under Article 19 (1) (g) of the Constitution and these restrictions are not in the interest of the general public within clause (6) of Article 19 of the Constitution.

36. In the affidavit-in-opposition only it is stated that the impugned circular is for

the public interest. It is well settled that once invasion of fundamental right under Art. 19 (1) (g) is proved, the State must justify its action under clause (6) of that Article which was in the nature of an exception.

37. In *Narendra Kumar v. Union of India*, AIR 1960 SC 430 the Supreme Court observed that in applying the test of reasonableness the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy to the beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interest of the general public.

38. It is not the case of the Railway that in order to give top priority for the movement of commodities essential to the life of the community, this restriction has been imposed or to remove accumulation of coal in the pitheads of the collieries large number of wagons have been employed or to get over an abnormal situation created by such and such things, the Railway Administration was compelled for the interest of the general public to impose such limitation in booking coal in "smalls." It is not disputed that railway administration has powers to stop all sorts of booking, if situation demands to impose such total prohibition. But such restriction or total prohibition must have justifications or reasons behind it. During the railway strike, goods traffic was totally suspended for days together. Nobody made any complaint for such suspension. To meet the exigency such action was necessary.

39. It is contended on behalf of the respondents that these restrictions are regulatory measures, required for the operation of the traffic and for the interest of the public.

40. Nothing is said that how these regulatory measures ensure benefit of the people at large or such measures are essentially required for the operation of traffic.

41. My attention was drawn by Mr. Banerjee to a decision of the Supreme Court *Madhya Bharat Cotton Co. Ltd. v. Union of India*, AIR 1954 SC 634 wherein the Supreme Court held that clause 4 of Cotton Control Order, 1950, did not offend Article 19 (1) (g) of the Constitution because sub-clause (5) validated it. The Supreme Court found that 'Cotton' being a commodity essential to the life of the community, it is reasonable to have restriction which may in certain circumstances extend to total prohibition for a time, of all normal trading in the community.

42. In *Madhya Bharat Cotton Association Ltd.'s case* AIR 1954 SC 634 a complaint was made against clause (4) of the Cotton Control Order of 1950 which banned all cotton contracts except those permitted by

the textile commissioner by order made under clause (6). 'Cotton' was listed as an "essential commodity" under Section 2 (a) of the Essential Supplies (Temporary Powers) Act, 1946. So the right of the State to control, and even to prohibit transactions in it is evident. "Hedging" is of vital importance in cotton trading. It not only acts as an insurance and protects cotton growers, manufacturers and merchants but also acts as a check on reckless speculation and gambling when properly controlled. Consequently, it is important to have this type of dealing under proper supervision and control, otherwise, as in the case of Banks and insurance companies, innocent persons may have to suffer for the reckless gambling and speculation of a handful of persons anxious to get rich quickly. Taking into account the nature of the evil sought to be remedied by such law, the Supreme Court held that total prohibition imposed under clause (4) of the Cotton Control Order did not violate Article 19 (1) (g) of the Constitution as such restriction or prohibition was for the interest of the general public within the meaning of sub-clause (5) of Article 19.

43. But in the instant case what are the evils sought to be remedied? No answer came from the respondents. 'Coal' is an essential commodity and a number of essential commodities have been given priority by the Central Government under Section 27-A of the Act. So the decision referred to by Mr. Banerjee has got no application to the facts and circumstances of these present cases.

44. The Supreme Court in *Rustom Kawasjee Cooper v. Union of India*, AIR 1970 SC 564 held that where restriction is imposed on carrying on of a business was so stringent that the business could not be carried on at all, the Court will regard the restriction as unreasonable. No material was placed before me to show that these restrictions were imposed in the interest of the general public. In order to be reasonable the limitation must have a proximate connection with the interest of the general public. How public at large would be benefited by the impugned circular has not been stated by the respondents.

45. In my view, the impugned circular also offends the petitioners' fundamental right guaranteed under Article 19 (1) (g) of the Constitution as the conditions are not reasonable in the interest of the general public within the meaning of clause (6) of Art. 19.

46. Lastly it is argued that the impugned circular offends Article 301 of the Constitution. I think it is not necessary for me to decide that point in the instant case as I have already found that the impugned circular is ultra vires Section 28 of the Railways Act and also offends Articles 14 and 19 (1) (g) of the Constitution. So that point is left undecided.

47. In the result, these rules are made absolute. The impugned circular dated 23rd April, 1974, is quashed by a writ of

mandamus. The respondents are directed to accept booking of coal in "smalls" from the petitioners subject to the availability of wagons and subject to the preference introduced by the Central Government in the preferential tariff schedule dated 8-1-1973 to book coal in "smalls" along with other commodities in the same order of preference in which they are offered for booking.

48. There will be no order as to costs.

Mr. Banerjee prays for operation of this order to be stayed, but in view of the facts and circumstances of the cases Mr. Banerjee's prayer is refused.

Ordered accordingly.

AIR 1975 CALCUTTA 322

SABYASACHI MUKHARJI, J.

Assam Bengal Roadways Pvt. Ltd., Plaintiff v. The New India Assurance Company Ltd. and another, Defendants.

Special No. 40 of 1973, D/- 20-5-1974.

(A) Arbitration Act (1940), S. 20 — Arbitration clause providing for reference of dispute relating to quantum of claim — Insurance company contending that loss suffered to goods due to cyclonic weather was not covered by the marine policy — Dispute held could not be the subject-matter of reference because the repudiation was not on ground of loss suffered but on ground whether loss was at all covered by the policy. AIR 1972 Delhi 182, Distinguished. (Para 2)

Cases Referred: Chronological Paras
AIR 1972 Delhi 182 = 1972 Acc CJ 130 2
(1968) 72 Cal WN 733 = 1968 Acc CJ 368 2
(1950) 85 Cal LJ 136 2
AIR 1923 Bom 249 = 25 Bom LR 164 2
1915 AC 499 = 84 LKJB 640 2

ORDER:— This is an application under Section 20 of the Arbitration Act, 1940. The plaintiff claims reference to arbitration in respect of a marine policy for the loss suffered to the goods. According to the plaintiff the goods suffered loss or damage due to cyclonic weather while in transit. The insurance policy covered loss by pilferage, theft and water damage. When the claim was made, the insurance company completely repudiated the liability contending that loss, if any, was not covered by the policy of insurance. The said policy of insurance contains the following clause:—

"If any dispute arising out of this policy relates to the quantum of claim the same shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the arbitrators

do not agree, by an umpire appointed in writing by the arbitrators before entering upon the reference. The umpire shall sit with the arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company. If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provision herein contained, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder. The venue of such arbitration shall be the place of issue of the policy."

2. The question, is, whether in the circumstances of the case the plaintiff is entitled to have the arbitration agreement filed under Section 20 of the Arbitration Act and reference made. Clauses like the one noted above generally receive strict construction as was observed by S. B. Sinha, J. in the case of Ganapatrai Gupta v. Moody Bros. Ltd., (1950) 85 Cal LJ 136. The question, is, whether in the circumstances that have happened, i.e. when the insurance company is contending that loss, if any, was not covered by the policy risk undertaken by the insurance, the arbitration clause is wide enough to include such a dispute. I am of the opinion that it is clearly not covered. If the dispute is regarding quantum then and then only can there be a reference under the clause in the agreement as referred to hereinbefore. But if, as in this case, the dispute is whether loss is at all covered by the policy of insurance, then in my opinion, in view of the limited jurisdiction conferred upon the arbitrator by the clause referred to above, the clause cannot be attracted. Support for this view may be obtained from the decisions in the case of Jureidini v. National British and Irish Millers Insurance Co. Ltd., 1915 AC 499, decision of the Bombay High Court in the case of Eagle Star & British Dominions Insurance Co. v. Dinanath, AIR 1923 Bom 249 and the decision of this Court in the case of Nityananda Dutta v. Caledonian Insurance Co., (1968) 72 Cal WN 733. My attention was drawn by counsel for the respondent to the decision of the Delhi High Court in the case of Maharaj Singh v. Vulcan Insurance Co. Ltd., AIR 1972 Delhi 182. There the clause 18 of the agreement was in the following terms: "If any difference arises as to the amount of any loss or damage such difference shall independently of all other clauses be referred to the decision of an arbitrator.....". The Court held that the contention that this clause would not apply when the insurance company had repudiated the claim in toto could not be accepted. There the court was concerned with the question whether there was any loss at all, the Court was not concerned with the dispute whether the loss was covered by the policy of insurance or not as in this case. Re-

repudiation of claim can be on various grounds. Repudiation on the ground that no loss has been suffered or about the quantum of loss suffered can certainly be the subject-matter of adjudication in a clause of the present type. Where, however, the repudiation is on the ground that loss, if any, to the goods is not covered by the policy, then such a dispute in view of the terms of the arbitration clause cannot, in my opinion, be the subject-matter of reference to the arbitration. In any case, no dispute has yet arisen as to the quantum of loss.

3. In the aforesaid view of the matter, this application fails and is, accordingly, dismissed.

4. In the facts and circumstances of this case, however, I make no order as to cost.

5. The plaintiff is permitted to file a copy of Insurance Policy.

Application dismissed.

AIR 1975 CALCUTTA 323

M. M. DUTT AND
N. C. MUKHERJI, JJ.

Amitava Roy and others, Plaintiffs-Appellants v. Sm. Jyotsna Prova Roy and others, Respondents.

A. F. O. D. No. 601 of 1962, D/- 30-4-1975.

(A) Succession Act (1925), Ss. 102, 103, 30 and 140 — Bequest — Residue — Property to which residuary legatee is entitled.

Where after giving various legacies to different persons and after making provision for the supply of water to the residents of town, out of the interest of the G. P. Notes, War loans, Debentures etc. which would remain undisposed of after meeting the expenses for his Shradh and for taking the probate of the will, the testator bequeathed all other movable and immovable properties to one of his brothers K. with an intention that K shall take the surplus or residue of his property, the testator's estate must be taken to have fallen into the residue and K. must be held as the residuary legatee. Since the funds bequeathed to the different persons mentioned in the earlier clause also fell into the residue and did not form part of the testator's estate, there was a bequest of the residue of the estate and the case came under Ss. 102, 103 and not under Sections 30, 140. (1883) 23 Ch D 218, Rel. on. (Paras 5, 7, 8, 9)

Cases Referred: Chronological Paras
(1883) 23 Ch D 218 = 48 LT 543 6

Mrinal Kanti Ghose Dastidar and Asoke Kumar Sengupta, for Appellants; Barun Kumar Roychowdhary and Madan Kumar Rai, for Respondents.

M. M. DUTT, J.:— This appeal is at the instance of the plaintiffs and it arises out

ES/FS/B845/75/HGP.

of a suit for declaration and permanent injunction.

2. Kumar Basanta Kumar Roy of Dighapatia died on August 17, 1920 leaving behind him surviving his mother Rani Drabamoyee, three brothers Raja Pramoda Nath Roy, Kumar Sarat Kumar Roy, Kumar Hemendra Kumar Roy and their sons and his sister. Before his death he executed a will in Bengali on August 11, 1920. He appointed his three brothers and his sister's husband Mahendra Kumar Saha Choudhury as executors of his will. Paragraphs 1 to 21 of the will contain provisions for various legacies to different persons including his three brothers and mother. The English translation of paragraphs 22 and 23 of the will is as follows:

"22. If excluding the G. P. Notes, War loans, Debentures and foreign bonds mentioned in the different paragraphs of this will which I have arranged to dispose of under the provisions of this will, there be any G. P. Notes, War loans or bonds or Debentures which remain undisposed of, then the executors of this will shall be entitled to spend the same for the supply of water to the people of Rajsahi or for any other work beneficial to the people of Rajsahi. All those works shall be performed with the interest keeping the principal intact."

"23. Excluding all my G. P. Notes, War loans, Debentures etc. and all kinds of Government Promissory Notes and the expenses for my Shradh and for taking the probate of the will, my third brother Sriman Sarat Kumar will get all other movable and immovable properties including the share of Techno Chemical Laboratory and Works."

The probate of the will was granted on September 30, 1921 in Probate Case No. 63 of 1920 of the Court of the District Judge, Rajsahi. The case of the appellants is that the bequest made by paragraph 22 of the will is void for vagueness and uncertainty and, as such, the said bequest has fallen into the residue of the estate of the testator. After payment of the specific legacies under the will, the G. P. Notes, Municipal Debentures, War loans, Bonds etc. of the face value of Rupees 1,25,000/- remained. The said Mahendra Kumar Saha Choudhury illegally misappropriated a portion of the same and the balance mentioned in the plaint Schedule 'A' which, after conversion, amounted to Rs. 75,200/-, is still lying in the Bhawanipore Branch of the Central Bank of India Limited, the respondent No. 4. It is contended that Kumar Sarat Kumar Roy, the predecessor-in-interest of the appellants was the residuary legatee and the bequest as made by paragraph 22 of the will being void, it fell into the residue and Kumar Sarat Kumar Roy became entitled to the same. The appellants being the heirs of Kumar Sarat Kumar Roy are entitled to the said amount lying in the said Bank. Alternatively, the appellants have claimed that, if on account of the provisions of paragraph 23 of the will, it is held that the Government

papers etc. have been expressly excluded from the residuary legacy and, the same passed on intestacy, the respondents excepting the respondent No. 4, who are the heirs of Kumar Hemendra Kumar Roy and the appellants have become entitled to the same. There is another alternative prayer, namely, that if the provisions in paragraph 22 of the will are held to constitute a valid trust, then on the death of Mahendra Kumar Saha Choudhury, the last trustee and executor, the present heirs of the testator, namely, the appellants and the said respondents are entitled to get possession of the G. P. Notes etc. now lying in the said Bank, as trustees in place of the said Mahendra Kumar Saha Choudhury, who died on December 16, 1931.

3. The appellants' claim has been opposed by the said respondents who are the heirs of Kumar Hemendra Kumar Roy. It is not disputed by them that the bequest under paragraph 22 of the will is void, but it is contended that Kumar Sarat Kumar Roy was not the residuary legatee, and the bequest did not fall into the residue. Their case is that they, along with the appellants, inherited the funds mentioned in paragraph 22 as heirs of late Kumar Sarat Kumar Roy.

4. It has been held by the learned Subordinate Judge, Fourth Court, Alipore that the bequest is void; that Kumar Sarat Kumar Roy was not the residuary legatee in respect of the funds mentioned in paragraph 22 of the will; that in respect of the said funds the testator died intestate and that the appellants along with the said respondents are entitled to the same. Upon the said findings, he has decreed the suit allowing the plaintiff's alternative prayer that they, along with the said respondents, are entitled to the funds described in Schedule 'A' to the plaint. Hence, this appeal.

5. Two questions which are involved in this appeal are whether or not Kumar Sarat Kumar Roy was the residuary legatee and whether or not the bequest under paragraph 22 of the will being void fell into the residue of the estate of the testator. In view of the provisions of paragraph 23 of the will, there can be no doubt that Kumar Sarat Kumar Roy was the residuary legatee. It has been already stated that after giving various legacies to different persons and after making provision for the supply of water to the residents of Rajsahi out of the interest of the G. P. Notes, War loans, Debentures etc. which would remain undisposed of after meeting the expenses for his Shradh and for taking the probate of the will, the testator bequeathed all other movable and immovable properties to his third brother Kumar Sarat Kumar Roy. Paragraph 23 clearly shows an intention on the part of the testator that Kumar Sarat Kumar Roy shall take the surplus or residue of his property. No reason has been given by the learned Subordinate Judge why he was not the residuary legatee. In the circumstances,

we hold that Kumar Sarat Kumar Roy was the residuary legatee.

6. Section 103 of the Indian Succession Act provides that under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect. The illustration under that section leaves no room for doubt that a lapsed legacy or a void legacy falls into the residue. In *Blight v. Hartnoll*, (1883) 23 Ch D 218 = (1881 to 1885) All ER 660, it has been observed that the residuary gift carries every lapsed legacy and every legacy which on any ground fails to take effect; but if a testator has shown some intention with regard to the excepted property inconsistent with its ever falling again into the residue, effect must be given to that intention. It is contended on behalf of the respondents that paragraph 23 of the will having expressly excluded the G. P. Notes, War loans, Debentures etc., the testator intended that the void bequest would not fall into the residue. This contention is without any substance. The G. P. Notes, War loans, Debentures etc. were disposed of by the testator in the earlier paragraphs of the will and, as such, those were specifically excluded in paragraph 23. In our view, it does not follow that the testator never intended that the same should not fall into the residue. In *Blight v. Hartnoll* referred to above, Sir George Jessel, M. R. observed as follows:—

"It is impossible to suppose that the testator would give a legacy knowing it to be void, and, with the exception of the case of a testator expressing a doubt whether a legacy given by his will was void or not, it would be impossible to hold that he even contemplated what should occur in case the legacy was invalid. We certainly should not presume such an intention on the part of a testator. A testator generally expects the legatees to survive him, though there is a possibility that they may not; but we cannot suppose him to have been such an idiot as wilfully to make a void bequest It is almost impossible to suppose that a testator intended that a legacy should not, because it is invalid, fall into the residue."

In the instant case also, there is nothing to suggest that the testator intended that the legacy in question should not fall into the residue.

7. It is contended on behalf of the respondents that by virtue of Section 140 of the Act, the funds mentioned in paragraph 22 of the will remained a part of the estate of the testator and did not fall into the residue. Section 140 is as follows:—

"Where a testator does not absolutely bequeath a fund, so as to sever it from his own estate, but gives it for certain purposes, and part of those purposes cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by

the will, remains a part of the estate of the testator.

Illustrations :

- (i) A directs that his trustees shall invest a sum of money in a particular way, and shall pay the interest to his son for life, and at his death shall divide the principal among his children. The son dies without having ever had a child. The fund, after the sons' death, belongs to the estate of the testator.
- (ii) A bequeaths the residue of his estate, to be divided equally among his daughters, with a direction that they are to have the interest only during their lives, and that at their decease the fund shall go to their children. The daughters have no children. The fund belongs to the estate of the testator."

Section 140 contemplates bequest of a fund for certain purposes and part of those purposes cannot be fulfilled; consequently, the bequest lapses. Under Section 103, a lapsed bequest falls into the residue. If the contention made on behalf of the respondents is accepted, in that case, it has to be held that Section 140, to some extent, overrides the provision of Section 103 in the case of a bequest of a fund for certain purposes which lapses. The illustration (i) contemplates a case where there is no residuary legatee and the illustration (ii) provides a case of a lapsed residuary bequest of a fund. Under Section 108, where a share which lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of. The bequest of the residue of the estate under illustration (ii) having lapsed it will form part of the testator's estate and will not go to the other residuary legatees. In that view of the matter, there is no conflict between Section 140 and Section 103 in respect of a case as mentioned in the illustration (ii). On a proper construction of Section 140 in the light of or as clarified by, the two illustrations, we are of the view that Section 140 contemplates a case where there is no residuary legatee and also the case of a bequest of the residuary fund which lapses. In either case, the bequest will form part of the estate of the testator. But in the case of a bequest of a fund, where there is a residuary legatee, the fund will fall into the residue in case the bequest fails or lapses. In the absence of any specific provision, it is difficult to hold that Sec. 140 overrides Section 103 to the extent indicated above. We are, accordingly, of the view that in the instant case, as Kumar Sarat Kumar Roy was the residuary legatee, the funds mentioned in paragraph 22 of the will fell into the residue and did not form part of the estate of the testator.

8. The respondents have also placed reliance on Section 30 of the Act and it is contended that the bequest being void, it

shall be deemed that the testator died intestate in respect of the fund mentioned in paragraph 22. There is no substance in this contention. Section 30 which provides that a person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect, contemplates cases where the testator does not make a will or he makes a will but does not dispose of a particular property. It does not contemplate a case where there is a residuary legatee and a bequest other than the residuary bequest is void or lapses. When there is a bequest of the residue of the estate, the case will come under Sections 102 and 103 of the Act. In such a case, neither Section 30 nor Section 140 of the Act will apply.

9. In these circumstances, in our opinion, the learned Subordinate Judge is not right in holding that the bequest under paragraph 22 of the will which is void, should be treated as undisposed of as forming part of the estate of the testator and, as such, the same was inherited by the appellants and the said respondents. We hold that Kumar Sarat Kumar Roy being the residuary legatee became entitled to the fund mentioned in paragraph 22 of the will, a part of which amounting to Rs. 75,200/-, is lying in the said Bank, and the appellant being his heirs inherited the same and are entitled to a decree for the said amount.

10. In the result, in lieu of the decree of the learned Subordinate Judge, the following decree is passed. The suit is decreed without any order as to cost. The appellants are entitled to the sum of Rs. 75,200/- lying in the Bhowanipore Branch of the Central Bank of India Limited. The other prayers of the appellants are disallowed.

11. The appeal is allowed, but in view of the facts and circumstances of the case, there will be no order for costs.

N. C. MUKHERJI, J.:— I agree.

Appeal allowed.

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M. M. DUTT AND

N. C. MUKHERJI, JJ.

Ramendra Nath Nandi and others, Appellants v. State of West Bengal and others, Respondents.

A. F. O. D. Nos. 391 of 1960 and 13 of 1966, D/- 30-4-1975.

(A) W. B. Land Development and Planning Act (21 of 1948) (as amended by Amending Act, 1955), S. 8 (1) Proviso Cl. (b), Second para — Validity — Does not get protection of Art. 31-B of Constitution. (Constitution of India, Art. 31-B and Sch. 9, Item 20).

The Act was included as Item 20 in Schedule 9 of the Constitution on 27-4-1955 as

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follows:— "W. B. Land Development and Planning Act 1948 (W. B. Act 21 of 1948), as amended by "W. B. Act 29 of 1951." Before the Act was included in Schedule 9, the Second para of clause (b) of the Proviso was amended with retrospective effect by W. B. Ordinance 4 of 1955 on 8-4-1955. The Amending Act of 1955 was passed on 21-9-1955, that is, after the Act was included in Sch. 9 substantially enacting the provision of the Ordinance. The question was whether the amended provision would get any protection of Article 31-B. Held, that, there was a good deal of difference between insertion in Sch. 9 of an Amending Act along with the Principal Act and insertion of the Principal Act only without any Amending Act. In the first case, the Principal Act as amended by the Amending Act which is inserted is protected, and any other Amending Act not so inserted is by necessary implication excluded from such protection. In the second case, all amendments made to the Principal Act up to the date of its insertion in Schedule 9 are protected. By expressly including Act 29 of 1951 in Schedule 9, neither the State nor Parliament intended to protect the amendment made by the Ordinance. Moreover, the expression "shall continue in force" in Article 31-B clearly shows that only permanent statutes can be included in Sch. 9. It is thus clear that the Second para of clause (b) of proviso to Section 8 (1) as amended by the Ordinance did not get any protection of Article 31-B, and consequently, the amendment of that para by the Amending Act of 1955 having been made after the incorporation of the Act in Sch. 9 will not also get any protection. AIR 1969 SC 168 and AIR 1968 SC 1395 and AIR 1965 SC 845, Referred to.

(Paras 12, 13)

(B) W. B. Land Development and Planning Act (21 of 1948) (as amended by Amending Act, 1955), S. 8 (1) Proviso, Cl. (b), Second para — Validity — Violates Art. 14 of Constitution. (Constitution of India, Arts. 14, 31 (2)).

Under the impugned provision if a piece of land is acquired for settlement of immigrants the owner of the land is to get compensation not exceeding the market value of the land as on 31-12-1946 whereas if the land is acquired for any other public purpose the owner is to get compensation equivalent to the market value of the land on the date of publication of the notification under Section 4 (1). There is no indication in the Act why such a discrimination has been made with regard to the payment of compensation. The classification is made on the basis of public purpose and discriminates between owners similarly situated. There is no relation, far less any rational relation, between the classification made between owners of land regarding payment of compensation and the object of the Act or the object sought to be achieved by such classification. Article 14 of the Constitution is thus violated. The

argument that in view of Article 31 (2) as amended the adequacy of compensation cannot be challenged is fallacious because there is a wide distinction between adequacy of compensation and discrimination made as to the quantum of compensation. If the legislature had laid down the same principle for determination of compensation in all cases of acquisition whether for one public purpose or another the matter might have been different but where, as in the instant case, the quantum of compensation depends on the public purpose for which the land is acquired without any reasonable relation to the object sought to be achieved, the provision must be held to be in infringement of the equality clause of the Constitution and, as such, void. AIR 1965 SC 1017 and AIR 1968 SC 394 and AIR 1973 SC 689, Followed. (Paras 16, 20, 21, 23)

(C) W. B. Land Development and Planning Act (21 of 1948), S. 8 (2) — Validity — Provision depriving owner of land of his right to solatium under S. 23 (2) of Land Acquisition Act — It violates Art. 14 of Constitution — Section 8 (2) to that extent is void. AIR 1972 Cal 487 and AIR 1968 SC 1425, Followed. (Constitution of India, Art. 14). (Land Acquisition Act (1894), S. 23 (2)).

(Para 24)

Cases Referred :	Chronological	Paras
AIR 1973 SC 89 = (1973) 3 SCR 39		19
AIR 1972 Cal 487 = 76 Cal WN 971		24
AIR 1969 SC 168 = (1969) 1 SCR 42		8
AIR 1968 SC 394 = (1968) 1 SCR 561		17
AIR 1968 SC 1395 = 1968 Lab IC 1525		12
AIR 1968 SC 1425 = (1969) 1 SCR 90		18
AIR 1965 SC 845 = (1965) 1 SCR 933		8
AIR 1965 SC 1017 = (1965) 1 SCR 614		17
AIR 1965 SC 1096 = (1965) 1 SCR 636		25
AIR 1961 SC 16 = (1961) 1 SCR 368		22
AIR 1954 SC 170 = 1954 SCR 558		15

S. C. Mitter, Syama Prasanna Roy Chowdhury (in F. A. No. 391 of 1960), Bhabani Prasun Chatterjee and Satindra Mohan Mukherjee (in F. A. No. 13 of 1966), for Appellants; P. K. Sen Gupta and Nani Gopal Das (in F. A. No. 391 of 1960), P. K. Sen Gupta, Bhabanath Dutta, Prafulla Kr. Chatterjee and Tapan Kr. Sen Gupta (in F. A. No. 13 of 1966), for Respondents.

M. M. DUTT, J.:— In these two appeals, which arise out of proceedings for compensation of land acquired under the West Bengal Land Development and Planning Act, 1948 (hereinafter referred to as the Act), the principal question relates to the constitutional validity of the second paragraph of clause (b) of the proviso to Section 8 (1), as amended by the West Bengal Land Development and Planning (Amendment) Act, 1955 (hereinafter referred to as the Amending Act).

2. Clause (b) of the proviso to Section 8 of the Act as it stood before the amendment is as follows:

"Provided that in determining the amount of compensation to be awarded for land

acquired in pursuance of this Act the market value referred to in clause first of sub-section (1) of S. 23 of the said Act shall be deemed to be the market value of the land on the date of publication of the notification under sub-section (1) of S. 4 for the notified area in which the land is included subject to the following condition, that is to say,—

if such market value exceeds by any amount the market value of the land on the 31st day of December, 1946, on the assumption that the land had been at that date in the state in which it in fact was on the date of publication of the said notification, the amount of such excess shall not be taken into consideration."

3. On April 8, 1955, the Governor of West Bengal promulgated the West Bengal Land Development and Planning (Amendment) Ordinance, 1955 (West Bengal Ordinance No. IV of 1955), Section 2 of the Ordinance provided as follows:—

"Notwithstanding anything contained in the West Bengal Land Development and Planning Act, 1948, the condition mentioned at the end of clause (b) of the proviso to Section 8 thereof shall not apply, and shall be deemed never to have applied, in relation to land which is, or has been acquired in pursuance of the said Act for any public purpose other than the purposes specified in sub-clause (i) of clause (d) of Section 2 thereof."

4. On September 21, 1955, the Amending Act was passed inter alia enacting Section 2 of the Ordinance. Section 8 was re-numbered as sub-section (1) and the Second paragraph of clause (b) of the proviso was amended by the Amending Act as follows:—

"if such market value in relation to land acquired for the public purpose specified in sub-clause (i) of clause (d) of Section 2 exceeds by any amount the market value of the land on the 31st day of December, 1946, on the assumption that the land had been at that date in the state in which it in fact was on the date of publication of the said notification, the amount of such excess shall not be taken into consideration."

5. Section 2 (d) is as follows:—

"(d) "public purpose" includes—

- (i) the settlement of immigrants who have migrated into the State of West Bengal on account of circumstances beyond their control,
- (ii) the establishment of towns, model villages and agricultural colonies,
- (iii) the creation of better living conditions in urban and rural areas, and
- (iv) the improvement and development of agriculture, forestry, fisheries and industries;

but does not include a purpose of the Union."

6. Under the first paragraph of Cl. (b) the market value of the acquired land on the date of publication of the notification under

Section 4 (1) shall be the market value for the purpose of clause first of sub-section (1) of S. 23 of the Land Acquisition Act, subject to the condition as contained in the Second paragraph, that if the land is acquired for a public purpose specified in Section 2 (d) (i), that is, for the settlement of immigrants, the compensation shall not exceed the market value of the land on December 31, 1946.

7. In F. A. No. 13 of 1966 the notification under Section 4 (1) was published on December 8, 1955 and in F. A. No. 391 of 1966 it was published on April 3, 1950. In both these cases, lands were acquired for settlement of immigrants and compensation has been awarded on the basis of the market value of the lands as on December 31, 1946. It is contended on behalf of the appellants who were the referring claimants, that the second paragraph of clause (b) of the proviso to Section 8 (1) as amended, is violative of the equality clause of the Constitution and, as such, ultra vires and void. It has been claimed by them that they are entitled to the market value of the acquired lands on the date of the respective notifications under Section 4 (1), as compensation.

8. The Act was included in the Ninth Schedule of the Constitution on April 27, 1955. Before the Act was included in the Ninth Schedule, the Second paragraph of clause (b) of the proviso was amended by the West Bengal Ordinance 4 of 1955. The Amending Act was passed on September 21, 1955; that is, after the Act was included in the Ninth Schedule substantially enacting the provision of the Ordinance. The question is whether the Second paragraph of clause (b) having been amended after the inclusion of the Act in the Ninth Schedule, the amended provision will get any protection of Art. 31-B of the Constitution. In *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845, it has been held by the Supreme Court that if a legislature amends any of the provisions contained in any of the Acts included in the Ninth Schedule, the amended provision would not receive the protection of Article 31-B and its validity may be examined on merits. In a later decision of the Supreme Court in *Ramanlal Gulabchand v. State of Gujarat*, AIR 1969 SC 168, the constitutional validity of the amendment of Section 65 of the Bombay Tenancy and Agricultural Lands Act, 1948 made after the inclusion of the said Act in the Ninth Schedule came up for consideration. It has been observed by the Supreme Court that if that amendment is accepted as unassailable it will have the indirect effect of amending the original Schedule Nine by including something in it which was not there before and that this is undoubtedly beyond the competence of any State legislature. It is, therefore, settled law that the constitutional validity of an amendment made to a statute after it is included in the Ninth Schedule may be

challenged and Article 31-B will not give any protection to such an amendment.

9. If clause (b) had been amended for the first time by the Amending Act, it could be said at once that the amended provision would not get the protection of Article 31-B, for the amendment was made after the Act was included in the Ninth Schedule. The Amending Act was, however, preceded by an Ordinance which, before the Act was included in the Ninth Schedule, amended the second paragraph of clause (b) with retrospective effect. On the basis of the decision in Ramanlal's case referred to above, it is argued that the amendment of the second paragraph of clause (b) of the proviso to Section 8 (1) by the Amending Act not having carried the Act into a new field it will get the protection of Article 31-B. The amendment that was made by the Ordinance and the amendment that was made by the Amending Act are substantially the same. After the amendment of the second paragraph of Cl. (b) by the Amending Act, the Act was not carried into a new field. But the question is whether the amendment which was made by the Ordinance was protected by Article 31-B after the inclusion of the Act in the Ninth Schedule. By the Constitution (Fourth Amendment) Act, 1955, the Act was included as item No. 20 in the Ninth Schedule as follows :—

"20. The West Bengal Land Development and Planning Act, 1948 (West Bengal Act XXI of 1948), as amended by the West Bengal Act XXIX of 1951."

10. Mr. Chatterjee, learned Advocate appearing on behalf of the appellants submits that in including the Act in the Ninth Schedule, Parliament intended to give protection to the provisions of the Act as amended by the West Bengal Act XXIX of 1951 and that it was not the intention of Parliament to extend the protection to the amendment made by the Ordinance. Had it been the intention of Parliament to give protection to the amendment made by the Ordinance, in that case, the Act would not have been included in the Ninth Schedule as amended only by the West Bengal Act XXIX of 1951. He submits that the express mention of the West Bengal Act XXIX of 1951 and non-mention of the Ordinance clearly indicates that it was not the intention of Parliament to give any protection to the Ordinance. Next, it is contended by him that the Ordinance was only a temporary provision which could be withdrawn by the Governor at any time and it died a natural death after the Amending Act was passed by the Legislature. It is submitted that the Legislature might not have amended the second paragraph of clause (b) in the same manner as was done by the Ordinance. Further, it is submitted that Article 31-B does not apply to temporary provisions, far less to the provisions of an Ordinance which is transitory in nature.

11. On the other hand, it is contended by Mr. P. K. Sen Gupta, learned Advocate appearing on behalf of the State of West Bengal that the second paragraph of clause (b) having been amended by the Ordinance before the Act was included in the Ninth Schedule and that the provisions of the Ordinance having been re-enacted by the Amending Act, the amendment will get the protection of Article 31-B. He submits that non-mention of the Ordinance in item No. 20 of the Ninth Schedule is irrelevant and does not deprive the amendment made by the Ordinance and re-enacted by the Amending Act of the benefit of the said protection. It is said that the West Bengal Act XXIX of 1951 has been mentioned in item No. 20 by way of abundant caution and such mentioning does not exclude the amendment of the second paragraph of clause (b) by the Amending Act from the benefit of the protection under Article 31-B. He submits that Article 31-B applies both to permanent and temporary statutes including an Ordinance which has the force of law under Article 13 (3) of the Constitution.

12. The West Bengal Act XXIX of 1951 by which the Act was amended has been mentioned in item No. 20 of the Ninth Schedule, but the Ordinance has not been mentioned. In our view, there is much substance in the contention of Mr. Chatterjee that by mentioning the West Bengal Act XXIX of 1951, Parliament intended to give protection to the Act as amended by Act XXIX of 1951. If Parliament had intended to protect the amendment made by the Ordinance, in that case, the Ordinance would have been mentioned. Mr. Sen Gupta has placed reliance on a decision of the Supreme Court in State of Maharashtra v. Madhavrao Damodar, AIR 1968 SC 1395. In that case, it was argued before the Supreme Court that the Act 13 of 1962 which amended the Maharashtra State Agricultural Lands (Ceiling on Holdings) Act, 1961 would not get protection of Article 31-B inasmuch as the said Amending Act 13 of 1962 was not mentioned in the Ninth Schedule along with the principal Act. In repelling the said contention it has been held by the Supreme Court that although some Amending Acts are mentioned in the Ninth Schedule apart from the principal Acts, there are many other Acts which had been amended before they were inserted in the Ninth Schedule and that it can be hardly imagined that Parliament intended only to protect the Act as originally passed and not the amendments made up to the date of their incorporation into the Ninth Schedule. After referring to item No. 20 and some other items of the list, it has been observed that the reason for the express insertion of certain Amending Acts is that some States, out of abundant caution, recommended that their Amending Acts be specifically inserted in the Ninth Schedule. In our view, the observation made by the Supreme Court in Madhavrao's case does not

lend support to the contention of Mr. Sen Gupta; on the contrary it supports the contention of Mr. Chatterjee. It follows from the said observation that the State of the West Bengal in its eagerness to protect the amendments made by the Act XXIX of 1951 recommended for its insertion in the Ninth Schedule along with the Act by way of abundant caution. It may, therefore, be reasonably inferred that the State of West Bengal had no intention to protect the amendment made by the Ordinance. In our opinion, there is a good deal of difference between insertion in the Ninth Schedule of an Amending Act along with the principal Act and insertion of the principal Act only without any Amending Act. In the first case, the principal Act as amended by the Amending Act which is inserted is protected, and any other Amending Act not so inserted is by necessary implication excluded from such protection. In the latter case, all amendments made to the principal Act up to the date of its inclusion in the Ninth Schedule are protected. By expressly including the Act XXIX of 1951 in the Ninth Schedule, neither the State nor Parliament intended to protect the amendment made by the Ordinance.

13. In considering the intention of Parliament, it is difficult to imagine that the State will recommend the protection of a provision which is transitory in character and will cease to operate at the expiration of six weeks from the re-assembly of the Legislature or even earlier if a resolution disapproving it is passed by the Legislative Assembly or if withdrawn by the Governor. Article 31-B provides as follows:—

“Without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provision of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend continue in force.”

Notwithstanding that a particular Act or regulation has been included in the Ninth Schedule, the Legislature will have the power to repeal or amend it but subject to such power the Act or regulation shall continue in force. An amendment of an Act made by an Ordinance cannot continue in force, for the Ordinance itself will cease to operate after a certain period or even earlier as stated above. It is, therefore, manifestly clear that Art. 31-B refers to such Acts and Regulations which, subject to the power of a competent Legislature to repeal or amend may continue to remain operative and not to cease to operate on the expiry of a certain period or on the

happening of a contingency. The expression “shall continue in force” in Article 31-B is significant. On a proper interpretation of Article 31-B, we are of the view that there is great force in the contention of Mr. Chatterjee that only permanent statutes can be included in the Ninth Schedule so as to save them from any attack for the violation of the rights conferred by Part III of the Constitution. In these circumstances, we hold that the second paragraph of clause (b) of the proviso to Section 8 as amended by the Ordinance did not get any protection of Article 31-B, and consequently, the amendment of that paragraph by the Amending Act having been made after the incorporation of the Act in the Ninth Schedule will not also get any protection.

14. Now the question is whether the second paragraph of clause (b) of the proviso to Section 8 (1) of the Act as amended is ultra vires Article 14 of the Constitution. Under that provision if the land is acquired for any public purpose other than for settlement of immigrants, the owner will get compensation on the basis of the market value of the acquired land on the date of the publication of the notification under Section 4 (1). If, however, the acquisition is made for settlement of immigrants the compensation shall not exceed the market value of the land as on December 31, 1946. The impugned provision seeks to make a discrimination between owners of land under like circumstances and situations. It is true that the legislature is competent to make a reasonable classification but that classification must be based on an intelligible differentia and the differentia must have a rational relation to the object sought to be achieved by the legislation concerned. It is only under the circumstances that a classification or discrimination made between two sets of persons similarly placed may be upheld as valid.

15. The object of the Act as stated in the preamble is to provide for the acquisition and development of land for public purposes. Some of the public purposes for which lands can be acquired have been enumerated in Section 2 (d) of the Act. One of the purposes is the settlement of immigrants who have migrated into the State of West Bengal on account of circumstances beyond their control. There can be no doubt that it is the duty of the State Government to provide accommodation to the immigrants who had to migrate into the State of West Bengal against their will under circumstances beyond their control. There is no dispute that the purpose is a public purpose and acquisition of lands for this purpose will get priority over other purposes mentioned in Section 2 (d). The unamended Section 8 (b) provides for payment of compensation equal to the market value of the acquired land on December 31, 1946. This is surely not a just equivalent of the acquired land, and, consequently, it contra-

venes the fundamental rights guaranteed by the provisions of Part III of the Constitution. In *State of West Bengal v. Mrs. Bela Banerjee*, AIR 1954 SC 170, the Supreme Court struck down the said provision as ultra vires Article 31 (2) of the Constitution. Thereafter, the Act was incorporated in the Ninth Schedule, as a result of which the unamended provision of clause (b) of the proviso to Section 8 became immune from challenge as contravening the provisions relating to the fundamental rights of citizens as contained in Part III of the Constitution. It has been stated already, that as clause (b) has been amended after the incorporation of the Act in the Ninth Schedule, the amended provision does not get the protection of Art. 31-B.

16. There is no indication in the Act or in the Amending Act why such a discrimination has been made with regard to the payment of compensation. If a piece of land is acquired for settlement of immigrants and another piece of land is acquired for a public purpose other than for settlement of immigrants, the owner of the land which is acquired for settlement of immigrants will get compensation not exceeding the market value of the land as on December 31, 1946. But in the other case, the owner will get compensation equivalent to the market value of the land on the date of the publication of the notification under Section 4 (1). The purpose for which a land is acquired has nothing to do with the amount of compensation that has to be paid by the State; the object of the Act as stated above, is simply to provide for the acquisition and development of land for public purposes. We fail to see what relation can a specific public purpose or the amount of compensation can have to the said object. The purpose for which a land is acquired is immaterial to the owner of the land. The owner is only interested in the payment of compensation. He is not interested in the purpose for which the land is acquired. If he finds that the land of another person has been acquired and that person gets a higher amount of compensation he will be entitled to make a reasonable grievance about the same. In our opinion, it will be no answer that because the land has been acquired for settlement of immigrants the compensation must not exceed the market value of the land as on December 31, 1946. As has been stated already, we do not see any relation, far less any rational relation, between the classification made between owners of lands regarding payment of compensation and the object of the Act or the object sought to be achieved by such classification.

17. In *P. Vajravelu Mudaliar v. Special Deputy Collector*, AIR 1965 SC 1017, the Supreme Court has struck down the Land Acquisition (Madras Amendment) Act, 1961 as violative of Article 14 of the Constitution, for the said Amending Act provided for payment of a lesser value to the owner if the

land was acquired for a housing scheme than he would get for the same land or a similar land if it was acquired for a public purpose like hospital, under the Land Acquisition Act, 1894. In the *Deputy Commr. and Collector, Kamrup v. Durganath Sarma*, AIR 1968 SC 394, the validity of Assam Acquisition of Land for Flood Control and Prevention of Erosion Act 6 of 1955 was challenged as violative of Article 14 of the Constitution. The Assam Act provided for speedy acquisition of lands for the public purpose of carrying out works or other development measures in connection with flood control or prevention of erosion on payment of compensation assessed on the basis of a multiple of the annual land revenue, that is, on payment of a nominal compensation. But a similar land could be acquired under the Land Acquisition Act on payment of adequate compensation. It was held by the Supreme Court that there was unjust discrimination between owners of land similarly situated by the mere accident of some land being required for purposes mentioned in the Assam Act and some land being required for other purposes. Accordingly, the Assam Act was held to contravene Article 14 of the Constitution and was declared void.

18. In *Balammal v. State of Madras*, AIR 1968 SC 1425, clause (6), sub-clause (2) of the schedule read with Section 73 of the Madras City Improvement Trust Act which deprived the owners of the statutory right to solatium at the rate of 15 per cent. on the market value of the land was held by the Supreme Court as invalid as it is violative of the equality clause of the Constitution. Further, it was held that it was a clear case of discrimination which infringed the Constitutional guarantee of equal protection of the law and the provision which was more prejudicial to the owners of land compulsorily acquired must be deemed invalid. It was observed that the distinction was not supported by any rational classification having reasonable relation to the subject-matter of the special provision and was not founded on any intelligible differentia.

19. The question whether classification can be made on the basis of the public purpose for the purpose of compensation for which the land is acquired came up for consideration before the Supreme Court in a recent decision in *Nagpur Improvement Trust v. Vithal Rao*, AIR 1973 SC 689. Sikri, C. J. who delivered the judgment of the Court observed as follows:—

"Can classification be made on the basis of the public purpose for the purpose of compensation for which land is acquired? In other words, can the legislature lay down different principles of compensation for lands acquired say for a hospital or a school or a Government building? Can the legislature say that for a hospital land will be acquired at 50 per cent. of the market value, for a

school at 60% of the value, and for a Government building at 70 per cent. of the market value? All three objects are public purposes and as far as the owner is concerned it does not matter to him whether it is one public purpose or the other. Article 14 confers an individual right and in order to justify a classification there should be something which justifies a different treatment to this individual right. It seems to us that ordinarily a classification based on the public purpose is not permissible under Art. 14 for the purpose of determining compensation. The position is different when the owner of the land himself is the recipient of benefits from an improvement scheme, and the benefit to him is taken into consideration in fixing compensation. Can classification be made on the basis of the authority acquiring the land? In other words can different principles of compensation be laid if the land is acquired for or by an Improvement Trust or Municipal Corporation or the Government? It seems to us that the answer is in the negative because as far as the owner is concerned it does not matter to him whether the land is acquired by one authority or the other.

It is equally immaterial whether it is one Acquisition Act or another Acquisition Act under which the land is acquired. If the existence of the two Acts would enable the State to give one owner different treatment from another equally situated the owner who is discriminated against can claim the protection of Art. 14."

20. The principles of law as laid down in *Vithal Rao's* case apply with all force to the facts and circumstances of the instant cases. Here also the classification for the purpose of compensation of the acquired lands has been made on the basis of the public purpose for which the lands have been acquired. The Second paragraph of the amended provision of clause (b) of the proviso to Section 8 (1) has sought to discriminate between owners similarly situated. The discrimination or classification is not based on any intelligible differentia having any rational relation to the object sought to be achieved. It may be that the purpose for which the lands in the instant cases have been acquired, namely, for settlement of immigrants is a very laudable purpose, but it matters very little to the owners. We do not find any justification for the differential treatment sought to be made by the impugned provision of the second paragraph of clause (b).

21. Mr. Sen Gupta has placed strong reliance on Article 31 (2) of the Constitution as amended, which provides that no property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of compensation or specifies the principles on which, and the manner in which, the com-

ensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate. It is argued that Section 8 (1) (b) including the second paragraph thereof, having specified the principle on which compensation is to be determined and the Act also having laid down the manner in which compensation is to be given, the adequacy of the compensation cannot be challenged in view of Article 31 (2). This argument, in our opinion, is fallacious. There is a wide distinction between adequacy of compensation and discrimination that may be made as to the quantum of compensation. The first paragraph of Section 8 (1) (b) provides for payment of compensation equal to the market value of the land on the date of the publication of the notification under Section 4 (1), subject to the condition which is contained in the second paragraph, namely, that if the land is acquired for settlement of immigrants, such compensation shall not exceed the market value of the land as on December 31, 1946. Although a citizen is precluded from challenging the adequacy of compensation in view of Article 31 (2) as amended, he can, in our view, surely complain about the discrimination which has been sought to be made between owners of land under like circumstances and conditions. If the legislature had provided for payment of the same amount of compensation or laid down the same principle for the determination of the amount of compensation in all cases of acquisition, whether for one public purpose or another, in that case, it might have been difficult to challenge the adequacy of compensation and there might not have been any scope for discrimination; but where, as in the instant cases, the quantum of compensation depends on the public purpose for which the land is acquired without any reasonable relation to the object sought to be achieved, the provision must be held to be in infringement of the equality clause of the Constitution and, as such, void.

22. Mr. Sen Gupta submits that in *State of West Bengal v. Naba Kumar Seal*, AIR 1961 SC 16, the classification which has been sought to be made by the impugned provision of the Act has been upheld by the Supreme Court as based on a rational consideration, having due regard to the purpose and policy underlying the Act. In that case, the question was whether Section 7 of the Act was ultra vires the provisions relating to the fundamental rights as contained in Part III of the Constitution. In that connection, the Supreme Court has observed that there are two classes of cases into which land acquisition proceedings envisaged by the Act fall; that the two classes can be easily identified and the purpose of the classification is based on a rational consideration, having due regard to the purpose and policy underlying the Act, namely, to acquire land for the public purpose, inter alia, of resettling immi-

grants who had to leave their hearth and home on account of circumstances beyond their control; such cases of urgency, as come under Section 7, are clearly meant to serve the main purpose of the Act and that, therefore, no discrimination is made by Section 7. Section 7 of the Act provides that in cases of urgency, if in respect of any notified area the State Government is satisfied that the preparation of a development scheme is likely to be delayed, the State Government may, at any time, make a declaration under Section 6, in respect of such notified area or any part thereof though no development scheme has either been prepared or sanctioned under Section 5. This is a special provision in case of urgency. The observation of the Supreme Court in Naba Kumar Seal's case referred to above as to the rational classification which has been made by Section 7 has no application to the consideration of the question of discrimination which has been made by the second paragraph of Section 8 (1) (b) as to the amount of compensation.

23. For the foregoing reasons, we are of the view that the second paragraph of clause (b) of the proviso to Section 8 (1) of the Act as amended, having made a differential treatment to the owners of land similarly situated without any rational relation to the object sought to be achieved, is ultra vires Article 14 of the Constitution and is void. The result, therefore, is that the appellants will be entitled to the payment of compensation on the basis of the market value on the date of the publication of the notification under Section 4 (1), as laid down in the first paragraph of clause (b) of the proviso to Section 8 (1).

24. The next question which arises for consideration is whether the appellants are entitled to the statutory allowance of 15 per cent. under Section 23 (2) of the Land Acquisition Act. Sub-section (2) of S. 8 of the Act provides that when the amount of compensation has been determined under sub-section (1), the Collector shall make an award in accordance with the principles set out in Section 11 of the said Act, but no amount referred to in sub-section (2) of S. 23 of the said Act shall be included in the award. Thus it appears that Section 8 (2) has expressly excluded the application of Section 23 (2) of the Land Acquisition Act. This question came up for consideration before a Division Bench of this Court presided over by Sankar Prasad Mitra, J. (as he then was) in *Monoranjan Routh v. State of West Bengal*, 76 Cal WN 971 = (AIR 1972 Cal 487). It has been held that sub-section (2) of S. 8 of the Act excluding the application of Section 23 (2) of the Land Acquisition Act is violative of Article 14 and is not saved by Article 31-B of the Constitution. In *Balammal's case* referred to above, the Supreme Court has struck down clause 6, sub-clause (2) of the schedule read with Section 73 of the Madras City Improvement Trust Act, 1950 which deprives the

owners of the statutory right to solatium at the rate of 15 per cent. on the market value of the lands, as invalid and it has been held that the owners of the lands are entitled to the statutory solatium under Section 23 (2) of the Land Acquisition Act in consideration of compulsory acquisition of their lands. The same principle will also apply to Section 8 (2) of the Act which deprives the owners of the statutory right to solatium at the rate of 15 per cent. on the market value of the acquired lands, and consequently, to that extent Section 8 (2) is void.

25. In both these appeals, the learned Land Acquisition Judge awarded compensation on the basis of the market value of the lands as on December 31, 1946 in accordance with the amended provision of the second paragraph of Section 8 (1) (b) of the Act. In view of our decision that the second paragraph of Section 8 (1) (b) as amended by the Amending Act is unconstitutional and void, the appellants are entitled to the market value of the acquired lands on the respective dates of the publication of the notifications under Section 4 (1) of the Act, as compensation. Further, the appellants are also entitled to the solatium as provided in Section 23 (2) of the Land Acquisition Act. In these circumstances, the awards in both the cases are set aside and, in view of the decision of the Supreme Court in *N. B. Jeejeebhoy v. Assistant Collector, Thana*, AIR 1965 SC 1096, both the cases are remitted back to the learned Land Acquisition Judge for fresh disposal in the light of this judgment after giving the parties an opportunity to adduce further evidence on the question as to the market value of the acquired lands on the respective dates of publication of the notifications under Section 4 (1).

26. Both the appeals are allowed to the extent indicated above, but in view of the facts and circumstances of the cases, there will be no order for costs either in this Court or in the Courts below.

N. C. MUKHERJI, J. :— I agree.

Order accordingly.

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RAMENDRA MOHAN DATTA, J.

Union of India, Applicant v. National Builders, Respondent.

Award Case No. 147 of 1966, D/- 9-4-1975.

(A) Arbitration Act (1940), S. 30 — Award — Arbitrator is not bound to make a separate and distinct finding on each issue unless so specifically required by terms of reference.

Considering the terms of reference, held that the arbitrator was not obliged to decide each of the issues separately and was quite justified in making a composite award of a

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lump sum amount. (AIR 1965 SC 214, Distinguished; AIR 1960 Cal 693 and AIR 1963 SC 1677, Rel. on). (Paras 10, 11)

Cases Referred :	Chronological	Paras
AIR 1965 SC 214 = (1964) 5 SCR 480	7, 11	
AIR 1963 SC 1677 = 1964 SCD 156	10	
AIR 1960 Cal 693 = 64 Cal WN 816	9	
(1867) 2 CP 296 = 36 LJCP 168	10	
(1853) 138 ER 1254 = 13 CB 399	10	
(1839) 9 Ad and Ell 522 = 112 ER 1309	10	

ORDER :— Union of India has made this application for setting aside the first award dated 4th August, 1966 and the final award dated 24th August, 1968 made after the said first award was remitted by the Court to the arbitrator. The Arbitrator was one O. P. Mittal, Engineer-Member, Delhi Development Authority, New Delhi and formerly Superintending Engineer (Arbitration) Central Public Works Department.

2. By an agreement in writing dated 16th October, 1949 the respondent National (Contd. on Col. 2)

Builders agreed to execute the construction of administrative block of India Government Mint at Alipore in Calcutta. In course of execution of the said contract various disputes arose between the parties and the Additional Chief Engineer, Central P. W. D., New Delhi, appointed the said O. P. Mittal, Superintending Engineer, (Arbitration) as Arbitrator and sent to the said Arbitrator along with his letter dated 27th November, 1958 a Schedule wherein the claims of the respondent were tabulated and against each item thereof, an issue was framed for his determination.

3. The short point involved, in this application is whether the arbitrator was obliged to make his award showing the determination of each of the issues and answering them in the manner it was raised before him. Some of the relevant claims and the respective issues raised in respect thereto are set out below to appreciate the nature of the terms of reference submitted to the Arbitrator by the said Additional Chief Engineer :

CLAIMS

1. The contractor was paid reduced rates for using inferior bricks. The contractor claims payment for first class bricks as they were supplied departmentally (Item No. 4)
5. The contractor used vibrator for providing concrete of good quality. He claims extra for vibration of concrete (Item No. 31)
9. 200 sq. ft. area of mosaic flooring done originally with grey cement was dismantled and replaced with white cement (Item No. 62)
10. The contractor claims payment for 14" thick red Patent Stone flooring done in Gold weight room at Rs. 150/- per sq. ft. (Item No. 63)
12. The contractor claims that the measurement cannot be taken in ft.-inch for this item (Item No. 66)

PART I

ISSUES

Whether inferior bricks were used on the work, if so, the reduction in rate that should be effected.

Whether extra rate is admissible for vibrated concrete, if so, how much.

Whether dismantling was done on the instruction of the department, whether any payment is due and if so, amount involved.

Whether payment is still due for this work and if so, how much.

Whether measurement can be taken in ft.-inch for this item and if any relief is called for.

PART II

3. The contractor claims payment for brick work done in recesses and chases in brick work for which deduction was made (Item No. 7)
4. The contractor claims that R. C. C. slabs have not been measured correctly including the full bearing (item No. 9)
12. The contractor claims that heavy compensation under clause (ii) is not justified.

Whether the deduction made is justified.

Whether the measurement has been correctly recorded, if not, the excess quantity involved.

Whether the contractor had made himself liable for compensation under clause (ii).

In the recital part of the said award dated 4th August, 1966, the said arbitrator, inter alia, referred to the letter dated 27th November, 1958 written by the Additional Chief Engineer, Central P. W. D. and the disputes as mentioned in the said letter and made his award, the relevant portion whereof read as follows :

"2. After hearing and examining and considering the statements of the parties and the oral and documentary evidence

produced before me by them and having given due consideration to all the facts and documents, I award as follows except as mentioned in paragraph 4.

3. In full and final settlement of all the disputes referred to me, the Union of India should pay to M/s. National Builders a sum of Rs. 31,270/- (Rupees Thirty-one thousand two hundred and seventy only)."

In paragraph 4 of the said award the Arbitrator, *inter alia*, recorded that since the High Court had expressed reluctance to grant further extension of time to make the award and since the disputed item No. 4 of Part II would take sometime to decide the same he left undecided so that the same might be referred to the other Arbitrator who had been appointed by the Additional Chief Engineer in respect of some other disputes. As such he made the said award without deciding the said item.

4. After the said award was filed in court, the Union of India made an application for setting aside the award and upon hearing the parties the Court remitted the award to the said arbitrator for his decision in respect of the said disputed item No. 4 of Part II which was not decided by him for shortage of time. The court directed that the award would not be placed in the list until five months from the date of the order. The said arbitrator has since made another award in respect of the said item No. 4, Part II, the operative part whereof reads as follows:

"4. After hearing, examining and considering the statements of the parties and the oral and documentary evidence produced before me by them and having given due consideration to all the facts and documents, I award that the Union of India should pay to M/s. National Builders a sum of Rs. 3,142/- (Rupees three thousand one hundred forty-two) in full and final settlement of the dispute as given in Part I above.

5. The parties will bear their own costs of reference."

That award was signed by him on 24th August, 1968.

5. The present application has been made in respect of both the awards and the Union of India has prayed for setting aside thereof.

6. Counsel for Union of India contends that the arbitrator has failed to decide all the disputes between the parties finally and conclusively inasmuch as the disputes which called for his decision by declaration as to methods and manner of measurement and/or calculations and not just money award, have been left out and not decided upon. It is contended that the terms of reference were sent by the Additional Chief Engineer, Central P. W. D. to the arbitrator and it was referred to the arbitrator for his decision in respect of each of the said issues. Under the circumstances, the arbitrator could not have made a lump sum money award and, having done so, he has misconducted himself and the award should be set aside on that ground.

7. Counsel for Union of India has referred to the passages appearing in Russell on Arbitration 18th Edn. at Pages 185 and 273-274 and the Supreme Court case of Jivraj Bhai v. Chintaman Rao Balaji, report-

ed in AIR 1965 SC 214. Counsel contends that neither any liability has been fixed nor have the quantum thereof been indicated in respect of the issues submitted to the arbitrator for his determination. Counsel also contends that admissibility of the extra rate claim for the vibrated concrete was required to be determined by the arbitrator but he had failed to do so. Not only so, on that basis he had also failed to determine and to indicate what amount was payable on account thereof. Furthermore, the arbitrator was obliged to give his decision on each issue and on that basis he should have arrived at the figure which was payable as the total amount by the Union of India.

8. The above Supreme Court case is distinguishable from the facts of the case before me. In that case, by paragraph 13 of the Partnership agreement the valuation of the firm was to be determined, by adopting some particular method prescribed therein and the arbitrator having followed a different method in arriving at his valuation by including the depreciation and appreciation of the property, outstandings and the dead stock, had travelled beyond his jurisdiction and his award became liable to be set aside. At p. 220 the Supreme Court observed:

"Question is not one of interpretation of paragraph 13 of the partnership agreement but of ascertaining the limits of his jurisdiction. The Primary duty of the arbitrator under the deed of reference in which was incorporated the partnership agreement, was to value the net assets of the firm and to award to the retiring partners a share therein. In making the "valuation of the firm", his jurisdiction was restricted in the manner provided by paragraph 13 of the partnership agreement."

9. In the case of Pannalal Paul v. Padmabati Paul, AIR 1960 Cal 693, a similar point, as is involved in this case, was sought to be argued and it was contended that it was the duty of the arbitrator to answer the several issues specifically. Bachawat, J. (as he then was) in delivering the judgment of the Bench at P. 696 observed:

"I am totally unable to accept this contention. The arbitrator is not bound to make a separate and distinct finding on each issue. He may award on the whole case. In the instant case the arbitrator has awarded that on the final taking of the accounts the appellants are liable to pay to the respondents a sum of Rs. 12,255/-. The arbitrator has given an award on the whole case whereby he has fully and finally determined the rights of the parties in respect of the subject-matter referred."

Upon those observations the Division Bench upheld the award and dismissed the appeal.

10. In *Sm. Santasila Devi v. Dharendra Nath Sen*, reported in AIR 1963 SC 1677 the Supreme Court relied on the following observation of Parke, B. in *Harrison v. Creswick*, (1853) 138 ER. 1254 = (13 CB 399):

"The silence of the arbitrator upon the subject placed before him means that the arbitrator has negatived such plea."

At p. 1680, the Supreme Court observed:

"Besides it is obvious that unless the reference to arbitration specifically so requires the arbitrator is not bound to deal with each claim or matter separately but can deliver a consolidated award. The legal position is clear that unless so specifically required an award need not formally express the decision of the arbitrator on each matter of difference. (Vide. *Re. Brown and the Groydon Canal Co.*, (1839) 9 Ad. and Ell 522 = (112 ER 1309) and *Jewell v. Christie*, (1867) 2 CP 296. Further, as Parke, B. himself put it during the course of argument in (1853) 138 ER 1254:

"Unless the contrary appears the Court will presume that the award disposes finally of all the matters in difference." and to repeat a sentence from the extract quoted earlier:

"where an award is made de praemissis, the presumption is that the arbitrator intended to dispose finally of all the matters in difference, and his award will be held final, if by any intendment it can be made so." From the above observation of the Supreme Court and the observation of Baron Parke, it appears that in the facts and circumstances of this case before me, the arbitrator was not not obliged to decide each of the issue separately and was quite justified in making a composite award of a lump sum amount. His two awards decide the whole of the dispute referred to him as the recitals in respect thereto would suggest.

11. It is to be noted that the terms of reference herein did not impose any limitation upon the said arbitrator that he was obliged to answer each of the issues separately and make his award in that way. The arbitration agreement herein was very wide. It did not require the arbitrator to decide each issue individually and under the said arbitration agreement the arbitrator was quite justified in making a lump sum award without deciding the issues separately. The Court is not called upon to go into the question as to in what way the arbitrator arrived at the said decision and in what way his mind was reacting in arriving at his conclusion. All that the court is required to find out is whether there was any express limitation imposed or direction given on the arbitrator by the arbitration agreement or by the terms of reference, as was the case before the Supreme Court in AIR 1965 SC 214. But the facts involved in this case do not warrant any such express limitation or direction on the arbitrator.

12. That being the position, I hold that the arbitrator did not exceed his jurisdiction in making the said two awards and accordingly, this application is bound to be and is hereby dismissed with costs.

13. The result, therefore, is that the respondent National Builders is entitled to

judgment upon the said two awards with interest at the rate of 6 P. C. Per Annum from the date of the decree and is also entitled to costs of and incidental to the filing of the said two awards.

Application dismissed.

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S. K. MUKHERJEA AND
SUDHAMAY BASU, JJ.

The State of West Bengal, Appellant v. Somendra Kumar Mitra and others, Respondents.

Supreme Court Appeal No. 69 of 1972, D/- 9-4-1975.*

(A) Constitution of India, Art. 133 (1) — Grant of certificate — Case involving a substantial question of law of general importance — Grant of certificate is not a must in such a case.

Under Article 133 (1) High Court has been vested with a large discretion in the matter of granting a certificate. Even when all other ingredients of the relevant Article have been established the High Court has still to consider whether it is necessary for the Supreme Court to pronounce on a substantial question of law of general importance involved in the appeal. (Para 5)

Held question whether an application in revision lies or not from an award given by an Arbitrator appointed under Section 19 (1) (b) of the Defence of India Act, 1939, was a substantial question of law of general importance but a wrong view taken on this question could be corrected by a Special Bench of High Court if need be and hence certificate could not be granted. That refusal might result in some inconvenience to the petitioner is no reason to hold that the question needs to be decided by the Supreme Court. (Para 6)

Cases Referred: Chronological Paras
AIR 1952 Mad 45 = (1951) 2 Mad LJ 402
3, 4

C. D. Roy Choudhury, for Appellant; Sankar Lal Seal for Tarak Nath Roy, for Respondents.

S. K. MUKHERJEA, J.:— This is an application for grant of a certificate under Article 133 (1) of the Constitution for appeal to the Supreme Court from a judgment and decree of a Division Bench consisting of Amarendra Roy and S. N. Bagchi, JJ., dated the 29th June, 1970. The judgment disposed of seventeen revision applications and two appeals preferred against orders made by an

*(For Leave to Appeal to Supreme Court against judgment of Amarendra Roy and S. N. Bagchi, JJ., D/- 29-6-1970).

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Arbitrator appointed under Section 19 (1) (b) of the Defence of India Act, 1939.

2. Certain lands lying in the neighbourhood of Panagarh in the district of Burdwan were acquired for purposes of defence by the Government of Bengal in September 1943 in exercise of the powers conferred by R. 75-A of the Defence of India Rules. As no agreement could be reached on the question of compensation payable for acquisition, the Central Government in exercise of the powers conferred by Section 19 (1) (b) of the Act appointed an Arbitrator to adjudicate on the quantum of compensation. The Arbitrator duly made his award for payment of compensation in each and every case at a specified rate. In two cases where the compensation exceeded the prescribed minimum, (Rupees Five Thousand) appeals were preferred against the award under Section 19 (1) (f) of the Act and in seventeen cases, where appeal did not lie, revision applications were filed in this Court.

3. It was contended on behalf of the State before the learned appellate court that no revision lies from an award made by an Arbitrator appointed under Section 19 (1) (b) of the Act having regard to the fact that an arbitrator is not a Court subordinate to the High Court and also because under Section 19 (1) (g) of the Act no other law for the time being in force, applies to arbitrations under the Act. The appellate court rejected these contentions and disagreeing with a judgment of a learned single Judge of the Madras High Court in *Abboy Reddiar v. Collector of Chingleput*, AIR 1952 Mad 45 held that a revision application lies in the High Court against an order of an arbitrator appointed under Sec. 19 (2) of the Defence of India Act. Having held so, the learned Judges proceeded to dispose of the revision cases and the appeals on merits. By the order of the appellate court the rate of compensation was enhanced in each and every case.

4. The proceeding out of which the present application arises was a revision application which was disposed of by a common judgment. It is contended before us that the learned Judges fell into error in holding that revision lies from an award made by an arbitrator appointed under Section 19 (2) of the Defence of India Act. Whether an application in revision lies or not from an award is a substantial question of law. Moreover, the question has been answered differently by the Madras High Court in the case reported in AIR 1952 Mad 45 and by this Court in the group of cases with which we are concerned. There is, therefore, a substantial question of law on which two High Courts have not seen eye to eye.

5. Learned Advocate, appearing on behalf of the petitioner, submitted that even today there are a large number of pending

cases of acquisition under Defence of India Act, 1939 in which Arbitrators have been appointed under Section 19 (2) of that Statute. The substantial question of law is, therefore, of general importance within the meaning of Article 133 (1) of the Constitution. It is not difficult to agree with the learned Advocate that that is so. The question which remains for us to be considered is whether in our opinion, the question is one which needs to be decided by the Supreme Court. On a fair reading of the relevant provisions of Article 133 (1) of the Constitution it is clear that the High Court has been vested with a large discretion in the matter of granting a certificate. Even when all other ingredients of the relevant Article have been established the High Court has still to consider whether it is necessary for the Supreme Court to pronounce on a substantial question of law of general importance involved in the appeal.

6. After giving the matter our anxious consideration, we are of opinion that here the question is not one which needs to be decided by the Supreme Court. It is not for the Court hearing an application for grant of a certificate to pronounce on the merits of the judgment from which appeal is sought to be preferred. We, therefore, refrain from expressing our views on the judgment even if we were inclined to do so. However, if the learned Judges are wrong, that is to say, if it be the correct law that no revision lies from an order made by an arbitrator, the error may be corrected in future by a Special Bench of this Court, if need be. It is not, in our view, necessary to settle the question in these proceedings. In similar proceedings which may arise in future the Union of India and the State will be necessary parties and they will always be able to agitate this question before a Division Bench and thereafter, before a Special Bench. To refuse a certificate may result in some inconvenience to the petitioner but that is no reason why we should hold that the question of law raised by the judgment of the appellate court needs to be decided by the Supreme Court, particularly having regard to the small stake involved in this case.

7. In the view we have taken, we refuse the grant of a certificate with some regret. The application is dismissed but there will be no order for costs.

8. Let the certified copy of the judgment of the appellate court be returned to the learned advocate, appearing on behalf of the petitioner on furnishing a plain copy.

SUDHAMAY BASU, J.:— I agree.

Application dismissed.

AIR 1975 CALCUTTA 337**CHITTATOSH MOOKERJEE, J.**

Tarak Nath Sen and others, Petitioners
v. Union of India and others, Respondents.

Civil Rule No. 1702(W) of 1967, D/-
14-3-1975.

(A) Defence of India Rules (1962),
R. 126-P — Adjudication proceeding is main-
tainable in respect of smuggled gold also.
(AIR 1974 SC 1818, Followed). (Para 5)

(B) Customs Act (1962), S. 124 — Notice
by Assistant Collector directing a party to
show cause to Additional Collector — Not
invalid.

The Additional Collector of Customs has
jurisdiction to pass final orders in the adjudi-
cation proceeding. A charge once issued be-
comes part of a quasi judicial proceeding.
Framing of such charge by an officer other
than the adjudicating authority will not pre-
judice a person who is asked to show cause.
Moreover, there will be less chance of bias
or formation of any prior opinion by the
adjudicating authority. Further, Section 124
(b) does not specifically provide that the per-
son who passes the adjudication order must
issue the show cause notice. (Paras 8, 9)

(C) Customs Act (1962), Ss. 111 (d) and
112 — Contravention of Ss. 111 (d) and 112
and also of Rr. 126-M and 126-L of Defence
of India Rules (1962) — Combined show
cause notice or combined proceeding for alleg-
ed contravention of the Act and the Rules is
not illegal when show cause notice gives suf-
ficient particulars of the charges and parties
have no difficulty in showing cause. (Defence
of India Rules (1962), Rr. 126-L and 126-M).
(Para 3)

(D) Customs Act (1962), S. 112 — De-
fence of India Rules (1962), R. 126-L (16) —
Contravention of provisions of S. 112 and
R. 126-L (16) by partners of a firm — Pen-
alty can be imposed only on partners and not
on both firm and partners.

Although a firm in mercantile usage, has
a personality of its own, strictly in the eye of
law, it is not a legal entity like a natural
person. A partnership is not a 'person' with-
in the meaning of Section 3 (42) of the Gen-
eral Clauses Act. Therefore, the rights and
obligations of a firm are really rights and
obligations of the individual partners of the
firm. Therefore, no exception can be taken
to imposition of penalties individually upon
them. But since the firm is not a legal entity
and Section 140 of the Customs Act is inap-
plicable to the adjudication proceeding, im-
position of penalties also upon the firm would,
in effect, be imposition of double punishment
on the partners for the same sets of acts.
(AIR 1956 SC 354, Rel. on).

(Paras 16, 17)

Cases Referred : Chronological Paras
AIR 1974 SC 1818 = 1974 Cri LJ 885 5

ES/FS/B736/75/MBR

1975 Cal./22 IX G—18

(1972) C. R. No. 5486(W) of 1969 and C. R.
No. 1463(W) of 1970, D/- 4-10-1972 (Cal)

AIR 1970 Cal 437 = 1970 Cri LJ 1341	5
AIR 1966 SC 1300 = (1966) 3 SCR 400	15
AIR 1956 SC 354 = 1956 SCR 154	15, 16
AIR 1953 SC 455 = 1954 SCR 171	14
AIR 1948 PC 100 = 75 Ind App 147	14
AIR 1948 Mad 427 = 49 Cri LJ 570	16
AIR 1933 All 77 = 1932 All LJ 999	15

N. C. Banerjee and Mahitosh Majumdar,
for Petitioners; R. N. Das, for Respondents.

ORDER :— The petitioners Nos. 1-4
claimed to be partners of the Firm, Messrs.
Shyamal Sen and Company. The Additional
Collector of Customs by his order No. 127,
dated July 28, 1967 (Annexure 'D' to the peti-
tion) has confiscated under Section 111 (d)
of the Customs Act, 1962, read with R. 126-M
of the Defence of India Rules, 1962, 142
pieces of gold coins (disc) weighing approxi-
mately 1656 grammes which were seized on
May 21, 1965 at 7, Nalini Seth Road, Cal-
cutta. The Additional Collector by the same
order has imposed on Messrs. Shyamal Sen
and Company and its partners a penalty of
Rs. 10,000/- each under Section 112 of the
Customs Act, 1962 and Rs. 5,000/- on each
of them under Rule 126-L (16) of the Defence
of India Rules.

2. Mr. N. C. Banerjee, learned Advo-
cate for the petitioners has submitted that the
aforesaid order of the Additional Collector
of Customs imposing penalties upon the peti-
tioners is illegal, without jurisdiction and in
violation of the principles of natural justice.
In the first place, the learned Advocate for
the petitioners has contended that a combined
show cause notice in respect of the alleged
offences under the Customs Act, 1962, Foreign
Exchange Regulation Act, 1947 and the De-
fence of India Rules, 1962 was bad in law.
I am unable to accept this submission. Ac-
cording to the said show cause notice, dated
June 3, 1965, issued by the Assistant Col-
lector of Customs for Preventive (I), Customs
House, Calcutta (vide Annexure 'A' to the
petition) on information a party of Customs
Officers led by the Assistant Collector of
Customs, Preventive (I) had reached the pre-
mises No. 7, Nalini Seth Road, Calcutta 7 oc-
cupied by Messrs. Shyamal Sen & Com-
pany at 7-45 p. m. on May 21, 1965 for
search. In course of the search, 142 pieces
of gold coins (disc) wrapped in a handker-
chief were recovered and seized from inside
the oven in the room on the 2nd floor.
Rs. 24,900/- in Indian Currency found inside
the Iron Safe placed in the gully was also
seized. Tarak Nath Sen, Debnath Sen,
Jognath Sen and Mahinath Sen were found
inside a room in the 1st floor of the premises.
The partners could not produce any docu-
mentary evidence to show that the gold coins
(disc) were duly declared before the Gold
Control Authorities or that those had been
entered in the prescribed returns. According
to the above show cause notice importation

of Gold without a valid permit was prohibited under Section 8 (1) of the Foreign Exchange Regulation Act, 1947 and the Government of India Notifications mentioned in the said notice. Therefore, the seized gold was liable to confiscation under clause (d) of S. 111 of the Customs Act, 1962. According to the said notice persons in possession or in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which they knew or have reason to believe, were liable to confiscation under Section 112 of the Customs Act, 1962. According to the said notice the above alleged acts were also in contravention of R. 126-H & R. 126-I of the Defence of India Rules, 1962 (Gold Control) (Part XIA) as possession of gold not included in any return was illegal. Further, failure to make any declaration of gold other than ornament amounted to contravention of the Defence of India Rules.

3. Thus, according to the above show cause notice, same set of facts gave rise to the above charges against the petitioners under the aforesaid provisions of the Customs Act and the Defence of India Rules. In other words, the petitioners' aforesaid acts amounted to contravention of Section 111 (d) and Section 112 of the Customs Act, 1962 and also of Rules 126-M and 126-L (16) of the Defence of India Rules, 1962. Under Rule 126-M of the Defence of India Rules (Gold Control), confiscation of any gold under Rule 126-L may be adjudged by the different officers of Customs or Central Excise depending on the value of the seized articles. Therefore, I find nothing illegal either in the show cause notice (Annexure 'A' to the petition) or in the adjudication proceeding merely because they were in respect of alleged contravention of the Customs Act and the Defence of India Rules (Gold Control). Therefore no prejudice was caused by conducting such combined proceeding to the petitioners and when the show cause notice gave sufficient particulars of the charges the petitioners had no difficulty in showing cause. In fact, the petitioners while showing cause did not make any grievance regarding the said joinder of charges.

4. A criminal case was started against the petitioners and one of their employees in respect of the aforesaid search and seizure at 7, Nalini Seth Road, Calcutta on May 2, 1967 under Section 135 (ii) of the Customs Act, 1962 and under Rule 126-P (2) (ii) of the Defence of India Rules, 1962. The learned Magistrate found the petitioners guilty and convicted them under the aforesaid provisions of the Customs Act and the Defence of India Rules and sentenced the firm to pay a fine of Rs. 5,000/- on each of the two counts. The learned Magistrate also sentenced the partners the petitioners Nos. 1 & 4 before me to suffer S. I. for nine months each and pay a

fine of Rs. 100/- each. They were further sentenced to pay a fine of Rs. 900/-.

5. S. K. Chakrabarti and Borooah, JJ. by their judgment, upheld the conviction of the appellants under the above provisions of the Customs Act. The learned Judges found that the accused persons themselves or someone with their knowledge or on their behalf or at their request or behest had placed those gold discs inside that oven so that they might not be found out by the customs people. The said gold discs were not covered by any declaration and the same were smuggled goods. The Division Bench, however, set aside the conviction and sentence of all the appellants under the Defence of India Rules. Their Lordships followed in this respect the decision of A. K. Das and K. K. Mitra, JJ. in *Aravinda Mohan Sinha v. Prohlad Chandra Samanta*, AIR 1970 Cal 437. The Supreme Court in *Aravinda Mohan Sinha v. Amulya Kumar Biswas*, AIR 1974 SC 1818 has overruled the decision of A. K. Das and K. K. Mitra, JJ. in *Aravinda Mohan Sinha v. Prohlad Chandra Samanta* (Supra). The Supreme Court while restoring the order of the learned Magistrate convicting and sentencing the accused persons under Section 135 of the Customs Act as also under R. 126-P of the Defence of India Rules at page 1822 paragraph 22 held that under the definition contained in Rule 126-A (c) of the Defence of India Rules, 1962 Part XII-A 'gold' means gold and it would be erroneous to say that a person was not liable to make under R. 126-I a declaration as to gold in his possession and that Rule 126-P was not attracted merely because the gold of which such persons were in possession was smuggled gold and not legal gold. In view of the above decision of the Supreme Court in AIR 1974 SC 1818 (supra) I am unable to entertain the submission that the adjudication proceeding against the petitioners under the Defence of India Rules (Gold Control) in respect of the aforesaid gold coins (discs) was not maintainable on the ground that the same were smuggled goods. I accordingly held that the initiation of a combined proceeding against the petitioners under the two aforesaid provisions of law was not without jurisdiction.

6. I am also unable to accept the second submission of the learned Advocate for the petitioners that the impugned adjudication proceeding was in contravention of Sec. 122 of the Customs Act, 1962. Section 122 provides that a Collector of Customs or a Deputy Collector of Customs would be competent to adjudicate upon the confiscations and penalties without any limit. An Assistant Collector of Customs can adjudicate only when the value of the goods liable to confiscation does not exceed ten thousand rupees and where the penalty proposed to be imposed does not exceed two thousand rupees. A Gazetted Officer of Customs lower in rank than an Assistant Collector of Customs has power to adjudicate confiscation or penalty where the

value of the goods does not exceed one thousand rupees and the penalty proposed to be imposed does not exceed two hundred rupees.

7. In the instant case, the show cause notice was issued by the Assistant Collector of Customs, Preventive (I), Calcutta and the Additional Collector of Customs passed the adjudication order confiscating the seized gold and also imposed a penalty of Rs. 10,000/- on each of the petitioners under Section 112 of the Customs Act and Rs. 5,000/- each on them under Rule 126-L (16) of the Defence of India Rules.

8. Under Section 2 (8) of the Customs Act, 1962, the 'Collector of Customs' includes an Additional Collector of Customs. The learned Advocate for the petitioners did not contend before me that the Additional Collector of Customs had no jurisdiction to pass final orders in the above adjudication proceeding. According to the learned Advocate for the petitioners the show cause notice was a part of the adjudication proceeding, and, therefore, the Assistant Collector who was not competent in law to either confiscate the seized gold or to impose penalties of Rs. 10,000/- on each of them and the initiation of the adjudication was without jurisdiction and void ab initio. I have elaborately considered the point mentioned above in my judgment in *Kumud Chandra Narandas Kapadia v. Union of India*, C. R. No. 5486 (W) of 1969 and C. R. No. 1463(W) of 1970, dated October 4, 1972 (Cal). I find no reason to take any different view in the instant case. Therefore, it is unnecessary to again elaborately set out the points. The three requirements of Section 124 of the Customs Act, 1962 are really embodiment of the well-known principle of Audi Alteram Partem. The fulfilment of these requirements of natural justice has been statutorily provided. The clause (a) of Section 124 in the first place provides for issue of a notice to appear before the Adjudicating Authority. The law requires that such notice must contain grounds on which it is proposed to confiscate the goods or to impose penalty. In other words, a notice under Section 124 (a) is in the nature of a charge against a person proceeded under the said provision. In so far as the notice under S. 124 (a) is akin to a summons of a civil suit it is partly ministerial and really serves the purpose of being an intimation of initiation of a proceeding without involving any judicial determination. The para. 15, Chap. III of the Adjudication Manual, 2nd Edition, Govt. of India, Ministry of Finance, Central Board of Excise and Customs, 1970 specifies the authority to issue show cause notices. The same contains observations that there was no legal objection to the issue of show cause notices by officers or other than the adjudicating authority. But a show cause notice issued by the Officer other than the adjudication authority must ask the parties to show cause direct to the adjudicating offi-

cer concerned. In the instant case, the Assistant Collector of Customs had asked the petitioner to show cause to the Additional Collector of Customs who had admittedly jurisdiction under Section 123 of the Customs Act, 1962.

9. Presumably the grounds mentioned in the notice under Section 124 are formulated by making prima facie inference. As a result of an investigation of Chapter XIII of the Customs Act. A charge once issued however becomes part of a quasi judicial proceeding. I fail to see how framing of such charge by an officer other than the adjudicating authority may prejudice a person who is asked to show cause. If on the other hand, the grounds contained in the show cause notice are formulated by an officer other than the adjudicating authority then the adjudicating authority may have no occasion to look into the grounds before conducting the adjudication proceeding. There will be less chance of bias or formation of any prior opinion by the adjudicating authority. When Section 124 (b) does not specifically provide that the person who passes the adjudication order must issue the show cause notice, I am not prepared to accept the submission of the learned Advocate for the petitioners on this point.

10. In the above view, I hold that the show cause notice issued by the Assistant Collector was perfectly legal and valid. The proceeding against the petitioners was lawfully initiated. The learned Advocate for the petitioners also made a grievance that the Additional Collector of Customs by passing the ex parte order had acted in violation of the principles of natural justice. After the petitioners showed cause to the Additional Collector of Customs they had prayed for adjournment of adjudication proceeding till the disposal of the criminal case started against them over the aforesaid search and seizure at premises No. 7, Nalini Seth Road, Calcutta. Although parallel proceedings are not forbidden the Additional Collector in his discretion had stayed the adjudication proceeding till the completion of the criminal case against the petitioners. After the criminal case ended in petitioners' conviction, the Additional Collector of Customs had fixed June 14, 1967 for hearing of the adjudication proceeding. The petitioners did not appear, but had applied in writing that till the disposal of their appeal in the High Court against the conviction order, the adjudication proceeding be stayed. On June 19, 1967, the Additional Collector of Customs informed the petitioners that he was not prepared to stay the departmental proceeding and he fixed June 27, 1967 for hearing. The petitioners were warned that if they failed to turn up, the case would be decided ex parte. The petitioners in spite of the warning did not participate in the adjudication proceeding. In the facts of this case, I am unable to hold that the Additional Collector of Customs had

acted arbitrarily or capriciously. He had given reasons for turning down the petitioners' prayer for further adjournment and he had fixed two dates, but the petitioners failed to appear. In these circumstances, the petitioners cannot make any complaint that the Additional Collector of Customs had acted in violation of principles of natural justice by ex parte concluding the case against them.

11. I also find no substance in the contention of the learned Advocate for the petitioners that the adjudication order was erroneous on the face of the record or that it was not based on materials on record. The petitioners did not dispute that 142 pieces of gold coins (disc) were seized during search of premises No. 7, Nalini Seth Road, Calcutta on May 21, 1965. But they denied that the said gold was found in their possession. In other words, they disclaimed the ownership and possession of the said gold coins (disc). Therefore, the petitioners did not advance any argument before me that the adjudication order for confiscation of the said gold did not make any point that they were not given a chance to pay a fine in lieu of such confiscation. Under Section 123 'where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized.' Thus, the burden of proof was upon the petitioners. The Additional Collector of Customs in his fairly lengthy order has found that the above pieces of gold coins (disc) were seized from the petitioners' possession and the same were smuggled goods. When the petitioners were found to be in possession of smuggled gold under Section 112 they were liable to be penalised for improper importation of the said smuggled goods. Once it was found that the petitioners were in possession of the smuggled gold they cannot question the penalty imposed under Section 112 as erroneous on the face of the record. The question whether the petitioners were in possession of any gold was one of fact and the petitioners did not file any appeal against any adjudication order, I cannot enter into the said question in the absence of any error of jurisdiction on the part of the adjudicating authority. The petitioners did not claim that they had made any return under Rule 126-F of the Defence of India Rules (Gold Control). Therefore, the penalty under Rule 126-L for their alleged omission to do the said act cannot be deemed to be without jurisdiction.

12. The Additional Collector of Customs has imposed a penalty of Rs. 10,000/- each under Section 112 of the Customs Act on the partnership firm, Messrs. Shyamlal Sen & Company and also its partners Taraknath Sen, Jogenath Sen, Debnath Sen and Mahinath Sen. The Additional Collector of Customs

has further imposed a penalty of Rupees 5,000/- each under Rule 126-L (16) of the Defence of India Rules upon the said firm and also its abovenamed partners. In these adjudication proceedings Section 140 of the Customs Act has no manner of application. The said section itself states that if a person committing an offence under Chapter XVI is a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. We need not set out the proviso to sub-sec. (1). Therefore, the explanation (a) of Section 140 which provides that 'company' means a body corporate and includes a firm or other association of individuals cannot be applied in respect of the proceedings under Chapter XVI for confiscation of goods and conveyances and imposition of penalties.

13. The word 'partnership' has been defined in Section 4 of the Indian Partnership Act, 1932 as:

".....the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually 'partners' and collectively 'a firm', and the name under which their business is carried on is called the 'firm name'."

14. The Judicial Committee of the Privy Council in *Bhagwanji Morarji Goculdas v. Alembic Chemical Works Co. Ltd.*, AIR 1948 PC 100 while considering the submission that under the Indian Partnership Act, 1932 a firm is recognised as a personality apart from the persons constituting it so long as the business of the firm continued had observed that 'it is true that the Indian Partnership Act goes further than the English Partnership Act, 1890, in recognising that a firm may possess a personality distinct from the persons constituting it, the law in India in that respect being more in accordance with the law of Scotland, than with that of England. But the fact that a firm possesses a distinct personality does not involve that the personality continues unchanged so long as the business of the firm continues. The Indian Act, like the English Act, avoids making a firm a corporate body enjoying the right of perpetual succession.' Again the Supreme Court in *The Commr. of Income-tax, West Bengal v. A. W. Figgis & Co.*, AIR 1953 SC 455 while considering the effect of change in the constitution of a firm in the context of the Income-tax Act, 1922 recognised that 'under the law of partnership a firm has no legal existence apart from its partners and it is merely a compendious name to describe its partners.'

15. The Supreme Court again in *Dulichand Laxminarayan v. Commr. of Income-*

tax, Nagpur, AIR 1956 SC 354 held that a partnership firm cannot enter into a partnership with another firm or Hindu undivided family or individual. S. R. Das, J. (as he then was) at page 358 observed:

"It is clear from the foregoing discussion that the law, English as well as Indian, has for some specific purposes, some of which are referred to above, relaxed its rigid notions and extended a limited personality to a firm. Nevertheless, the general concept of partnership, firmly established in both systems of law, still is that a firm is not an entity or 'person' in law but is merely an association of individuals and a firm name is only a collective name of those individuals who constitute the firm. In other words, a firm name is merely an expression, only a compendious mode of designating the persons who have agreed to carry on business in partnership."

The learned Judge thereafter proceeded to refer to the reported decisions on the point that the firm is not given the legal personality apart from the partners. The learned Judge in AIR 1956 SC 354 (supra) also held:

"In our opinion the word 'persons' in Section 4 of the Indian Partnership Act, which has replaced Section 239 of the Indian Contract Act, contemplated only natural or artificial, i.e., legal persons and for the reasons stated above, a firm is not a 'person' and as such is not entitled to enter into a partnership with another firm or Hindu undivided family or individual."

The Supreme Court in AIR 1956 SC 354 (supra) did not approve the decision in *re Jai Dayal Madan Gopal*, AIR 1933 All 77 observing that the said case did not appear to have considered whether there was any repugnancy in the subject of partnership law which operated to exclude the application of that definition to the word 'person' as given in Section 239 of the Indian Contract Act, 1872. Again the Supreme Court in *Addanki Narayanappa v. Bhaskara Krishnaappa*, AIR 1966 SC 1300 recognised that a partnership property vests in all persons in the sense that every person has an interest in the partnership.

16. The decision of *Govinda Menon, J. In re Swaranath Bhatia*, AIR 1948 Mad 427 was cited by Mr. Das, learned Advocate for the respondents. But the said decision does not really assist the respondents' case. *Govinda Menon, J.* held that according to General Clauses Act a 'person' includes a partnership and in Rule 5, Defence of India Rules, if a partnership fails to secure compliance with the Orders made under the Defence of India Rules such partnership should be deemed to have contravened the provisions of the Rules. According to the learned Judge, the partnership had no existence apart from the individuals constituting the firm. Therefore, the individual partner shall be deemed to have contravened the said provision. In view of the Supreme Court's deci-

sion in *Dulichand's case* AIR 1956 SC 354 (supra), I am unable to accept the position that a partnership is a 'person' within the meaning of Section 3 (42) of the General Clauses Act. Further, even according to the above decision of *Govinda Menon, J.* the partner comprising a firm would be liable for contravention of a provision of law by their firm.

17. Thus, these decisions make it clear that although a firm in mercantile usage has a personality of its own, strictly in the eye of law, it is not a legal entity like a natural person. Therefore, the rights and obligations of a firm are really rights and obligations of the individual partners of the firm. In the instant case, according to the findings made by the Additional Collector of Customs in his adjudication order the petitioners 2 to 4 carrying on business as a partnership firm had contravened provisions of the Customs Act and the Gold Control Rules and were liable for penalties under Section 112 of the Customs Act and under Rule 126-L (16) of the Defence of India (Gold Control) Rules. Therefore, no exception can be taken to imposition of penalties individually upon them. But since the firm is not a legal entity and Section 140 of the Customs Act was inapplicable to the adjudication proceeding, the Additional Collector of Customs by imposing penalties also upon the firm has really twice punished the petitioners Nos. 1 to 4 for the same sets of acts. Therefore, although I propose to sustain the imposition of penalties under the Customs Act and the Defence of India (Gold Control) Rules upon the petitioners 2 to 4, the penalties of fine imposed upon the petitioner No. 5 firm should be quashed.

18. I accordingly make this Rule absolute in part and quash the penalties imposed upon the petitioner No. 5, Messrs. Shyam Lal Sen & Company under Section 112 of the Customs Act and under Section 126-L (16) of the Defence of India (Gold Control) Rules, 1962. I do not interfere with the penalties imposed upon the petitioners 1 to 4 under the aforesaid two provisions of law. The rest of the Rule is accordingly discharged.

19. There will be no order as to costs.

20. The operation of this order is stayed for four weeks.

Petition partly allowed.

AIR 1975 CALCUTTA 341

SABYASACHI MUKHARJI, J.

In the matter of Dulal Chand Auddy, Debtor.

Insolvency Case No. 14 of 1973. D/-11-2-1975.

ES/FS/B909/75/RSK

(A) Presidency Towns Insolvency Act (1909), S. 9 (c) — Validity of judgment debt — Court whether can go behind the decree.

In an appropriate case on proper complaint being made to the court of bankruptcy making an adjudication order, Court is entitled to go behind the decree and to determine whether there was a genuine debt or a valid decree or not even though in a previous proceeding that decree had been passed without contest or had been passed upon contest overruling the opposition of the judgment-debtor. There is no question of *res judicata* or estoppel preventing the court adjudicating to go into the fact afresh. But there must be strong grounds, and sufficient proof in support of the allegations of fraud, otherwise if this power is not used with caution any judgment-debtor can defeat the scheme of the Insolvency Act and try to impeach the decree by indirect methods not contemplated by law.

(Para 5)

(B) Presidency Towns Insolvency Act (1909), S. 9 — Acts of insolvency — Instances.

There was an attachment for more than three weeks no steps were taken for liquidating the claim of the judgment-debtor. Secondly there were also other decrees against the judgment-debtor in respect of which insolvency proceedings were initiated. Held there was sufficient justification to initiate insolvency proceedings. AIR 1972 SC 2127, Distinguished.

(Para 6)

(C) Presidency Towns Insolvency Act (1909), S. 9 (e) — Act of insolvency — Property remaining attached for not less than 21 days — Creditor himself can move for initiating insolvency proceedings.

Prima facie if a decree remain unsatisfied, the act of insolvency, by the fact that the property had remained attached for a period of not less than 21 days in execution of the decree, is committed, the petitioning creditor is entitled to have an order for adjudication and that Act of insolvency is not limited only for having attachment at the instance of another creditor and not the petitioning creditor. To do so, would be to restrict the scope of Section 9 (e) for which there is no warrant.

(Para 8)

(D) Presidency Towns Insolvency Act (1909), Ss. 9 (e), 12 (2) — Execution of a decree by attachment — Analogy of secured creditor cannot be extended — Decree remaining unsatisfied for more than 21 days creditor can initiate insolvency proceedings.

(Para 7)

Cases Referred : Chronological Paras
 AIR 1972 SC 2127 = (1973) 3 SCC 187 6
 (1964) Suit No. 170 of 1964, D/- 7-5-1964 1, 2
 (Cal) 1, 2
 AIR 1963 Mad 217 = (1963) 1 Mad LJ 113 6
 (FB) 6
 (1888) 22 QBD 83 = 37 WR 42 4
 (1885) 16 QBD 315 = 55 LJQB 45 3

Mrs. Manjulala Bose with Miss M. Roy Choudhury, for Creditor; Mrs. P. Banerjee, for Debtor.

ORDER :— This is an application by Daulal Phumra claiming to be a creditor of one Dulal Chand Auddy for an order of adjudication. It is stated that the said Dulal Chand Auddy had resided and was still residing at No. 16/1, Ramanath Kaviraj Lane, Calcutta, and the said debtor has committed an act of insolvency inasmuch as there was an attachment which was levied on 29th May, 1973 and the said attachment in execution of the decree had remained unsatisfied for more than 21 days. The decree was obtained in Suit No. 1558 of 1963 of this Court which was instituted by the petitioner Daulal Phumra and the decree was passed in favour of the petitioner against the defendants on the 6-12-1963. It was ordered and decreed that the said defendants should pay to the petitioner the sum of Rs. 15,892/- with interest on the principal sum of Rs. 15,000/- at the rate of 6 per cent. per annum from 6th December, 1963 until realisation and pay also to the petitioner the cost of the suit. The said sums decreed have not been paid. It is stated that within three months before the date of presentation of the petition the said Dulal Chand Auddy has committed an act of insolvency as there is an attachment on his property which had remained unsatisfied for a period of three weeks. Under Section 9 (e) of the Presidency Towns Insolvency Act a debtor is deemed to commit an act of insolvency if his property is attached for a period of not less than 21 days in execution of a decree of any court for payment of money. In order to appreciate the controversy in this case, it would be necessary to refer to certain facts. On the 1st May, 1962 there was a hundi for Rs. 20,000/- drawn by one N. C. A. Production Private Ltd. on Dulal Chand Auddy payable by the joint family firm of Giridharilal Ramanlal, the loan was granted by Ramanlal Phumra as Karta. On the 26th July, 1962 two hundies for Rs. 10,000/- and Rs. 5,000/- respectively were drawn in favour of the petitioner. The loan was granted by the petitioner in the name of his business Sajan Kumar Krishna Kumar and Co. as sole proprietor. Thereafter, Suit No. 1558 of 1963 was instituted by the petitioner under Order 37 of the Code of Civil Procedure against the respondent and another defendant No. 2 in respect of two hundies for the total sum of Rs. 15,000/-. In that suit no leave to defend was obtained by the defendants. In the premises, on the 6th December, 1963 a decree was passed in Suit No. 1558 of 1963 for the sum of Rs. 15,892.50 p. with interest on the principal sum at the rate of 6 per cent. until realisation and cost. This decree has remained unrealised as a result of which the present insolvency proceeding has started. It appears that thereafter, on the 7th May, 1964 Suit No. 170 of 1964 (Cal) was instituted by Ramanlal Phumra v. N. C. A. Productions Pvt. Ltd. in respect of hundi loan of Rs. 20,000/-. In that suit also no leave to defend the suit was obtained. The

suit was also under Order 37 of the Code of Civil Procedure. In 1966 insolvency proceedings were commenced by Ramanlal against Dulal Chand Auddy and the case was numbered 17 of 1966 in respect of suit No. 170 of 1964. In the said insolvency proceedings the present debtor took up pleas which were more or less similar to those taken in the affidavit in opposition in this case to which I shall refer later. In the said proceedings, however, it was not stated that in the agreement dated 26th July, 1962 the present petitioner was a party to the said agreement. In the instant case before me, the said case has been made out for the first time. Insolvency proceeding was also taken out in 1966 against Prem Chand Auddy being No. 18 of 1966. On 8th September, 1967 in the insolvency proceeding an order was made directing the sum of Rs. 19,427/- payable under the decree should be paid in certain instalments mentioned in the order to which I need not refer. Thereafter, there was an order on the 30th April, 1968 granting time to pay Rs. 9,000/- by 30th April, 1968 and the balance of Rs. 5,472/- by 8th May, 1968. On the 9th May there was a further order to pay Rs. 20,000/- by 9th May, 1968 and the balance amount by 9th July, 1968. On 21st January, 1971 an application was made for execution of the decree in Suit No. 1558 of 1963. The said application for execution and attachment was contested on grounds which were more or less identical in nature. On the 2nd September, 1971 on contest an order of attachment of the right title and interest of Dulal Chand Auddy in premises No. 54/4C, Strand Road, Calcutta, was made in execution of the decree. Sheriff attached the said property on 29th May, 1973 and the said attachment is still subsisting and on 22nd August, 1973 the present petition for adjudication of the debtor has been made under the Presidency Towns Insolvency Act. In the affidavit-in-opposition regarding the circumstances under which the said hundi was given the debtor has stated, inter alia, as follows:

"10. On May 1, 1962 a hundi for Rupees 20,000/- was drawn by N. C. A. Production Private Limited on me Dulal Chand Auddy and on my brother Prem Chand Auddy payable to a joint family firm known as Girdharilal Ramanlal 30 days after date without grace.

11. Between May 1, 1962 and 25th July, 1962 diverse sums aggregating to Rs. 5,000/- were paid by the said N. C. A. Production Private Limited to the said firm of Girdharilal Ramanlal as detailed below:

- (i) On May 1, 1962 — By cash — 200.00
- (ii) On June 1, 1962 — By cash — 800.00
- (iii) On July 7, 1962 — By Cheque—1,500.00
- (iv) On July 17, 1962 — By Cheque—2,500.00

12. On July 26, 1962 it was agreed by and between the parties namely, Ramanlal Phumra on behalf of said firm of Girdharilal Ramanlal of the first part, Daulal Phumra

(a brother of the said Ramanlal Phumra) carrying on business under the name and style of Messrs. Sajjan Kumar Krishna Kumar & Co. of the second part and myself and my brother Prem Chand Auddy on behalf of the said N. C. A. Production Private Limited of the third part that the said hundi for Rs. 20,000.00 drawn on May 1, 1962 would stand discharged as being paid and satisfied in full in terms of the agreement between the parties, namely—

- (a) That my brother Prem Chand Auddy would draw two hundis one for Rupees 10,000/- and the other for Rs. 5,000/- and the same would be accepted by me payable to Shri Daulal Phumra (a brother and Benamdar of the said Ramanlal Phumra) carrying on business under the name and style of Messrs. Sajjan Kumar Krishna Kumar & Co. payable 38 days after date without grace.
- (b) Upon the said two hundis being drawn and accepted as above in consideration of the said sum of Rs. 5,000/- paid as stated in paragraph 11 above, the said hundi for Rs. 20,000/- dated May 1, 1962 would stand discharged, cancelled and satisfied in full.
- (c) That although the said two hundis for Rs. 10,000/- and Rs. 5,000/- respectively would be drawn by my brother Prem Chand Auddy and accepted by me payable to the said Daulal Phumra as proprietor of the said business but that no liability or obligation would attach in respect of either of the said two Instruments unless and/or until all accounts of all transactions had between the said Ramanlal Phumra and Daulal Phumra on the one hand and myself and the said Prem Auddy and the said N. C. A. Production Private Limited on the other were taken and the actual position was clearly and properly ascertained.
- (d) That the said two instruments mentioned in the last preceding clause would be of no force or effect and would impose no liability or obligation whatsoever either on me or on the said Prem Chand Auddy until the happening of the mentioned in the last preceding clause."

2. In the affidavit of Dulal Chand Auddy affirmed on 22nd June, 1971 in opposition to the application for execution the judgment-debtor has stated as follows:

"(a) On May 1, 1962 a Hundi for Rupees 20,000 was drawn by N. C. A. Production Private Limited on me Dulal Chand Auddy and on my brother Prem Chand Auddy payable to a Joint Family Firm known as Girdharilal Ramanlal 30 days after date without grace.

(b) Between May 1962 and 25th July 1962 diverse sums aggregating to Rs. 5,000/- were paid by the said N. C. A. Production

Private Limited to the said firm of—Girdharilal Ramanlal as detailed below:—

- (i) On May 1, 1962 — By Cash ... Rs. 200.00
- (ii) On June 1, 1962 — By Cash ... Rs. 800.00
- (iii) On July 2, 1962 — By Cheque ... Rs. 1,500.00
- (iv) On July 17, 1962 — By Cheque ... Rs. 2,500.00

(c) On July 25, 1962 it was agreed by and between the parties namely — Ramanlal Phumra on behalf of the said firm of Girdharilal Ramanlal on the one hand and myself and my brother Prem Chand Auddy on behalf of the said N. C. A. Production Private Limited on the other hand that the said Hundi for Rs. 20,000/- drawn on May 1, 1962 would stand discharged as being paid and satisfied in full upon the understanding mentioned in clause (e);

- (i) My brother Prem Chand Auddy drawing a Hundi for Rs. 10,000.00 and accepted by me payable to Shri Dulal Phumra (a brother of the said Ramanlal Phumra) carrying on business under the name and style of Messrs. Sajan Kumar Krishna Kumar & Co.) payable 38 days after date without grace, and (ii) another Hundi for Rs. 5,000.00 being drawn by my brother Prem Chand Auddy and accepted by me payable to the said Daulal Phumra carrying on business under the name and style of Messrs. Sajan Kumar Krishna Kumar & Co. payable 38 days after date without grace.

(d) In pursuance of the said agreement between the parties the said 2 hundis were, upon the understanding mentioned in Cl. (e) hereinbelow, drawn and accepted as above for Rs. 10,000.00 and Rs. 5,000 respectively. Upon the said two hundis being drawn and accepted as above and upon payment of the said sum of Rs. 5,000.00 as stated in Cl. (b) above, the said hundi for Rs. 20,000.00 dated May 1, 1962 stood discharged cancelled and satisfied in full in terms of the said agreement solemnly entered into between the parties as aforesaid.

(e) It was also agreed by and between the said Daulal Phumra carrying on business under the name and style of Sajan Kumar Krishna Kumar & Co. on the one hand and myself and the said Prem Chand Auddy on the other hand on July 26, 1962 that the said two Hundis for Rs. 10,000.00 and Rupees 5,000.00 respectively would be drawn by my brother Prem Chand Auddy and accepted by me payable to the said Daulal Phumra as Proprietor of the said business but that no liability or obligation would attach in respect of either of the said instruments unless and/or until all accounts of all transactions had between the said Ramanlal Phumra and Daulal Phumra on the one hand myself and the said Prem Chand Auddy in the other were taken and the actual position was clearly and properly ascertained.

(f) It was also agreed by and between the said parties on July 26, 1962 that the said

instruments mentioned in the last preceding clause would be of no force or effect and would impose no liability or obligation whatsoever on me and the said Prem Chand Auddy until the happening of the event mentioned in the last preceding clause.

(g) The said accounts were not taken. Nor was the actual position between the parties ever ascertained.

(h) In the premises aforesaid, I state and submit that the condition precedent as mentioned above to the attaching of any obligation under and in respect of the said two alleged hundis dated July 26, 1962 has not been satisfied and that no obligation or liability can be imposed on either me or the said Prem Chand Auddy by virtue of the said instruments and/or otherwise.

(i) In spite of the facts and circumstances mentioned above and in complete breach of the arrangement between the parties, the said Ramanlal Phumra purporting to act as Karta and/or Manager of a Joint Hindu family governed by the Mitakshara School of Hindu Law and carrying on the said joint family business under the name and style of Girdharilal Ramanlal, filed a Suit being Suit No. 170 of 1964 (Cal), (Ramanlal Phumra v. N. C. A. Production Private Ltd., in this Hon'ble High Court in its Ordinary Original Civil Jurisdiction and obtained by fraud a decree therein on the basis of the said Hundi dated May 1, 1962 which had been cancelled, discharged, and satisfied in full, as stated above.

(j) In spite of the facts and circumstances mentioned and the aforesaid arrangements made by and between the said parties, the said Daulal Phumra purporting to act as the sole Proprietor of the business carried on by him under the name and style of Sajan Kumar Krishna Kumar and Company filed a suit being abovementioned suit No. 1558 of 1963 in this Hon'ble Court and obtained by fraud a decree therein on the basis of the aforesaid Hundis dated July 26, 1962 for Rs. 10,000.00 and Rs. 5,000.00 though as stated above, no liability or obligation could, in the premises aforesaid, be imposed on either myself or the said Prem Chand Auddy by virtue of the said instruments and/or otherwise."

In the premises, it appears that prior to the present proceedings it was not stated that there was an agreement to which the judgment creditor was a party. The allegations that in the agreement dated 26th July, 1962 the judgment creditor was a party have been made for the first time in opposition to the present application.

3. The question, in these circumstances, is, whether the judgment-debtor is entitled to raise these contentions. It is undoubtedly true that in an application for adjudication the court should proceed cautiously and the court has jurisdiction both in terms of Section 13 (5) of the Act and also under the general principles governing insol-

veny proceeding to direct in appropriate cases examination of the contention about the validity of the debt leading to the decree. It was observed in the case of *in Re Lennox Ex Parte Lennox*, (1885) 16 QBD 315 that the court of bankruptcy had power to go behind a judgment and inquire into the consideration for the judgment debt, not only at the instance of the trustee in the bankruptcy of the debtor upon the question of proof of debt, but also at the instance of the judgment debtor himself upon the hearing of a petition by a judgment creditor for a receiving order, even though the debtor had consented to the judgment, and if on the hearing of the petition facts were alleged by the debtor, of which if evidence was tendered and which if proved, would show that notwithstanding the judgment, there was by reason of fraud or otherwise, no real debt, the court ought not to make a receiving order without first enquiring into the truth of the debtor's allegations. Lord Esher, M. R. at page 321 of the report observed :

"It seems to me that the question is, not so much what is the right of the debtor, or what the conduct of the debtor or of the creditor has been, but rather whether the Court ought to exercise this great power, which deals not only with the particular debt of the petitioning creditor, but with the whole class of the creditors of the debtor, including the petitioning creditor, — whether the court of Bankruptcy ought to exercise its power and authority when there are the strongest grounds for believing that there is no petitioning creditor's debt upon which it can be put in motion, and the whole foundation upon which the court is authorised and empowered to do such a strong thing as to make a receiving order, or to declare a man a bankrupt, is that a petitioning creditor's debt exists."

Again at page 323 Master of Rolls observed:

"Nevertheless it seems to me that, upon certain allegations being brought forward, the Court is entitled to enquire into the alleged debt, and the Court, exercising a judicial authority, is bound to do so upon a sufficient case being shown. Circumstances may be alleged which would show that the judgment ought to be disregarded in bankruptcy. Those circumstances must differ in each particular case, and if when the case is brought before the Court at that stage, the Registrar is of opinion that, even if all the circumstances alleged were proved, they would not be sufficient to induce him to set aside that which is strong *prima facie* evidence against the debtor, and to disregard the consent judgment, he might stop there, and say, I will not hear the evidence; it would be useless to hear it if that is all you can allege. Of course his view would be subject to an appeal. But, if the circumstances alleged before him and offered in evidence are such, that, if proved, they would clearly show that there was no debt at all, and certainly if they would show that that which was alleged to

be a debt was mere fraud, and a fraud known to the petitioning creditor who had obtained the judgment, and acted upon by him, it seems to be that it would be monstrous to say that the Court of Bankruptcy ought to stop, and say that although these allegations were made, and even though (for the argument must go that length) they were so made that the Court must have the strongest suspicion that there never was any debt, yet it was bound, as a matter of law, to say that it was 'satisfied' that the receiving order ought to go."

4. In *re: Flatau; Ex Parte Scotch Whisky Distillers, Ltd.*, (1888) 22 QBD 83 it was held that in a bankruptcy petition the act of bankruptcy relied on as the failure to comply with a bankruptcy notice to pay a judgment debt, the mere fact that an appeal was pending from the judgment was not a sufficient ground for staying the proceedings upon the petition. It was further held that the Court of Bankruptcy would not, as a matter of course, inquire into the validity of a judgment debt, but only when there was evidence that the judgment had been obtained by fraud or collusion, or that there had been some miscarriage of justice.

5. Therefore, it is true that in an appropriate case on proper complaint being made to the court of bankruptcy making an adjudication order this Court is entitled to go behind the decree and to determine whether there was a genuine debt or a valid decree or not even though in a previous proceeding that decree had been passed without contest or had been passed upon contest overruling the opposition of the judgment-debtor. There is no question of res judicata or estoppel preventing the court adjudicating to go into the facts afresh. But as has been mentioned before by the Master of Rolls there must be strong grounds, and sufficient proof in support of the allegations of fraud, otherwise if this power is not used with caution any judgment-debtor can defeat the scheme of the Insolvency Act and try to impeach the decree by indirect methods not contemplated by law. In view of the nature of the allegations made by the respondent I am of the opinion that the facts alleged are not of such nature which would entitle me to exercise my discretion and go behind the decree and direct factual examination as to the validity of the decree.

6. The next question that was urged in opposition to this application was that this was an application at the instance of a creditor who had obtained his decree and had attached the property of the debtor. There was no evidence, it was stated, that there were other creditors or that the judgment debtor was insolvent to pay his debt. It was stated that the proceedings in insolvency were being utilised for the purpose of executing the decree and for the purpose of extracting money. It was submitted that insolvency proceeding was intended to be for the

benefit of the general body of creditors and was not to be a means for execution of a decree, and in the circumstances it was urged that the Court should exercise its discretion and refuse to make an order. It was submitted that as there was no other creditor and there was no allegation that the attached property was not sufficient to meet the liability of the judgment creditor, the court should exercise its discretion in refusing to make an order of adjudication. In this connection, reliance was placed on the decision of the Supreme Court in the case of *Sarat Chandra Roy v. Harak Chand Damani*, AIR 1972 SC 2127 where it was held non-payment of a decree promptly by itself, could not be a ground to adjudicate a person insolvent; for, insolvency proceedings could not be an alternative to execution proceedings. In that case what had happened was there was an order for adjudication; there was no other creditor joined in person or was a party thereto and there was no satisfactory proof that some other debts were also due from the debtor or that he was unable to discharge the debts due from him. The prayer for adjudication was proceeded on the basis of failure of the insolvent to discharge the debt due to the petitioning creditor. At the hearing of the appeal the appellate Bench of the High Court determined that the balance amount due from the insolvent to the petitioning creditor was Rupees 46,623.49 p. The court had directed the appellant insolvent that if he paid to the petitioning creditor the sum of Rs. 28,186.40 p. by 2nd December, 1964 and the balance with interest by 30th June, 1963, the order of adjudication would be set aside. On the same day 23rd September, 1964 the appellant paid to the petitioning creditor the sum of Rs. 28,186.49. The balance amount was not paid within the time fixed. For that reason the appellate court of the High Court confirmed the adjudication of the insolvent by its judgment dated 12th July, 1966. Thereafter, on the 30th July, 1966, the appellant's solicitors sent a cheque for Rs. 20,366/- to the solicitors of the petitioning creditor in full satisfaction of the balance due to the petitioning creditor. That cheque was returned by the solicitors of the petitioning creditor on August 1, 1966 on the sole ground that the amount in question had not been paid within the time fixed by the court. There was no justification in doing so. The appellant applied to the appellate court to review its order. That application was dismissed mainly on the ground that the petitioning creditor opposed the same and that there were differences between the two. In these circumstances, the Supreme Court found that the court was not justified in maintaining the adjudication order in the circumstances of the case. But the Supreme Court observed that from the records it was satisfied that there was no justification for initiating the proceedings for non-payment of the decree

promptly by itself was no ground to adjudicating a person insolvent. The appellant was a person of substantial means. In these circumstances, the Supreme Court set aside the order of adjudication. The facts of the instant case are different. Here there was an attachment for more than three weeks and even at the date of hearing of the application no step for liquidating the claim of the judgment creditor was made as was made in the case before the Supreme Court. Secondly, it appears that there were other decrees against the judgment-debtor in respect of which insolvency proceedings had been initiated which is also a significant difference from the facts before the Supreme Court. True principles upon which this discretion should be exercised have been referred to by a Full Bench of the Madras High Court in the case of *R. M. Subramaniam v. N. Sundaram Iyer*, AIR 1963 Mad 217 (FB) where the Full Bench observed:

"The court has got a discretion in the matter of adjudication, as the language used in Section 13 (5) of the Presidency Towns Insolvency Act shows. But the discretion should be judicially exercised and should be not arbitrary or capricious. If a creditor establishes the fact that he has got to receive moneys from the debtor, of an amount more than Rs. 500/- and that the debtor is guilty of an act of Insolvency within a period of three months prior to the filing of the petition, the court should normally exercise its discretion by directing an adjudication. Otherwise, it would be unjust to the creditor filing the petition and also to the general body of creditors, to whom the debtor might be indebted. The debtor might secrete the properties and defeat the creditors. The object of the insolvency law is to promote and help a fair distribution of the debtor's assets between the creditors."

7. It is true, as counsel for the debtor submitted, it is a matter of discretion but prima facie where an act of insolvency has been committed on the ground of the conduct of the judgment-debtor in this case, in my opinion, there is nothing to warrant to exercise my discretion and not to make an order for adjudication. Counsel for the debtor, however, submitted that the petitioning-creditor having obtained the order of attachment was in the position of a secured creditor and as such was not entitled to proceed with the insolvency application. In this connection, reliance was placed on Section 12 (2) of the Presidency Towns Insolvency Act and it was submitted that the analogy of the same principle, would apply to a case where by virtue of attachment levied for execution of a decree, the petitioning creditor had become a secured creditor. I am unable to accept the position. The aim of Section 12 is clear. Section 12 (2) enjoins in case of secured creditor to the extent of his security which is taken by the act of the party he goes out of the insolvency proceedings. But

in the case of an execution of a decree by attachment being levied, in my opinion, that analogy cannot apply.

8. Counsel for the debtor further submitted that in view of the fact that the petitioning creditor had obtained an order of attachment, this was being used as a method to execute the decree and in exercise of my discretion such method of execution of decree should not be permitted. I am also unable to accept this contention. Prima facie if a decree remains unsatisfied, the act of insolvency by the fact that the property had remained attached for a period of not less than 21 days in execution of the decree, is committed the petitioning creditor is entitled to have an order for adjudication and that act of insolvency is not limited only for having attachment at the instance of another creditor and not the petitioning creditor. To do so, in my opinion, would be to restrict the scope of Section 9 (e) of the Act for which there is no warrant. In the aforesaid circumstances, the contentions raised in opposition are rejected.

9. Therefore, there will be an order of adjudication in terms of prayer in the petition. But this order will not be given effect to if the debtor pays the decretal amount with cost within a period of two months from this date. In that case, the order of adjudication would stand annulled.

Order accordingly.

AIR 1975 CALCUTTA 347

ANIL KUMAR SEN AND
BANKIM CHANDRA ROY, JJ.

Kanti Mohan Mondal, Plaintiff-Petitioner
v. Naba Kumar Pal and others, Defendants-
Opposite Parties.

Civil Rule. No. 604 of 1974, D/- 5-2-1975.

(A) Court-fees Act (1870), S. 7 (iv) (c) — Suit for reopening transactions between parties for relief under Ss. 36, 37 and 38 of Bengal Money Lenders Act and for injunction restraining defendant from interfering with plaintiff's possession of suit property. — Court-fees payable. (Bengal Money Lenders Act (1940), Ss. 36, 37 and 38).

In the instant case, a relief by way of an injunction is wholly unnecessary because if the transaction is a loan and the plaintiff gets the relief under the Money Lenders Act, there is no question of the plaintiff's possession being interfered with by the defendants on the basis of the documents representing the transaction. On the other hand, if the plaintiff fails to get his relief under that Act, then also there would be no question of getting any relief by way of injunction. The plaintiff has not sought for any declaration

tion, mere addition of certain redundant prayers would not change the true nature of the suit which is really one for obtaining relief under the Money Lenders Act and make it a suit for declaration was consequential relief within the meaning of S. 7 (iv) (c) of the Court-fees Act. Court-fees prescribed by the Bengal Money Lenders Act, therefore, would be payable. (AIR 1929 Mad 396 and AIR 1949 All 63 and AIR 1935 Cal 338 and (1948) 52 Cal WN 685, Rel. on).

(Paras 6, 8)

Cases Referred :	Chronological	Paras
AIR 1950 Cal 85 = 54 Cal WN 139		4
AIR 1949 All 63 = ILR (1949) All 3		6
(1948) 52 Cal WN 685		5, 8
AIR 1943 Pat 102 = ILR 21 Pat 720		8
AIR 1935 Cal 338 = 39 Cal WN 131		6
AIR 1929 Mad 396 = 56 Mad LJ 394		6, 8
(1907) 35 Ind App 22 = ILR 35 Cal 202 (PC)		7

R. K. Banerjee and Abhijit Banerjee, for
Petitioner; Tarun Chatterjee, for Opposite
Parties.

ORDER:— On January 25, 1965 the plaintiff executed a deed of sale in respect of his residential house at Gondalpara, Chander-nagore in favour of defendant No. 1, son of the other two defendants and simultaneously two other deeds were executed by defendant No. 1 in favour of the plaintiff namely (1) an agreement to reconvey the property to the plaintiff on his paying a sum of Rupees 8,500/- within two and half years and (2) a deed of lease in favour of the plaintiff in respect of the house on a monthly rent of Rs. 25/-. A few months thereafter, the plaintiff executed another deed of sale on June 25, 1965 in favour of defendant No. 2, wife of defendant No. 3 and the said defendant on her part executed a deed of lease in respect of the house in favour of the plaintiff.

2. In the plaint, the plaintiff claims that all these transactions really represent loans obtained on mortgage by the plaintiff from defendant No. 3 and to avoid the provisions of the Bengal Money Lenders Act, all those subterfuge steps of going through such transactions were taken recourse to instead of executing mortgage deeds for securing the loans taken. Hence, the plaintiff instituted the suit out of which the present Rule arises for a declaration that the transactions are in substance loan transactions, for reopening the transactions for relief under Sections 36, 37 and 38 of the Bengal Money Lenders Act on accounts being taken and for permanent injunction restraining the defendants from interfering with plaintiff's possession of the suit property.

3. In the plaint, the plaintiff valued the relief for declaration at Rs. 19,000/- and paid the court-fee of Rs. 20/-. He separately

under the provisions of the Bengal Money Lenders Act for the reliefs claimed thereunder.

4. Defendants raised an objection that the relief for declaration and the consequential relief cannot be valued separately and the plaintiff must put in one single valuation for the declaration and injunction and pay court-fees accordingly. Such an objection prevailed with the learned Judge in the court below who on the authority of the decision of this Court in the case of *Balaram Mondal v. Sahebjan Gazi*, 54 Cal WN 139 = (AIR 1950 Cal 85) held that as the case comes within Section 7 (iv) (c) of the Court-fees Act, the plaintiff must put in a single valuation and must also pay ad valorem court-fees on such valuation. Being aggrieved by the aforesaid order, the plaintiff has now moved this Court and obtained the above Rule.

5. Mr. Banerjee, appearing in support of this Rule has contended that the learned Judge in the court below has entirely misread the true nature of the suit in thinking that it comes within Section 7 (iv) (c) and as such ad valorem court-fees are payable on a single valuation. According to Mr. Banerjee it is not at all a suit for declaration with consequential relief; it is a simple suit for relief under Sections 36, 37 and 38 of the Bengal Money Lenders Act for which the court-fee payable is a fixed one namely Re. 1/- as prescribed by that Act itself. To support this contention of his, Mr. Banerjee relies on a decision of this Court in the case of *Sudhir Kumar v. Mahadev*, (1948) 52 Cal WN 685. Mr. Chatterjee appearing on behalf of the opposite parties has failed to contest the legal position contended for by Mr. Banerjee.

6. In our opinion, there is great substance in the contention of Mr. Banerjee. It is a settled principle that in order to decide the amount of court-fees payable, the court must look to the substance of the claim and not merely the form in which the relief has been prayed for. Reference may be made to the decisions in the cases of *Kattiyia Pillai v. Ramaswami Pillai*, AIR 1929 Mad 396 and *Kamala Devi v. S. C. Board of Wakfs, U. P.*, AIR 1949 All 63. In the case of *Gajendra Nath Saha Chowdhury v. Sulochana Chowdhurani*, 39 Cal WN 131 = (AIR 1935 Cal 338) this Court observed as follows:

"Mere form and language of a plaint is not final test and to arrive at a sound conclusion the court has to look beyond the mere form and verbiage of the plaint and arrive at what is the real substance."

7. That again is based on high authority of the decision of the Privy Council in the case of *Fulkumari v. Ghanashyam Misra*, (1907) 35 Ind App 22 (PC) wherein it was laid down that "for the right determination of the question at issue it is necessary to ascertain what are the objects and the nature of the suit."

8. Judging on the aforesaid test, it cannot but be held that in the present suit the real relief claimed by the plaintiff is one of having the transaction between the parties reopened and getting relief under Sections 36, 37 and 38 of the Bengal Money Lenders Act. In order to reopen the transaction the court has to go into and decide the basic question whether the transaction is a loan and whether such a loan transaction comes within the scope of the statute. Though prayed for, no specific declaration that it was a loan is really necessary for getting the substantial relief under the Bengal Money Lenders Act, an adjudication and decision that it is a loan is mere incidental. Similarly, a relief by way of an injunction is wholly unnecessary because if the transaction is a loan and the plaintiff gets the relief under the Bengal Money Lenders Act, then there is no question of the plaintiff's possession being interfered with by the defendants on the basis of the documents representing the transaction. On the other hand, if the plaintiff fails to get his relief under the Bengal Money Lenders Act, then also there would be no question of getting any relief by way of injunction. Reading the plaint as a whole, it is quite explicit that the plaintiff has not sought for any declaration that the transaction is a loan independently of and separately from his claimed relief under the Bengal Money Lenders Act. Such being the position, mere addition of certain unnecessary and redundant prayers would not change the true nature of the suit which is really one for obtaining relief under the Bengal Money Lenders Act and make it a suit for declaration with consequential relief within the meaning of S. 7 (iv) (c). See *Kattiyia Pillai v. Ramaswami Pillai*, AIR 1929 Mad 396 (supra) *Hasan Mirza v. Syed Bakar Hassan*, AIR 1943 Pat 102. This being the position, the decision of this Court in the case of (1948) 52 Cal WN 685 relied on by Mr. Banerjee is good authority for the proposition that the court-fees payable in a suit of the present nature is the fixed court-fee of Re. 1/- prescribed by the Bengal Money Lenders Act itself. The decision and the order under challenge are, therefore, clearly erroneous.

9. In the result, this application succeeds and the Rule is made absolute. The impugned order is set aside.

10. There will be no order as to costs.
Application allowed.

AIR 1975 CALCUTTA 348

SABYASACHI MUKHARJI AND
R. N. PYNE, JJ.

Sm. Nirmala Birla and others, Appellants
The Wealth Tax Officer, 'M' Ward Dist. V(I),
Calcutta and others, Respondents.

A. F. O. O. No. 187 of 1974 (Matter
No. 269/1973), D/- 23-9-1974.

DS/ES/B426/75/VSS

(A) Letters Patent (Cal), Cl. 15 — Order making a reference to Chief Justice in terms of Rule 2 of Chapter V, Calcutta High Court (O. S.) Rules — Appeal — Order is not a final order — No appeal lies — (Calcutta High Court (Original Side) Rules, Chap. V, R. 2). (Para 11)

An order making a reference to Chief Justice in terms of Rule 2 of Chapter V on the ground that the matter could be more advantageously heard by a larger Bench is not a final order from which an appeal lies.

(Para 11)

Rule 2 is a rule regulating the procedure of the court in which a discretion has been given to the learned Judge before whom the matter is pending for making such reference as would be in the interest of justice and the consideration for making such reference has been indicated in the said rule, that is to say, when the matter can be more advantageously heard by a bench of two or more Judges. When a report is made under this rule there is no decision about the merits of the matter. The decision of course is made about the comparative advantage or disadvantage of the matter being heard by a learned single Judge or a Bench of two or more Judges. This is a decision affecting the procedure, regulating the procedure of the matter. And it would not in any way affect the merit of the matter in question. It does affect to some extent the proceeding in disposal of the matter which is entirely different from the merit of the matter involved.

(Paras 7, 9)

The right of appeal from the order of single Judge to a Division Bench is not a vested right. In these circumstances, it is subject to the Rule 2 of Chapter V and Rule 26 of the Calcutta High Court Writ Rules.

By the order of reference no question arises of the divestiture or interference of any right of appeal of the appellants.

The single Judge has been given certain powers for regulating the procedure of the matter in certain manner. If he erroneously exercises such discretion, no question of conditions precedent not being fulfilled or usurpation of jurisdiction arises.

Therefore, the impugned order of reference does not also involve any question of jurisdiction. Case law referred.

(Paras 9 to 10)

(B) Calcutta High Court (Original Side) Rules, Chap. V, R. 2 — Reference under — Criterion for making reference.

Delay and costs cannot be the criterion for making a reference under Rule 2. The Rule was meant to be exercised in such cases where the Judge hearing the matter was of opinion that because of the complexity of the points of law involved or of facts involved it would be more advantageous to the matter in question. The importance of the expression "advantage to the matter" in the rule

has to be borne in the matter, it was not advantage to the parties.

Held on the facts and in the circumstances of the case that the grounds upon which the Judge has exercised his discretion are not proper grounds. (Para 12)

(C) Constitution of India, Art. 226 — Writ petition challenging notice issued under S. 17 of Wealth Tax Act to reopen assessment — Jurisdiction of High Court under Art. 226 — Extent of.

Where the petitioner filed a petition for issue of appropriate Writ in respect of notice issued by Wealth Tax Officer to assessee under Section 17 of the Wealth Tax Act with a view to re-open assessment for a particular year on the ground that certain assets (Shares) had to be valued according to the basis of valuation indicated in the report of Director of Inspection (Investigation).

Held that the main point to be decided is whether the conditions of clause (a) or clause (b) of Section 17 have been fulfilled and this will depend upon the facts and records of assessment all that an application under Article 226 of the Constitution could decide was whether the particulars of the transactions were disclosed in such a manner as to amount to full and true disclosure or whether in view of the report of the Director of Inspection it could be said that information had come to the possession of the revenue entitling the revenue to re-open the assessments. (Para 12)

Cases Referred: Chronological Paras

AIR 1972 SC 2397 = (1973) 2 SCJ 543 8
AIR 1972 Cal 449 = 76 Cal WN 1039 (FB) 3

(1971) 75 Cal WN 416 8

AIR 1962 Cal 23 8

AIR 1958 Cal 284 = 62 Cal WN 418 8

AIR 1957 Cal 727 = 61 Cal WN 559 8

R. C. Dev with Dr. Debi Pal and R. N. Bajoria, for Appellants; Balai Pal with Ajit Sen Gupta, for Respondents.

SABYASACHI MUKHARJI, J.:— It appears that on the 29th March, 1973, the Wealth-tax Officer, 'M' Ward, District V (I), Calcutta, issued a notice under Section 17 of the Wealth Tax Act, 1957, with a view to reopen the assessment of the assessee for the assessment year 1968-69. The petitioners were the assessee Smt. Nirmala Birla, Kalachand Chatterjee and Onkarmal Somani as Trustees of Chandralekha Trust. On or about the 11th April, 1973, the petitioners made an application under Article 226 of the Constitution to this Court, inter alia, praying for the writs in the nature of Certiorari, Mandamus and Prohibition in respect of the notice mentioned hereinbefore. On the same date this Court issued a Rule Nisi in terms of the prayer of the said Rule. S. C. Ghose, J. who issued the said Rule Nisi also gave liberty to the revenue to conclude the proceedings initiated pursuant to the said notice under

Section 17 of the said Act and to pass final order. But the revenue authorities were restrained from communicating or enforcing the said final order, if any, passed in the said proceedings until the disposal of the rule nisi. We enquired at the hearing of this appeal whether if pursuant to the liberty granted steps had been taken to complete the proceedings, if any, for which liberty had been given as mentioned hereinbefore, we were informed that till to-day no steps had been taken in respect of the proceedings pursuant to the said notice. Thereafter affidavits were filed and the said application under Art. 226 of the Constitution became ready for hearing. It appears that there are 29 other matters wherein other assesseees, according to the revenue, have also challenged the jurisdiction of the Wealth-tax Officer concerned to reopen the respective assessment or assessments under Section 17 of the Wealth-tax Act. It appears that the case of the revenue is that in respect of the said assessments which have been reopened there involved the question of valuation of certain shares under the Wealth-tax Act, 1957. There was a report along with a letter of the Director of Inspection (Investigation) dated the 14th March, 1973, wherein certain basis of valuation of these shares had been given and on the basis of the said report the said assessments have been reopened. The question, therefore, is whether in view of the said report of the Director of Inspection (Investigation) it can be said that there was omission or failure on the part of the assessee as contemplated under Cl. (a) of Section 17 of the Act or information as mentioned in clause (b) of Section 17 of the said Act. According to the revenue there is also another matter, namely, Birla Jan Kalyan Trust where the assessment in the income-tax proceeding has also been reopened on the said basis. In paragraph 8 of the petition made by the revenue it appears that the said cases were due to appear on the 28th March, 1974, for hearing before Masud, J. The learned Judge, however, in his judgment has stated that the said matters were due to appear on the 28th March, 1974, in the list as marked 'to be mentioned' for fixing a date of hearing. Be that as it may, it is a common case that either the said matters were due to appear for hearing on the 28th March, 1974, or due to appear on the said date for fixing a date of early hearing soon thereafter. It may be mentioned, as it appears from the petition, that prior thereto the revenue had mentioned the said matters before S. C. Ghose, J. for referring those cases to a larger Bench. The learned judge declined to do so at that stage and observed that the said question would be considered after the learned judge had gone into the matter. It appears that the identical prayer was also made before Masud, J. by the present respondents and the learned Judge declined to pass any order in respect thereto. Ultimately, one day prior to 28th March, 1974, the revenue being the respondents to the appeal moved a petition

before the Court which came up before Masud, J. for an order that the learned Judge be pleased to report under Chapter V, Rule 2 of the High Court Rules of the Original Side that the said group of cases which were described as Birla group of cases as mentioned in annexure A to the petition, should be more advantageously heard by a Division Bench. The respondents to the present appeal, i.e. the revenue, also prayed that pending hearing or final disposal of the said application, the said cases be not listed for final disposal. This application was opposed by the present appellants, the petitioners to the rule nisi under Article 226 of the Constitution. The application was heard by Masud, J. and by a judgment delivered and order passed on 24th May, 1974, the learned Judge has held that it would be advantageous for both the parties to have the matter heard before a larger Bench and has directed that the writ petition being Petition No. 269 of 1973 be referred to the Hon'ble the Chief Justice under Rule 2, Chapter V of the Original Side Rules to the High Court. There is also an order passed restraining hearing and disposal of the other 31 applications mentioned in the Annexure A regarding what is described as Birla Group of cases reopening. This judgment and order of the learned Judge is the subject-matter of this appeal before us.

2. Before us really two points are involved — whether the order made is appealable and as such this appeal is maintainable, and, secondly, whether the order made by the learned Judge is a proper or correct order.

3. It was contended on behalf of the respondents that the order of the learned Judge not being a final order was not appealable order and as such no appeal lay. In this connection, reliance was placed on several decisions but mainly on the Full Bench decision of this Court in the case of Nurul Hoda v. Amir Hasan, AIR 1972 Cal 449 (FB). There this Court observed while discussing various authorities on the question of "Judgment" that it was not necessary, to lay down exhaustive definition. The following tests, however, were indicated as useful guides for determining whether an order in question was final order or not, viz. (1) whether the order in question had put an end to the proceeding so far as the court dealing with it was concerned, in which the order was sought for and made, (2) the order must involve determination of some right or liability affecting the merits, (3) an adjudication or a decision, which was not anything more than a step towards obtaining the final adjudication on the merits of the dispute in the proceeding was not a judgment within the meaning of Letters Patent, (4) where the decision involved adjudication on the question of limitation or jurisdiction of the Court, in certain cases such decisions might amount to judgment. It was further noted that a decision which affected the proceeding of the dispute need not

necessarily be a decision which affected the merits of the dispute. Under the Constitution the High Courts are given the powers under Article 226 to be exercised in certain circumstances mentioned in the said Article. It is accepted that the said powers are to be exercised under certain circumstances when the ordinary remedies provided by the different statutes do not provide adequate and alternative remedies and in some other contingencies. We need not in detail deal with these contingencies. These extraordinary remedies are available to a party who feels aggrieved by an action as in this case the petitioners under Article 226 of the Constitution obtained this rule nisi on the ground that conditions precedent for user of power of reopening had not been fulfilled. The different High Courts have framed different rules of procedure as to how this power given by the Constitution should be exercised by different High Courts. As this matter was moved in the original side of this Court Chapter V of the Rules of the High Court (Original Side) would be applicable. The High Court has also framed rules relating to applications under Article 226 of Constitution. Reference has been made in the impugned order to Rule 2 of Chapter V of the Original Side Rules which provides as follows:—

“Where it shall appear to any Judge, either on the application of the party or otherwise, that a suit or matter can more advantageously be heard by a Bench of two or more Judges, he may report to that effect to the Chief Justice who shall make such order thereon as he shall deem fit.”

4. Therefore, in any suit or matter which includes matter under Article 226 of the Constitution, if it appears to the learned Judge taking the matter that the matter can be more advantageously heard by a Bench of two or more Judges, discretion has been given to the learned Judge to make report to that effect. If a report to that effect is made then it is for the Chief Justice to make such order as he will deem fit, he may refer the matter to a learned single Judge or to a bench consisting of two or more Judges. The rule authorises expression of opinion by the learned Judge, either on the application of a party or otherwise about the procedure to be followed in the disposal of a pending matter.

5. In essence, in our opinion, the rule enjoins that with regard to a particular matter the disposal of which involves such question either having regard to the complicated nature of the fact or of law that its disposal by a larger Bench would be more advantageous, discretion has been given to the learned Judge before whom the matter is pending, to make a reference in terms of Rule 2 of Chapter V of the Original Side Rules. In this connection, we may refer to Rule 3 of Chapter V which is in the following terms:—

“Where it shall appear to any Judge at any stage of a suit, application or other matter, that it involves a substantial question of law as to the interpretation of the Government of India Act, 1935, or any order in Council made thereunder, he shall report to that effect to the Chief Justice, who shall constitute a Bench of two or more Judges to hear the question of law arising in the suit, application or other matter and remit the matter with their opinion to the Judge who made the report.”

The aforesaid rule deals with interpretation of the Government of India Act 1935 or of the Constitution of India. We are not concerned with that question. This discretion of the learned Judge under Rule 2 of Chapter V, as it appears from the rule, can be exercised either on the application of the party or suo motu. For regulating the procedure of the applications, under Article 226 of the Constitution separate rules have also been framed by this Court. Rule 46 of the said rules which were introduced in July, 1973 provides as follows:—

“In all application which involve the revenue, and in which the court has granted an interim stay of the assessment and/or realisation or taxes, the parties will be at liberty, after the pleadings have been completed, to mention the matter to court, and the matter upon being so mentioned shall be directed to be placed in the daily hearing list upon a day deemed to be convenient to the court.”

6. Rule 26 which was also introduced on the 5th March, 1974 provides as follows:—

“The Court hearing such application may issue a Rule Nisi or summarily reject the application or make such order thereon as it thinks fit. A Judge issuing a rule nisi may make it returnable before a Division Bench.”

7. In this connection, we may mention that the application for rule nisi in the instant case having been issued on 11th April, 1973 the said rule was then not in force. Therefore, the learned Judge who issued the rule nisi had no occasion to consider whether he should make the matter returnable before a Division Bench. Indeed, when the matter was mentioned before S. C. Ghose, J. who had issued the rule nisi he declined to make a reference before hearing the matter as mentioned before. Therefore, neither Rule 26 nor Rule 46 has any application in the facts and circumstances of this case. We are confined in this case to R. 2 of Chap. V of the Original Side Rules of this Court as we have set out before. As we read the rule, this is a rule regulating the procedure of the court in which a discretion has been given to the learned Judge before whom the matter is pending, for making such reference as would be in the interest of justice and the consideration for making such reference has been indicated in the said rule, that is so say, when the matter can be more advantageously heard by

a bench of two or more Judges. The rule as to report, therefore, is made when the matter is not heard but a step is taken for disposal of the matter. Therefore, when a report is made under this rule there is no decision about the merits of the matter. The decision of course is made about the comparative advantage or disadvantage of the matter being heard by a learned single Judge or a Bench of two or more Judges. This is a decision affecting the procedure, regulating the procedure of the matter.

8. Counsel for the appellant contended that this order in question was appealable because the order in question had put an end to the proceeding before the learned Judge, meaning thereby the proceeding under Article 226 of the Constitution pending before the single Judge. He, secondly urged that the impugned order had also denied to his clients the right of appeal from the decision of the learned single Judge. Under our rules the matters under Article 226 of the Constitution are normally heard by a single Judge. Under the Letters Patent, appeal lies from that decision of the learned single Judge to the Division Bench. According to counsel for the appellant this right was vested right and the appellants had been deprived of this right by the impugned order passed by the learned Judge. Thirdly, it was contended that the order in question related to the jurisdiction of the learned Judge passing the order. In other words, it was contended that the factors upon which the learned Judge could form the opinion that the matter could be more advantageously heard by a larger bench were conditions precedent upon which the learned Judge's jurisdiction to make a report was dependent. Therefore, it affected the exercise of jurisdiction by the learned Judge. In this connection, counsel referred us to several decisions, viz. the decisions in the case of *Satis Churan Law v. R. Goho*, AIR 1962 Cal 23; *National Textiles v. Premraj Ganpatraji*, 62 Cal WN 418 = (AIR 1958 Cal 284); *Steel and Allied Products v. Gerbueder Bohlar & Co.*, (1971) 75 Cal WN 416 and *Shorab Merwanji Modi v. Mansata Film Distributors*, 61 Cal WN 559 = (AIR 1957 Cal 727). He also contended that according to the principle laid down in the aforesaid Full Bench decision referred to hereinbefore inasmuch as it had put an end to the proceeding and inasmuch as it had affected the jurisdiction of the court, the order in question was appealable. It was also contended that the concept of jurisdiction was a changing one and it was not merely where the authority or the officer lacked the jurisdiction to entertain a matter but also when an authority was exercising power upon certain condition, the question of jurisdiction was involved and in this connection reliance was placed on the observations of the Supreme Court in the case of *M. L. Sethi v. R. P. Kapur*, AIR 1972 SC 2379.

9. Having regard to the nature of the discretion given by the rule, we are of the opinion that this is essentially as we mentioned before a matter regulating the procedure of the court. The discretion or the power given to the court is only to regulate the procedure of the court and in our opinion, exercise of that power would not in any way affect the merit of the matter in question. It does affect to some extent the proceeding in disposal of the matter which is entirely different from the merit of the matter involved. So far as the question of right to appeal is concerned, it is true that normally when a matter is heard by a learned single Judge a party has a right to appeal to the Division Bench under Letters Patent by the rules of our court but that is subject to the rules that have been made, i. e. R. 2 of Chap. V and R. 26 of 226 (writ) rules we have mentioned before. In a case where the learned Judge issuing a rule nisi at the time of the issuance of the rule nisi was of the Opinion that the matter involved such question which should be heard by a larger bench, he can make the rule returnable before a larger bench. In that case, the party aggrieved would not have any right of appeal under Letters Patent. Secondly in a case where, the learned Judge is of the opinion that because of certain factors the matter can be heard more advantageously by a Bench of two or more Judges, the party in question is deprived of the right of appeal. Therefore, the right of appeal from the order of single Judge to a Division Bench is not such a vested right. In these circumstances, it is subject to the R. 2 of Chap. V and R. 26 of the 226 (writ) rules. Furthermore, in our opinion, in this case no question of divestiture of the right of appeal arises. The learned Judge has made a report to the effect that in his opinion the matter could be more advantageously heard by a Bench of two or more Judges. If when the matter is referred to a Division Bench and the present appellants succeed in their contentions before the Division Bench, then no question of divestiture of the appellants' right of appeal arise. Secondly, if the Chief Justice pursuant to the report refers the matter to a bench of three or more Judges, then the appellants would have the advantage of the views of three learned Judges. Thirdly, the Chief Justice might refer the matter to a learned single Judge then the appellants would still have the right of appeal in the event of being aggrieved by the order of the learned single Judge. We are therefore, of the opinion that by the impugned order no question arises of the divestiture or interference of any right of appeal of the appellants. Lastly, it was contended that the order affected the jurisdiction of the learned Judge. Assuming that the Judge was in error in making the impugned order when he referred the matter or the grounds on which he had referred the matter were not germane to the determination of the question

Under the compromise, (1) the partnership was to continue for five years after the end of which it was to stand automatically dissolved, (2) the share of the plaintiff in profits for past years as well as future years was fixed and it was agreed that it would be payable irrespective of partnership making any profit or not and (3) at the end of five years the defendant was to hand-over exclusive possession of the premises to the plaintiff.

Held, that, the terms of the compromise entirely related to the suit and the Court was bound to pass and draw up a decree in accordance therewith and that the payment of share of profits could be enforced in execution. Order of Khanna, J. D/- 12-10-1971 (Delhi). Reversed.

(Para 9)

(B) Civil P. C. (1908), S. 11 — Constructive res judicata — Objection as to executability of decree not taken in former execution proceedings — Barred in subsequent proceedings. (Para 9)

Bawa Gurcharan Singh, for Appellant; C. L. Itorora and Harish Chandra, for Respondent.

V. S. DESHPANDE, J.:— The question for decision in this as also in the connected F. A. O. (O. S.) 43 of 1972 is whether certain terms of the compromise dated December 5, 1968 between the parties in Suit No. 283 of 1967 recorded by Jagjit Singh, J. could be said to "relate to the suit" within the meaning of Order XXIII, Rule 3, Civil Procedure Code so as to be embodied in a decree and whether the said part of the decree was executable.

2. The appellant had sued the respondent in Suit No. 283 of 1967 in this Court for three reliefs namely:—

(1) dissolution of the partnership between the parties; (2) rendition of accounts to the appellant by the respondents and (3) an injunction that the respondent be restrained from using certain premises of which the appellant was a lessee but which were used by the partnership of which the parties were partners.

3. On December 5, 1968 the parties filed a compromise petition before Jagjit Singh, J. praying that the terms of the compromise thereof be recorded by the Court. Thereupon, the learned Judge passed the following order:

"The compromise, as arrived at between the parties and embodied in the application Ex. P/A, is recorded.

In terms of the compromise between the parties the suit is dismissed but the defendant shall pay Rs. 2,000/- as costs to the plaintiff. The parties will also be bound by all the other terms contained in the application, Ex. P/A. The plaintiff

shall also be entitled to withdraw the amount of Rs. 15,000/- which is lying in deposit in the court and had been deposited by the defendant."

4. Briefly the compromise gave to the appellant the following three reliefs in place of the original three reliefs which had been claimed in the suit namely:

(1) the partnership between the parties was to continue for 5 years from December 15, 1967 to December 14, 1972, on which date it was to stand dissolved automatically;

(2) the share of the appellant in the profits of the partnership was fixed and it was agreed that it would be paid to the appellant by the partnership irrespective of the partnership making any profit or not; and

(3) at the end of the contractual period (December 15, 1967 to December, 14, 1972) the respondent was to hand-over the exclusive possession of the premises to the appellant in case the parties disagree to extend the existing period of the contract (of partnership).

5. Acting on the terms of the compromise the respondent paid to the appellant his share of the profits for the previous years and also started paying to the appellant his share of profits for the current years at Rs. 2,500/- per month. When he committed default in payments of these instalments, Execution Case No. 27 of the 1970 was instituted by the appellant against the respondent. In this Execution the respondent made the payment and the Execution was disposed of as satisfied. But default was again made by the respondent and another Execution No. 52 of 1970 was taken out by the appellant. In this Execution, for the first time, the respondent raised the objection that the compromise decree was not executable. The appellant replied that the respondent was barred from raising this contention by constructive res judicata inasmuch as he had not raised it in the previous Execution No. 27 of 1970. After the arguments were heard and the case was reserved for orders, the parties entered into a compromise before Prithvi Raj, J. In accordance with the compromise the respondent paid to the appellant Rs. 5,000/- thus bringing to an end Execution No. 52 of 1970.

6. The respondent again committed default in payment of the appellant's share of the current profits of the partnership and Execution Cases Nos. 48 and 50 of 1971 were taken out by the appellant against the respondent for the recovery of the defaulted instalments. Again the respondent objected that the compromise decree was not executable.

7. Execution Applications Nos. 48 and 50 of 1971 were dismissed by P. N.

Khanna, J., on the following grounds, namely: (1) no executable decree resulted in favour of the appellant as a result of the compromise; (2) the compromise of December 5, 1968, was itself a negation of the suit of the appellant inasmuch as the suit for dissolution of partnership, rendition of accounts and injunction was dismissed as a result of the compromise and the partnership was continued as the agreement of the partnership had been merely amended by the compromise; and (3) that the respondent was not precluded from raising the objections regarding the unexecutability of the decree inasmuch as no final decision between the parties had been given by the court holding that the decree was executable. E. F. A. (O. S.) 8 of 1971 has been filed by the appellant against this decision of P. N. Khanna, J.

8. During the pendency of the E. F. A. (O. S.) 8 of 1971 two Interlocutory Applications Nos. 595 and 745 of 1972 were made by the appellant, the first praying that from the draft of the compromise decree prepared by the Registrar, the words "suit is otherwise dismissed" should be deleted and the second praying that the terms of the compromise should form part of the compromise decree. I. A. 595 of 1972 was dismissed and I. A. 745 of 1972 was partly dismissed and partly accepted by Jagjit Singh, J., who held that (1) the words "suit is dismissed" would have to form part of the compromise decree inasmuch as the suit of the appellant was dismissed when in the compromise the appellant gave up all the reliefs for which the suit had been originally brought, and (2) that "the terms of the compromise regarding matters beyond the scope of the suit do not become part of the decree, even though the parties had agreed to be bound by them". The learned Single Judge, therefore, ordered that the decreer shall not contain the words "that the terms of the compromise shall form part of the decree". The learned Judge, however, directed that the decree be completed without further delay. F. A. O. (O. S.) 43 of 1972 has been filed against this order of Jagjit Singh, J., and has been heard by us along with E. F. A. (O. S.) 8 of 1971.

9. On hearing Bawa Gurcharan Singh for the appellant and Shri Harish Chandra for the respondent the legal position appears to us to be as follows:

1. Under Order XXIII Rule 3, Civil Procedure Code, Jagjit Singh, J., was satisfied that this suit of the appellant had been adjusted by a lawful agreement between the parties. The learned Judge, therefore, ordered that the terms of the compromise be recorded. The only question, therefore, which remained for con-

sideration after the recording of the compromise was of passing "a decree in accordance therewith so far as it relates to the suit". For some or all of the terms of the compromise may be of two kinds. Either they may "relate to the suit" or they may not so relate to the suit. The expression "so far as it relates to the suit" used in Order XXIII, Rule 3 is important because a decree on a compromise can be passed only in respect of those terms of the compromise which relate to the suit. It is only in respect of those terms that a decree would be drawn up. Effect would be given to such a decree according to its terms. If the relief given by the compromise decree is only a declaration then the decree would be declaratory but if the compromise requires a party to do something then the decree would so require and to that extent it would be executable.

The first part of the question, therefore, is whether the terms of the compromise of December 5, 1968, related to the suit which had been adjusted by the compromise. For this purpose Rule 3 of Order XXIII has to be considered as a whole. It is divisible into two parts. Firstly, the suit has to be adjusted by a lawful compromise. Secondly, a decree in accordance with the compromise has to be passed "so far as it relates to the suit." These two parts may be separated from each other or may be inter-dependent on each other. That is to say, a suit may be adjusted by a compromise which may relate to the suit or which may not relate to the suit. In so far as it does not relate to the suit the compromise, though lawful and binding between the parties, shall remain only a contract between the parties. Such a contract will not, however, be a part of the decree to be passed by the Court. The rights of the parties arising out of such a contract will not be the subject-matter of the decree for compromise but will have to be worked out separately by the parties. The Court has thus to find out the intention of the parties. Did the parties intend the compromise to be worked out by a decree in the same suit or did they intend it to be only a new contract between the parties to be worked out separately? Such intention can be gathered on the one hand from the reliefs claimed in the suit and on the other hand from the reliefs given by the compromise. If these reliefs are identical then the compromise would merely amount to an admission of the whole claim and the decree would rather be called one on admission and not one on compromise. A compromise, properly speaking, would therefore, result in reliefs which would be somewhat different from the reliefs claimed in the suit. What has to be seen, therefore, is whether the

new reliefs given by the compromise are so related to the old reliefs claimed in the suit as to show that the parties intended that the new reliefs should be worked out by a decree in the same suit. If, therefore, the old reliefs are the cause of the compromise while the new reliefs are the effect of the compromise then the two can be said to be consideration for each other. Such a consideration makes the contract of the compromise a valid contract. It also makes the suit and the compromise parts of an integral scheme. To judge whether the two are parts of the whole scheme many tests may be applied, such as the identity of the subject-matter, identity of parties, identity of reliefs and so on. On a totality of all these considerations one can arrive at the conclusion whether the compromise or a part of it relates to the suit or is not related to the suit. Let us apply these tests to the reliefs claimed in the suit and the reliefs given by the compromise.

The suit was firstly for dissolution of partnership. The compromise was that the partnership should continue for 5 years at the end of which it should stand automatically dissolved. P. N. Khanna, J., thought that the compromise merely amended the agreement of partnership in continuing the partnership rather than dissolving it. That was one way of looking at it. Another way to look at it is that while the appellant had sought to dissolve the partnership immediately by a preliminary decree of the Court by agreement of parties the dissolution of the partnership was to take place on a fixed date that is December 14, 1972. Which of these two ways of looking at the compromise accords better with the intention of the parties? If the parties merely wanted to extend the period of the running of the partnership, they need not have specified the date of the termination of the partnership. If their emphasis was on the continuance of the partnership then the suit should have been withdrawn or the parties should have agreed that the suit should be dismissed as the appellant had changed his mind. But this was not so. On the contrary, the appellant continued to insist on the dissolution of the partnership. Ordinarily the dissolution by a preliminary decree and taking up of the accounts resulting in a final decree would have taken some years. Parties therefore came to an agreement that the date of the dissolution should be fixed and the rendition of accounts should also be avoided by fixing the share of the profits of the appellant. We are of the view, therefore, that the fixing of the date of the dissolution of the partnership was a term which related to the suit inasmuch

as the relief claimed by the suit was also the dissolution of the partnership.

The second relief claimed in the suit was rendition of accounts. This would have meant the appointment of a Commissioner to take accounts and disputes between the parties as to the amount of profits payable to the appellant. The respondent could even have pleaded that the partnership made no profits at all. The parties decided to end the delay and the disputes by agreeing that fixed amounts should be paid to the appellant as his shares of the profits of the partnership for the past years as well as the current years. This part of the compromise, therefore, completely related to the relief for the rendition of accounts.

The third relief was an injunction that the respondent should quit the premises of the appellant given to the partnership and should not use it. This relief was also virtually granted by the compromise which said that the possession of the premises be handed over to the appellant by the respondent at the end of the contractual period (of 5 years).

On this analysis of the reliefs claimed in the suit and the terms of the compromise we are of the view that the latter entirely related to the suit and therefore the court was bound to pass a decree in accordance with the terms of the compromise under Order XXIII, Rule 3, Civil Procedure Code. This is not to say, however, that each of the terms of the compromise decree is executable and none of them is merely declaratory. In these appeals we are only concerned with the question whether the terms of the compromise shall form part of the decree and whether the payment of the share of the profits of the appellant is an executable part of such a decree. Both these questions are answered by us in the affirmative. But we are not called upon to go further and consider whether the other parts of the compromise such as the continuance of the partnership for 5 years and the handing over of the possession of the premises by the respondent to the appellant are also executable and are not merely declaratory. For, those parts will have to be considered by the Executing Court when the appellant tries to execute the decree in respect of those parts.

2. The words "suit is dismissed" were added by Jagjit Singh, J., in the order recording the compromise. Under Order XXIII, Rule 3, Civil Procedure Code the Court has to accept the compromise as it is if it is legal. There is no discretion in the Court to add to or vary the terms. Further, the Court has to pass a decree in accordance with the compromise so far as it relates to the suit. The appellant in the order appealed against in

F. A. O. (O. S.) 43 of 1972 made a grievance that the words "suit is dismissed" should not have been added by the order recording the compromise. Shri Harish Chandra, for the respondent rightly pointed out that if the appellant was aggrieved by these words in the order recording compromise then his remedy was to file an appeal against such order under Order XLIII, Rule 1 (m), Civil Procedure Code. As no such appeal was filed within limitation, the complaint against these words by the appellant was out of place and time barred. The appellant would have been in serious difficulty if we would have taken the view that the words "suit is dismissed" in the order recording the compromise gave the appellant a cause of action for filing an appeal under Order XLIII, Rule 1 (m), Civil Procedure Code and that because of these words either the compromise could not be recorded or if so recorded a decree could not be passed according to it. To take such a view would be hypertechnical and unjust. After all, parties enter into compromise with some purpose and to shorten the process of litigation. The Court should be therefore, sympathetic to the purpose of the compromise and try to effectuate it rather than take a technical view which would result in defeating the purpose. In our view, the words "suit is dismissed" used by Jagjit Singh, J., can have only one meaning. It was that the reliefs originally claimed in the suit were denied to the plaintiff and in that sense or to that extent the suit was dismissed. The Registrar so understood their meaning in preparing the draft decree and, therefore, in the draft decree he used the words "suit is otherwise dismissed". If the words were intended to mean that the appellant was to be out of Court and was to get no relief from the Court, then the learned Single Judge would have regarded the whole of the compromise as not relating to the suit. In that event, no part of the compromise would have been either embodied in or executable as a decree. But it is admitted by both the parties that much of the compromise was immediately acted upon with the help of the Court such as payment of the past profits to the appellant and subsequent payments of the current profits also in execution proceedings. The Court thus treated that part of the compromise which related to the payment of the profits to the appellant as executable. If so it related to the suit and a decree had to be drawn up in respect of at least that part of the compromise. This position would be inconsistent with the dismissal of the suit if such a dismissal meant a total dismissal and grant of no relief whatever. Such contradiction is avoided if the words "suit is dismissed" are construed to mean "suit is dismissed in res-

pect of the original reliefs in the plaint." On this view no harm was done to the appellant by the use of these words by Jagjit Singh, J. As the whole of the compromise was recorded and only the original reliefs claimed in the plaint were disallowed, the plaintiff appellant was fully satisfied and he could not have filed any appeal under Order XLIII, Rule 1 (m), Civil Procedure Code.

3. In number 1 above we have held that the whole of the compromise related to the suit. We are unable to agree therefore with the view of Jagjit Singh, J., in the order appealed against in F. A. O. (O. S.) 43 of 1972 that the terms of the compromise shall not form part of the decree. It is the right of the appellant that a decree embodying the terms of the compromise shall be drawn up by the Court. It is the duty of the Court to draw such a decree and it is not necessary that the party should make any application to the Court for drawing up such a decree or should pursue the matter in the Court for getting the decree drawn up. It is a settled principle that the failure of the Court to do its duty to draw up such a decree will not prejudice the rights of the party to execute such a decree. As soon as the compromise was recorded by the Court, the Court became bound to pass a decree in so far as it related to the suit thereon and the appellant as a decree-holder had the right to execute the executable part of the decree irrespective of the question whether a decree was actually drawn up by the Court or not. This conclusion is supported by the following provisions of the Civil Procedure Code:—

1. Order XXIII, Rule 3 makes it mandatory for the Court to pass a decree on the compromise in so far as it relates to the suit.

2. Section 2 (2) certainly defines "decree" to mean the formal expression of an adjudication, but this does not mean that the right of the decree-holder to execute a decree is defeated after the Court fails to do its duty in drawing up a decree.

3. Section 33 also says that on the delivery of a judgment "a decree shall follow."

4. Order XX, Rule 6 (1) says that "the decree shall agree with the judgment."

5. Order XX, Rule 7 says that "the decree shall bear the date of the day on which the judgment was pronounced."

6. Order XXI, Rule 10, unlike Order XLI, Rule 1, does not require that an execution application shall be accompanied by a copy of the decree to be executed.

7. Order XXI, Rule 11 (1) expressly states that where a decree is for the payment of money the Court may, on the

oral application of the decree-holder, order immediate execution thereof at the time of the passing of the decree by the judgment-debtor prior to the preparation of a warrant if he is within the precincts of the Court.

The passing of a decree in the eye of law, therefore, means the delivery of a judgment on which a decree has to be drawn up compulsorily by the Court. The delay on the part of the Court in drawing up of the decree will not mean that no decree is passed in favour of a successful party until it is actually drawn up and signed by the Court. There is a distinction therefore, between the passing of a decree and the drawing up of a decree. This is why the explanation to Section 12 of the Limitation Act 1963 says that in computing the time requisite for obtaining a copy of a decree any time taken by the Court to prepare the decree before an application for a copy of it is made shall not be excluded. The time to file appeals therefore runs from the delivery of the judgment or order onwards and not from the date on which the decree is drawn up. This is why the date of the decree must be the same as the date of the judgment even though the decree may have been actually drawn up long after the judgment was delivered. The failure of the Court to draw up a decree would not therefore be construed (as was done by P. N. Khanna, J.) to mean that the terms of the compromise did not relate to the suit and were not meant to be followed by a decree.

4. When the appellant filed Execution Case No. 27 of 1970 and the respondent made the payment to the appellant in their execution, no objection was raised by the respondent on the ground that the compromise decree was not executable. As stated above, in the eye of law, the compromise decree was passed even though it was not actually drawn up. It was, therefore, incumbent on the respondent to raise such an objection if he wanted to oppose the executability of the decree. As he did not raise the objection at that time as he "might and ought" to have done, he is precluded by Explanation No. IV to Section 11, Civil Procedure Code from raising such an objection subsequently by the rule of constructive *res judicata*. P. N. Khanna, J., has pointed out that no decision on merits was given as to the executability of the decree. But the learned Single Judge does not seem to have considered that objection as to the executability was barred not by actual *res judicata* but by constructive *res judicata*. We find, therefore, that so far as the payment of money to the appellant by the respondent under the terms of the compromise was concerned, the compromise decree was executable and also that the objection to its

executability not having been raised in Execution No. 27 of 1970, the respondent was barred by constructive *res judicata* from raising it at any subsequent time.

10. As the legal position stated above is clear on principle, we have not thought it necessary to refer to the decisions cited by the learned Counsel of the parties in proof of points which are self-evident. For the above reasons, therefore, we allow both the appeals, set aside the orders appealed against and direct as follows:

(1) All the terms of the compromise of December 5, 1968, relate to the suit and shall therefore form part of the decree which shall be drawn up according to the terms of the compromise as ordered to be recorded by Jagjit Singh, J.

(2) The terms of the compromise relating to the payment of money by the respondent to the appellant are held to be an executable part of the compromise decree. The Executing Court is left free to decide as to the executability about the other parts of the compromise decree.

(3) The respondent shall pay to the appellant the costs of both the appeals.

Order accordingly.

AIR 1975 DELHI 149

S. N. SHANKAR AND F. S. GILL, JJ.

Jagan Nath Prem Nath, Appellant v. Bhartiya Dhoop Karyalaya, Khari Baoli, Delhi, Respondent.

F. A. O. (O. S.) 39 of 1972, D-/ 29-4-1975.*

(A) Trade and Merchandise Marks Act (1958), Sections 28 (1) and (3), 56 — Trade Mark with numerals — Infringement — Suit against defendant for permanent injunction — Numerals denoting quality — Defendant found to have added those numerals to his trade mark after registration — Interim injunction against defendant not to use those numerals — Suit stayed as a result of application by defendant under Section 56 — Interim injunction also vacated on the ground that other manufacturers had also those numerals in their trade marks — Vacation if valid — (Civil P. C. (1908), Order 39, Rules 1 and 2) — Order of Avadh Behari, J., dated 16-6-1972 (Delhi), Reversed.

The plaintiff appellant brought a suit for permanent injunction against defendant respondent on allegations of 'infringement' and 'passing off' of his registered trade mark containing numerals '555', in respect of his agarbatis. He obtained an ad interim ex parte injunction

*(Against Order of Avadh Behari, J., D/- 16-6-1972).

ES/FS/B880/75/VBB

restraining the respondent from using the numerals '555' on their agarbatis. Although '555' did not appear in the registered trade mark of the respondent, the numerals were deliberately added by it as they had come to be regarded as denoting superior quality. The respondent later applied under Section 56 to the Registrar for rectification of the appellant's trade mark by deleting '555' or, in the alternative, for disclaiming the exclusive user of those numerals. As a result of that application, the suit was stayed and the interim injunction, vacated mainly because it was found that other manufacturers of agarbatis also used those numerals in their registered trade marks. The appellant appealed against the order vacating the interim injunction:

Held that the interim injunction granted in favour of the appellant deserved to be confirmed. The interim injunction however would be subject to the decision by the Registrar of the application by the respondent under Section 56. Order of Avadh Behari, J., dated 16-6-1972. Reversed. (Para 19)

In an action for infringement, the plaintiff can succeed not only when he proves that the whole of his registered trade mark has been copied but can also succeed if he shows that the defendant's mark is similar to the plaintiff's mark as it would be remembered by persons possessed of an average memory with its usual imperfections or that its essential particular or the distinguishing or essential feature has been copied: ILR (1973) Delhi 393 and (1951) 68 R. P. C. 271 and AIR 1951 Bom 147, Rel. on. (Para 7)

According to Section 28 (1) the appellant, subject to the other provisions of the Act, as the registered proprietor of the trade mark, had the exclusive right to the use of the trade mark in relation to the goods in respect of which the trade mark was registered in the manner provided by the Act. It was open to the respondent to prove that he does not have that right and that was the contention he had raised before the Registrar in his application under Section 56 of the Act, as a result of which the suit had been stayed as required by the provisions of the Act. (Para 11)

The mere fact that the other manufacturers had the numerals in question in their trade marks did not furnish a sufficient ground to discharge the interim injunction because of Section 28 (3). In law, even though the appellant might not be in a position to enforce any right against the other registered holders of the trade mark using the numerals of 555, yet against every third person (including the respondent) who was not a registered holder of the trade mark, he

was entitled to enforce all his rights as registered holder of the trade mark. Therefore, as the respondent itself had applied for rectification of the appellant's trade mark in respect of the numerals '555' and had specifically pleaded therein that the appellant's goods were not known in the market by those numerals, there was a *prima facie* case for the appellant for the confirmation of the injunction till such time as the respondent was able to prove his contention before the Registrar. (Para 14)

The argument that where a distinct label is registered as a whole such a registration did not confer any exclusive statutory right on the proprietor to use any particular word or name contained therein, apart from the mark as a whole was not at all relevant for the controversy because the plaintiff could succeed in an action for "infringement" if he proved that an essential particular of his trade mark had been copied. (1951) 68 RPC 271. Rel. on: AIR 1955 SC 558, Dist. ing. (Para 15)

Cases Referred: Chronological Paras
ILR (1973) Delhi 393 4
AIR 1972 SC 1359 = (1972) 3 SCR 289 6
AIR 1970 SC 1649 = (1970) 2 SCR 222 17
1969 Delhi LT 469 18
AIR 1955 SC 558 = (1955) 2 SCR 252 15
AIR 1951 Bom 147 = 53 Bom LR 556 6
(1951) 68 R. P. C. 271 5, 15

N. K. Anand, for Appellant; P. C. Khanna, for Respondent.

S. N. SHANKAR, J.:— By the order under appeal, the learned Single Judge on the original side has vacated an interim *ex parte* injunction granted to the appellant in a suit for permanent injunction filed by him against the respondent on the allegations of 'infringement' and 'passing off' in respect of his registered trade mark in relation to 'agarbatis' etc.

2. The learned single Judge has held that the appellant had failed to establish any exclusive right in regard to the use of the numerals 555 appearing in his registered trade mark in respect of 'agarbatis' and that at this stage it could not be said that these numerals 555 were the distinctive or essential features of his trade mark. He further observed that as the respondent had not copied the appellant's trade mark as a whole, no case for injunction was made out.

3. Before dealing with the merits, it would be appropriate to notice the legal aspect of the questions that require consideration for the decision of the controversy.

4. In *M/s. Atlas Cycle Industries Ltd. v. Hind Cycles Ltd.*, ILR (1973) Delhi 393 on page 405 this Court has said:

"In an action for an alleged infringement of a registered trade mark, it has first to be seen whether the impugned mark of the defendant is identical with

the registered mark of the plaintiff. If the mark is found to be identical, no further question arises, and it has to be held that there was infringement. If the mark of the defendant is not identical, it has to be seen whether the mark of the defendant is deceptively similar in the sense that it is likely to deceive or cause confusion in relation to goods in respect of which the plaintiff got his mark registered. For that purpose, the two marks have to be compared, "not by placing them side by side, but by asking itself whether having due regard to relevant surrounding circumstances, the defendant's mark as used is similar to the plaintiff's mark as it would be remembered by persons possessed of an average memory with its usual imperfections", and it has then to be determined whether the defendant's mark is likely to deceive or cause confusion".

5. In *Taw Manufacturing Co. Ltd. v. Notek Engineering Co. Ltd.*, (1951) 68 R. P. C. 271, the monopoly right claimed under the registered trade mark related to Motor Lamps and consisted of a pictorial device and the word "Taw". The device comprised of a representation of the full-faced view of a cat's head, wherein the eyes were drawn in the form of a motor car headlamps and the whole was superimposed upon an open body motor car viewed from the front in a manner as to substitute the cat's head for the bonnet and radiator as normally seen. The device that was the subject-matter of challenge consisted of a square panel with informative particulars printed below. The panel depicted a full-faced view of a cat's head with the eyes drawn as motor car headlamps, beneath which was the caption "Let Notek be your eyes in fog and darkness". The disposition and lettering was such as to lead the reader to take particular notice of the device with the word "Notek" beneath it. The question for decision was whether there was infringement by the latter device of the former registered trade mark. The Court held:

"A trade mark is infringed if a person other than the registered proprietor or authorised user uses, in relation to goods covered by the registration, one or more of the trade mark's essential particulars. The identification of an essential feature depends partly upon the Court's own judgment and partly upon the burden of the evidence that is placed before the Court."

6. In *James Chadwick & Bros. Ltd. v. The National Sewing Thread Co., Ltd.*, AIR 1951 Bom 147 the Court ruled that in an action for infringement what is important is to find out what was the distinguishing or essential feature of the trade mark already registered and what

is the main feature or the main idea underlying the trade mark. In *Parle Products (P) Ltd. v. J. P. & Co., Mysore*, AIR 1972 SC 1359 the Supreme Court took the same view.

7. This being the law, it cannot be disputed that in an action for infringement the plaintiff can succeed not only when he proves that the whole of his registered trade mark has been copied but can also succeed if he shows that the defendant's mark is similar to the plaintiff's mark as it would be remembered by persons possessed of an average memory with its usual imperfections or that its essential particulars or the distinguishing or essential feature has been copied.

8. Coming to facts of this case, even at this stage, there are certain facts about which there is no dispute between the parties. These facts are that one other manufacturer of 'agarbatis' "Mysore Sugandhi Dhoop Factory" at Bombay manufacture 'kasturi agarbati' under the registered trade mark 'Kasturi Agarbati 555' and that another manufacturer of 'agarbatis' "Ananda Perfumery Works, Bangalore" also manufacture 'agarbatis' under their registered trade mark 'Anand Darbar Batti 555'. The trade marks of these two parties are published in the Trade Marks Journal of 16th August, 1957 (No. 197) at page 738 and 1st July, 1949 (No. 71) at page 269 respectively. Both these trade marks contain the numerals '555'. This aspect has been noticed by the learned single Judge in the impugned order and with the material on record he has said:

"In my opinion the registration of the trade marks of 'Agarbatis' in the two Trade Mark Journals referred to above, clearly indicate that the numerals 555 has come to be regarded in this trade as denoting superior quality of the product of the manufacturer."

9. Thus, according to evidence on record and the observation of the learned single Judge himself, numerals 555 have come to acquire a distinctive meaning in the trade, in relation to 'agarbatis'. They are not wholly meaningless. These numerals, but for this acquired meaning in the trade, do not have the dictionary meaning of "First Class" or "superior" quality goods.

10. It is further admitted between the parties that the respondent itself has applied under Section 56 of the Trade and Merchandise Marks Act, 1958 (hereafter called "the Act") to the Registrar for rectification of the registered trade mark of the appellant by deleting the numerals 555, as a result of which the present suit has been stayed. Copy of this application is on the record. In para. 1 of this application, he has asked for rectification. Para. 2 of the application is in the following terms:

"The numeral 555 be removed from the label or in the alternative the rights for the exclusive user of the numeral 555 should be disclaimed."

11. In paragraphs 3 and 4 the respondent has averred that the appellant was at no time the owner of the words 555 in the Trade Mark and that its goods were not known in the market by these numerals. This application is still pending before the Registrar of Trade Marks and it is a matter to be proved by the respondent in these proceedings whether in spite of registration by the appellant of his trade mark containing the numerals 555 he was not an owner as alleged or that his goods in the market were not known by that numeral. As the matter stands at present, according to sub-section (1) of Section 28 the appellant, subject to the other provisions of the Act, as the registered proprietor of the trade mark, has the exclusive right to the use of the trade mark in relation to the goods in respect of which the trade mark is registered in the manner provided by this Act. It is open to the respondents to prove that he does not have that right and that is the contention he has raised before the Registrar in his application under Section 56 of the Act, as a result of which the learned Single Judge has stayed the suit as required by the provisions of the Act.

12. There is another significant fact relevant for purposes of the present appeal. The respondent is admittedly a manufacturer of 'agarbatis'. By trade marks Nos. 180044 and 157462 he got the same registered in respect of these goods. Under the former trade mark he got the name of 'RAJKAMAL' per se registered in respect of 'dhoop agarbatis' and 'havan samagaris' etc., for the territories mentioned in the certificate. By the latter registration he got the device mark registered. In none of these trade marks, numerals 555 appear. These numerals have now been added by the respondents to his registered trade mark. This prima facie lends support to the claim of the appellant that he has done so deliberately as these numerals have come to be associated in the mind of the public with a particular quality of 'agarbati' made by the manufacturer of trade marks with these numerals.

13. The learned single Judge felt disinclined to continue the injunction mainly because he found that two other manufacturers, whose names we have set out earlier in this order, had already been selling 'agarbatis' manufactured by them under their registered trade mark containing the numerals 555. To our mind, at the present stage, this alone, without anything more, does not furnish a sufficient ground to discharge the injunction

because of the provisions in sub-section (3) of Section 28 of the Act. Sub-section (3) of this Section provides that where two or more persons are registered proprietors of trade marks, which are identical with or nearly resemble each other, the exclusive right to the use of any of those trade marks shall not be deemed to have been acquired by any one of those persons but regarding the right of such registered proprietors against third Parties, it says that:

"..... each of those persons has otherwise the same rights as against other persons (not being registered users using by way of permitted use) as he would have if he were the sole registered proprietor".

14. The result, therefore, in law is that even though the appellant may not be in a position to enforce any right against the other two registered holders of the trade mark using the numerals of 555 but against every third person (including the respondent) who is not a registered holder of the trade mark, he is entitled to enforce all his rights as registered holder of the trade mark. In our view, therefore, as the respondent itself has applied for rectification of the appellant's trade mark in respect of the numerals '555' and has specifically pleaded therein that the appellant's goods are not known in the market by these numerals (vide para. 3 of the application referred to above) there was a prima facie case for the appellant for the confirmation of the injunction till such time as the respondent is able to prove his contention before the Registrar.

15. Shri P. C. Khanna, learned Counsel for the respondent, argued that where a distinct label is registered as a whole such a registration does not confer any exclusive statutory right on the proprietor to use any particular word or name contained therein, apart from the mark as a whole. Reliance in support of this proposition was placed on the observations in the Registrar of Trade Marks v. Ashok Chandra Rakhi Ltd., (1955) 2 SCR 252 = (AIR 1955 SC 558). These observations in the cited case were made in the context of exercise of powers conferred on the Registrar by Section 13 of the Trade Marks Act, 1940. This aspect is not at all relevant for the present controversy because the plaintiff can succeed in an action for 'infringement' if he proves that an essential particular of his trade mark has been copied: See (1951) 68 R. P. C. 271.

16. The learned Counsel then urged that the registered label of the appellant was a composite label and the numerals 555 were only in the corner along with the words 'highly perfumed'. They cannot, he maintained, be said to be a distinctive part of the trade mark.



We are unable to sustain this submission of the learned Counsel in view of the averments in the respondent's petition under Section 56 of the Act. The burden of substantiating the averments made therein lies on the respondent and in view of this application it is for him to prove before the Registrar, now that the present suit has been stayed, that the goods of the appellant are not known by the numerals 555 in the market.

17. Placing reliance on Section 29 of the Trade and Merchandise Marks Act, 1958, the learned Counsel then argued that in order to constitute infringement of the trade mark, when the copy is not of the whole of the trade mark, the plaintiff has to prove that his mark is deceptively similar to the registered mark in relation to any goods in respect of which the trade mark is registered. In support of this submission, he referred us to *Ruston and Hornby Ltd. v. Zamindara Engineering Co.*, AIR 1970 SC 1649. No exception can be taken to this proposition, but in the present case when the suit of the appellant has been stayed, there is no occasion for him to discharge this burden. On the contrary, by raising the controversy before the Registrar the respondent has volunteered to undertake this burden. Numerals '555' in the registered trade mark of the appellant have an acquired meaning in the trade in respect of 'agarbatis' as shown earlier. The very fact that the respondent added these numerals (without registration) to his registered trade mark is by itself an indication *prima facie* that he wanted his goods to be deceptively similar to those containing the numerals 555 as part of the registered trade mark.

18. Lastly, Shri Khanna argued that the balance of convenience was in favour of the respondent and that the injunction will adversely affect his trade. The argument does not impress us, firstly, because the numerals 555 are a subsequent addition to the respondent's trade mark and as such not *prima facie* bona fide and, secondly, because the appellant as the registered holder of the trade mark with numerals 555 has certainly a better right *prima facie* to restrain the respondent from using it vide Section 28 (1) of the Act. In *Wearwell Cycle Co. (India) Ltd. v. Wearwell Industries, Ludhiana*, 1969 Delhi LT 469 in a case for 'passing off' dealing with the scope of grant of temporary injunction under Order 39, with reference to the balance of convenience, this Court said that this question was relevant only when at least *prima facie* the two parties were on the same level and their rights are about equal. This obviously is not so in the instant case for reasons already stated. It cannot, therefore, be said that the

balance of convenience is in favour of the respondent.

19. For all these reasons, we are of the view that the interim injunction granted in favour of the appellant deserved to be confirmed. We accordingly accept this appeal and grant ad interim injunction in favour of the appellant against the respondent restraining him from using the numerals '555', on their cartons in respect of 'agarbatis'. This injunction, however, will abide by and be subject to the decision of the application of the respondent under Section 56 filed by him before the Registrar. Respondent will be entitled to move the court for appropriate order or direction after the decision of his application. In case that application is dismissed the interim injunction shall continue to remain operative till the decision of the suit.

20. Having regard to all the circumstances of the case, parties are left to bear their own costs of this appeal.

Appeal allowed.

AIR 1975 DELHI 153

H. L. ANAND, J.

Indraj and others, Petitioners v. The Collector, Delhi and others, Respondents.

Civil Writ No. 550 of 1974, D/- 31-3-1975.

(A) Public Premises (Eviction of Unauthorised Occupants) Act (1971), Section 4 (1) — Show cause notice — Provision requiring ten days' notice is not mandatory.

Where the proceeding remained pending for more than one year and the petitioner had sufficient time to submit objections, the proceeding cannot be said to have been vitiated merely because initially he had less than ten days' time to submit objections. (Para 6)

(B) Civil P. C. (1908), Section 11 — Res judicata — Finding necessary for relief claimed in suit — Finding binding in subsequent proceeding.

The plaintiff filed a suit restraining the authorities from interfering with his possession on the allegation that he was a tenant. The court, however, found that he was not a tenant but was in unauthorised occupation and passed a decree restraining the defendants from interfering with his possession except in accordance with law. No appeal against the decree was preferred. It was held that the finding regarding the nature of possession operated as *res judicata* in proceedings under the Public Premises (Eviction of Unauthorised Occupants) Act. AIR 1954 J. & K. 32, Distinguished. (Para 6)

FS/GS/C27/75/JHS

Cases Referred: Chronological Paras
AIR 1954 J & K 32 = 10 J & K LR 59 6

R. K. Chopra, for Petitioners; P. N. Tiwari, for Respondents.

ORDER:— By this petition under Articles 226 and 227 of the Constitution of India, the petitioners, who claim to have been in possession of the land in dispute for over 20 years as tenants under the Delhi Development Authority and its predecessor-in-office, the Delhi Improvement Trust, assail the proceedings taken under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, hereinafter referred to as "the Act", against the petitioners as indeed the order made in it by the Estate Officer, directing the eviction of the petitioners and of the Additional District Judge upholding the said order in appeal.

2. The proceedings and the impugned orders are assailed on the grounds that the notice issued to the petitioners under Section 4 (1) of the Act of show-cause why the petitioners be not evicted does not conform to the statutory requirements of Section 4 (1) of the Act and the petitioners were denied a reasonable opportunity of being heard in that the Estate Officer declined to make the aid of his process available to the petitioner for the production of Official records and certain public servants to establish the petitioner's contention that they had been in occupation of the land in dispute as tenants under the then Delhi Improvement Trust.

3. It appears to me after hearing learned counsel for the parties that while both the grounds on which the proceedings are assailed are well founded, the petitioners are nevertheless not entitled, in the peculiar circumstances of this case, to any relief.

4. Section 4 (1) of the Act provides that a notice under that provision requiring the respondent to show cause why he should not be evicted should be for a date which is not earlier than 10 days from the date of its issue. The notices in the present case are admittedly undated and parties are agreed before me that there is no indication from the file as to when they were issued although the record shows that the direction for their issue was made on July 12, 1972. It is, however, a common case of the parties that these were received by the petitioners on September 16, 1972 and, therefore, in the ordinary course of events may have been issued a couple of days earlier. It could not, therefore, be said that the notices were issued not less than 10 days before the date on which the matter was scheduled to come up for hearing. The notices, therefore, were obviously not in conformity with the statutory requirement.

5. As for the other ground it was not disputed before me that the petitioners had set up before the Estate Officer a case that they were not in unauthorised occupation of the land in dispute because they were in possession of it since over 20 years as tenants and had been paying rent to the appropriate authorities. The petitioners sought process of the Estate Officer to summon the records of the relevant authorities but the same was declined with the observation that the petitioners should make their own arrangements to produce public servants concerned with the relevant records. Obviously, the petitioners were not in a position to compel the public servants to appear before any authority much less with official records and such a course would have been possible only with the assistance of the process of the Estate Officer, who had been amply authorised in that behalf. The refusal, therefore, of the Estate Officer to summon the records and the official concerned clearly amounted to a denial of a reasonable opportunity of being heard and could not possibly be defended on behalf of the respondents.

6. Even so, the petitioners would not be entitled to the relief sought by them. The non-compliance of the provisions of Section 4 (1) of the Act would not vitiate the proceedings because the provisions of Section 4 do not appear to me to be mandatory but are only directory in nature intended to ensure that a person proposed to be evicted has a reasonable notice of the date of hearing and sufficient time to file his reply to it. This purpose was more than satisfied because the notices were received by the petitioners on September 16, 1972, but the proceedings remained pending until November 19, 1973, when the final order was made by the Estate Officer. The petitioners, therefore, had sufficient time, even though less than 10 days time initially, to submit such objections as they may have or to produce such material as they may like to in support of their contention that they were not liable to be evicted. The fact that the petitioners made no grievance of this to the Estate Officer further establishes the fact that the petitioners had no real grievance that notice was too short for the petitioners to submit a reply. What is more, the petitioners really had no possible cause to show and could not have even set up the plea that they had been in authorised occupation of the land in dispute. This is so because it was admitted that prior to the initiation of the proceedings, the petitioners had filed a civil action against the authorities seeking a perpetual injunction restraining the authorities from dispossessing the petitioners otherwise than in accordance with law on the plea that the petitioners have been

in occupation of the land in dispute since over 20 years as tenants. The trial Court dispelled the plea of the petitioners that they were tenants and held that they were unauthorised occupants. It however held, that even an unauthorised occupant had a limited right not to be disturbed except in accordance with law and, therefore, on that plea granted the relief sought by the petitioners and decreed the suit of the petitioners restraining the authorities from interfering with the petitioners' possession except in accordance with law. The petitioners being party to the aforesaid suit the finding of the trial Court that the petitioners had been in unauthorised occupation of the land was binding on the petitioners and would operate as res judicata in the proceedings under the Act so as to disentitle the petitioners to set up such a plea. The contention raised on behalf of the petitioners before the Additional District Judge, as indeed before this Court, that such a decree would not operate as res judicata because by the decree the petitioners' suit had succeeded and the petitioners, therefore, could not have filed an appeal against it is, however, unsustainable and was rightly dispelled by the learned Additional District Judge. The petitioners had sought relief from the Civil Court on the basis that the petitioners were tenants in respect of the land in dispute. The decision of the question whether the petitioners were tenants or were in unauthorised occupation was, therefore, necessary for the relief which the petitioners sought. That being so, it could not be said that the refusal by the Civil Court to grant them the relief on the basis that they were authorised occupants either as tenants or otherwise would not disentitle the petitioners to assail the decree to that extent and that being so, the decree would certainly operate as res judicata. The principle of the decision in the case of Mohamad Mir v. Ghulam Moh-uddin, AIR 1954 J & K 32 which was invoked by the petitioners before this Court, as indeed before the learned Additional District Judge, was, therefore, of no avail to the petitioners. In the face of the aforesaid decree the petitioners were, therefore, not entitled to set up a plea that they were in authorised occupation of the land and that being so, any relief to the petitioners in the present case on the basis of the two grounds urged above would amount to granting a futile writ because if the proceedings are quashed, the fresh proceedings would only be an exercise in futility so far as the petitioners are concerned because, being bound by the aforesaid decree, they cannot be heard to say that they were not unauthorised occupants and if they are unauthorised occupants, they are liable to be evicted.

7. In the result, the petition fails and is hereby dismissed but in the circumstances without costs.

Petition dismissed.

AIR 1975 DELHI 155

AVADH BEHARI ROHTAGI, J.

Mahender Nath Gupta, Appellant v. M/s. Moti Ram Rattan Chand and another, Respondents.

Ex. Second Appeal No. 4 of 1973, D/- 26-3-1975.*

(A) Specific Relief Act (1963), Section 22 — General Clauses Act (1897), Section 6 — Suit for specific performance of contract for sale — Filed before commencement of Specific Relief Act — Decree after commencement of the Act — Relief of delivery of possession neither claimed in the plaint nor granted in the decree — Whether executing court can grant delivery of possession.

Under the Specific Relief Act, 1877, in a suit for specific performance of contract for sale the executing court could grant delivery of possession of the property even if it was not prayed for in the suit and consequently the decree also did not contain that relief. That Act has been repealed by Section 44 of the Act of 1963 and Section 22 of the new Act has altered the law making it necessary for the plaintiff in such a suit to ask specifically for the relief of possession in the plaint in order to enable the Court to grant it. AIR 1950 All 415 and AIR 1952 Cal 362 and AIR 1954 All 643, Rel. on.

(Paras 12, 16)

A suit for specific performance of a contract for sale was pending when the new Act of 1963 came into force and was decreed after its commencement. The decree did not contain a relief of delivery of possession. The question was whether the executing court could grant delivery of possession under the old law or Section 22 of the new Act applied to the case. Held that it was a settled law that the rights of the parties to an action were to be governed by the law in force when the action was commenced and a change in law did not affect pending actions unless there was a clear provision to that effect in the new enactment. AIR 1967 SC 1541, Rel. on.

(Para 26)

Under Section 6 of the General Clauses Act also the repeal of an enactment did not prima facie affect pending actions which were to be decided as if the repealed enactment was still in force. When repeal was followed by a fresh

*(From order of S. R. Goel, Addl. Dist. J., Delhi, D/- 24-8-1972).

enactment on the same subject the Court could look to the provisions of the new Act only for the purpose of determining whether they indicated a different intention. AIR 1957 All 475 (FB) and AIR 1955 SC 84, Rel. on. (Paras 21, 22)

There was nothing in the new Act to show an intention to destroy the old rights and liabilities of the party which accrued under the old Act. Section 22 also showed that it applied to those persons who sued for specific performance of a contract for sale after coming into force of the new Act. It did not apply to pending proceedings. (Paras 25, 28, 29)

(B) Interpretation of Statutes — Procedural statutes — Whether retrospective — Specific Relief Act 1963 not dealing with mere procedure — No retrospective operation — (General Clauses Act (1897), Section 6).

It is a general rule that law relating to procedure operates retrospectively. No one has a vested right in the course of procedure. But a statute should not be so construed as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the amending or new Act came into force. The same principle is embodied in Section 6 of the General Clauses Act. (1960 AC 965 and AIR 1970 SC 1636 and (1965) 1 WLR 892, Rel. on). Specific Relief Act, 1963, does not merely deal with procedure but affects substantive rights of the parties. (Paras 30, 33)

(C) Specific Relief Act (1963), Section 22 — Object of — Avoidance of multiplicity of proceedings.

Section 22 enacts a rule of pleading. The legislature thought it will be useful to introduce a rule that in order to avoid multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance even though, strictly speaking, the right to possession accrues only when specific performance is decreed. (Para 31)

Cases Referred: Chronological Paras
AIR 1970 SC 1636 = 1970 Cri LJ 1396 33
AIR 1967 SC 1541 = (1967) 2 SCJ 633 25
(1965) 1 WLR 892 = (1965) 2 All ER 382 34

1960 AC 965 = (1960) 3 WLR 466 33
AIR 1957 All 475 = 8 STC 666 (FB) 21
AIR 1955 SC 84 = (1955) 1 SCR 893 23, 24

AIR 1954 All 643 = 1954 All LJ 255 12
AIR 1952 Cal 362 = ILR (1950) 1 Cal 350 11

AIR 1950 All 415 = 1950 All WR (HC) 162 11
1936 Ch 237 = 105 LJ Ch 129 33

S. L. Bhatia, for Appellant.

JUDGMENT:— These are three execution appeals against the order of the Additional District Judge Delhi. The

facts in all the cases are similar. I will first take Execution Second Appeal No. 4 of 1973.

2. Mohinder Nath, appellant, instituted a suit for specific performance against M/s. Moti Ram Rattan Chand, respondents, for specific performance. This suit was instituted in June, 1963, in the court of the Subordinate Judge, Delhi. He decreed the suit on August 31, 1968. A decree for specific performance was passed in favour of the appellant.

3. The appellant made an application for execution of the decree. He prayed for the delivery of possession of the plot of land which he had agreed to buy from the respondents. The respondents made an application under Section 47 of the Code of Civil Procedure to the executing court. Their sole objection was that the appellant was not entitled to get possession of the property as no such relief was granted to him by the Court and as none was asked for in the plaint in the suit. The executing court upheld the objection and dismissed the prayer of the appellant for delivery of possession.

4. The appellant appealed to the District Court. His appeal was dismissed by the Additional District Judge on August 24, 1972. The appellant now appeals to this Court.

5. The suit was filed in June, 1963. It was decided on August 31, 1968, as I have said. During the pendency of the suit the new Specific Relief Act (Act 47 of 1963) came into force. On March 1, 1964, it was brought into force.

6. Section 22 of the new Act provides:

"22. (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1)

shall be without prejudice to its powers to award compensation under Section 21."

7. This section makes it incumbent on a plaintiff to ask for possession of the property in addition to specific performance. Sub-section (2) provides that if in a suit for specific performance the plaintiff has omitted to ask for possession of the property in addition to specific performance no relief shall be granted by the court unless it has been specifically claimed. The effect of the section is that in a suit for specific performance prayer for possession must be distinctly and specifically made.

8. The courts below took the view that Section 22 applied to the suit of the appellant. He should have asked for the relief of possession and should have amended his plaint so as to bring it in line with the new section, they said.

9. Reference was also made to Section 44 of the new Act of 1963 which reads:

"The Specific Relief Act, 1877, is hereby repealed."

10. On the basis of this section the courts below held that the legislature intended that the proceedings in the pending suits should also be governed by the new Act and not by the old Act.

11. When the appellant brought the suit in June, 1963, the Act in force was the Specific Relief Act of 1877 (Act 1 of 1877). He instituted the suit under that Act. He claimed only a decree for specific performance. He did not specifically ask for the relief of possession. The reason for this was simple. Under the old Act the High Courts had held that it was not necessary for a plaintiff to ask for the relief of possession separately and specifically. Such a relief was comprehended in the decree for specific performance. The claim to possession was involved in the claim to specific performance, the courts held. It was laid down in decided cases that possession can be asked for in execution of a decree for specific performance even though possession was not claimed in the plaint on the ground that the relief of possession is merely incidental to that of execution of a deed of conveyance: See *Arjun Singh v Sahu Maharaj Narain*, AIR 1950 All 415 and *Kartik Chandra v. Dibakar Bhatta-charjee*, AIR 1952 Cal 362.

12. *Pt. Balmukand v. Veer Chand*, AIR 1954 All 643 may be taken as fairly representative of the views which prevailed before the enactment of the new Act in 1963. A Division Bench held that where in a suit for specific performance of a contract for sale relief for possession is not claimed and consequently the decree passed in the suit contains no relief of delivery of possession, the court exe-

cuting the decree is competent to deliver possession; an order directing delivery of possession being merely incidental to the execution of the deed of sale.

13. In that case the plaintiff filed a suit for specific performance of a contract and the suit was decreed. The plaintiff had also asked for delivery of possession of the property, but no mention was made in the decree about the delivery of possession. The judgment-debtor contended that the plaintiff having claimed possession and possession not having been specifically granted in the decree, it must be deemed that the relief for possession was refused and the plaintiff could not claim delivery of possession.

14. The Division Bench rejected the argument and said:

"We do not think there is any force in this contention. Section 55 (1) (f) of the Transfer of Property Act of 1882 provides that

"The seller is bound

(f) to give, on being so required, the buyer or such person as he directs such possession of the property as its nature admits;"

The decree for specific performance, which provides that the property shall be sold to the plaintiff by the defendant and the sale deed shall be executed within a certain time, failing which the court will have the sale deed executed by a person nominated by it, implies that delivery of possession shall be given in accordance with the provisions of Section 55 (1) (f) T. P. Act. Delivery of possession is a necessary ingredient and part of transfer of ownership."

The learned Judges continued:

"We do not think that it is necessary in a suit for specific performance either to separately claim possession or it is necessary for the court to pass a decree for possession. A decree for specific performance of contract includes everything incidental to be done by one party or another to complete the sale transaction, the rights and obligations of the parties in such a matter being indicated by Section 55, T. P. Act."

15. The appellant, therefore, thought that according to the prevailing view of the law then it was enough for him to ask for a decree of specific performance. So he brought the suit in that form.

16. On March 1, 1964, Specific Relief Act of 1963 came into force. This Act altered the law by enacting Section 22. It made it necessary for a plaintiff to ask specifically the relief of possession in suits for specific performance.

17. Both the courts have held that it is the new Act which applied to the appellant and it was necessary for him to

amend his plaint so as to claim the relief of possession. Since the appellant did not amend the plaint and did not ask for possession the court at the time of passing the decree did not give him the relief of possession. Since the decree did not give him that relief the courts thought that they were powerless to put the appellant in possession of the property though he had a decree for specific performance in his favour. Therefore this decree became valueless to the appellants to all intents and purposes.

18. In my view, the courts have not taken the correct view. Section 22 is a new section in the Act of 1963. There was no corresponding or analogous provision in the old Act. The new Section 22, therefore, will apply only to suits which are instituted after the commencement of the new Act, that is, on or after March 1, 1964. I think this section does not apply to pending suits.

19. It is true that Section 44 of the new Act repealed the Specific Relief Act of 1877. What is the effect of that repeal? That is precisely the question to be determined in this case.

20. Section 6 of the General Clauses Act says:

"6. Effect of repeal. — Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

21. Under Section 6 the repeal of an enactment does not prima facie affect pending actions which are to be decided as if the repealed enactment was still in force. This is the general rule: See AIR 1957 All 475 (FB) Adarsh Bhandar v. Sales Tax Officer.

22. But when the repeal is followed by fresh legislation on the same subject the court would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention.

23. The line of inquiry would be, not whether the new Act expressly keeps alive old rights and liabilities, but whether it manifests an intention to destroy them. I cannot, therefore, subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material: See State of Punjab v. Mohar Singh, AIR 1955 SC 84.

24. As the Supreme Court said in the case of (AIR 1955 SC 84) (Supra).

"Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion."

25. Here in the new Act we have Section 44. This is a simple repeal. There is no saving clause (Section 3 of the Act of 1963 though deals with "savings" contains no reference to the old Act of 1877). The repeal is followed by fresh legislation on the same subject. But there is nothing in the new Act to show an intention of the legislature to destroy the old rights and liabilities of the party which accrued under the old Act. The repeal of the old Specific Relief Act will not affect any right, liability acquired or incurred under the repealed enactment or any legal proceedings or remedy in respect of such right or liability etc., and such legal proceeding or remedy may be continued as if the repealing Act has not been passed: See G. Ekambarappa v. Excess Profits Tax Officer. AIR 1967 SC 1541.

26. It is a settled principle of law that the rights of the parties to an action are to be governed by the law in force when the action was commenced that a change in the law would not affect pending actions unless there is a clear provision to that effect in the new enactment.

27. In general when the substantive law is altered during the pendency of an action the rights of the parties are decided according to the law as it exist-

ed when the action was begun, unless the new statute shows a clear intention to vary such rights (Maxwell — Interpretation of Statutes 12th Edition, page 220). The rights of the litigants are generally to be determined according to the law in force at the date of the suit. If an alteration in the law occurs pending action the rights of the parties are to be decided by the law and equity existing when the action was begun.

28. In my opinion Section 22 did not apply to the appellant's suit. He was not bound to amend the plaint. The old law did not require him to do so. The new law does not apply to him.

29. A reading of Section 22 also shows that this section applies to those persons who sue for specific performance of a contract for the transfer of immovable property after the coming into force of the new Act. The opening part of the section says "any person suing for specific performance of a contract". This shows that the legislature wants this provision to apply to those who instituted suits for specific performance after the new Act came into force. There is nothing in this section or in any other part of the Act to evince an intention on the part of the legislature that pending suits be also governed by the new section. I think the section contains clear words which show that the legislature has no intention that the Act should operate on pending proceedings.

30. The first appellate court was of opinion that the Specific Relief Act, 1963 merely deals with procedure and does not affect substantive rights of the parties. Therefore, it applied to pending actions as well as to future actions. I cannot, I am afraid, share this view.

31. Section 22 enacts a rule of pleading. The legislature thought it will be useful to introduce a rule that in order to avoid multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance even though, strictly speaking, the right to possession accrues only when specific performance is decreed. The legislature has now made a statutory provision enabling the plaintiff to ask for possession in the suit for specific performance and empowering the court to provide in the decree itself that upon payment by the plaintiff of the consideration money within the given time, the defendant should execute the deed and put the plaintiff in possession: See the Ninth Report of the Law Commission page 35.

32. Now this section modifying or amending existing rules of pleading was enacted when the appellant's action was pending in court. In such a case the statute should, unless it clearly appears to be intended otherwise, be held inapplicable:

(See Crawford Statutory Construction, page 588).

33. It is true that as a general rule the law relating to procedure operates retrospectively. No one has a vested right in the course of procedure. But there is another equally important principle, viz., that a statute should not be so construed as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the amending or the new Act came into force: See *In re a Debtor* 1936 Ch 237, *In re Vernazza*, 1960 AC 965 and *N. G. Mitra v. State of Bihar*, AIR 1970 SC 1636 (1639). The same principle is embodied in Section 6 of the General Clauses Act.

34. Here it is well to remember the advice of Lord Reid:

"The canons of construction are not so rigid as to prevent a realistic solution."

(*Connaught Fur Trimmings Ltd. v. Cramas Properties Ltd.*, (1965) 1 WLR 892 (899)).

35. I now turn to the other two appeals. In execution second appeals 1 of 1973 and 3 of 1973 the appellants similarly brought suits for specific performance. The respondents raised the same objection. The respondents are same in all the three cases. Moti Ram Rattan Chand had agreed to sell three separate plots of land to these three appellants. The respondents' application under Section 47 was substantially the same in other cases as in execution case No. 4 of 1973. In these two cases also the respondents succeeded in the two courts. Now the appellants succeed. This judgment will govern all the three execution second appeals.

36. In the result the appeals are allowed. The orders of the courts below are set aside. Since there is no representation on behalf of the respondents in this court there will be no order as to costs.

Appeals allowed.

AIR 1975 DELHI 159

T. V. R. TATACHARI, C. J. AND
S. S. CHADHA, J.

Lachhman Das and others, Appellants
v. Hakim Sita Ram and others, Respondents.

Letters Patent Appeal No. 45 of 1971,
D/- 21-3-1975.

(A) Contract Act (1872), Sections 10, 23 — Auction sale — Agreements between bidders not to bid against each other, not void — Such agreement is not against public policy.

ES/FS/B887/75/AGT

Under Sec. 10 all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under any provision of the Act. Thus an agreement is a contract if it is made for a lawful consideration and with a lawful object. Section 23 declares what considerations and objects are lawful and what not. Inter alia, it provides that the object of an agreement is lawful unless the Court regards it as opposed to Public Policy. The Courts will uphold the sanctity of contracts which form the basis of the Society, but where the purpose is contrary to Public Policy, the Courts may relieve parties of their duty.

(Para 11)

Agreements which are likely to prevent the property put up from realising its fair value and to damp the sale, would certainly be against the public good, but an agreement between two or more persons not to bid against each other at an auction is not illegal or against public good.

(Para 11)

Held on facts that there was no suggestion of conspiracy to cheat and to defraud the Government by getting property at less price than it would have brought if there was no agreement. AIR 1943 Lah 100; AIR 1954 Mys 29; AIR 1933 Oudh 124; AIR 1914 Sind 165, Dist.; Halsbury's Laws of England, 3rd Edn. Vol. 8 p. 130, Rel. on.

(Para 7)

Cases Referred: Chronological Paras

AIR 1954 Mys 29 = 32 Mys LJ 167	9
AIR 1943 Lah 100 = 45 Pun LR 119	8
AIR 1933 Oudh 124 = 10 Oudh WN 1	9
(1927) 1 KB 169 = 95 LJKB 945	8
(1921) 1 KB 635 = 90 LJKB 404	8
AIR 1914 Sind 165 = 8 Sind LR 247	10
1901 Pun Re 37 = 1901 Pun LR 97	8

J. S. Arora, for Appellants; D. D. Chawla, Sr. Advocate and C. L. Choudhry, for Respondents.

S. S. CHADHA, J.:— This Letters Patent Appeal on certificate, has arisen from the judgment D/- 6-11-1970, of a learned Single Judge of this Court in a Regular Second Appeal.

2. We can do no better than to state the facts which are not disputed, as brought out in the judgment of the learned Single Judge. The facts are that the plaintiffs filed a suit for specific performance of an alleged contract of sale of Shop No. 2562, Gali No. 6, Beadonpura, Ajmal Khan Road, Karol Bagh New Delhi. It was alleged that the plaintiffs are in possession of Shop No. 2562 which is a part of the property known as No. 2562-73 (New No. XVI 2593-2606). This whole property was a composite property and was auctioned by the Competent Officer, Delhi for Rs. 40,000/- in 1954. Ten per cent. of

the sale price was deposited by the plaintiffs and the defendants who were the bidders. However, the sale was not confirmed and the property was put to re-auction on 9-1-1955 when the bidding was open to public and the maximum bid of Rs. 60,250/- was given. The auction was then to be continued only amongst the sitting allottees and for this purpose auction was postponed to the next day. This is clear from the proceedings before the Competent Officer, Exhibit P-2 on the file. Before that the defendants-respondents entered into an agreement Ex. P-1 in which it was provided that the plaintiffs who were in occupation of Shop No. 2562 were not interested in the auction of the aforesaid full property by the Competent Officer, Delhi, and that they will not purchase the property if sold by the Competent Officer to the defendants together with Sh. Sohan Singh. It was also agreed that after the sale as and when completed by the Competent Officer in favour of the defendants along with Shri Sohan Singh, they would transfer to the plaintiffs without payment of any consideration Shop No. 2562 and that the defendants shall get the sale deed registered in the name of the plaintiffs. It was also agreed that the plaintiffs will withdraw from the auction of the property and as such will not bid. Later on auction was sanctioned in favour of the defendants and Shri Sohan Singh for Rupees 60,250/-. The sale certificate was issued in their favour on 5-8-1955. The defendants having refused to carry out their promise of transferring the shop in the name of the plaintiffs, the latter filed a suit for specific performance of the agreement Exhibit P-1, and prayed for a decree to execute the sale deed in their favour. The defendants controverted the allegations. Various pleas were raised and on the pleadings of the parties the following issues were framed:—

"(1) Is the suit within time? O. P. P.

(2) Whether the plaint has been properly valued for purposes of court-fee and jurisdiction?

O. P. P.

(3) Whether the defendants agreed to convey the shop in suit to the plaintiffs without consideration. If so, is the said agreement for consideration and is valid and enforceable in law? O. P. P.

(4) Whether the agreement of issue No. 3 was not entered into by proper parties and was it entered into by the defendants under coercion and threat, and if so, what is its effect? O. P. D.

(5) Whether the plaintiffs are in lawful possession of the shop in suit? If not, how can they maintain the suit? O. P. D.

(6) Is the suit bad for non-joinder of the parties?

(7) Relief."

3. The trial Court held under issue No. 1 that the suit was within time. On issue No. 2, the trial Court found that the suit was valued properly for the purpose of court-fee though for the purpose of jurisdiction the court held that the suit for jurisdictional value would be Rupees 3,250/-. On issues 3 and 4 it was found that the agreement was for consideration and it was legal and binding on the parties. Issue No. 5 was held in favour of the plaintiffs. On issue No. 6 it was held that as Shri Sohan Singh was not a party to the agreement Exhibit P-1, he cannot be made a party to the suit though the decree could be passed in respect of the parties actually before the court. Consequently, the trial court decreed the plaintiffs' suit and ordered the defendants to execute a conveyance deed in favour of the plaintiffs in respect of shop No. 2562. He, however, made it clear that the decree would have no effect on Shri Sohan Singh's right in the suit property.

4. An appeal was taken against the judgment by the defendants. The lower appellate court has affirmed the findings of the trial court that the agreement was for a consideration. The objection of the defendants that as they had only 5/6th share of the shop and that 1/6th share could not be transferred as it vested with Shri Sohan Singh, the suit should not have been decreed was not accepted by the lower appellate court which found that they were under compulsion to transfer their rights in the property. The learned lower appellate court, however upheld another objection raised by the defendants that the agreement Exhibit P-1 was void as it was opposed to public policy. Consequently, on his finding that the agreement was opposed to public policy the appeal of the defendants was allowed and the suit of the plaintiffs was dismissed.

5. Regular Second Appeal No. 143-D of 1961 against the judgment and decree of lower appellate court was allowed by the learned Single Judge in view of his finding that it cannot be held that the agreement Ext. P-1 is opposed to public policy. The judgment and decree of the lower appellate court were set aside and those of the trial court restored, with the result that the suit of the plaintiffs for specific performance of the contract was decreed to the extent of 5/6th share in the property bearing No. 2562 Gali No. 6, Beadonpura, Ajmal Khan Road, New Delhi.

6. In this appeal, the only question that was argued by Shri J. S. Arora, appearing for the appellant is issue No. 3 reading as follows:—

"Whether the defendants agreed to convey the shop in suit to the plaintiffs without consideration. If so, is the said agreement for consideration and is valid and enforceable in law?"

The findings of the courts below on the first part of this issue about the agreement Ex. P-1 being for consideration, namely; consideration not to bid at the auction before the Competent Officer amongst the sitting allottees, was not questioned before us. The main argument that was addressed by the counsel for the appellant was that the agreement is unenforceable as against Public Policy. According to him the concept of Public Policy is a varying concept changing with the conditions prevailing in this country at any particular time. The counsel argued that in this country the Government is now entering into commercial activities on a large scale and as the Government preferred sitting allottees, it was necessary that there should be adequate protection against the mischief of 'knock-out' agreements causing injury to the Government by under-hand dealings. He further contends that on a true construction of the agreement Ex. P-1 between the parties, Hakim Ram Kishan representing himself and his son Dr. Durga Dass had expressed himself as not interested in the auction of the aforesaid property by the Competent Officer and will not purchase the said property, if sold by the Competent Officer to the sitting allottees together with Sh. Sohan Singh and that as and when the sale of the aforesaid property by the Competent Officer is completed, then without payment of any consideration the sitting allottees together with Sh. Sohan Singh shall arrange to transfer the ownership of shop No. 2562 in favour of Hakim Ram Kishan and his son Dr. Durga Dass. According to the counsel, the very fact that under the agreement in question, Hakim Ram Kishan and Dr. Durga Dass were not to bid, was sufficient proof that had they made the bids before the Competent Officer in competition with the other sitting allottees, the Government would have secured higher price at the auction. This agreement according to the learned Counsel was with the object to defraud the Government of the maximum bid that the property could have fetched in the auction, inter se, the sitting allottees. These arguments, however, need closer scrutiny on the facts brought out on the record of the case.

7. The sequence of events from the record show that the property in dispute was put to auction in 1954 and the highest bid at that time was Rs. 40,000/-. This bid apparently was not accepted by the authorities and the property was put to auction again. The copy of the bid sheet in respect of the property in dispute

Ex. P-2 shows that the bid started on January 9, 1955, at Rs. 10,000/- and continued till the bid of Behari Lal at Rupees 59,000/-. The auctioneer recorded the fact in the bid sheet that the bid be resumed again at 1 p. m. At 1 p. m. bid again started with the first overbid of Dayal Chand at Rs. 59,500/-. Behari Lal gave the second bid at Rs. 60,000/-. The third maximum bid was then given by Dayal Chand at Rs. 60,250/-. It is significant to note that Dayal Chand had been participating in the bid from the very beginning. At that stage, the sitting allottees namely; (a) Mali Chand and others, (b) Lachman Das, (c) Ram Asra Mal, (d) Hakim Ram Kishan, (e) Lal Singh and (f) Amrit Singh, gave the fourth joint bid of Rs. 60,250/-, claiming a preferential right to purchase the property at the maximum bid received at the open auction. The bid sheet records a note to the effect 'auction to be continued among sitting allottees only on 10-1-1955 at 2 p. m. in court'. The Competent Officer thus restricted the auction amongst sitting allottees only on 10-1-1955. The Competent Officer with a view to benefit the sitting allottees of the composite property thought it fit after ascertaining the market value of the property at Rs. 60,250/- to restrict the auction amongst the sitting allottees. The bids given on 9-1-1955 were in open auction and the highest bid that was offered for this property was Rs. 60,250/-. The Competent Officer could refuse to accept this highest bid but did not choose to do so as it has to be presumed that he thought it to be a fair market value of the property. The Competent Officer would have also taken note of the reserve price of this property which is valued by the authorities themselves and the value of Rs. 60,250/- must be over the reserve price. There is no material on the record to show that the price of Rs. 60,250/- is not the market price or that there was any conspiracy amongst the sitting allottees to deprive the Government of fair market value of the property or to defraud the Government of the same. The agreement Ex. P-1 only says that Hakim Ram Kishan and his son Dr. Durga Dass will not purchase the said property in dispute. It further recites that they are not interested in the auction of the property in dispute by the Competent Officer. The proceedings before the Competent Officer on January 10, 1955, start with the order of the Competent Officer reciting the fact that 'Yesterday at the time of sale the occupants exercised their right of pre-emption, but it was then not decided as to whether they will bid against each other or will have a joint sale and they were directed to appear in Court to-day to make a definite statement and to bid against each other if the bid was not a

joint one.' The proceedings further show that Hakim Ram Kishan made a statement that he does not want to join in the sale either in competition with the other occupants or in collaboration with them, and that his interest in the sale is nil. The other sitting allottees thereafter made a statement that their bid is a joint one and if accepted, their share would be as specified in that statement. It may be significant to note that Sh. Sohan Singh also made the statement that his share would be 1/6th. If Hakim Ram Kishan had joined the other allottees, the sale would have been only at Rs. 60,250/-. The fact that he made a statement to the effect that he does not want to join in the sale, would not increase the market value of the property. It must not be forgotten that the object of the sale of the composite property to sitting allottees in preference to outsiders was to grant a rehabilitation benefit to the displaced persons. Once having ascertained the market value in open auction, the Competent Officer was within his powers to sell the property jointly to the sitting allottees, who had agreed that their bid may be considered as a joint one. The maximum bid for the property was for Rs. 60,250/-. The Competent Officer on that date adjourned the proceedings to February 25, 1955, for confirmation, and confirmed the sale later on. In view of this material brought on the record, the learned Single Judge was perfectly justified to return the finding that there is no evidence on record to show that the total property was valued for more than Rs. 60,250/-, that the record is thus bereft of any suggestion of conspiracy to cheat and to defraud the Government by getting property at less price than it would have brought if there was no agreement.

8. The counsel for the appellant made reference once again to a number of authorities cited before the learned single Judge. In *Parduman Chand v. Kashmira Singh*, AIR 1943 Lah 100, relied upon by counsel, the parties were intending bidders at an auction; they formed a ring and the amounts sued for represent the share of the profits resulting from the 'knock-out'. *Monroe, J.*, after examining 1901 Pun Re 37; (1921) 1 KB 635 and (1927) 1 KB 169 expressed the opinion that there is a clear distinction between the agreements not to bid or to share the property bid for after purchase on the one hand and an agreement to have the real auction afterwards amongst the members of a ring on the other. Relying on the dissenting note of *Scrutton, L. J.*, in (1921) 1 KB 635 that the agreement for a 'knock-out' is unenforceable, his Lordship held that it is a mode of cheating and that the object of

these suits is to enforce an agreement contrary to public policy. Even in this case it was not held that the agreements not to bid or to share property bid after purchase are un-enforceable as against public policy. The judgment proceeded on the peculiar facts as the enforcement of the share of profits resulting from the 'knock-out' was sought.

9. The next case relied upon by the counsel for the appellant is *Huthegowda v. H. M. Basaviah*, AIR 1954 Mys 29. In this case the parties came to an agreement not to raise the bids in revenue sales but to divide the property purchased between themselves, so as to prevent the land from being sold for its real value. The object of the agreement was held to be fraudulent and unlawful and was thus held as un-enforceable. Mallappa, J., relied only on the head note (c) in the matter of *Ram Lal v. Rajendra Nath*, AIR 1933 Oudh 124 and rendered no independent discussion. Probably the reason why there was no discussion is that the suit was held to be barred by time under the first part of Article 113 of the Limitation Act. Since there is no helpful discussion in the Mysore case, reference was made by the counsel to AIR 1933 Oudh 124. In this case the plaintiff came into the court with the allegation that the defendant approached the plaintiff and asked him not to raise bids against him and that as a consideration for this he offered to pay off the prior mortgage and also to make good the whole amount due to the plaintiff under his decree. The finding recorded in this case was that the object of the secret arrangement arrived at between the parties clearly was to deprive the rival decree-holder of his legitimate share in the amount which was to be paid by the defendant to the plaintiff over and above the amount which he was to get as his share in the rateable distribution made by the court, or in other words to benefit the plaintiff at the expense of the rival decree-holder. It was also held that the case, therefore, is not merely of an honest combination between two bidders to purchase the property at an advantageous price but goes further by resorting to secret artifice for the purpose of defrauding a third person, namely, the rival decree-holder and it is in these circumstances that their Lordships held that the object of the agreement in that case was fraudulent and it is, therefore, void under Section 23 of the Contract Act. On the question of law the Bench quoted with approval a passage from Halsbury's Laws of England, Volume 1, page 512:

"An agreement between the two or more persons not to bid against each other at an auction even if amounting to what is popularly known as a 'knock-out' would

not seem to be illegal or to invalidate the sale."

Their Lordships further noticed a number of decisions and held "We are of opinion that an agreement between two persons not to bid against each other at an auction sale is perfectly lawful and cannot be considered to be opposed to public policy." The agreement in the case before us, thus cannot be regarded as opposed to public policy. There is no secret artifice between the parties in defrauding the Government of the market value of the property.

10. Reliance was next placed on a reported judgment in re: *Chattamal Jethmal v. Rewachand*, AIR 1914 Sind 165. In this case the finding was recorded that before the partners went inside the building, where the Executive Engineer held the auction, they agreed not merely not to bid against each other, but that there should be a show of bidding up to a certain limit, in order to cause the Executive Engineer to believe that there was no combination between them and that there was keen competition amongst the bidders. It was further found as a matter of fact that the right to collect lac was worth Rs. 21,200/- and that there was a loss to the public purse of Rs. 8,200/- which loss was due to this arrangement among the partners. On these findings it was held that there was a show of bidding in order to make the Executive Engineer believe that there was no combination but rather a keen competition among the bidders and held that the conduct of these partners was dishonest. This artifice employed by the partners was held to be illegal, unlawful and not a case of combination. This authority is peculiar on the facts found in the case. In this case it was also observed that it must be remembered that no decision is an authority except upon the facts of the case in which it is given.

11. Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy (Halsbury's Laws of England, 3rd Edn. Volume 8 at page 130). Under Section 10 of the Indian Contract Act, (hereinafter called the Act) all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under any provision of the Act. Thus an agreement is a contract if it is made for a lawful consideration and with a lawful object. We have already held that the agreement is for a lawful consideration. Section 23 of the Act declares what considerations and objects are lawful and what not. Inter alia, it provides that the object of an agreement is lawful unless the Court re-

regards it as opposed to Public Policy. It often happens that an agreement which in itself is not unlawful is made with the intention of one or more of the parties to make use of the subject-matter for an unlawful purpose, that is to say, a purpose contrary to Public Policy. The Courts will uphold the sanctity of contracts which form the basis of the Society, but where the purpose is contrary to Public Policy, the Courts may relieve them of their duty. In the later class of the cases, the Courts will not lend their help to such a plaintiff—the maxim is *Ex turpi casua non oritur actio*. It may, therefore, be necessary to examine as to what is the public good involved in the Government auctions. Agreements which are likely to prevent the property put up from realising its fair value and to damp the sale, would certainly be against the public good, but an agreement between two or more persons not to bid against each other at an auction is not illegal or against public good. It is clearly to the interest of the public as well as the State where the auctions are held by it that a fair market price should be realised at the auctions. It is in the public interest that the State should get a fair price at the public auctions of the public properties, and not be a victim of fraud or conspiracy to keep the price low causing loss to the public exchequer. Being aware of the duty cast upon us, we have examined the facts of the case leading to the entering of the agreement Ex. P-1, and we have found that there was no attempt to defraud the public revenue and that the property was sold to the sitting allottees and Shri Sohan Singh at the market value. The agreement Ex. P-1, thus cannot be held to be opposed to the Public Policy. No material was brought to our notice at the hearing that the price is not the market price or that any fraud was practised to keep the prices down.

12. The result is that there is no merit in the appeal and it is dismissed with costs.

Appeal dismissed.

AIR 1975 DELHI 164

AVADH BEHARI, J.

Shama Banu and others, Appellants v. Jagdish Parshad and others, Respondents.

Second Appeal No. 57 of 1974. D/- 6-3-1975.*

(A) Delhi Rent Control Act (59 of 1958), Section 14 (1), Proviso, Clause (g)

*(From order of G. C. Jain, Rent Control Tribunal, Delhi, D/- 14-1-1974).

ES/FS/B882/75/GDR.

— Eviction on ground of bona fide requirement of premises for building by landlord — Right to evict the tenant under Clause (g) is personal — Such right is incapable of being transmitted to a purchaser of the property.

An order of eviction against the tenant under Section 14 (1) (g) was passed by the Controller on the ground of bona fide requirement of the premises for building by the landlord. During the pendency of the appeal the tenant died. His legal representatives were brought on record. Subsequently the landlord sold his interest in the property and the new landlord was added as party to the appeal. On the question whether the contention based on the ground of bona fide requirement of the premises for building by the landlord was personal to the statutory tenant and that on his death the same was not open to his legal representatives it was held.

That the contention was not personal to the statutory tenant and on his death the legal representatives could show that they could not be evicted by the new landlord in execution of the decree which was originally passed in favour of his predecessor-in-interest. AIR 1972 SC 2526 Distinguished. (Para 13)

The new landlord could not evict the legal representatives as the requirement of building or rebuilding was personal to the previous landlords and since they ceased to be the owners that requirement came to an end when they sold the property. If the new landlords wish to build or rebuild he will have to file his own eviction petition under clause (g) and make his own claim against the tenant. He cannot claim the benefit of the original right to sue in his capacity as the landlord. The order of eviction under cl. (g) was for the benefit of the previous landlord. The benefit of that order of eviction could not be transferred or assigned to the new landlord.

(Paras 20, 26)

If the new landlord is permitted to continue the proceedings, the lis will assume a complexion wholly beyond the compass of the original cause of action. The requirement of the new landlord may be fundamentally different from that of the previous landlord and an examination of facts and circumstances in regard thereto will open a new field of inquiry. Therefore the new landlord cannot continue the proceedings and claim the benefit of the original right to sue. AIR 1973 SC 2110, Followed. (Para 27)

Cases Referred: Chronological Paras
AIR 1974 Delhi 171 = 1974 Ren CR 118 (FB) 8

AIR 1973 SC 2110 = 1973 Ren CR 364 27

AIR 1973 Delhi 97 = 1972 Ren CR 433. 15

AIR 1972 SC 2526 = (1973) 1 SCR 850. 8

AIR 1971 SC 942 = (1970) 3 SCR 734 15

AIR 1963 SC 499 = 1962 Supp (2) SCR 623

JUDGMENT:— This is an appeal against the order of the Rent Control Tribunal dated January, 14, 1974.

2. The facts are these. On October 18, 1960, Jagdish Parshad and Rajinder Kumar, landlords owners, filed an application against one Gul Mohd. for his eviction from a part of the property bearing No. 1485, Gali Chuleh Wali, Sadar Bazar, Delhi. Gul Mohd. was a tenant under them on a monthly rent of Rs. 4/-. The sole ground of eviction was clause (g) to the proviso to Section 14 (1) of the Delhi Rent Control Act 1958 ("the Act") which is in these terms:

"that the premises are required bona fide by the landlord for the purpose of building or rebuilding or making thereto any substantial additions or alterations and that such building or rebuilding or addition or alteration cannot be carried out without the premises being vacated;"

3. The tenant contested the claim. The rent controller dismissed the petition on September 4, 1961. The landlords went in appeal to the tribunal. The tribunal dismissed the appeal. The landlords thereupon preferred a second appeal to this Court. On February 3, 1966, their appeal was accepted and the case was remanded to the Rent Controller. On April 5, 1971, the Controller passed an order of eviction against the tenant on the ground mentioned in clause (g) to the proviso to Section 14 (1).

4. On May 27, 1971, the tenant filed an appeal in the rent control tribunal against the order of eviction.

5. During the pendency of the appeal two important events happened. One was that Jagdish Parshad and Rajinder Kumar sold their interest in the said property to Abdul Qadir and Abdul Majid on August 25, 1971.

6. On September 8, 1971, Abdul Qadir and Abdul Majid made an application under Order 22, Rule 10 of the Code of Civil Procedure to the tribunal for their names being substituted in place of the previous landlords who were the original respondents Nos. 1 and 2 to the appeal. The application was allowed later on. The names of Abdul Qadir and Abdul Majid instead of being substituted were added to the array of the respondents on February 5, 1973, by the tribunal. They are now respondents 3 and 4 before me.

7. The other event was that during the pendency of the appeal the tenant Gul Mohd. died on December 31, 1972. He left behind a widow and eight children. They made an application for being brought on the record in place of the deceased appellant-tenant. Their application was allowed on August 13, 1973.

8. A preliminary objection was raised before the tribunal. It was this. It

was said that Gul Mohd.'s contractual tenancy was determined by a notice to quit. He, therefore, became a statutory tenant. On his death the legal representatives did not inherit the tenancy. They, therefore, could not be heard in appeal as the challenge to the ground of eviction was personal to the tenant. The tribunal examined the notice of termination of tenancy and came to the conclusion that the contractual tenancy of Gul Mohd. was validly terminated. In consequence of that conclusion the tribunal held that the only defence which the legal representatives could raise before it was about the validity of the notice to quit and none other. As to the notice to quit it found that it was a valid notice. Following *J. C. Chatterjee v. Sri Kishan Tandon*, AIR 1972 SC 2526 and a Full Bench ruling of this court in *Kedar Nath v. Mohanji Devi*, 1974 Ren CR 118 = (AIR 1974 Delhi 171) (FB) it decided that the legal representatives could not be heard in opposition to the claim for eviction. The tribunal, therefore, dismissed the appeal on January 14, 1974. The legal representatives of Gul Mohd. now appeal to this Court.

9. In *J. C. Chatterjee's* case (supra) the Supreme Court held that on the death of a statutory tenant during the pendency of an eviction suit or appeal his legal representatives who are brought on record cannot claim the status of a tenant. The only contentions that they can put forward are the contentions appropriate to their representative character and not one which was personal to the deceased tenant.

10. In that case the landlord brought a suit for ejectment on the ground that premises were bona fide required by him and his family. Munsif granted a decree of ejectment. On appeal the District Judge dismissed the suit. The landlord filed a second appeal in the High Court. During the pendency of the second appeal the tenant died. His legal representatives were brought on the record. The High Court set aside the order of the District Judge and restored the decree passed by the Munsif. The legal representatives appealed to the Supreme Court. It was held that the defence of want of bona fide requirement by the landlord was personal to the statutory tenant and on his death the same was not open to his legal representatives. The only contention which they could urge was about the validity of the notice for the termination of the tenancy. The court said:

"When B. N. Chatterji died, he was only a statutory tenant with a personal right to remain in possession till eviction under the provisions of the Act, and the heirs were incapable of inheriting any estate or interest in the original tenancy. It was also not shown to us that they fell

within any other part of the definition of 'tenant' reproduced above. Therefore, the heirs and legal representatives of the deceased B. N. Chatterjee could not in their own right claim to be 'tenant' within the meaning of the Act. Therefore, the only contentions that they could put forward in the appeal were the contentions appropriate to their representative character and not one which was personal to the deceased. The contention based on the ground of bona fide requirement by the landlord was personal to the statutory tenant and on his death the same is not open to his legal representatives."

11. The facts of the present case are entirely different. The distinguishing feature of this case is that the previous landlords, respondents 1 and 2, namely, Jagdish Parshad and Rajinder Kumar sold this property on August 25, 1971, to respondents 3 and 4, viz., Abdul Qadir and Abdul Majid respectively. It is they who now claim eviction and threaten to execute the decree which was obtained by their predecessors-in-interest."

12. The counsel for the appellants submits that the purchasers Abdul Qadir and Abdul Majid have no right to evict the legal representatives of Gul Mohd. If there was any right that was the right of Jagdish Parshad and Rajinder Kumar. If Jagdish Parshad and Rajinder Kumar had not transferred their interest and had continued to remain the owners of the property the principle laid down in J. C. Chatterji's case (supra) would have come handy to them. On the basis of that authority it could have been argued as was urged before the tribunal that the legal representatives cannot be heard in opposition to the ground of eviction set out in clause (g) as the contention based on the ground of bona fide requirement of the premises for building by the landlord was personal to the statutory tenant and on his death the same was not open to his legal representatives. The sale of the property in dispute by Jagdish Parshad and Rajinder Kumar in favour of Abdul Qadir and Abdul Majid has made all the difference between this case and the case of J. C. Chatterji (supra).

13. The short question which now arises for decision is this. Are the legal representatives of Gul Mohd. precluded from urging that the decree obtained by Jagdish Parshad and Rajinder Kumar against Gul Mohd. deceased cannot be executed against them by Abdul Qadir and Abdul Majid? Can it be said that this contention was personal to the statutory tenant and on his death it is not open to his legal representatives? In my opinion the reply is in the negative. The short answer is

that this defence was not available during the lifetime of Gul Mohd. He died on December 31, 1972. Abdul Qadir and Abdul Majid were added as parties to the appeal on February 5, 1973. Therefore, the legal representatives can now show that they cannot be evicted by Abdul Qadir and Abdul Majid in execution of the decree which was originally passed in favour of Jagdish Parshad and Rajinder Kumar.

14. There is another important point which is raised in this appeal. Clause (g) says that the claim of the landlord that he requires the building for reconstruction and re-erection must be bona fide, that is, honest in the circumstances and that they have the means to reconstruct them: See Neta Ram v. Jiwan Lal, 1962 Supp (2) SCR 623 = (AIR 1963 SC 499).

15. Under clause (g) the requirement is entirely of the landlord. It is personal to him. It is for his benefit. He is allowed to develop his property by the law so that he may make it more profitable for himself as well as serve public interest by increasing the accommodation or modernising the plan of the building. The question of better economic use of the property and its development to increase its profitability to the landlord directly arises under clause (g). The court is not concerned with the condition of the premises as that is the subject-matter of clause (f) to the proviso to sub-section (1) of Section 14: See Kailash Kumar v. B. S. Raizada, 1972 Ren CR 433 = (AIR 1973 Delhi 97). As was said by the Supreme Court in Panchamal v. Basthi, 1970 3 SCR 734 (738) = (AIR 1971 SC 942 at pp. 944, 945):

"In considering the reasonable and bona fide requirement of the landlord under this clause, the desire of the landlord to put the property to a more profitable use after demolition and reconstruction is also a factor that may be taken into account in favour of the landlord. In our opinion, it is not necessary that the landlord should go further and establish under this clause that the condition of the building is such that it requires immediate demolition. That the condition of the property may be such which requires immediate demolition is emphasised in clause (k) of the proviso (of Mysore Rent Control Act). When such a specific provision has been made in clause (k), the condition of the building cannot come into the picture nor could it have been dealt with again in clause (j). So the requirement under clause (j) is that of the landlord and cannot have any reference to the building."

16. It appears to me that the requirement under clause (g) was personal to the previous landlords Jagdish Parshad

and Rajinder Kumar. The previous landlords have ceased to be the owners of the house. The legal representatives of the tenant cannot be asked to vacate by Abdul Qadir and Abdul Majid.

17. That the requirement under clause (g) is that of the landlord who brings a claim for eviction is clear from that clause and sub-section (8) of Section 14. The said sub-section is in these terms:

"No order for the recovery of possession of any premises shall be made on the ground specified in clause (g) of the proviso to sub-section (1), unless Controller is satisfied that the proposed reconstruction will not radically alter the purpose for which the premises were let or that such radical alteration is in the public interest, and that the plans and estimates of such reconstruction have been properly prepared and that necessary funds for the purpose are available with the landlord."

18. There are several factors which are entirely personal to a particular landlord. The first is his ability to reconstruct the premises. He has to show that he has got the necessary finances for that purpose. This ability to construct the premises could be viewed only in relation to Jagdish Parshad and Rajinder Kumar. Abdul Qadir and Abdul Majid have not proved before the controller that they also have the necessary funds for the purpose.

19. The previous owners got plans sanctioned for the purpose of rebuilding. They wanted to erect a double storey building. They decided to raise a new construction of a particular model. The present purchasers may decide otherwise. They may like to erect a multi-storeyed building for all we know. If they want to erect a building which is different from one which was proposed by the previous owners the controller will have to examine afresh the question whether the proposed reconstruction will not radically alter the purpose for which the premises were let and that such radical alteration is in the public interest.

20. Section 20 of the Act also shows that it is the obligation of that landlord who has got an eviction order to commence the work of building or rebuilding within one month from the specified date. If he fails to complete the work within a reasonable time or having completed the work, fails to place the tenant in occupation in accordance with sub-section (2), the controller may, on an application made to him in this behalf by the tenant order the landlord to place the tenant in occupation of the premises or part thereof or to pay to the tenant such compensation as the controller thinks fit. His obligation is to put the tenant back in occupation on completion of the building if the tenant has elected to go back

to the premises on reconstruction. These are not the obligations of Abdul Qadir and Abdul Majid under the order of the rent controller. The upshot of the discussion is that the new landlords Abdul Qadir and Abdul Majid cannot evict the legal representatives as the requirement of building or rebuilding was personal to the previous landlords and since they ceased to be the owners that requirement came to an end when they sold the property to Abdul Qadir and Abdul Majid. If the new landlords wish to build or rebuild they will have to file their own eviction petition under clause (g) and make their own claim against the tenant.

21. The central question is whether the purchasers, respondents 3 and 4, can claim the benefit of the original right to sue in their capacity as the landlords. The answer to this problem is to be found in the pleadings of the previous landlords. Their pleadings will reveal the true nature of the right asserted by them in the ejectment proceedings. In their ejectment application they said:

"The proposed reconstruction will not radically alter the purpose for which they were let. The premises are very old and its reconstruction is in public interest. The plans have been sanctioned and necessary funds are available for the purpose with the petitioners."

22. Thus the requirement pleaded in the ejectment application and on which the previous landlords founded their right to relief was their personal requirement. It was a cause of action personal to them. The order of eviction which was passed in their favour by the controller enured for their personal benefit.

23. The controller has to see whether the requirement of the landlord is bona fide. Bona fides is a condition of the mind. The controller has to be satisfied of the genuineness of the claim of the landlord. It can be predicated of a particular landlord that his need is genuine. Similarly the means of the particular landlord to rebuild the premises have to be seen. What is predicative of landlord A is not necessarily predicative of the transferee landlord B.

24. Mr. Sultan Singh on behalf of Abdul Qadir and Abdul Majid has urged that the legal representatives have no right to urge that the ground in clause (g) which was available to the previous landlords is no more available to the present landlords. He placed reliance on J. C. Chatterji's case (supra). That case as I have said, is distinguishable from the present one.

25. Next he contended that clause (g) and sub-section (8) are in no sense personal to the landlord. I do not agree. I have given my reasons for holding that

the right to evict the tenant under clause (g) is personal to a particular landlord and is incapable of being transmitted to a purchaser of the property.

26. The counsel then submitted that the case should be remanded to the tribunal in order to find out whether Abdul Qadir and Abdul Majid have the necessary funds with them for the purpose of construction. I cannot accept this submission. The order of eviction under clause (g) was for the benefit of Jagdish Parshad and Rajinder Kumar. They are no more the owners. They had the right to evict the present legal representatives. That right has now come to an end. The benefit of the order of eviction passed in favour of Jagdish Parshad and Rajinder Kumar cannot be transferred or assigned to Abdul Qadir and Abdul Majid on the view I have taken in his case.

27. If respondents 3 and 4 are permitted to continue the proceedings, the lis will assume a complexion wholly beyond the compass of the original cause of action. The requirement of respondents 3 and 4 may be fundamentally different from that of the previous landlords and an examination of facts and circumstances in regard thereto will open a new field of inquiry. In my opinion they cannot continue the proceedings and claim the benefit of the original right to sue. See *Phool Rani v. Naubat Rai Ahluwalia*, 1973 Ren CR 364 = (AIR 1973 SC 2110).

28. Lastly, it was said that the order adding the purchasers as parties to the appeal was made on February 5, 1973. It was an appealable order, the counsel said. Since no appeal was preferred it has become final, it was contended. This is a specious argument which cannot prevail. When the tribunal on the application of Abdul Qadir and Abdul Majid added them as parties to the appeal an objection was taken by the legal representatives. The tribunal said that this question will be decided in the appeal itself. The tribunal ought to have decided this objection at the time of deciding the appeal. But at that time this point does not appear to have been raised before it. It has now been raised before me.

29. I allow the appeal and set aside the orders of the rent controller and the tribunal. The eviction petition is dismissed. In the circumstances I leave the parties to bear their own costs.

Appeal allowed.

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V. S. DESHPANDE AND YOGESHWAR DAYAL, JJ.

Suresh Chandra Chiman Lal Shah, Petitioner v. Union of India and others, Respondents.

C. W. No. 1224 of 1973, D/- 14-2-1975.

(A) Constitution of India, Articles 25, 26, 27 — Cultural programme for celebration of 2500th Anniversary of Bhagwan Mahavir's Nirvan approved by Government — Whether infringed Articles 25, 26 and 27.

While religion is an essential element in the Indian culture, cultural activity is distinguished from religious activity by its dominating purpose and objective. While the Jains may have the exclusive right to profess and practice Jainism and to perform the ceremonies prescribed for the observance of the Nirvan of Bhagwan Mahavir, the State and others cannot be shut out from expressing their respect and admiration for the contribution of Bhagwan Mahavir to the Indian culture. The programme for the celebration of the 2500th Anniversary of Bhagwan Mahavir's Nirvan as approved by the Government fell within the domain of culture and was not either a matter of religion or religious activity. It was a secular way of remembering Bhagwan Mahavir. It was devised by the Government to suit all the people irrespective of the religion to which they may belong. It was the essence of a common cultural activity that everyone should be able to participate in it. It was not meant to be an imitation of a religious practice. It did not, therefore, misrepresent the Jain religion or the religious practice. Therefore, the question of hurting the feelings of the Jains did not arise, and Article 25 was not infringed. The celebration of the Nirvan of Bhagwan Mahavir in a completely secular way by spending money on works of public utility could not be construed to mean interferences by the State in the management of matters of religion by the Jain Community. As no matter of religion was involved in it Article 26 (b) was not attracted at all. The impugned programme could not be said to promote or maintain the Jain religion. The facilities for disseminating knowledge of Jainism and providing for the study of it provided in the programme will not amount to promotion or maintenance of Jainism. Further, the cultural activity sponsored by the Government of India was a part of a long-range continuous policy not restricted to Jainism. It is only the favouring of one particular religion as against others which is prohibited by Article 27. Government has been consistently honouring the memory of the great sons of India for the past some time, im-

partially and irrespective of the religions to which they belonged. It could not be said, therefore, that the Government was promoting or maintaining only the Jain religion at the expense of other religions. There was therefore, no infringement of Article 27. (Paras 13, 14, 15, 16)

Cases Referred: Chronological Paras

AIR 1971 SC 1731 = (1971) 2 SCC 269 11, 16
(1971) 403 US 602 = 29 Law Ed 2d 745 7

AIR 1954 SC 282 = 1954 SCR 1005 16
AIR 1954 SC 400 = 1954 SCR 1046 16

A. B. Dewan, Sr. Advocate with S. K. Dholakia and B. V. Desai, for Petitioner; Mrs. Shyamala Pappu, Sr. Advocate with Harish Chandra (for Nos. 1 and 2), Dr. L. M. Singhvi, Sr. Advocate with Ravinder Narain and J. N. Aggarwal (for No. 3), for Respondents.

V. S. DESHPANDE, J.:— Is India a secular State? If so, in what sense? These questions are raised by this writ petition filed by a Hindu and the connected Writ Petitions Nos. 1225 of 1973, 235 of 1974 and 919 of 1974 filed by some Jains to challenge the legality of the programme of the celebration of the 2500th Anniversary of Bhagwan Mahavir's Nirvan (Salvation) extending over a period of one year from November 13, 1974 onwards by the Government of India.

2. The programme for the celebration, drawn up by a National Advisory Committee consisting mainly of prominent members of the Jain Community and approved by the Government involving an expenditure of about rupees fifty lakhs by the Government includes the following:— Development of a national park named after Bhagwan Mahavir, Erection of stone pillars therein with inscriptions from his sayings, episodic treatment of his life by sculptors; Establishment of a museum of Jain art and paintings, a library of Jain literature; Setting up of a National Council of Jainological studies; Setting up of twenty Bhagwan Mahavir Bal Kendras in which apart from recreation etc., arrangements for imparting knowledge about the life and teachings of Bhagwan Mahavir to children would be made; Establishment of rural library centres named after Bhagwan Mahavir in each State; Monument at the birth place of Bhagwan Mahavir at Vaishali consisting of a concealed water tank; Organising of Bhagwan Mahavir Memorial Lectures and instituting visiting fellowships and scholarships, arranging seminars, Organising joint meetings of the heads of research centres and institutions of Jain learnings; Publication of books on life and teachings of Bhagwan Mahavir; Releasing of a postal stamp on November 13, 1974; showing documentary films on Jain art, architecture, paintings and places of pilgrimage;

Exhibitions of Jain art, literature, printings, culture and manuscript; Declaring November 13, 1974, a Dry Day and closure of slaughter houses and sale of meat in public eating houses, etc.

3. While all the petitioners ostensibly take the stand that India is a secular State and that the impugned programme is contrary to the secular nature of the State, there is a basic difference in the approach of the Hindu petitioner and the Jain petitioners. Understandably, the Hindu petitioner complains that the State is virtually promoting and maintaining Jain religion in particular and in preference to other religions by the implementation of the impugned programme and, therefore, the expenditure on it from the public funds is contrary to the prohibition contained in Article 27* of the Constitution. He further says that his own fundamental right to profess and practice Hinduism guaranteed by Article 25† is violated by it. There is some plausibility about non-Jains feeling discriminated against by this State patronage of the celebration of an event which the non-Jains are likely to regard as giving a greater importance to the Jains than to the others.

4. In this background one would not have expected that some members of the Jain community also would feel aggrieved by the impugned programme. For, after all it boosts up the memory of their prophet Mahavir. But the Jain petitioners appear to be the more orthodox members of the Jain community. They say that Mahavir was only the last of the Tirthankars and his role was purely religious. He was not a social reformer. The Jain

*[Art. 27:— Freedom as to payment of taxes for promotion of any particular religion. — No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.]

†[Art. 25:— Freedom of conscience and free profession, practice and propagation of religion. — (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

scriptures lay down the religious practice or the manner (Aradhana) as to how the Jains should observe the Nirvan Anniversary. The impugned programme violates Jain religious practice and the right of the Jains to manage their own affairs in matters of religion guaranteed by Article 26 (b) of the Constitution* because it is different from the prescribed religious practice and because non-Jains are associated with it. The Jains regard Mahavir as having obtained salvation. The celebration of a death anniversary would be proper only in respect of persons who have not obtained salvation. It is derogatory to the memory of Mahavir and an insult to it to regard him only as a great man (Maha Manav) rather than a prophet who has obtained the final salvation (Paramatma). The way adopted by the Government to celebrate the Nirvan is not the true Dharma. The propagation of the knowledge of the Jain scriptures can be done only by the Jain saints and not by the Government and the Committee. The association of the name of Mahavir with the national park or the Bal Kendras and the publication of the Jain scriptures by the Government are not contemplated by Jain religion and they hurt the religious sentiments of the Jains. Imparting the knowledge of Jain scriptures to those who are not fit to receive it is also prohibited by the Jain religion. The Government has decided to erect a monument to Mahavir taking Vaishali as his birth place. But the Sthanakwasi Jains believe Ksatriya Kunda to be the birth place of Bhagwan Mahavir.

5. While both the Hindu and the Jain petitioners agree in alleging the impugned programme as being religious in character and, therefore, contrary to the secular role of the State envisaged by the Constitution and by the established policy of the State, one can discern in the allegations of the Jain petitioners a hint that they are also opposed to the secularisation of the significance of Nirvan by the Government while the Jains believe it to be essentially a religious event. Celebration of the 2500th Anniversary of Bhagwan Mahavir's Nirvan in the manner described above by the Government is unconstitutional and illegal, according to the petitioners, for the following reasons:—

(1) India is a secular State partly because of the provisions of the Constitution and partly because of the consistent policy

*[Art. 26:— Freedom to manage religious affairs. — Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(b) to manage its own affairs in matters of religion;

of the Government. The State is not to associate with religion and is not to interfere with it. The celebration of the 2500th Anniversary of Mahavir Nirvan is contrary to the secular character and policy of the State.

(2) The State cannot spend money from the public funds for the promotion or maintenance of any particular religious denomination in view of Article 27 of the Constitution.

(3) The celebration interferes with the right of the petitioners to practise their religion guaranteed by Article 25 of the Constitution and the right of the Jain religious denominations to manage their own affairs in matters of religion guaranteed by Article 26 (b) of the Constitution.

6. The Government of India in the Ministry of Education and Shri Anand Raj Surana on behalf of the National Advisory Committee have resisted the writ petitions and pointed out that:—

(1) No fundamental or legal rights of the petitioners are infringed and they have no locus standi to file these writ petitions. No religious activity or ritual is involved in the celebration of the 2500th Anniversary of Bhagwan Mahavir Nirvan. One of the important activities undertaken by the Government since Independence is to commemorate distinguished personalities who have contributed towards our cultural heritage development of thought and reform of social systems with the following three aims, namely, (i) to bring to light the life and activities of these personalities and to inform world opinion about the ideas they stood for and their relevance through the ages; (ii) to create and arouse in the younger generation of our own country an awareness of our heritage and to reinterpret the cultural and spiritual values India stands for; and (iii) to promote international understanding through the inclusion of commemoration of celebrations of the noted personalities among similar celebrations of other leaders of thought in the world community through the UNESCO etc. Accordingly, the Government celebrated the 2500th Anniversary of Lord Buddha's Parinirvan in 1956, the birth centenary of Rabindranath Tagore in 1961-62, the death centenary of Mirza Ghalib in 1969, the birth centenary of Mahatma Gandhi in 1969, the 500th birth anniversary of Guru Nanak in 1969, the first death anniversary of Doctor Zakir Hussain in 1970, the birth centenary of Deenabandhu C. F. Andrews in 1971, the birth centenary of Sri Aurobindo in 1972, the birth bicentenary of Raja Rammohun Roy in 1972, etc., prior to the impugned celebration. Appropriate amounts of money were spent on these various celebrations. The object of the impugned celebration is, as observed by the Prime

minister, that the message of a great person like Bhagwan Mahavir is as relevant today as it was in his time. The term "Ahimsa" has a much deeper, and far-reaching significance and in essence means that the weaknesses of others should not be exploited in any form. It would be in the true spirit of Bhagwan Mahavir's teachings and philosophy if the celebration programme would contribute towards the raising of the life of the common man particularly of the less privileged sections of the society. Such programme would have a much higher socio-economic impact than expensive constructions and memorials. Bhagwan Mahavir's contribution to Indian culture and to Indian philosophical thought cannot be disputed. To honour eminent personalities of Indian history would not make the celebration religious even though the personalities may have belonged to different religious denominations and do not contravene the religious neutrality of the State expressed in our Constitution.

(2) Article 27 of the Constitution is not contravened by the impugned celebration which does not amount to promotion or maintenance of any religion. Further, the Government is honouring consistently the religious and cultural leaders of India irrespective of the community or religion to which they may have belonged. It does not, therefore, favour any particular religion.

(3) Articles 25 and 26 are also not contravened. The impugned celebration does not interfere with the religious practice of the petitioners. The encouragement of study and research in the Jain history, religion and culture as a part of the Indian culture is not an interference with the management of religious affairs of Jains by Jain religious denominations.

7. While the petitioners on the one hand, and the Government and the National Committee on the other hand, are agreed that the State in India is secular, they obviously do not give the same connotation to the word "secular" in this context. According to the petitioners, secularism means that the State must not associate itself with religion at all and must have nothing to do with it. They have in mind the analogy of the First Amendment of the U. S. Constitution which in Jefferson's words created "a wall of separation" between the church and the State. In the latest decision of the U. S. Supreme Court on the First Amendment, however, it has been observed that:—

"Judicial caveats against entanglement must recognize that the line of separation, far being a "wall", is a blurred, indistinct, and variable barrier depending on all circumstances of a particular relationship." *Lemon v. Kurtzman*, (1971) 403 US 602 at p. 614.

Nevertheless, the American or the Western conception of secularism seems to be that the State should have nothing to do with religion at all. That is to say, there should be complete non-association and neutrality by the State with regard to religion. The reason why secularism got this meaning in Europe and America is historical. The authority of Catholic church transcended political boundaries. Catholics persecuted the religious dissenters. With the success of the Reformation, therefore, there was a reaction against the unity of church with the State. The separation of the State and the church is a result of the reaction. The evolution of the concept of secularism in modern India has a very different background. Inspired by the spirit of toleration and liberalism which characterised the Hindu thought from ancient times, the Indian National Congress developed a non-communal approach in politics leaving religion as being a matter of the conscience of the individual. The secularism in India developed as a part of nationalism and Freedom Movement which assured protection to the minorities and neutrality of the State in regard to all religions. This policy was embodied in the resolution of the Congress passed in 1931 at Karachi. As observed by Setalvad, "Secularism", pages 17 and 18 this resolution furnishes a key to the understanding of the attitude adopted by the framers of the Indian Constitution in dealing with the guarantee of religious neutrality. The Debates in the Constituent Assembly show that

"what was intended by the Constitution was not the secularisation of the State in the sense of its complete dissociation from religion, but rather an attitude of religious neutrality, with equal treatment to all religions and religious minorities." *Secularism* p. 18. It is perhaps because the word "secular" was associated with the Western concept that it was not used to describe the character of Indian Constitution in the same way that the word "socialism" was not used in the Constitution because of the diverse meanings which can be attached to it. In 1961 Dr. Radhakrishnan in his capacity as the Vice-President of India said:—

"I want to state authoritatively that secularism does not mean irreligion. It means we respect all faiths and religions. Our State does not identify itself with any particular religion." Cited at page 127 in "Secularism in India" edited by V. K. Sinha (1968).

8. The thrust of the attack by the petitioners is that the impugned programme is either itself a religious activity or if it is a cultural activity, then it is a mis-representation of Jain religion. The Government parries the thrust by stating

that the impugned programme is not religious at all and that it is intended only to represent and promote Indian culture without mis-representing Jain religion. What is culture? Taking note of 164 definitions collected in A. L. Kroeber and Clyde Kluckhohn, "Culture: a Critical Review of Concepts and Definitions." Professor D. E. Smith concludes "India as a Secular State", page 372:—

"Culture is a collective name for the material, social, religious, and artistic achievements of human groups, including traditions, customs, and behaviour patterns, all of which are unified by common beliefs and values."

Religion is an essential part of culture. Professor Werner Stark "Types of Religious Culture" being Vol. V of "The Sociology of Religion", pages 1 and 2 has distinguished between two kinds of society, one based on community and the other on association. The former is a "we society", the latter being "I and you society". A community contrasted with an association, is a closely knit unity which could be based on religion alone. The replacement of community by association resulted in the society being more loosely knit. It ceased to be a unity based on religion but became a multiplicity of individuals more or less co-ordinated for the pursuit of common ends.

9. In India, prior to the commencement of the Constitution communities tended to be based on religion alone such as the Hindus, the Muslims, the Christians, etc. This tendency was encouraged by separate electorates. With Independence, the separate electorates went out. The objective of the Constitution is to evolve, in the words of the Preamble, "fraternity assuring the dignity of the individual and the unity of the nation". The remark that the Constitution is not only a political but is also a social document is nowhere more true than here. It does not establish only the State as the political organ but also intends to promote the growth of the nation as a politico-cultural entity. To achieve this object, the Constitution has attempted to play up those elements or religion which contribute to a composite culture and to play down other elements which incline towards separatism. The adoption of the wheel from the Ashoka Pillar of Saranath on the Indian National Flag is an assertion of the spiritual emphasis of Indian secularism. While Article 28 (1) prohibits religious instruction in an educational institution wholly maintained out of State funds obviously because peoples of different religions would attend such institutions, Article 28 (2) allows religious instruction to be given in State aided institutions established under any endowments or trusts which requires reli-

gious instruction to be given though Article 28 (3) takes away the compulsory element from such religious instruction. Banaras Hindu University and Aligarh Muslim University are maintained by the Central Government out of public funds. Public funds are spent on the maintenance of certain temples in South India under Article 290-A. Hindi with Devanagari script has been made the official language of the Union by Article 343 of the Constitution. Article 282 enables the Central and State Governments to make grants for any public purpose which would include grants for religious purposes. The only restriction is that the Government must not discriminate between religions contrary to Article 14 and must not promote or maintain a particular religion as against others contrary to Article 27.

10. India has a glorious past and is proud of it. In view of the widespread illiteracy in the country, the State had to take upon itself the provision for free and compulsory education for children under Article 45 of the Constitution. The study of history forms part of such education as also of more advanced education in the Universities. Mahavir is one of the great figures of Indian history. It may be that, as contended by the Jain petitioners, his place in history is significant more as a religious leader than as a social reformer. But the religion was propounded for people to live in society. It taught them certain doctrines and expected them to conduct themselves according to those doctrines. It had, therefore, a positive influence on the conduct of the people in society. It had an impact on society. The main social change sought to be brought about by the Constitution in India is to coalesce the different communities based on religion into a society based on association of people coming together to achieve common ends. This new society based on association has to be nurtured on a composite culture. It has to be made aware of the elements of that culture which nourish the feeling of oneness and national unity. It must know the good elements of the history and tradition of the country. The roles played by the founders and propounders of religions in India like Buddha, Mahavir, Guru Nanak, Swamy Vivekananda, etc., have greatly contributed to the evolution of the Indian culture. This culture exhibits unity in diversity. The attempt of the State is to educate the people in understanding this unity in diversity. Each of these diverse elements from different cultures makes a valuable contribution to the common culture. The doctrine of Ahimsa emphasised by Mahavir has a great relevance to the present times both in the domestic and the International fields. It can be used to support non-ex-

plotation of the weak by the strong, avoidance of violence, adoption of peaceful negotiation and persuasion in solving both the National as well as the International problems. Everyone ought to feel proud that the propounder of such an important principle was born and lived in this country more than 2500 years ago. Even if in the ancient Indian history, the culture of the community tended to be dominantly religious, the consistent trend of history all over the world is the secularisation of cultures particularly in the modern times. As shown by Meland "The Secularization of Modern Cultures" many forces are working towards the secularization of cultures weaning them away from the hold of religion. The transition from tradition to modernity is a universal phenomenon. Religion as an element of culture has not escaped the process of secularization.

11. It is in this background that we have to examine the impugned programme with a view to determine whether it infringes on any of the legal or the constitutional rights of the petitioners. The development of a national park named after Mahavir is objected to by the Jain petitioners on the ground that such a park could be used as a place of recreation and some animals may also be killed there and non-vegetarian food may be eaten there and this would make its association with the name of Mahavir irreligious. This objection assumes that Mahavir and his name is a monopoly of the Jains. It forgets that Mahavir was a son of India and is a part of the history of India as such and not merely of the history of Jains or Jainism. If the whole country admires him, none of the Jain petitioners can have a right that the Government should not admire him. As a token of the respect in which he is held and the salutary influence which his life and teachings had and would continue to have on the people of this country, the State wishes to commemorate him by naming a national park after him. Of course, it cannot be ensured that nobody would eat non-vegetarian food in the park or nobody would go there for recreation. But the petitioners have no right to prohibit anyone from eating non-vegetarian food in a public place. Nor do they have any right that a public place should not be named after Mahavir. Going to a national park to see its beauty is the most innocent type of recreation and enjoyment that one can imagine. Jainism does not forbid it. By no stretch of imagination can it be argued that naming of a national park after Mahavir would violate any fundamental right of the petitioners guaranteed by Articles 25 and 26. The same remarks apply to the naming of Bal Kendras after Mahavir or rural library centres after him. The monument at the

birth place of Mahavir will have a column with sculptural relief work on selected episodes from Lord Mahavir's life and inscriptions of passages from selected sayings of Lord Mahavir. The life and teachings of Mahavir would also be taught as a part of Jainological studies in research and educational institutions. Jain scriptures and literature may also be published. In *D. A. V. College v. State of Punjab*, (1971) 2 SCC 269 = (AIR 1971 SC 1731), the Supreme Court held that the provision made by the impugned statute for the study and research on the life and teachings of Guru Nanak and promotion of study and research of Punjabi language, literature and culture did not affect Article 29 (1), of the Constitution as such a provision does not amount to imparting of religious instruction. It would follow that the publication of books containing the life and teachings of Mahavir and the display of his sayings on monuments, etc., does not amount to religious instruction. The scheme of Articles 25 and 26 would show that it is the religion and religious practices proper which are guaranteed by these fundamental rights. The secular aspects of religion are subject to regulation by the State. There is no religious right in the members of the Jain community to prevent publicity being given to the life and teachings of Mahavir by the State. On the other hand, they should be thankful for it.

12. How does this discussion bear upon the problem of India being a secular State? Professor Smith gives the following answer "India as a Secular State", pages 379, 381, 383 and 384.

"The state is charged with responsibility for the promotion of Indian culture, but as a secular state must not promote Hinduism. The state, then, must actively encourage the valuable cultural contributions of all religious traditions. In a sense the state becomes a catalytic agent in the process of cultural synthesis which has been going on for centuries. The position taken by Professor Kabir (the then Minister for Cultural Affairs) is that as long as the cultural contributions of all the religious traditions are recognized and encouraged, there is no conflict with the principle of the secular state. Thus, grants have been made by the ministry for the translation of various Hindu, Buddhist, and Zoroastrian scriptures and of Maulana Azad's Urdu commentary on the Koran. This position, of course, is quite in keeping with the traditional role of the Indian state as the patron of all creeds and cultures. Official policies must deal with both ancient and contemporary Indian culture. In the case of ancient culture the aim is

to preserve the cultural heritage of the past and to increase people's understanding and appreciation of it."

In 1956 the 2500th Anniversary of Bhagwan Buddha's Parinirvan was celebrated by the Government. Public funds were spent on the celebrations which included public meetings, exhibitions of Buddhist art, the visits of foreign Buddhist scholars, the publication of forty volumes of the Buddhist scriptures, the issue of special postal stamps and the erection of a monument in New Delhi to commemorate the event. This was very similar to the programme which is impugned in these writ petitions. The propriety of the celebrations was questioned by a writer and by a Hindu religious leader. Professor Smith, however, justified the celebrations in the following words "India as a Secular State" p. 391:—

"While for the Buddhist countries the significance of the event was primarily religious, for India it could be primarily cultural. Buddhism was one of the important vehicles by which Indian culture, languages, art, architecture, sculpture, customs was spread to parts of East and especially Southeast Asia, ... The Government could afford to display a lively interest in a religion which was professed by such a tiny minority within India"

13. While religion is an essential element in the Indian culture, cultural activity is distinguished from religious activity by its dominating purpose and objective. While the Jains may have the exclusive right to profess and practise Jainism and to perform the ceremonies prescribed for the observance of the Nirvan of Bhagwan Mahavir, the State and others cannot be shut out from expressing their respect and admiration for the contribution of Bhagwan Mahavir to the Indian culture. For instance, the marriage ceremony as such may be a matter of religion to be practised by the parties to the marriage and the priest. But the festivities connected with it are something in which the others can join. It cannot be said, therefore, that they are barred by religious practice. Similarly, on the death of a Hindu, the performance of his Shradha may be a matter of religion which is a concern of his son and the priest. But the commemoration of the death by paying respects to the memory of the departed is a matter for others who are neither a son of the deceased nor the priest concerned with the Shradha. It would be strange indeed if the marrying couple and the priest were to complain that the joy about the marriage is expressed by others or if the son of a deceased Hindu were to complain that the memory of the departed is being commemorated by others. The distinction between religion and culture is quite

clear. According to this test, the programme which is impugned by the petitioners clearly falls within the domain of culture and is not either a matter of religion or religious activity.

14. Let us now consider if any of these specific articles of the Constitution referred to by the petitioners has been violated by the impugned programme. Article 25 guarantees freedom to profess and practise religion. The Hindu petitioner has not cared to explain how the impugned programme affects his right to profess and practise his own religion. The Jain petitioners say that the manner prescribed by their scriptures for the celebration of the Nirvan is very different from the impugned programme. The greater the difference between the two the more it is evident that the impugned programme is entirely secular and has nothing to do with Jain religion. A secular way of remembering Bhagwan Mahavir is devised by the Government to suit all the people irrespective of the religion to which they may belong. It is the essence of a common cultural activity that everyone should be able to participate in it. It is not meant to be an imitation of a religious practice. It does not, therefore, misrepresent the Jain religion or the religious practice. Therefore, the question of hurting the feelings of the Jains does not arise.

15. Article 26 (b) gives a religious denomination or a section of it a right to manage its own affairs in matters of religion. None of the Jain petitioners is suing in a representative capacity on behalf of any Jain denomination. Assuming for the sake of argument that each such petitioner in his individual capacity can avail himself of the fundamental right under Article 26 (b) or rather complain if such a fundamental right is infringed, none of them has shown how the celebration of the Nirvan of Bhagwan Mahavir in a completely secular way by spending money on works of public utility can be construed to mean interference by the State in the management of matters of religion by the Jain community. As no matter of religion was involved in it Article 26 (b) is not attracted at all.

16. Before any of the petitioners can complain of the infringement of the fundamental right guaranteed by Article 27, he has to show that public funds were spent on the promotion or maintenance of the Jain religion in particular in preference to other religions. The last words of the Article "for the promotion or maintenance of any particular religion or religious denomination" are significant. The impugned programme cannot be said to promote or maintain Jain religion. The expression "religious instruction" was narrowly construed by the Supreme

Court in the D. A. V. College's case AIR 1971 SC 1731 referred to above, to mean "that which is imparted for inculcating the tenets, the rituals, the observances, ceremonies and modes of worship of a particular Sect or denomination." The trend of the Supreme Court decisions is to confine religion to the essential doctrine and the necessary ceremonies associated with it and not to extend it to secular or cultural activities. The impugned programme cannot, therefore, be said to promote or maintain the Jain religion. If the provision of facilities for the study of and research in Sikh religion did not amount to religious instruction, then the facilities for disseminating knowledge of Jainism and providing for the study of it will not amount to promotion or maintenance of Jainism. Further, the cultural activity sponsored by the Government of India is a part of a long-range continuous policy not restricted to Jainism. As pointed out by Justice Gajendragadkar, "Secularism and the Constitution of India" page 58, a perusal of Article 27 makes it at once clear that unlike the first amendment to the Constitution of the United States, what this article prohibits is the payment of taxes for promotion of any particular religion. Under the first amendment to the Constitution of the United States, the Congress cannot make appropriations in aid of religious bodies at all but under Article 37 of our Constitution what is prohibited is payment of taxes for any particular religion and not for the promotion of all religions generally. This article thus brings out the fact that the secularism contemplated by the Indian Constitution is not anti-god or anti-religion. In the Commr., H. R. E., Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, (1954) SCR 1005 at p. 1045 = (AIR 1954 SC 282 at pp. 296-297), the Supreme Court had to consider the levy of a tax the proceeds of which were to be spent on the administration of religious trusts and institutions. Its constitutionality was challenged under Article 27. But the Court repelled the challenge in the following words:—

"But the object of the contribution under Section 76 of the Madras Act is not the fostering or preservation of the Hindu religion or any denomination within it. The purpose is to see that religious trusts and institutions, wherever they exist, are properly administered. There is no question of favouring any particular religion or religious denomination in such cases."

In Sri Jagannath Ramanuj Das v. State of Orissa, (1954) SCR 1046 at pp. 1054-55 = (AIR 1954 SC 400 at p. 403), the Supreme Court again considered the meaning of Article 27 in the following words:—

"We are further of opinion that an imposition like this cannot be said to be hit by Article 27 of the Constitution. What is forbidden by Article 27 is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The object of the contribution under Section 49 is not the fostering or preservation of the Hindu religion or of any denomination within it; the purpose is to see that religious trusts and institutions wherever they exist are properly administered. As there is no question of favouring any particular religion or religious denomination, Article 27 could not possibly apply." These decisions would show that it is only the favouring of one particular religion as against others which is prohibited by Article 27. The petitioners do not deny the statement of the Government on affidavit that the Government has been consistently honouring the memory of the great sons of India for the past some time impartially and irrespective of the religions to which they belonged. It cannot be said, therefore, that the Government is promoting or maintaining only the Jain religion at the expense of other religions. There is, therefore, no infringement of Article 27 of the Constitution in this case at all.

17. For the above reasons, the writ petitions are dismissed. No order as to costs.

Petitions dismissed.

AIR 1975 DELHI 175

DALIP K. KAPUR, J.

Chandra Kishore and others, Plaintiffs v. Nanak Chand and others, Defendants.

I. A. Nos. 1207 and 2831 of 1974 in S. No. 292 of 1969, D/- 14-2-1975.

(A) Hindu Law — Joint family property — Presumption as to.

Unless a person succeeds in showing that the property is not joint property, the prima facie impression from the material on record must be that the property is in fact joint family property.

(Para 6)

(B) Hindu Law — Partition — Daughter — Right of unmarried daughter to get marriage expenses.

An unmarried daughter is entitled to get her marriage expenses from the joint family estate and in case the marriage expenses are met by somebody else, he is entitled to get re-imbursement of those expenses from the estate. She is entitled to get these expenses in lieu of her share

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in the partition. AIR 1947 PC 122, Followed (Paras 8, 9)

(C) Hindu Adoptions and Maintenance Act (1956), Sections 20 (3), 3 (b) — Unmarried daughter — Marriage expenses of — Obligation of father.

The obligation of a Hindu father includes the obligation to maintain his unmarried daughter not only for the purpose of her day to day expenses but also in respect of the reasonable expenses of her marriage. Thus, a Hindu is obliged to meet the marriage expenses of his daughter. This applies, whether there is a joint family property or not a joint family property. (Para 9)

(D) Civil P. C. (1908), Sections 151, 94 — Inherent powers of Court — Not restricted by Section 94 — Suit for partition of Hindu joint family property — Interim order granting marriage expenses of daughter — Passing of — Permissibility — ((1) Hindu Law — Partition; (2) Hindu Adoptions and Maintenance Act (1956), Sections 20 (3), 3 (b)).

Inherent powers of Court under Section 151 are not restricted by Section 94 of the Code. In a suit for partition of Hindu joint family property, therefore, an interim order under the inherent powers of the Court granting payment of marriage expenses of daughter can be passed against the father, when there is no provision prohibiting passing of such an interim order. Where there is a Hindu Joint Family estate or where there is none, if there is a Joint Hindu Family property, she is entitled as of right to get her marriage expenses from that estate. If there is no Joint Hindu Family property she is entitled to get reasonable marriage expenses from father under Section 20 (3) read with Section 3 (b) of the Hindu Adoptions and Maintenance Act, 1956.

(Paras 10 to 12)

Cases Referred: Chronological Paras

AIR 1968 Cal 305 7

AIR 1968 Cal 405 = 73 Cal WN 78 7

AIR 1968 Cal 567 7

AIR 1966 SC 1899 = (1966) 3 SCR 856 11

AIR 1964 SC 993 = 1964 SCD 715 11

AIR 1962 SC 527 = 1962 Supp (1) SCR 450 11

AIR 1959 Mys 152 7

AIR 1956 Mad 428 = (1956) 2 Mad LJ 193 7

AIR 1953 Mad 420 = (1952) 2 Mad LJ 846 7

AIR 1947 PC 122 = 51 Cal WN 829 7, 8

AIR 1924 Pat 69 = 2 Pat LR 159 7

B. N. Kirpal, for Plaintiff; D. R.

Dhamija (for Nos. 1 to 7) and S. K. Ti-

wari (for Nos. 2 to 4), for Defendants.

JUDGMENT:— There are four applications for hearing before this Court, two of which are concerned with the marriage expenses of defendant No. 4 and two of which are concerned with the management of the alleged Joint Hindu Family

property, which is the subject-matter of the suit. This order will dispose of the applications, which are concerned with the marriage expenses of defendant No. 4, and the other two applications will be heard on some subsequent date. I, therefore, proceed to decide I. A. Nos. 1207 and 2831 of 1974. The former application was moved by the plaintiffs and prayed for an order directing defendant No. 1 to set aside a sum of Rs. 75,000/- or such other amount as the Court may direct to meet the marriage expenses of defendant No. 4. I. A. No. 2831/74 has been moved by defendant No. 4 to meet her marriage expenses. According to this application, the property of the Joint Hindu Family is worth more than Rs 5,00,000/- and is earning a handsome income of not less than Rs. 5,000/- per month, and hence, defendant No. 1 will be in a position to meet the expenses of the proposed marriage of the applicant, defendant No. 4. This application also prays that a sum of Rs. 75,000/- or such other amount as this Court may direct may be set aside for meeting the marriage expenses of defendant No. 4. Both the applications state that the sum should be placed at the disposal of the plaintiffs and defendants 2 to 4 to meet those expenses.

2. Both these applications have been heard by me on a number of occasions both in Court as well as in camera for the purpose of bringing about some convenient arrangement by which the marriage of defendant No. 4 can be performed in a satisfactory manner. Unfortunately, it has not been possible to reach an agreement in spite of defendant No. 1 being willing to perform the marriage. I may say at the outset, that Shri Nanak Chand, defendant No. 1 is the father and plaintiffs 1 to 3 are his sons, whereas defendants 2 to 4 are his daughters. There are unfortunate circumstances in the case which have proved to be a stumbling block in the performance of the marriage as originally thought possible by me and directed on 13th January, 1975. I proceed to deal with the circumstances.

3. Shri Nanak Chand is the adopted son of the late Shri Banarsi Dass. He has six children from his first marriage. He later married Shrimati Bimla Devi, defendant No. 5, but the factum and validity of the marriage is contested by the plaintiffs. He has two children through the second marriage. One of the issues framed in the suit, reads "Is Shrimati Bimla Devi the wife of defendant No. 1 and are the two sons from her, his sons". The fact of the matter is, that according to the plaintiffs, the 5th defendant is not the legally wedded wife of their father, Shri Nanak Chand. On the other hand Shri Nanak Chand is willing to perform the marriage, but he insists on the presence of Shrimati Bimla Devi at the time

Both the trial Court and first appellate Court are agreed that the husband went on writing letters with a view to persuading wife to come and stay with him. It appears that wife became more and more obstinate either on her own account or under ill-advised pressure of the parents not to return to the husband. There is not the slightest allegation of any physical cruelty. Even when the wife returned to India in 1964, with her parents, she did not visit her husband; and every attempt of the husband to meet her was thwarted. It is such a wife who is now complaining about mental cruelty on reading some letters written by the husband. Now, one must realise the hard fact of life that when a husband writes letters to his wife or vice versa they are not supposed to be accurate and precise keeping in view distant possibility of the letters being read by unsympathetic hard-boiled lawyers and Judges devoid of sentiments, as if these letters were going to provide documentary evidence in an ultimate rupture between the husband and wife. The letters have to be read in the background in which they are written between two spouses in utmost marital confidence. Secrecy in love letters lies in a fact that it is read by addressee alone and none else. Therefore, while writing such letters there is no inhibition or taboo. They are written in a certain vein with certain mental approach and pen addressing itself more to the heart and less to the head. These letters cannot be construed as if they are precedents or judgments or statute. They have to be read by putting one's feet in the shoes either of the husband or a wife and then try to make sense out of it. The learned trial Judge was completely in error in reading into these letters something which was not in it at all. Referring to letter Exh. 72, the learned trial Judge observed that when the husband inquired from the wife whether she had conceived, he wanted to stigmatize her character impliedly suggesting that she was a woman who had strayed from the path of virtue. This is just an approach with coloured glasses. The husband and wife were together and letters were written only a few months after they parted company. If the husband were to inquire about the natural outcome of the man and woman, being under the same roof, there is no attempt at stigmatizing the character but attempt at ascertaining fruitful outcome of lawful wedlock. The learned trial Judge unfortunately read into the letters much more than what they wanted to convey. It is true that the husband appears to be tactless. But for the matter of it, should the husband be tactful with his wife also? There are places where one can be confidently tact-

less and one such place ought to be one's own wife or one's own husband. Let us not forget that the husband is a professor who must have read a good deal of literature. In any place outside the classroom where he would find chance to give vent to his strain of having read some fictional literature, the only place he must have found would be the letters to his wife. Such letter cannot be read in a manner done by the learned trial Judge by picking up sentences torn out of their context and by putting meaning on it which one can never think of putting. The learned trial Judge approached the matter, as if he was construing a sale-deed or mortgage deed or a contract. The aforementioned documents may come into existence ordinarily with the assistance of lawyers or expertise of drawing up documents, or with the assistance of legal expertise. Letters are not exchanged between husband and wife after consulting the experts on law. Therefore, with the greatest respect, the learned trial Judge completely misdirected himself while construing these letters and having once come to the correct conclusion that the letters written by the husband are not only persuasive but disclosed an ardent desire of the husband to induce the wife to go to him, he went away absolutely on the wrong track when he says that these tactless letters inflicted mental cruelty. The finding of the learned trial Judge is thoroughly unsustainable. In fact no attempt was made to read these letters over again to me. However, those letters which have been referred to by the learned trial Judge were read, more especially sentences relied upon by the wife in support of her case, and I am fully satisfied that these are the letters written by the husband frustrated in his overtures to his wife and agonised because of his failure to induce her to return to him during the time and period when to the two young men marital love means everything and nothing is higher than it. Letters disclose the yearning of a husband in ardent love superimposed by garrulous approach of a man who has read literature and is working as a professor. These letters have to be read in that way and when read in that vein they would only mean that there was no attempt at inflicting cruelty on wife. It is the perverse approach of the wife which impelled her to read these letters from a different angle. In fact the tragedy is that we have no evidence as to how the wife read these letters because she has not stepped into the witness box. It is Mr. Vora learned Advocate for the wife who read the letters on behalf of the wife and put his own construction thereon. I fail to see how Mr. Vora could ever imbibe the spirit of the wife for whom the let-

ters were meant. Therefore, these letters are wholly harmless documents one would ever come across and should not be the foundation for propounding an allegation that by some of the stray sentences picked up here or there torn out of the context read by a lawyer in the cool atmosphere of Law Court conveying any marginal mental cruelty being inflicted on wife. First contention of Mr. Shah must, therefore, be rejected as utterly unsustainable.

7. Next, contention of Mr. Shah was that a petitioning spouse who files a petition for obtaining a decree for restitution of conjugal rights must not only prove (1) that the defending spouse has withdrawn from his or her society but must go further and prove (2) that he or she withdrew from the society without reasonable excuse. Mr. Shah urged that in the present case, the husband must prove that his wife withdrew from his society and that she has done so without reasonable excuse. In other words, Mr. Shah contended that the burden of proving (i) withdrawal from society and (ii) want of reasonable excuse both lie on the aggrieved petitioning spouse. In this connection, Mr. Shah relied upon two judgments—one of B. G. Thakore J. (as he then was) in *Kantagauri, Mohanlal v. Soni Hirral Mohanlal*, Second Appeal No. 760 of 1964 decided on 25th June 1969 (Guj.), in which it was observed that while dealing with a petition under Section 9 (1) of the Hindu Marriage Act, it is the duty of the Court first to decide whether the defending spouse has withdrawn from the society of the aggrieved spouse without any reasonable excuse. The burden of proof of this issue must lie completely on the aggrieved spouse and if aggrieved spouse failed to prove this issue, then no other question can arise for Court's consideration. This judgment was read to convey that initial burden on the aggrieved spouse filing petition under Section 9 (1) is not only to prove withdrawal from society by defending spouse but also that the defending spouse has no reasonable excuse for doing so. Reference was also made to *Madhukanta w/o Thakorlal Chunilal v. Thakorlal Chunilal Daru*, Second Appeal No. 54 of 1966 decided on 14th November 1969 (Guj.) decided by Y. D. Desai J. (as he then was). It was held in this judgment that the burden of proof with respect to establishing facts including want of reasonable excuse is on the petitioner while the burden of proof with respect to defence available under Section 9 (2) of the Act, and which have been raised is on the defending spouse. With greatest respect, it would have become necessary to refer this matter to a larger Bench

because bare perusal of Section 9 would show that the aggrieved spouse who brings petition has only to prove the allegation made in the petition and it is the defending spouse who must show reasonable excuse for withdrawal from the society. Section 9 (1) reads as under:

"9. (1) When either the husband or the wife, has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly."

The aggrieved spouse must file a petition. Therein he or she must complain that the defending spouse has withdrawn from her or his society. After the aggrieved spouse proves that the defending spouse has withdrawn from his or her society, it would be open to the defending spouse to go further and establish that he or she had done so for a reasonable excuse. How could an aggrieved spouse prove that not only the defending spouse withdrew from the society but also that the defending spouse had no reasonable excuse for doing that? It is the defending spouse who must have reasonable excuse for withdrawal from the society. Assumption underlying the Hindu marriage is that husband and wife shall stay together under the same roof, meaning thereby that they would cohabit and both sides would fulfil their mutual marital obligations and one of the marital obligations is procreation, because the foundation of the spiritual Hindu Law is of propriety. Procreation of a child and that too male child who will offer Pinda is the sine qua non of spiritual Hindu Law. If procreation is one of the essential and probably most important marital obligation, it cannot be achieved unless husband and wife cohabit, and this cohabitation postulates being in company of each other. Therefore, any spouse who withdraws from the society of the other spouse, must justify its act of withdrawal by showing that he or she had reasonable excuse for withdrawal from the society of the other spouse. Aggrieved spouse must, therefore, come to the Court with a petition and allege in the petition that the defending spouse has withdrawn from his or her society. If the aggrieved spouse proves withdrawal from the society by the defending spouse, the defending spouse must go ahead and prove that he or she had reasonable excuse for such withdrawal from the society of the aggrieved spouse. If she or he fails to prove

any reasonable excuse for such withdrawal, decree for restitution of conjugal rights must follow because that is the normal state of husband and wife contemplated by Hindu marriage. This construction of Section 9 (1) is borne out by the expression "on being satisfied of the truth of the statements made in such petition", Court may decree restitution of conjugal rights. Now, in the petition the aggrieved spouse would allege withdrawal from the society. The defending spouse shall show reasonable excuse for her conduct for withdrawal from the society. This is crystal clear from the language employed in S. 9 (1). Now, if the burden of proving even reasonable excuse for which defending spouse has withdrawn from the society of the aggrieved spouse is also on the aggrieved spouse, how is he or she to discharge that burden? The aggrieved spouse would never know what excuse would be put forth by the defending spouse. Aggrieved spouse may assume some reason, allege it in the petition and proceed to prove it, that it is not reasonable and defending spouse at that time may come out and say that he or she has other or entirely different reason or excuse and the aggrieved spouse must go further and prove that the alleged excuse is not reasonable. This is just inconceivable and is not warranted by the language employed in Section 9 (1). Therefore, with greatest respect, it would have been necessary to refer this matter to a larger Bench, but in view of certain facts disclosed in this case, it is not necessary to do so.

8. Following the ratio of the aforementioned two judgments, let me see whether the appellant-wife has put forth any excuse much less reasonable excuse for her withdrawal from the society, and whether that has been established in this case. Her case as put forth in the written statement is that as the husband was guilty of inflicting mental cruelty on her as exhibited through the letters written by the respondent to her, she has withdrawn from the society of the husband. As the mental cruelty is not proved, no reasonable excuse is shown for withdrawal by wife from the society of the husband. There is no excuse much less reasonable excuse. The burden of proof when both the parties have led evidence pales into insignificance. Therefore, on the evidence, it is satisfactorily established that not only the wife has withdrawn from the society of the husband but she has done so without reasonable excuse.

9. Last contention is that the learned trial Judge was in error in rejecting the application for issuing com-

mission to examine the wife. The wife is staying with her parents at Kuwait, a Shaikhdom in Persian Gulf. It is true that she was far away from Rajkot where the husband instituted the petition. However, going through the judgment of the learned District Judge, I do not find anything which would indicate that this contention about the refusal of the request for issuing commission was canvassed before the learned District Judge. It would, therefore, not be proper now to reopen this question in a Second Appeal. It may as well be mentioned that the oral evidence of wife would hardly in any way be helpful to her because she alleged mental cruelty and relied upon the letters written by the husband for mental cruelty. These letters are on record and they have been admitted in evidence. The oral word would not improve the case, and therefore, also I am not inclined to reconsider that order.

10. These were all the contentions urged in this appeal and as there is no merit in any of them the appeal fails and is dismissed, but looking to the fact that the wife fails, she should not be made answerable for the costs of the husband. Therefore, the proper order of costs would be that parties to bear their respective costs throughout.

Appeal dismissed.

AIR 1975 GUJARAT 163

J. M. SHETH, J.

Vanlila Vadilal Shah, Petitioner v. Mahendrakumar J. Shah and another, Opponents.

Civil Revn. Appln. No. 405 of 1971, D/- 18-2-1974.*

(A) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Ss. 12, 5 (7) and 7 — Gujarat Education Cess Act (35 of 1962), Ss. 19 (3), 21 — Education cess is part of "rent" within Bombay Act — It is not increase in rent within S. 7 but "permitted" increase within S. 5 (7).

The education cess which ultimately becomes payable by the tenant by virtue of Sec. 21 of the Gujarat Act is a part of the "rent" within the meaning of that term as used in the Bombay Act and by reason of Sec. 19 (3) of the Gujarat Act is not increase in rent within Sec. 7 of the Bombay Act but constitutes "permitted increase" within Sec. 5 (7) of the Bombay Act. (Paras 7, 12, 14)

*(Against order of D. J. Dave, Dist. J., Surendranagar in C. A. No. 101 of 1969.)

JR/JR/D999/74/GNB

(B) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 12 (3) (a) — Rent of premises payable by month — Education cess deemed to be part of rent under statute — No agreement to pay cess monthly — Rent of premises cannot be said to be payable by month — S. 12 (3) (a) does not apply.

Even though rent of the premises is payable by the tenant by the month, education cess which is deemed to be part of the rent payable by the tenant by virtue of Sec. 21 of Gujarat Education Cess Act is not, in the absence of an agreement, payable by the month and since the education cess which is part of the rent is not payable by the month the rent of the premises cannot be said to be payable by the month so as to attract the provisions of Sec. 12 (3) (a). (1962) 3 Guj LR 574, Rel. on; AIR 1971 SC 659, Dist. (Paras 15, 16, 17)

Cases Referred: Chronological Paras

1973 Ren CJ 276 (Guj.) 7
AIR 1971 SC 659 = 1971 SCD 276 5
(1969) 71 Bom LR 752 = 1970 Ren CR 14
AIR 1970 SC 1584 = (1971) 1 SCR 335 6
AIR 1963 SC 1742 = (1964) 2 SCR 608 6
AIR 1962 SC 151 = (1962) 3 SCR 49 6
(1962) 3 Guj LR 574 3, 16

Suresh M. Shah, for Petitioner; P. M. Raval, for Opponents.

ORDER:— This is a revision petition filed by the petitioner-landlord under Section 29 (2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (which will be hereinafter referred to as "the Act"), against the judgment and decree passed by the learned District Judge, Surendranagar in Civil Appeal No. 101 of 1969, dismissing the petitioner's appeal and confirming the judgment and decree passed by the learned trial Judge.

2. Both the Courts below have dismissed the petitioner-landlady's suit for eviction which was claimed on account of non-payment of arrears of rent and education cess for a period over six months. By suit notice, Ex. 23, demand of arrears of rent for the period between 10-5-1967 and 10-5-1968 was made. That was the rent which could be claimed as found by the two Courts below. She was not entitled to rent upto 27-5-1968 on the date of the notice as it was broken portion of the month. It was a monthly tenancy and she was entitled to get rent at the end of the month. The month ended on 10-6-1968. That amount came to Rs. 48. The petitioner-landlady had further claimed education cess of Rs. 8.40 paise. Opponent-tenant had sent money order of Rs. 48 within the period of one month from the date of the receipt of the notice.

He had not sent the aforesaid education cess amount, but he had paid it later on.

3. The learned District Judge came to the conclusion that sub-section (3) (a) of Section 12 of the Act would not be attracted as part of the rent, namely the education cess, could not be said to be payable by month, relying upon the decision of this Court in *P. Mohanlal v. Maheshwari Mills Ltd.*, (1962) 3 Guj LR 574; he came to the conclusion that the education cess was an annual cess. Therefore, although defendant No. 1 was a monthly tenant and so far as the rent of Rs. 4 per month was concerned, it was payable by month, the education cess payable by him was not payable by month. In that view of the matter, Section 12 (3) (a) of the Act was not attracted. Taking that view of the matter, he reached the conclusion that the decree for eviction cannot be passed against the opponent-tenant under Section 12 (3) (a) of the Act.

4. Mr. Suresh M. Shah, appearing for the petitioner-landlady, has urged that payment of education cess in respect of the suit premises is also a part of the rent. The two Courts below, on consideration of the evidence, have reached the conclusion that there was monthly tenancy and the rent of Rs. 4 in respect of the suit premises was payable by month. This increase in rent is permissible on account of payment of education cess by the landlady who is primarily liable and the tenant is bound to pay, such an increase in the rent is permissible and Section 7 of the Act does not come in the way of the landlady. It should therefore be taken to be rent payable by month. It could not be that part of the rent in respect of the suit premises is payable by month and part of it is not payable by month.

5. In support of his argument, Mr. Shah has invited my attention to the decision of the Supreme Court in *Gauri Shankar Chittarmal Gupta v. Smt. Gangabai Tokersey*, AIR 1971 SC 659. Short question that arose for consideration for the Supreme Court was, whether the High Court was justified in holding that the respondent-landlady was entitled to seek eviction of the appellant on the ground that the latter had failed to pay the standard rent including the permitted increases for over a period of six months. At page 661, in para. 3, it is observed:—

"It will be noted that in this notice the respondent claimed arrears of rent including the amount of increment in municipal taxes and that the total amount per month was at Rs. 52-9-6. Claim by way of arrears of rent including the increments in municipal taxes was for a

period of five months from December 1, 1954 to April 30, 1955, and compensation was further claimed for one month. The appellant again sent a reply through his counsel on July 1, 1955. In this reply he had stated that the claim contained in the notice dated June 15, 1955 was very much in excess of what was actually due by him. It was further stated that the monthly rent of the premises was only Rs. 45 and that the municipal tax recoverable was also only Rs. 2-13-0 per month. He, however, admitted that from April 1, 1954 there was an addition to the rent according to law, but he stated that he has paid rent at Rs. 48-2-9 including all taxes from April 1, 1954."

It is thus evident that in that case the tenant also had in terms stated that the monthly rent of the premises was Rs. 45 and that the municipal tax recoverable was only Rs. 2-13-0, per month. It, therefore, clearly means that there was an agreement to pay the municipal tax also per month. In that municipal tax there was increase which was claimed by the landlord. It was having regard to those facts and circumstances that the Supreme Court has observed at page 664 in para. 14:—

"Even otherwise if the appellant was in any manner of doubt on this point or required any clarification from the respondent, normally, he should have called for information on those points especially when he was sending replies through a lawyer to the notices issued by the respondent. Excepting baldly saying that the claim was excessive, he never cared to ask for any particulars. The appellant must have been well aware that the standard rent in this case is Rs. 45 per month and increase not exceeding 7½% under Section 10-C. Further, he must also be well aware that the respondent was further entitled to claim increases on account of payment of municipal taxes to a local authority under Section 10 of the Act. That the appellant was well aware of this is clear from his reply dated July 1, 1955 wherein he has stated that the municipal tax is only Rs. 2-13 annas and that he has been paying the same to the Receiver. That the increases that the respondent was entitled to get under Sections 10 and 10-C were Rs. 4-3 annas and 6 p. and Rs. 3-6 annas respectively, is not challenged. Adding these two items to the standard rent of Rs. 45 it follows that the total monthly amount claimed in the sum of Rs. 52-9 annas 6 ps. was perfectly correct."

It is further observed in para. 15:—

"..... So far as we could see there is nothing in law to prevent the landlord making the increase at the time of giving

the notice. Section 12 (3) (a) itself gives the tenant a period of one month for complying with the demand for arrears of rent for a period of six months or more and it is only if the amount is not paid within that period, the landlord is entitled to file a suit. There is nothing in the Act which requires a landlord to give first a notice under Section 10 or 10-C and then a further notice under Section 12. In this case, the landlord has given a notice on June 15, 1955 calling upon the appellant to pay the arrears due from December 1, 1954. There is no controversy that the amount was not paid till the institution of the suit. When that is so, it follows that the appellant was in arrears for a period of six months or more and that he had further neglected to make the payment until the expiration of one month after the notice, dated June 15, 1955."

This decision, therefore, cannot be pressed into service as that decision had not to consider any question whether part of the rent was not payable by month. As said earlier, even the tenant said that amount of Rs. 2-13 annas, which amount was the original municipal tax, was payable by month.

6. Mr. Shah has also invited my attention to the decision of the Supreme Court in the Bombay Municipal Corporation v. The Life Insurance Corporation of India, Bombay, AIR 1970 SC 1584. After referring to the definition of the "Standard rent" in Section 5 (10) of the Act and definition of "permitted increases" in Section 5 (7) of the Act and the definition of the word "landlord" given in Section 5 (3) and "tenant" given in Section 5 (11) of the Act, following observations at page 1585 have been made:—

"..... Section 7 provides for increase in rent on account of improvements or structural alteration of the premises which have been made with the consent of the tenant and such increase is not to be deemed an increase for the purpose of Section 7. Under Section 10 a landlord can increase the rent on account of payment of rates, cess or taxes imposed and levied by a local authority. Such an increase again is not to be deemed to be an increase for the purpose of Section 7. Similarly under Section 10-AA the landlord can increase the rent on account of payment of enhanced rates etc. permitted after certain date in particular areas. Any increase in this section cannot be deemed to be an increase for the purpose of Section 7.

The High Court was alive to the fact that the mention of increase in Sections 10, 10-A and 10-AA referred to increases in rent but it was felt that the section in express terms provided that such an in-

crease shall not be deemed to be an increase in rent under Section 7. According to the High Court it followed that what was allowed to the landlord in addition to the standard rent was not an increase in the rent but a provision was made in a specified way for the transfer of the burden of the tax to the tenants because of the rigours of the Rent Act. The other factor which weighed with the High Court was that if the increase in rates was to be treated as a part of the rent which would enable the Municipal Corporation to increase the valuation on every occasion when there was increase in rates and taxes this would land us again into a cycle of increments every year from figure to figure never intended by the framers either of the Rent Act or of the Municipal Act."

After referring to such view taken by the High Court and after referring to material S. 7 of the Act, at p. 1586, the relevant observations made in para 6 are:—

"It is quite clear that Section 7 does not prohibit the recovery of the increase to which landlord may be entitled under the provisions of the Act in addition to the standard rent. The obvious implication of the definition of 'permitted increase' in Section 5 (7) is that such an increase becomes a part of the rent. The language which has been employed in Sections 9, 10 and 10-AA seems to indicate that the legislature treated the permitted increase as a part of the rent which the landlord would be entitled to receive from the tenant. In *Corporation of Calcutta v. Smt. Padma Devi*, 1962-3 SCR 49 — (AIR 1962 SC 151) the question arose whether the Municipal Corporation had the power to fix the annual valuation on a figure higher than the standard rent. It was held that on a reading of the provisions of Section 127, (a) of the Calcutta Municipal Act, 1923, the rental value could not be fixed higher than the standard rent under the Rent Control Act. It was further held that the words 'gross annual rent at which the land or buildings might at the time of assessment reasonably be expected to let from year to year' in Section 127 (a) implied that the rent which the landlords might realise if the house was let was the basis for fixing the annual valuation of the buildings. Thus the criterion was the rent realisable by the landlord and not the valuation of the holding in the hands of the tenant. Even applying that criterion the rent realisable, in the present case, would be the standard rent together with the permitted increase on account of the levy of education cess. As observed in *Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad*, 1964-2 SCR 608 — (AIR 1963 SC 1742) there are three modes

of determining the annual or rateable value of lands or buildings. The first is the actual rent fetched by the land or buildings where it is actually let. The second is rent based on hypothetical tenancy where it is not let and the third is by valuation based on capital value from which the annual value has to be found by applying a suitable percentage, where either of the first two modes is not available. In the present case admittedly the actual rent of the building in question which is being fetched comprises the standard rent and the permitted increase. The building can well be said to be reasonably expected to be let from year to year at the figure arrived at by adding the permitted increase to the standard rent. The valuation had, therefore, to be arrived at after taking into account the amount of educational cess which was levied by the Corporation. Even if such a conclusion leads to some kind of inconvenience of variation in valuation at frequent intervals that can be no consideration for not giving full effect and meaning to the provisions of the Act of 1888 and the Rent Act under consideration."

This decision only lends support to the submission made by Mr. Shah that payment of such education cess or the liability to pay it, would be in respect of a part of the rent.

7. No doubt, Mr. Raval, appearing for the opponents-tenants, has stated that such payment of education cess and such demand could not be said to be a demand of part of the rent. In my opinion, this is not a well founded argument. Mr. Raval has invited my attention to the decision of my learned Brother D. P. Desai, J. in *Nathusingh Vardhisinh v. Raval Markandrai Chunilal*, 1973 Ren CJ 276 (Guj.). The relevant observations made therein are:—

"Section 10 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, provides for increase in rent not exceeding the increase paid by the landlord by way of such rate, cess or tax over the amount paid in the period of assessment which included the date of coming into operation of this Act or the date on which the premises were first let, whichever is later. The phrase 'over the amount paid', in the prescribed period, whichever is applicable, also emphasises the fact that there must be an existing liability of payment of rent, cess or tax during the prescribed period which liability may have been increased subsequently. The phrase "increase paid by him by way of such rate, cess or tax" also shows that the payment made by the landlord to the local authority must be of an increased payment which pre-supposes the lesser payment under the ori-

ginal liability which has been increased. The word "increased" is very suggestive of the fact that the legislature provided for passing on the burden of an increase in the existing liability of the landlord in respect of rate, cess or tax to the tenant. Where, therefore, there was liability on the landlord to pay any rate, cess or tax, as in the present case, no question of increase in the liability arises; and if there is no increase in the liability contemplated by Section 10 of the Act, the said section is not applicable."

In that case, certain areas were brought within the limits of municipal corporation with effect from 13-8-1958. There was, therefore, no existing liability to pay any municipal tax. Liability arose when those areas were brought within the limits of the Municipal Corporation, and my learned Brother D. R. Desai, J., had to consider the wording of Section 10 of the Act and on consideration of the wording of it, reached the conclusion that that section will cover the case where there was already existing liability to pay the municipal tax. If there was increase made, it would be permitted increase under Section 10. Present case will not also be covered by Section 10 of the Act, as in the instant case, the landlord is not required to pay to the local authority in respect of the premises the education cess for the purpose of such authority. It is only the collecting agency. But we have, in the Gujarat Education Cess Act, 1962 (which will be hereinafter referred to as "the Cess Act") itself, certain provisions which would undoubtedly point to the conclusion that such payment would be in respect of a part of the rent and it will not be considered to be an increase in rent so far as Section 7 of the Act is concerned.

8. Section 12 of the Cess Act is, a charging section. Section 2 (1) defines "annual letting value". Section 2 (4) defines "education cess", as under:—

"'education cess' means a surcharge or tax on lands and buildings levied under this Act."

"Surcharge" has been defined in Section 2 (xi), "tax" has been defined in Section 2 (xii) and "tenement" has been defined in Section 2 (xiv) of the Cess Act.

9. Section 14 of the Cess Act deals with "primary responsibility for tax on lands and buildings". Section 3 of the Cess Act reads:—

"For the purpose of providing for the cost of promoting education in the State of Gujarat, there shall be levied and collected in accordance with the provisions of this Act an education cess which shall consist of—

(a) a surcharge on all lands, except lands which are included within a

village site and not assessed to land revenue;

(b) a tax on lands and buildings in urban areas."

It is, therefore, evident that this tax collected by the local authority is not for the purpose of the authority.

10. Section 19 of the Cess Act, which is material for our purposes, reads:—

"19 (1) If any person from whom under the provisions of Section 12 the tax is leviable pays the tax in respect of any land or building, he shall if he be not himself in occupation thereof during the period for which he has paid the tax, be entitled to recover the amount of the tax from the person, if any, in actual occupation of such land or building for such period."

It is, therefore, evident that the landlady is entitled to recover such tax paid by her in respect of the suit premises in occupation of the opponent-tenant.

11. Sub-section (2) of Section 19 of the Cess Act reads:—

"(2) Where tax is paid in respect of any building consisting of more tenements than one, by the person primarily liable or on his behalf, he shall be entitled to recover, from the occupiers of the tenements the amounts paid pro rata to the amount of rents for which such tenements are let."

Present case is a case falling within the purview of that sub-section (2) of Section 19 of the Cess Act. Proviso to it reads:—

"Provided that, no such recoveries shall be made in respect of—

(a) any tenement in occupation of such person or any person acting on his behalf, or

(b) any tenement the tax on which by the terms of the tenancy, such person has agreed to pay its occupier."

It is not suggested that the instant case falls within the purview of that proviso.

12. Sub-section (3) of Section 19 of the Cess Act, which is the most material sub-section for our purposes, reads:—

"(3) The recovery of any amount of tax from an occupier under this section shall not be deemed to be an increase for the purposes of Section 7 of the Bombay, Rents, Hotel and Lodging House Rates Control Act, 1947 (Bom. LVII of 1947), or any law corresponding thereto."

This sub-section clearly indicates that such recovery will not be deemed to be an increase in the rent within the meaning of Section 7 of the Act. Mr. Shah is, therefore, justified in submitting that this will be a permitted increase. The Supreme Court also, in the decision cited by him, has taken the same view.

13. Section 21 of the Cess Act reads:—

"Any person entitled to recover any sum under Section 19 or 20 shall have for the recovery thereof, the same rights and remedies as he would have if such sum were rent payable to him by the person from whom he is entitled to receive the same."

It further indicates that this would amount to a part of the rent payable by the tenant to the landlord.

14. A Single Judge of the Maharashtra High Court had an occasion to decide a similar question in *Smt. Muktabai Gangadhar Kadam v. Smt. Muktabai Laxman Palwankar*, (1969) 71 Bom LR 752. In the Maharashtra Education (Cess) Act, 1962, there was also similar provision as contained in the Cess Act. Bal, J. has observed:

"Education cess payable by an occupant by virtue of Section 13 of the Maharashtra Education (Cess) Act, 1962, is part of the 'rent' within the meaning of that term as used in the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, and when claimed in addition to the contractual or standard rent constitutes a 'permitted increase' as defined in Section 5 (7) of the latter Act." At page 754, it is observed:

"..... The trial Court further held that the dispute relating to 'education cess' was not a dispute relating to a 'permitted increase' and hence, though the petitioner had complied with the requirements of Section 12 (3) (b) of the Rent Act, she was not entitled to the protection of that section. According to that Court as the rent was in arrears for over six months, the case was governed by the provisions of Section 12 (3) (a) of the Rent Act. It, however, held that the notice did not satisfy the requirements of Section 12 (2) of the Rent Act inasmuch as the amount demanded therein was in excess of the amount due, and, on that ground alone, dismissed the suit directing that the opponents should withdraw the amount deposited in Court by the petitioner and that the parties should bear their respective costs.

On appeal by the opponents, the appellate Court reversed the finding of the trial Court on the question of validity of the notice but confirmed the finding that 'education cess' was not a 'permitted increase' under the Rent Act, and the dispute relating to the same would not, therefore, take the case out of the provisions of Section 12 (3) (a)."

After referring to the expression 'permitted increase' defined in Section 5 (7) of the Act, it is observed:

"The term 'rent' is not defined in the Rent Act and it would be reasonable, therefore, to suppose that it has been

used in its ordinary dictionary meaning. According to the Oxford English Dictionary, 'Rent' means the return or payment made by a tenant to the owner or landlord, at certain specified or customary times, for the use of lands or houses". This is comprehensive enough to include all items of periodical payment which a tenant is liable to make to his landlord for the occupation of the premises, whether under the contract of tenancy or by virtue of a statutory provision. There is ample judicial authority for holding that where the term 'rent' has not been specially defined, it should be given this wider meaning."

In support of his conclusion, Bal, J., has referred to several English decisions and observed at page 756:

"The cases referred to above deal with contractual payments but there is no reason why the same principle should not apply to payments which the tenant is required to make to his landlord by virtue of statutory provisions when the liability to make those payments arises on account of the tenant's use and occupation of the premises let to him. This view receives support from the provisions of Section 10-B of the Rent Act."

After referring to that section it is observed:

"..... Section 10-B does not, however, say that the landlord shall be entitled to make an increase in the rent of the premises on account of payment by him of the riot tax but only provides that the recovery of the amount 'shall not be deemed to be an increase for the purposes of Section 7' and Section 7, as we shall presently see, prohibits only an increase 'on account of rent' above the standard rent.

The 'education cess' which is the subject of controversy in the present case is a tax levied and collected under the Maharashtra Education (Cess) Act, 1962 (Maharashtra Act No. XXVII of 1962). Section 4 (a) of the Act provides for the levy and collection of that tax on lands and buildings in Municipal Areas at the rate of two per cent. of the annual letting value (or 'rateable value') of such lands or buildings with effect from October 1, 1962. Section 8, in effect, casts the primary responsibility for the payment of the tax on any land or building on the owner thereof (other than the Government or a Local Authority) irrespective of whether he is the actual occupier thereof or not. Section 13 then provides that on payment of the amount of the tax in respect of any land or building, the owner shall be entitled to receive that amount from the person, if any, in actual occupation of such land or build-

ing during the period for which he has paid the tax. Section 14 provides for cases where the land or building assessed to the tax is let but the rateable value exceeds the rent which the landlord receives from the tenant. The net effect of the provisions of Sections 13 and 14 is to ultimately transfer the entire burden of the tax to the actual occupier or occupiers.

Section 15 which follows reads:

"Any person entitled to receive any sum under Section 13 or 14 shall have for the recovery thereof, the same rights and remedies as if such sum were rent payable to him by the person from whom he is entitled to receive the same."

In our Cess Act the corresponding section is Section 21 which is in pari materia with it. At page 757 Bal. J., has observed:

"The actual occupier of a land or building may not necessarily be the tenant of the owner thereof and the section had, therefore, to be worded in general terms; but for the recovery of the amount of the Education Cess from him, the section provides the same rights and remedies as if the amount were rent payable by him to the person entitled to receive the same irrespective of whether the occupier is or is not the tenant. Where the premises in his occupation are governed by the Rent Act, a suit for the recovery of the Education Cess from the occupier must, therefore, be brought in the Special Court established under that Act and in such a suit the plaintiff and the defendant must be regarded as the landlord and the tenant respectively. If then the premises are let, so that the occupier is a tenant liable to pay rent to his landlord, it can be safely concluded that the amount of education cess which is payable by him by virtue of the statutory provision in Section 13 of the Maharashtra Education (Cess) Act, 1962, is part of the 'rent' within the meaning of that term as used in the Rent Act and when claimed in addition to the contractual or standard rent constitutes an 'increase in rent'."

He has, thereafter considered the relevant provisions of the Act and reached the conclusion that it is a permissible increase under the provisions of the Act. In my opinion, that decision lays down the correct ratio. I am in agreement with it and I feel no hesitation in reaching the conclusion that this education cess, which ultimately becomes payable by the tenant, is a part of the rent. It is not on account of any contract, but it is on account of the statutory provisions of the Act.

15. The important question that survives for consideration is, whether such liability of payment of education cess, which is deemed to be a part of the

rent, was payable by month. In the instant case, it is not suggested that there was any such agreement to pay such educational cess levied in respect of the suit premises, by the tenant every month. If we refer even to the notice given by the landlady, which is at Ex. 23, she makes a clear distinction between the arrears of rent demanded and the education cess demanded. In para. 3, she states:

"That you are not paying rent regularly. You are in arrears of rent from Vaishakh Sudi Ekam of Samvat Year 2023 to Vaishakh Vadi Amas of Samvat Year 2024 for 13 months which comes to Rs. 52. Therefore, you being in arrears for more than six months my client is entitled to recover possession of the suit premises from you on that ground. That Rs. 4 is the standard rent."

In para. 4, she refers to this demand for the educational cess amount paid by her which she is entitled to recover under the provisions of the Cess Act from the occupier, viz. the opponent-tenant. She states:

"That education cess is applied to the suit tenement. Therefore, you are liable to pay the same from 1-8-1962 to 31-5-1968 for 70 months at the rate of 12 paise which comes to Rs. 8.40 paise. My client is entitled to recover the same from you under the law."

This is the first time that the demand is made for such educational cess in respect of the suit premises which the landlady paid sometime in year 1967. She has, no doubt, stated that the rate would be Re. 0.12 paise per month, and at that rate she has claimed arrears for 70 months and that amount came to Rs. 8.40 paise. There is no mention made that there was any agreement to pay this part of the rent every month which would be deemed to be a part of the rent, as stated by me above, in view of the statutory provisions of the Act. Admittedly, such tax is not levied monthly by local authorities. It is stated that it is levied quarterly, or half yearly, and by some authorities annually. There is no evidence also suggesting any such agreement. It cannot, therefore, be said that this part of the rent was payable by month. Simply because Rs. 4 were payable by month, it need not be and cannot be concluded that this part of the rent which was payable under the statutory provisions was payable by month. Mr. Shah has not been in a position by relying upon any decision to support that conclusion of his.

16. In (1962) 3 Guj LR 574, at p. 591 Bhagwati, J. (as he then was) has observed:

"That brings me to the last branch of the contention of Mr. M. P. Amin that

the rent of the premises was not payable by the month as required by sub-section (3) (a) of Sec. 12 and that the case did not, therefore, fall within the scope and purview of that sub-section. This contention was put by Mr. M. P. Amin in the following form. Mr. M. P. Amin contended that the rent of the premises was not only the sum of Rs. 326 p. m. as provided in clauses (1) and (3) of the Deed of Lease but it also included municipal taxes, property taxes and Government taxes in respect of the premises which were payable by the defendant to the plaintiffs under clause (9) of the deed of lease. The rent of the premises, according to Mr. M. P. Amin, consisted of two parts, one part being the sum of Rs. 326 p. m. payable by the defendant to the plaintiffs in advance on or before the 5th day of every month and the other part being the amount of municipal taxes, property taxes and Government taxes in respect of the premises payable by the defendant to the plaintiffs. Both the parts, argued Mr. M. P. Amin, constituted rent of the premises since they were payable by the defendant to the plaintiffs for the use and occupation of the premises. Mr. M. P. Amin contended that though the first part might be payable by the month, the second part was certainly not payable by the month and that it could not, therefore, be said of the rent, which consisted of both the parts, that it was payable by the month; and if it could not be said of the rent that it was payable by the month, then obviously sub-section (3) (a) of Section 12 could not apply. There is, in my opinion, great force in this contention of Mr. M. P. Amin."

In view of this decision of this Court, there is no merit in the submission made by Mr. Shah that if part of the rent is payable by month, the other part of the rent should be presumed to be payable by month.

17. The net result, in view of the aforesaid decision, is that in the instant case it cannot be said that the rent was payable by month so that the provisions of Section 12 (3) (a) of the Act were attracted. The learned District Judge was justified in reaching the conclusion that the present case will not fall within the purview of Section 12 (3) (a) of the Act, but it falls within the purview of Section 12 (3) (b) of the Act. Tenant has admittedly complied with the conditions of that sub-section and was, therefore, entitled to protection under Section 12 (3) (b) of the Act. The suit has been rightly dismissed against the opponent-tenant. The revision petition, therefore, fails.

18. Revision petition is dismissed. Looking to the circumstances of the case,

each party is ordered to bear its own costs in this revision petition. Rule is discharged.

Petition dismissed.

AIR 1975 GUJARAT 170

J. M. SHETH, J.

Nosir Marafatia & Co., Petitioner
v. Bank of Baroda Ltd., Ahmedabad, Opponent.

Civil Revision Appln. No. 446 of 1972.
D/- 10-4-1974.*

(A) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 28 — Jurisdiction — Education cess paid by landlord — Suit for recovery from tenant — Special court mentioned in S. 28 (1) (a) alone has jurisdiction. (Gujarat Education Cess Act (35 of 1962), Ss. 21 and 19).

A suit by a landlord against his tenant for recovery of education cess paid by him is maintainable in the court referred to in S. 28 (1), cl. (a) having special jurisdiction and not the ordinary Court of Small Causes. (Para 8)

Under a deeming fiction introduced by S. 21 of the Gujarat Education Cess Act, the landlord who has paid the education cess, is entitled to recover this amount from the tenant as if it were rent payable to him. Thus it will be a suit relating to the recovery of the rent and would fall within the mischief of S. 28, as such only the Court referred to in clause (a) of sub-section (1) of Section 28 will have jurisdiction to hear such a suit and not the ordinary Court of Small Causes.

(Para 8)

Cases Referred: Chronological Paras
AIR 1975 Guj 163 = Civil Revn. Appln.
No. 405 of 1971, D/- 18-2-1974 14
(1969) 71 Bom LR 752 = 1970 Ren CJ 106 13

A. N. Divecha for I. M. Nanavati, for Petitioner. Ashok C. Gandhi, for Opponent.

ORDER:— This is a revision petition filed by the original defendant-tenant against the plaintiff-opponent (landlord) against the judgment and decree passed by the learned Judge of the Small Causes Court, Ahmedabad, in Summary Suit No. 2106 of 1969, decreeing the plaintiff's suit against the defendant with costs for a sum of Rs. 361.45 paise.

2. Plaintiff-opponent filed the aforesaid suit against the petitioner-de-

*(To set aside order of R. C. Bhatt, J., Sm. C. C., Ahmedabad in Summary Suit No. 2106 of 1969.)

HR/IR/D388/74/MVJ

The most material section for our purposes is Section 21 of the Cess Act, which reads:

"Any person entitled to recover any sum under Section 19 or 20 shall have for the recovery thereof, the same rights and remedies as he would have if such sum were rent payable to him by the person from whom he is entitled to receive the same."

A mere glance at the wording of this Section 21 of the Cess Act leaves no doubt, that the legislature has introduced a deeming fiction and recovery of such amount is deemed to be a recovery of the rent amount. This section in terms states that, a person like the opponent who is a landlord and who has paid the education cess, he being liable primarily under the Cess Act and he wants to recover this amount from his tenant, it will be evident that he being a person entitled to recover this sum under Section 19 from his tenant, shall have for the recovery thereof, the same rights and remedies as he would have, if such a sum were rent payable to him by the petitioner-tenant from whom he is entitled to receive the same. It would, therefore, necessarily mean that recovery of such a sum by the landlord from the tenant would be recovery of rent payable to him by the tenant. It will, therefore, be a suit filed by the landlord against the tenant relating to the recovery of the rent. It would, therefore, fall within the mischief of Section 28 of the Rent Act. It is, therefore, evident that it is the Court referred to in clause (a) of sub-section (1) of Section 28 of the Rent Act having a special jurisdiction under Section 28 of the Rent Act, which will have jurisdiction to hear such a suit and not the ordinary Court of Small Causes.

9. Mr. Ashok Gandhi, appearing for the opponent-landlord, has contended that an occupier need not necessarily be a tenant. He may be even a licensee. It will not therefore be correct to reach the conclusion that such amount of education cess would amount to rent and it would not be correct to deduce further therefrom that even if the recovery is to be made from such licensee, it should be termed to be a suit for recovery of rent.

10. In my opinion, this argument has no bearing on the question that is posed before me. Section 28 of the Rent Act will have application only if it is a suit between a landlord and a tenant. It will not have an application if it is a suit between a licensor and a licensee. In the instant case, admitted position is that this is a suit between a landlord and a tenant. That condition is satisfied. The only question that requires consideration is, whether it is a suit relating to the recovery of rent. In view of the provisions of Section 21 of the Cess Act, such a suit would be a suit relating to the recovery of rent.

11. Mr. Gandhi has pointed out to me sub-section (3) of Section 19 of the Cess Act and urged that recovery of such amount of tax from an occupier under Section 19 of the Cess Act would not be deemed to be increase for the purpose of Section 7 of the Rent Act or any law corresponding thereto. It would, therefore, necessarily mean that recovery of such tax was not the recovery of rent amount. There is fallacy in this argument of Mr. Gandhi. Section 7 of the Rent Act reads:

"Except where the rent is liable to periodical increment by virtue of an agreement entered into before the specified date, it shall not be lawful to claim or receive on account of rent for any premises any increase above the standard rent, unless the landlord was, before the coming into operation of this Act, entitled to recover such increase under the provisions of the Bombay Rent Restriction Act, 1939 or the Bombay Rents, Hotel and Lodging House Rates Control Act, 1944, or is entitled to recover such increase under the provisions of this Act." The landlord, in view of the provisions of the Cess Act, is entitled to recover from its tenant such educational cess paid by it on account of its liability being a primary liability.

12. Section 19 (3) of the Cess Act only states the position that recovery of such amount will not be deemed to be an increase for the purposes of Section 7 of the Rent Act. It means that such recovery of rent will not be illegal within the meaning of Section 7 of the Rent Act. That sub-section (3) of Section 19 of the Cess Act, therefore, does not assist the submission made by Mr. Gandhi.

13. This conclusion reached by me, gets support from the decision of a Single Judge of the Maharashtra High Court in Smt. Muktabai Gangadhar Kadam v. Smt. Muktabai Laxman Palwankar, (1969) 71 Bom LR 752. It is observed therein:

"Education Cess payable by an occupant by virtue of Section 13 of the Maharashtra Education Cess Act, 1962, is part of the 'rent' within the meaning of that term as used in the Bombay Rents, Hotel and Lodging House Rates Control Act 1947, and when claimed in addition to the contractual or standard rent constitutes a 'permitted increase' as deemed in Section 5 (7) of the latter Act."

It is significant to note that the relevant sections of the Maharashtra Education Cess Act, 1962, are in pari materia with the relevant provisions of the Cess Act.

14. In Civil Revn. Appln. No. 405 of 1971, decided on 18th February, 1974= (reported in AIR 1975 Guj 163). I have taken a similar view, observing

"Payment of such education cess or the liability to pay it, would be in respect of a part of the rent." I have followed the aforesaid decision of the Maharashtra High Court and observed in that behalf:

"..... I am in agreement with it and I feel no hesitation in reaching the conclusion that this education cess, which ultimately becomes payable by the tenant, is a part of the rent. It is not on account of any contract, but it is on account of the statutory provisions of the Act." The trial Court has, therefore, committed an error of law in reaching the conclusion that the present suit will not fall within the mischief of Section 28 of the Rent Act and so, the ordinary Small Causes Court had jurisdiction to hear this Summary Suit. In this view of the matter, it is not necessary to go into the merits of the case.

15. The result is that the decree has got to be set aside and the order will have to be made to return the plaint to the plaintiff-opponent for its presentation to the proper Court.

16. Civil revision application is allowed and the judgment and decree passed by the trial Court are set aside and the trial Court is directed to return the plaint to the plaintiff-opponent to present it in the Court contemplated under Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Looking to the circumstances of the case, each party is ordered to bear its own costs in this revision petition. Rule is made absolute.

Petition allowed.

AIR 1975 GUJARAT 173

S. H. SHETH, J.

The New Brahma Kshatriya Co-operative Housing Society Ltd., Petitioner v. Govindlal Narbheram Thakore and others, Respondents.

Misc. Civil Appln. No. 966 of 1972, D/- 17-1-1974.*

(A) Civil P. C. (1908), O. 41, Rr. 17, 19 and O. 17, R. 1 — Adjournment of appeal—Advocate's illness—Good ground for one adjournment.

Advocate's illness entitles him to one adjournment. He cannot claim as of right more adjournments. Thus where one adjournment is granted on that ground subject to the condition that the appellant would make his own arrangements for the hearing of the appeal if his advocate

could not attend on the adjourned date of hearing and this is not done, the court would be justified in dismissing the appeal for default on the adjourned date.

(Para 13)

(B) Civil P. C. (1908), O. 41, R. 17 — Dismissal of appeal for default of appearance — Old appeal — Default of appearance would be sufficient justification for dismissal.

(Para 14)

(C) Civil P. C. (1908), O. 41, Rr. 17, 19 — Dismissal of appeal for default of appearance — Restoration application made on same day — Effect.

The application should normally be granted. But a matter is not restored for further adjournment. It is restored for final hearing. Hence appearance on the same day cannot be pleaded in support of restoration if, after restoration, a case is to be adjourned again.

(Para 15)

(D) Civil P. C. (1908), O. 41, Rr. 17, 19 and O. 17, R. 1 — Adjournment of appeal — Lawyer engaged in another court — He cannot claim more than one adjournment on that account.

Hence his absence on adjourned date for the same reason is not sufficient cause for restoration of appeal dismissed for default of appearance. AIR 1926 Cal 1231, Distinguished.

(Paras 17, 20)

Cases Referred: Chronological Paras AIR 1938 Bom 199 = 40 Bom LR 238 (FB)

AIR 1926 Cal 1231 = 44 Cal LJ 165

J. M. Thakore, Advocate-General with Arun H. Mehta, for Petitioner; I. M. Nanavati (for Nos. 1 (a), 1 (b), 1 (d) and 2 and G. M. Vidyarthi, (for Nos. 3 (a) to 3 (d) and 3 (f) to 3 (i)), for Respondents.

ORDER:— The appellant in second Appeal No. 497 of 1963 has made this application for restoring the appeal to file. It was dismissed by me for default of appearance on 19th July, 1972. While doing so, I made a speaking order because I thought that there were unusual circumstances which required a reasoned order:

2. I made the following order:

"This appeal was placed before me for final hearing and disposal on 19th June, 1972 when the Court reopened after Summer Vacation. It was placed first on Board. On that day an application was made to me for adjourning the matter in order to enable the parties to bring about a settlement. The appeal is more than nine years old. Very reluctantly, therefore, I granted the adjournment for a week. On 26th June, 1972 when this appeal was again placed on Board, no settlement was produced before me nor were the learned advocates ready to proceed with it. They made again a pressing

*(Against judgment of S. H. Sheth, J. in S. A. No. 497 of 1963, D/- 19-7-1972.)

application for granting an adjournment in order to enable the parties to settle the matter. Though I was not inclined to grant the application, I granted it on account of persistent request made by the learned advocates in that behalf. It was, therefore, adjourned to 7th July, 1972. I made it clear to the learned advocates at that time that since the appeal was more than nine years old, it would not be possible for me to grant any further adjournment for any reason whatsoever and that if settlement was brought out between the parties, it would be quite alright, but if no settlement was brought about, then they should make arrangements to proceed with the appeal. The learned advocates for the parties took the adjournment upto 7th July, 1972 subject to the aforesaid condition. On 7th July, 1972 the appeal could not reach hearing. 8th and 9th July were Saturday and Sunday. On 10th July, 1972 which was Monday the appeal again could not reach hearing. On 11th July, 1972 Mr. S. R. Divatia, learned advocate holding brief on behalf of Mr. A. H. Mehta, learned advocate for the appellant told me in my Chamber that Mr. Mehta had sustained some injury and that he would not be able to appear in the Court and proceed with this appeal. I, therefore, allowed the appeal to remain on Board on 11th and 12th July, 1972. On 13th July, 1972 an application was made by Mr. Divatia on behalf of Mr. A. H. Mehta that Mr. Mehta would appear before the court on Monday, the 17th July, 1972 and conduct the appeal and that, therefore, I should grant accommodation until then. Having noticed the undue protraction of the matter I made the following order on 13th July, 1972 on the aforesaid request made by Mr. Divatia.

"Mr. A. H. Mehta, learned advocate for the appellant has sustained some injury. This appeal is therefore adjourned to 17-7-1972. Inform Mr. A. H. Mehta that this appeal will be heard on 17-7-1972 immediately after the overnight part-heard matter, if any, and that it will not be adjourned on that day for any reasons whatsoever. If Mr. A. H. Mehta is not able to attend the Court on that day he may make his own arrangements for proceeding with this appeal. If none appears on behalf of the appellant, it will be dismissed for non-prosecution. This order shall be made known to Mr. A. H. Mehta himself or to him through his Clerk. Other learned advocates appearing for other parties may also be informed that this order applies to them as well."

The appeal again appeared on Board on 17th July, 1972. It did not reach hearing on 17th July, 1972 and 18th July, 1972.

It has reached hearing on 19th July, 1972. I have waited for more than 15 minutes for the learned advocates to appear before me and to proceed with the appeal. None has, however, appeared before me. The appeal is more than nine years old. It cannot be allowed to hang on for any more time. Even though about a month has elapsed the parties have not been able to bring about a compromise. The order which I made on 13th July, 1972 and which I have quoted above was brought to the notice of Mr. A. H. Mehta and to the notice of other learned advocates appearing in the appeal and they have signed in token of their having noticed the order. This is the tortuous way in which the appeal has been pending final hearing and decision for the last one month. I see no reason why I should not proceed with it in absence of parties and their advocates. Accordingly I dismiss the appeal for default of appearance."

3. It is not necessary for me to elucidate the circumstances which I have recorded in the order quoted above. They are self-explanatory and speak for themselves. I would however like to add that they were gross circumstances which only testified to a sense of irresponsibility and indifference.

4. Now when this application for restoration of the appeal to file was made, it stated many grounds to support the prayer for restoration. They were as follows:

1. On July 12, 13 and 14, 1972, Mr. Mehta had filed a sick note which should have led to the automatic adjournment of the appeal to some other day. (It may be noted that the appeal was dismissed on 19th July, 1972).
2. I had refused in my Chamber to see a copy of the sick note which Mr. Mehta had filed. It was brought to me by Mr. Divatia in my Chamber.
3. The mere fact that a matter is an old one is per se no ground for dismissing it for default of appearance.
4. Mr. Mehta had told the Sheristadar of my Court on 13th July, 1972 that he would like the appeal to be heard and decided. I had curtly replied through the Sheristadar that I had already made the order dismissing the appeal for default of appearance. (It may be noted that I had made the order on 19th July, 1972 — six days after the Sheristadar was told to the above effect. I could not have said on 13th July that I had already made the order).

5. Though Mr. Mehta was under physical disability on the day when the appeal was dismissed for default of appearance, he had to attend the High Court to conduct election petition in which a parliamentary election was challenged. Election petition could not have been adjourned, it is submitted.
6. The appellant was not willing to permit Mr. Mehta to retire from the appeal because it wanted Mr. Mehta's services. Mr. Mehta had therefore prepared a note for retirement. It was not filed in the High Court.
7. When the appeal was called out for hearing on 19th July, 1972, Mr. Mehta was busy before Divan, J. and his junior Mr. Divatia was busy before A. D. Desai and C. V. Rane, JJ. Therefore, none was present when this appeal was called out. Mr. Mehta and Mr. Divatia had informed the Sheristedar and peon of my court accordingly.
8. At the time when this appeal was called out for hearing, there were other advocates in my court who were ready to proceed with their matters as Mr. Mehta was not available.
9. My sheristedar had told me that Mr. Mehta was busy with the Election Petition and was not likely to be available for the whole of that week.
10. It is strange that when other advocates were ready to proceed with their matters in my court I should have insisted upon disposing of Mr. Mehta's appeal first. Such an attitude on the part of a Judge is contrary to the practice of the Bombay High Court and this High Court.
11. Mr. Mehta has practised in both the High Courts and has not come across a single case where a judge dismissed for default any appeal when other advocates were ready to proceed with their matters and to engage the Court.
12. The appeal was dismissed because it was an old appeal and "though the learned Judge had ordered Mr. Mehta to transfer his brief and inasmuch as no such steps were taken by Mr. Mehta, the appeal deserved to be dismissed."
13. Mr. Mehta believes that "before a lawyer can transfer his brief to another lawyer, at least there must be a consent of the client or in any case absence of prohibition from the client against transferring of the brief."
14. Whether to transfer a brief to another lawyer or not is a matter of discretion for the lawyer concerned. There is "no law, rule, regulation of any nature whatsoever which authorises a Judge to command an advocate to transfer any brief."
15. If an advocate cannot proceed with the hearing of an appeal, he can retire from it. In such a case, rules of the High Court, require the Court to issue notice to the party concerned.
16. "Sickness, calamity and disease can come to one and all, to judges and lawyers alike. If a judge is sick or suffers even a minor ailment, he may remain absent for a day or a month and similarly a lawyer is also entitled to the courtesy and facility. The cause of justice, if it suffers will suffer equally with the absence of the judge and the lawyer concerned."
17. The use of the word "tortuous" in the order quoted above was strongly resented. "To ask for an adjournment on the ground that the matter is likely to be settled is not unknown to law courts. Law courts have granted such adjournments by thousands and they are being granted even today. The learned Judge, if he was not inclined to grant adjournment, could have turned down the request but to use the word "tortuous", thereby casting aspersion on the modus operandi of the lawyers of the parties to this second appeal and in particular appellant's advocate is to say the least uncalled for, unjustified, undignified and is not in consonance with the dignity of a Judge of High Court.
18. Oral application was made by Mr. Divatia on the same day for restoration of the appeal. I refused to hear it. Bombay High Court and this High Court follow the practice of restoring matters, dismissed for default of appearance, if oral application is made on the same day. Oral application is the only procedure known to Mr. Mehta and it was a perfectly proper procedure. It was in consonance with the practice referred to above.
19. I dictated the order orally to the Stenographer. It was typed out on the same day and was signed by me before 2.00 p.m. and was sent to the decree department on the same day before 4.45 p.m. Therefore, there was no time to obtain a copy thereof.

20. The procedure followed by me was unusual and contrary to the practice known to the Bombay High Court and this High Court, "for a century and at least within the knowledge of Mr. Mehta within last 22 years."

21. Oral application made to me for restoration of the appeal was turned down by me "contrary to the known practice."

5. These were the twenty one grounds which were originally stated in this application which has been sworn in by Mr. Arun H. Mehta and Mr. S. R. Divatia, two learned advocates. The learned Advocate-General who appeared to support the application saw the wisdom of deleting a large number of grounds. He with his experience, sobriety and wisdom, did not think fit to press all the grounds in support of the application and I think he rightly did so.

6. I have summarised all the grounds which the application originally stated in order to show that the restoration of the appeal which was nine years old when it was dismissed for default was sought with a bang. Talks of settlement in offing are often done at the Bar and adjournments are sought. Parties to this appeal did not have any time to settle the matter during nine years during which the appeal had been pending. Wisdom of settling the dispute dawned only when the matter was about to be called out for hearing and then the learned advocate thought that it was his right to go on obtaining adjournments after adjournments on that ground and that I had no business to question the propriety of his action. If a court has to submit to such applications, I do not think any court can function. None has any right to any adjournment on the ground of a probability of settlement. If parties settle their dispute, it is the duty of the court to record it and to pass decree in terms thereof. It is always within the discretion of the Court to adjourn a matter or not to adjourn it when an adjournment is sought on the ground of settlement. If a matter has been pending on file for an inordinately long period of time and if parties have not seen the propriety of settling it during its pendency, a court will be perfectly justified in refusing to grant an adjournment on that ground. If, however, the court grants an adjournment or two on that ground, it cannot recoil on its head and force it to go on granting adjournments after adjournments until either the settlement is arrived at or the learned advocate thinks fit to state to the court that talks of settlement have failed. To accept this dictum is to throw the procedure of the court

at the mercy of a procrastinating and 'never-ready-to-argue' lawyer.

7. Sickness is a ground which entitles a lawyer to obtain one adjournment. I say "entitled" because he does not know that he will be ill or indisposed on a particular day nor does his client know that illness, unforeseen as it is, will prevent his lawyer on a particular day from attending the court. Therefore, one adjournment should be granted. To grant more than one adjournment or not to grant them on that ground depends upon the facts and circumstances of each case and also upon the discretion of the Court. None has any right to more than one adjournment. None can claim it. It is perfectly open to the court to direct a party to make his own arrangements for the hearing of the appeal if his lawyer who has been incapacitated cannot attend the court on the adjourned date of hearing. While granting the adjournment, the court can subject a party to this condition. This is what I had done in the instant case. It is wrong to think that on the ground of sickness or indisposition, any number of adjournments can be as of

right sought and that the court is bound to grant them. It is necessary to remove this illusion. Earlier it is done, the better. If the Court has refused to grant further adjournments and dismissed the matter for default, none can seek its restoration with a bang at the bar and as of right.

8. Engagement in some other court may be a good ground for one adjournment. It cannot be allowed to give rise to a series of adjournments or to long adjournments. If a lawyer is busy elsewhere, it is for him and for his client to devise ways and means for the hearing of the appeal. If the court while granting some time on this ground directs a party to make his own arrangements next time if his lawyer is unable to attend the court then, it cannot in such a situation be said to have commanded him to engage another lawyer.

9. Several grounds stated in this petition, therefore, were born of loose thinking and of strange notions and they originated probably from the belief that emphatic and categorical assertions made in that behalf, however unsound they may be, would be good enough to frighten a weak-kneed judge. Such an attempt ought not to have been made particularly when I had accepted Mr. Mehta's word regarding the probability of settlement of dispute between the parties even though I had really not believed it because if the parties had not seen the wisdom and propriety of settling their dispute for 15 long years — the suit was

thereafter the Governing Body terminated his services. It was contended that the Governing Body had violated the provisions of Ordinance 20 framed under the University of Saugar Act. The Supreme Court held that the Ordinance had the force of law and conferred rights on teachers of affiliated colleges, and cl. 8 of the Ordinance relating to the security of the tenure of teachers was a part and parcel of the Teachers' Service Conditions. The Supreme Court observed that an order terminating the services of the appellant in violation of clause 8 of the Ordinance gave the appellant a right to apply under Article 226 for relief and the consideration that he had entered into a contract was immaterial. On the other side of the line is *Vidya Ram Misra v. The Managing Committee Shri Jai Narain College*, AIR 1972 SC 1450. Statute 151 framed under the Lucknow University Act, 1920 provides that teachers of an Associated College shall be appointed on written contract and that a contract shall, *inter alia*, provide the conditions mentioned therein in addition to such other conditions not inconsistent with the Act and the Statutes as the Associated College may include in its own form of agreement. The conditions as regards salary, age of retirement and others are enumerated in the Statute, the statute also specifies the grounds on which a teacher's services can be terminated. Statute 152 requires that the form of agreement to be adopted by each college must be approved by the Executive Council before it is put in force. Statute 153 serves as a model. The Supreme Court observed that Statute 151 merely provides that the terms and conditions mentioned therein must be incorporated in the contract to be entered into between the college and the teacher concerned, and that these terms and conditions do not *proprio vigore* have the force of law. It said:

"They become terms and conditions of service only by virtue of their being incorporated in the contract. Without the contract, they have no vitality and can confer no legal rights." Referring to *Pra-bhakar Ram Krishana Jodh* (1965) 2 SCR 713 (*supra*) and distinguishing it, the Supreme Court pointed out:—

"The terms and conditions of service embodied in clause 8 had the force of law apart from the contract and conferred rights on the appellant there; here the terms and conditions mentioned in Statute 151 have no efficacy unless they are incorporated in a contract."

8. In the case before us, the grievance is that there is a violation of clause 30 of the agreement inasmuch as the termination of the petitioner's contract had not been effected in the public interest. The provision for such termination is to

be found only in the agreement; it is not a provision of the Act or Rules. It is urged by the petitioner that when Rule 33 refers to the agreement being in Form 'K', it thereby makes all the provisions of the agreement a part of the Rules. It seems to me that the mere reference to Form 'K' in Rule 33 does not clothe the provisions of Form 'K' with statutory operation. The provisions in the agreement become operative when the parties subscribe their signatures to the agreement; Rule 33 does not bring them into operation. To be more specific, the Rules do not mention that the contract can be terminated by the Government in the public interest. Authority for the termination of a contract on that ground is to be found in the contract alone. It is a right founded in contract, it is not a power issuing from the statute.

9. The petitioner urges that the decision in *Vidya Ram Misra* AIR 1972 SC 1450 (*supra*) is distinguishable on the ground that it was concerned with a contract between master and servant where the contract cannot be specifically enforced, and a writ was sought against a non-statutory authority and also that the statute in that case did not indicate the form of the contract itself. It seems to me that those considerations make no difference in principle to the application of the proposition laid down by the Supreme Court.

In my opinion, the petitioner's complaint arises out of an alleged breach of contract, and as no writ can issue in respect of it, we must decline to enter into that complaint.

10. The second preliminary objection is that the Union of India is a necessary party and because it has not been impleaded no relief can be granted to the petitioner. The reason for contending that the Union of India should have been impleaded is that the Hydel Project is a Central Government undertaking. It is also pointed out that among other reliefs the petitioner has prayed for a direction to the Project authorities to pay the dues of the petitioner in respect of supplies made to the Hydel Project. As regards this relief, *Shri Sushil Malhotra*, learned counsel for the petitioner, states that he withdraws it. In the circumstances, the relief will be considered as deleted. The remaining reliefs are directed against the order of the State of Himachal Pradesh and the Director of Industries, Himachal Pradesh Government. No relief is now claimed against the project authorities. The Chief Engineer and the Executive Engineer of the Project have been impleaded as respondents in this writ petition, and the interests of the Project authorities are sufficiently safe-

guarded by their presence on the record. It is not necessary that the Union of India should be impleaded. This preliminary objection must fail.

11. The third preliminary objection is that instead of applying by way of writ petition the petitioner should have applied in revision to the Central Government under Section 30 of the Mines and Minerals (Regulation and Development) Act. Section 30 of the Act empowers the Central Government to revise any order made by the State Government or other authority in exercise of the powers conferred on it by or under the Act. When the order terminating the contract has not been made in the exercise of statutory power, the remedy by way of revision under Section 30 cannot be availed of by the petitioner.

12. The last preliminary objection is that inasmuch as complicated questions of fact arise on this writ petition the Court should refer the petitioner to a suit. Upon an overall appreciation of the questions raised in this case, I do not see why the writ petition should be rejected on this particular ground.

13. The petitioner's submissions on the merits have already been detailed above. On careful consideration, it seems to me that if the termination of the petitioner's contract amounts to a mere breach of contract the petitioner's submission on the merits are barred from consideration in this writ petition.

14. Taking the first two contentions first, whether there is a breach of Clause 30 because the termination of the contract cannot be justified on the ground of public interest or because the period of notice is insufficient are matters which can be examined by the Court only if a writ could issue for such breach. And as regards the contention that Section 4-A (2) of the Act cannot be invoked in support of the termination of the contract, it appears unnecessary to enter into that question because *ex facie* the impugned notice purports to have been issued under clause 30 of the agreement and as this Court cannot question the validity of that notice in this writ petition it is not necessary for the Government to have recourse to Section 4-A (2) of the Act.

15. Then there is the submission of the petitioner that the termination of his contract by the Government is *mala fide* and has been occasioned by the ill-will of the sixth respondent. If the Government has terminated the contract with *mala fides* it has done so as a contracting party. For that, relief cannot be granted by the issue of a writ.

16. Finally, we are left with the contention that the petitioner has been the victim of discrimination inasmuch as no such action has been taken in respect of the contracts of Vinod Kumar Sud and Umesh Kumar covering the two contiguous reaches. To my mind, this contention must also fail on the finding that the complaint of the petitioner arises out of a breach of contract. The petitioner's case in regard to discrimination is based on Article 14 of the Constitution. To invoke Article 14, it must be shown that the State has acted in the context of law. When the Government is party to a contract, and it exercises a right by virtue of such contract it is a matter falling within the sphere of contract. If the Government, having entered into contracts with different persons, arbitrarily terminates the contract of one person only its action must necessarily be referred to its contractual capacity from which the contract and the impugned action flows. Had the discrimination been applied in the course of granting a contract, as was the case in *K. N. Guruswamy v. State of Mysore*, AIR 1954 SC 592, the discriminatory action of the Government would be referable to its statutory authority, because the statute empowers the Government to enter into such contracts. But once the contract has been concluded between the Government and an individual any action taken by the Government in the application of a term or condition of the contract must be attributed to the capacity of the Government as a contracting party. When the Government passes from the stage of granting a contract to the stage of exercising rights under it, it passes from the domain of statutory power into the realm of contract. And as was observed by the Supreme Court in *C. K. Achutan v. State of Kerala*, AIR 1959 SC 490, "..... a contract which is held from the Government stands on no different footing from a contract held from a private party." In my opinion, Article 14 of the Constitution cannot be invoked by the petitioner.

17. Accordingly, the writ petition must fail.

18. The petition is dismissed, but in the circumstances there is no order as to costs.

CHET RAM THAKUR, J.:— I agree.
Petition dismissed.

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CHET RAM THAKUR, J.

Kailash Wati and another, Petitioners
v. State of Haryana and another, Res-
pondents.

M. F. A. No. 2 of 1972, D/- 10-9-1974.

(A) Motor Vehicles Act (1939),
Section 110-B — Compensation — De-
duction on account of lump sum
payment — No such deduction can be
made where prospects of deceased im-
proving his earnings have not been taken
into consideration, 1972 ACJ 334 (P. & H.)
and 1973 ACJ 147 (P. & H.) and 1973 ACJ
414 (P. & H.), Relied on. (Para 16)

(B) Motor Vehicles Act (1939), Sec-
tion 110-CC — Interest — Amount grant-
ed not very huge and the case pending
for about 2 years — Interest at the rate
of 4 per cent. per annum from date of
application to date of payment was grant-
ed. AIR 1970 Madh Pra 168 and AIR 1973
Mys 162, Relied on. (Para 20)

(C) Motor Vehicles Act (1939), Sec-
tion 110-B — Compensation — Deduction
on account of pension — Pension should
not be deducted from compensation
amount since it is payment for past con-
duct and services rendered. 1969 ACJ 363
(House of Lords, England) and 1971 ACJ
309 (Malaysia), Relied on. (Para 26)

Cases Referred: Chronological Paras

1974 Acc CJ 305 (CA) 29

AIR 1973 Mys 162 = 1973 ACJ 57 20

1973 ACJ 147 = 75 Pun LR 360 15

1973 ACJ 414 = 75 Pun LR 715 15

1973 ACJ 216 = 1972 Cur LJ 776 28

1972 ACJ 208 = 42 Com Cas 261 (Pat.) 15

1972 ACJ 334 = ILR (1972) 1 Punj 677 15

1971 ACJ 309 (Malaysia) 26

AIR 1970 Madh Pra 168 = 1970 ACJ 310 20

1969 ACJ 363 = (1969) 1 All ER 555 (HL) 26

AIR 1968 Ker 315 = 1968 ACJ 127 30

AIR 1968 Mad 436 = 1969 ACJ 34 29

R. K. Gupta, K. D. Sud, for Appel-
lants; B. Sita Ram, Advocate-General, for
Respondents.

JUDGMENT:— These four appeals

arise out of four claims petitions under

Section 110-A of the Motor Vehicles Act

disposed of by the Motor Accident Claims

Tribunal, Mahasu and Kinnaur Districts

at Kelleston, Simla by a single judgment,

dated 31st August, 1971.

2. The undisputed facts of the

cases are that on 28th October, 1969 the

Haryana Roadways Bus No. HRA-1243

left Chandigarh at about 2-10 P.M. for

Kasauli, Shri Anand Kumar a second

year Law student, Shri Ajesh Kashyap,

a third year Chemical Engineering Stu-

dent, Shri Ravi Datta, a Forest Guard
and his brother Shri Bishan Datt boarded
the bus. When the bus reached near vil-
lage Jabli, 17 miles towards the West of
Police Station, Solan, i.e., at 73 mile-
stone, the front wheel tyre of the right
side of the bus burst and the driver who
was driving the bus negligently and rash-
ly could not control the bus with the
result that it rolled down in the Khud
at a distance of about 450 feet from the
road. Sarvshri Anand Kumar and Ajesh
Kashyap who were 21 and 21½ years of
ages, respectively, sustained multiple in-
juries resulting in their instantaneous
death. Shri Ravi Datt also sustained mul-
tiple injuries of a serious nature result-
ing in the fracture of his leg and he re-
mained in the hospital for about three
months and in order to save his life, the
right leg which had been fractured and
in which gangrenous limb had developed
had to be amputated and therefore, he
was physically rendered incapacitated for
service as a result of which he was retir-
ed on pension. Shri Bishan Datt also
sustained some injuries but not of very
serious nature and he remained in the
hospital for about three days and then
he was discharged.

3. Smt. Kailash Wati, the mother
and Shri Kishori Lal, the father of Anand
Kumar, filed claim application No. 25-M/2
of 1969 before the Claims Tribunal for
compensation of rupees five lacs. Smt.
Sarla, the mother and Shri Gian Parkash
Kashyap, the father of Ajesh Kashyap
also filed claim application No. 26-M/2 of
1969 for a compensation of rupees one lac.

4. Shri Ravi Datt filed his claim
petition No. 21-M/2 of 1969 for a com-
pensation of rupees one lac and Shri Bi-
shan Datt filed his claim application
No. 27-M/2 of 1969 for a compensation of
rupees twenty thousand.

5. The respondents, who were the
State of Haryana and the General Mana-
ger, Haryana Roadways admitted the
factum of accident and the deaths of
Anand Kumar and Ajesh Kashyap and
the injuries to Ravi Datt and Bishan
Datt, but denied their liability.

6. The Claims Tribunal found on
examination of evidence that the accident
occurred due to sheer negligence of the
respondents in fitting unsuitable and un-
reasonable damaged tyre to the right-
fore wheel of the vehicle. The Claims
Tribunal, therefore, awarded the follow-
ing amounts by way of compensation in
each of the claim petition to each of the
claimants.

(For Table see page 36)

7. The claimants were not satis-
fied with the awards of the compensation
and they, therefore, filed these appeals
which shall be disposed of by a single
judgment.

Application No.	Claimants.	Claim assessed.	Deduction.	Net payable.
25-M/2 of 1969.	1) Kailash Wati (Mother)	Rs. 12,600.00	1,890.00	10,710.00
	2) Kishori Lal (Father)	Rs. 10,800.00	1,305.00	9,495.00
26-M/2 of 1969.	1) Sarla Devi (Mother)	Rs. 11,700.00	1,755.00	9,945.00
	2) Gian Parkash Kashyap (Father)	Rs. 8,700.00	1,305.00	7,395.00
27-M/2 of 1969.	Bishan Datt	Rs. 2,000.00	—	2,000.00
21-M/2 of 1969.	Ravi Datt	Rs. 51,850.00	—	51,850.00

8. The appellants in M. F. A. No. 2 of 1972 and M. F. A. No. 3 of 1972 challenged the findings only on the question of quantum of compensation. According to the learned counsel for these two appellants, the Claims Tribunal had erred in not taking into consideration the important factors which are necessary for arriving at the pecuniary loss caused to the parents due to the death of their sons. Secondly, the Claims Tribunal had wrongly made the deduction of 15 per cent. without further taking into consideration the future rise in income of the deceased. Thirdly, the Claims Tribunal had also erred in not allowing any interest on the sums awarded.

9. First I will take up the case M. F. A. No. 2 of 1972 on this point.

10. In so far as the findings on the life span and the ages of the parents are concerned, the same have not been challenged nor the respondent have come up in appeal, therefore, the life span as determined by the Claims Tribunal and also their ages, etc., must be held to be correct. The only question is whether the Claims Tribunal had correctly assessed the earning at Rs. 300 to Rs. 400 per month. The Claims Tribunal further found that he would have contributed at least Rs. 50 towards each of his parents and thereby Smt. Kailash Wati applicant suffered a pecuniary loss of Rs. 600 a year and which benefit she would have derived for a period of 21 years and in the case of Shri Kishori Lal he held that he was deprived of this pecuniary gain because of the premature death of his son by an accident for 18 years and he, therefore, assessed the compensation as already indicated above.

11. There is a solitary evidence of Shri Kishori Lal one of the claimants about the income that Anand Kumar would have earned if he had not met an accidental death. According to him he would have put him in business after he had passed law. But I do not feel fully convinced about the prospects of the income that Anand Kumar would have derived from business. If he had joined Law then there was hardly any likelihood of his reverting to a business. He would have taken to the profession of Law. Any way there is no cogent evidence and,

therefore, I must uphold the findings of the learned Claims Tribunal on this point.

12. Now I take up the case No. F. A. O. 3 of 1972 (Smt. Sarla Devi and Gian Parkash Kashyap v. State of Haryana).

13. In this case the earnings of Ajesh Kumar if he had not died, had been fixed at Rs. 300 to Rs. 400 by the time he had reached the age of 25 years. The age of Gian Parkash Kashyap admittedly was 52 years and it was held that he had to go for another 18 years to complete the normal span of 70 years and Smt. Sarla Devi was of 47 years of age and she has to live for another 23 years of her expected life and that the deceased would have reached the earning capacity $3\frac{1}{2}$ years after from the date of the accident and thus the father could expect a contribution for $14\frac{1}{2}$ years while the mother expected such contribution from her son for $19\frac{1}{2}$ years of her life. In their case also the Tribunal held that the dependents-claimants were deprived of the pecuniary benefit to the tune of Rs. 50 per month per head and he assessed the loss so sustained by each of the parents as indicated above.

14. On the point of income in this case also there is no other evidence excepting the bald testimony of Shri Gian Parkash Kashyap, the father of the deceased Ajesh Kumar. I find that here is nothing whereby it can be inferred that the income as assessed by the learned Claims Tribunal is in any way on the lower side. Therefore, I must take the income as assessed by the learned Claims Tribunal to be correct. The pecuniary loss so sustained after deducting the personal expenses, etc., by the parents because of the premature death of their son had rightly been assessed at Rs. 50 per month per head and I do not find any reason to interfere with the same.

15. Now I take up the second point about the deduction made at the rate of 15 per cent. by the Claims Tribunal. The learned counsel for the appellant contends that this deduction should not have been made unless the Claims Tribunal had taken into consideration the increase in their future income. If the future increase in income had been al-

lowed then there could be some justification for some deduction out of the amount. Therefore, there could not be any justification for deduction of this 15 per cent. of the claim so assessed as the future increase was not taken into account. In this behalf the learned counsel has relied on a few authorities. The first authority is *Valcan Ins. Co. Ltd. v. Kongasari Lal Banerji* (1972 ACJ 208) (Pat.) (High Court of Patna) where it has been held that "deduction for lump sum payment is allowed in appropriate cases". The second authority is *Damayanti Devi v. Sita Devi* (1972 ACJ 334) (Punjab) (High Court of Punjab and Haryana). In this authority, it was held that "no deduction on account of lump sum payment was allowed, firstly, because the prospects of the deceased improving his earnings were not taken into account while assessing the loss, secondly the claimants were not allowed any interest on the amount awarded". The third authority is *Major Jagjit Singh v. Kartar Singh* (1973 ACJ 147) (Punjab) (High Court of Punjab and Haryana) wherein it has been held that "the cut on account of lump sum payment is not made because of the uncertain and imponderable factors which may come about in future resulting in the increase or decrease of her income. But if the increases in income are taken into account, then it is a case for applying a reasonable reduction on account of lump sum payment. No reduction on account of lump sum payment has to be made if the compensation is determined on the basis of the income at the time of accident without taking into calculation any future interest therein". A similar view has been taken in *Sood and Company, Kulu v. Surjit Kaur* (1973 ACJ 414) (Punjab) (High Court of Punjab and Haryana).

16. The Claims Tribunal in these two cases has held that the deceased would have begun to make their earnings after they would have attained the ages of 25 years each and the income that they would have earned at the age of 25 years was between Rs. 300 to Rs. 400 out of which the Claims Tribunal held that the deceased if they would have lived and continued to earn would have spared Rs. 50.00 per month per head towards their parents and, therefore, from this it is quite clear that he has not taken into consideration the prospects of the deceased improving their earnings. Consequently I am of the view that these deductions made by the learned Claims Tribunal are really quite unjustified.

17. The learned Advocate-General has tried to support the findings of the Claims Tribunal but he has not been able to show any authority to justify his stand in supporting the deductions made

by the Claims Tribunal. Therefore, I have no hesitation in accepting the contentions of the learned counsel for the appellant that this deduction on the claims assessed by the Claims Tribunal is unjustified as the Claims Tribunal has not taken into consideration the prospects of the future increase of the earnings.

18. The third point is about the interest.

19. The learned Claims Tribunal did not allow any interest on the amount of compensation. Section 110-CC of the Motor Vehicles Act provides for award of interest where any claim is allowed. The section says that the Tribunal may direct that in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf. Therefore, the Tribunal has got the discretionary power to allow interest in suitable cases. In these cases no interest has been allowed. The Tribunal has fixed the loss caused to the parents due to the premature deaths of their sons at a very low rate of Rs. 50-00 per month for each dependant. In such circumstances, in my opinion, it was necessary to have awarded interest also. The accident took place in the month of October, 1969 and the awards were made by the learned Claims Tribunal on 31st August, 1971. Therefore, in my opinion, in these circumstances it was incumbent upon the Tribunal to have allowed the interest.

20. According to *Kamla Devi v. Kishan Chand*, 1970 ACJ 310 = (AIR 1970 Madh Pra 168) (Madhya Pradesh High Court) interest at the rate of 4 per cent. from the date of award per annum is reasonable. Similarly it has been held in *A. Harsha V. Pai v. Dr. K. V. Karna*, 1973 ACJ 57 = (AIR 1973 Mys 162) (High Court of Mysore) also that the appellant was entitled to interest at the rate of 6 per cent. per annum from the date of application to the date of payment. In the instant case as already stated the amount granted is not very huge and the case has been pending since 1969 till 1971 and, therefore, the appellants are entitled to the interest, in my opinion, at the rate of 4 per cent. per annum from the date of the application to the date of payment.

21. Therefore, the result is that the appellants in both the appeals succeed to the extent that the deductions made by the Claims Tribunal are held unjustified and the same are restored. Further the appellants are held entitled to interest at the rate of 4 per cent from the date of the application to the date of payment.

22. Now I take up the other two appeals of Bishan Datt and Ravi Datt.

23. Shri Bishan Datt has been awarded Rs. 2000.00. His only submission is that the Court has not taken into consideration the shock, pain suffering, disfigurement, loss of earning capacity, expenditure on medicine, torture to relations and other disabilities which the appellant has suffered and the award is conjectural and meagre. The appellant remained in the hospital as per the statement of Dr. Kuldip Singh (P.W. 1) from the 28th October to 31st October, 1969 and the injuries have been stated of a simple nature excepting the one which was a lacerated wound about 8"×1½" scalp deep on the frontal parietal region and he was allowed free treatment in the hospital. In these circumstances of the case I think the Claims Tribunal was perfectly justified in awarding not more than Rs. 2000.00 as compensation for the injury and the shock sustained by him. This award, therefore, in the case of Bishan Datt does not require any interference in this appeal and hence this appeal fails.

24. Ravi Datt has been awarded Rs. 51,850.00. No deductions in his case has been made. However, he too has not been awarded any interest.

25. Learned counsel for the appellant has submitted that the Claims Tribunal has erred in not taking into consideration the revision of pay scale of the appellant. The salary of the appellant on the date of the accident has been found by the Claims Tribunal at Rs. 190.00 inclusive of all the allowances, but this finding has been challenged. According to the learned counsel for the appellant the monthly salary of the appellant, as revised with effect from 1st February, 1968, was Rs. 279. In order to verify this fact he has taken me through the evidence particularly the statement of P.W. 2 who was the Range Officer, Taradevi, where Ravi Datt was posted as Forest Guard before the accident. He produced the service record of Ravi Datt. According to the service record the last pay drawn by Ravi Datt was Rs. 118.00 plus Rs. 98.00 Ad hoc D. A. and 30 per cent. C. A. which comes to Rs. 280.80, say roughly Rs. 281.00. It is also manifest from the statement of P.W. 2 that he was retired, vide order Ex. PW-2/A from service invalid pension with effect from 3rd February, 1970. He has also stated that the new scale of pay in which Shri Ravi Datt was placed with effect from 1st February, 1968 was Rs. 110-180 and it is in accordance with that that his pay at the time of the accident was worked out at Rs. 281.00 per month. Therefore, in the face of this evidence which is quite clinching, the learned Tribunal fell in error in not considering this revised scale

of pay and he took into consideration only his old scale of pay i.e. Rs. 45-75. The evidence was there but he overlooked the same and it is also manifest from the statement of P.W. 2 that if he had not retired he was eligible for promotion to the post of Forester in the department. In these circumstances he had better prospects of promotion in his service but due to the accident which disabled him he had to retire pre-maturely from service. Therefore, on this score alone the amount of compensation requires to be increased fixing his pay at Rs. 281-00 per month. It would appear that there is a difference of Rs. 91.00 (Rs. 281-190 = 91) per month and the total amount by which the compensation falls short is Rs. 1,090 (Rs. 91×12 months) to be multiplied by 19 years and 7 months which comes to Rs. 21,385.00. Therefore, on this account alone the award is short by this amount.

26. It has been urged by the learned Advocate-General that the appellant had been paid his pension and which also should have been deducted from this amount. But this argument has been raised simply to be rejected because the pension is the fruit of the service which had already been rendered and he had been paid the pension for the past service and no account has been taken of his future service. If he had continued in service he would have earned a greater amount of pension, therefore, the pension cannot be deducted and in this behalf I may refer to Perry v. Cleaver (1969 ACJ 363 in the House of Lords, England) wherein it has been held:

"Pension was the fruit of services rendered by an employee in the past. It was in the nature of deferred wages payable under a contract of employment for past services. Therefore just as the amounts received by an injured under a contract of insurance were not deductible, the amount, disablement pension, received by an employee were also not deductible."

A similar view has been expressed in Raja Mokhtar Bin Raja Yaacob v. Public Trustee, Malaysia (1971 ACJ 309 (High Court of Malaysia)) where a Government servant sustained injuries in a motor accident. He was rendered totally unfit for service and was awarded pension and the question arose whether the amount of pension should be taken into consideration while assessing compensation for injuries and it was held that the pension should not be taken into consideration because it was an ex gratia payment made by the Government to its employees, in respect of their past conduct and service. Therefore, the contention that the pension has been granted to Ravi Datt and that the same should be deducted from

the compensation is not correct because that is the payment for his past conduct and services rendered.

27. The Tribunal has also not granted anything for future increments in the case of the appellant. According to the statement of P.W. 2, his revised pay was in the scale of Rs. 110-180 and the total emoluments as revised stood at Rs. 281.00 per month and according to him he was eligible for promotion as Forester in the department and undoubtedly the scale of pay of the Forester must be higher and in no case the start must be less than Rs. 180 per month where the scale of pay of the Forest Guard ends. In that way also he would have necessarily made greater earnings. Undoubtedly there is no evidence as to what would have been his emoluments when he would have got the promotion. But the fact remains that he had chances of promotion because he had yet to put in 19 years and 7 months of service in the department and, therefore, roughly his loss on account of the future increments must be calculated at Rs. 10,000. This is a rough estimate because in such cases there cannot be any arithmetical accuracy but a certain amount of conjecture and surmises have got to be taken as the basis.

28. In respect of grant of future increments and prospects of promotion I may refer to State of Punjab v. Lieutenant J. P. S. Kapoor (1973 ACJ 216 (Punj) (High Court of Punjab and Haryana)) where the claimant 22 years of age was a Lieutenant in the Army. He remained bed ridden for more than two years and seventy-three days. He sustained fracture of the left leg and head injury resulted in permanent disability, physical deformity and paralytic conditions. He was declared unfit for future service. The Claims Tribunal awarded Rs. 2,80,000 for loss of service career, Rs. 90,000 for future pension, Rs. 20,000 for loss of enjoyment of married life, Rs. 4,000 for pains and sufferings and Rs. 2,000 for travelling expenses incurred by the parents of the claimant. The total award was made for Rs. 3,96,000 and in appeal the award was upheld. Similarly in this case also the appellant was a Forest Guard at the time of the accident and he had 19 years and 7 months left for further service and he had further prospects of being promoted to the rank of a Forester which was admittedly a higher post with higher emoluments. In this case also the appellant is entitled to an increase in his pay or in his pension and that way I have, therefore, allowed roughly Rs. 10,000 inclusive of his earnings plus pensionary benefit which would have accrued to him if he had not met this accident and had

not been rendered unfit for service and ultimately retired.

29. The appellant has also contended that he has been granted only Rs. 50 per month on account of the cost for keeping an attendant and this amount was quite a low amount. This also appears to be correct because of the amputation of the right leg he has been rendered helpless and he has to depend upon the service of others. He is, therefore, definitely entitled to the damages on that account as would be apparent from K. Gopalakrishnan v. Sankara Narayanan, (1969 ACJ 34 = (AIR 1968 Mad 436) (High Court of Madras)) where the claimant was incapacitated for marital life by reason of an accident. He was held entitled to the damages on that account. The learned Tribunal has observed that his wife would be looking after him. But that factor also cannot be taken into consideration in assessing the compensation. No doubt the wife renders the voluntary services yet she will not be able to attend to other domestic affairs as also the other agricultural work and for that also they shall have to engage some labour which in these days of high cost of living would be difficult to procure at such a low salary of Rs. 50 per month. Therefore, it also requires to be enhanced to Rs. 100 per month. In Donnelly v. Joyce (1974 ACJ 305 (Court of Appeal, England)) it has been held that:—

"The question whether the plaintiff was under a moral or contractual obligation to pay the third party for the services provided was irrelevant, the plaintiff's loss was the need for those services, the value of which for the purpose of ascertaining the amount of his loss was the proper and reasonable cost of supplying the plaintiff's need."

Therefore, in my opinion, as already stated above, the appellant is entitled to be paid at the rate of Rs. 100 per month for the services of his wife who is now solely wedded to the services of the appellant who had been disabled for no fault of his and had to take disability pension.

30. It has also been contended by the learned counsel for the appellant that the appellant was not paid the expenses of the treatment because according to the Tribunal there were no bills and vouchers, and that compensation should be awarded for the actual expenses and for this support is drawn from Swaraj Motors Private Ltd. v. T. R. Raman Pillai (1968 ACJ 127 = (AIR 1968 Ker 315) (High Court of Kerala)). But in this regard I may say that the doctor has stated that free treatment was given to the appellant. If any treatment on payment was made and the appellant had to

pay some money from his pocket then I am sure that he must have claimed the reimbursement from the department because the Government servant is entitled for the reimbursement for the medical charges and if he had not claimed the same the fault will not lie with the department. Therefore, on that account he cannot be granted anything.

31. In the light of the above, I am, therefore, of the view that the appellant is entitled to the enhancement of Rs. 31,385.00 on account of his salary plus Rs. 10,000.00 on account of the loss of his prospects of promotion and future increments and he is also further held entitled to an increase of another Rs. 50 per month for the services to be rendered by his wife for the rest of his life and which also comes to Rs. 7,200.00.

32. Last is the point about interest. The appellant is also entitled to an interest at the rate of 4 per cent. per annum from the date of the award to the date of payment because he was in service till October, 1970 and he had been getting his full salary and it was only thereafter that he sustained the loss and the award was made in 1971, therefore, I think that the interest should be allowed from the date of the award till the date of the payment.

33. Consequently the compensation awarded by the learned Claims Tribunal is enhanced by another amount of Rs. 38,550.

34. The result is that the appeals Nos. M. F. As. 2 and 3 of 1972 and F. A. O. 37/1971 succeed to the extent indicated above, whereas the appeal No. F.A.O. 7/1972 of Shri Bishan Datt is hereby dismissed. But I pass no order as to costs.

Order accordingly.

AIR 1975 HIMACHAL PRADESH 40

D. B. LAL, J.

Amar Nath, Petitioner v. The State of Himachal Pradesh and another, Respondents.

C. M. P. (M) No. 25 of 1973, D/- 27-8-1974.

(A) Essential Commodities Act (1955), S. 6-A — Order of sale of confiscated food grains — Power is inherent in order of confiscation. (Para 5)

(B) Essential Commodities Act (1955), S. 6-A — Order of confiscation — Pending prosecution case is not condition precedent. (Criminal P. C. (1898), S. 516-A).

There is no condition precedent for making the order of confiscation that a

prosecution case should be pending. This is so clear from S. 6-A itself. Therefore, the provisions of the Criminal P. C. will not come into play and even without prosecution case being launched, the Collector will have the power to confiscate and also to deal with the property, may be by selling the same in public interest. Where a statute specifies a particular mode of enforcing a new obligation created by it, such obligation can, as a general rule, be enforced in no other manner than that provided by the statute. Therefore, there can be no relevancy of S. 516-A, Criminal P. C. (1898). (Para 6)

(C) Constitution of India, Art. 226 — Collector passing order of sale of confiscated foodgrains after examining evidence and stating reasons — Order even if incorrectly passed will not be corrected in exercise of writ jurisdiction especially when statutory remedy of appeal was not availed of. (Essential Commodities Act (1955), Ss. 6-A, 6-C).

(Paras 5, 7, 9)

Ramesh Chand, for Petitioner; B. Sita Ram, Advocate-General and Bhawani Singh, for Respondents.

ORDER :— Amar Nath has filed this writ petition under Article 227, wherein he has called in question the order of confiscation and sale made by the Collector of Una under Section 6-A of the Essential Commodities Act, 1955, in respect of 27 bags of maize and 19 bags of wheat said to be stored at the shop known as "M/s. Hem Raj Rameshwar Datt". The facts giving rise to the petition are, that the petitioner was the owner of the food stuff and the same was stored at the shop not for sale but because he needed some place to stock it. The police moved an application under Section 6-A for the confiscation of the said bags of maize and wheat. Accordingly the Collector ordered for confiscation but in addition thereto also ordered for disposal of the grain in so far as, that he directed the maize to be sold through the Food Corporation of India and the wheat to be sold by auction and the amount was to remain deposited in the Government Treasury. According to petitioner, the order regarding sale was not contemplated under Section 6-A and hence the Collector acted without jurisdiction. It was further pleaded that no opportunity to show cause was afforded to the petitioner against the order of sale, although the said opportunity was given against order for confiscation. It was also pleaded that the provisions of the Code of Criminal Procedure, namely Section 516-A, were applicable and unless an enquiry or trial was pending be-

fore the Magistrate and the article confiscated was subject to speedy or natural decay, the same could not be sold by the Court. Since the conditions laid down in Section 516-A were not satisfied, the order itself was illegal and could not be passed. According to petitioner, the Collector had no jurisdiction to entertain the case under Section 6-A. He did not record any reasons in his order why the foodgrains were liable to sale in the manner ordered by him. Articles 19, 31 and 31-A were thus impinged and interference should be made by the Court.

2. As against these allegations, the affidavit submitted by the Collector indicated that he acted well within his jurisdiction. The petitioner was closely related to both Hem Raj and Rameshwar Datt and as such the shop really belonged to him. He brought the foodgrains for sale and there was a presumption to that effect in accordance with the provisions of the Himachal Pradesh Foodgrains Dealers Licensing Order, 1968 and the Himachal Pradesh Wheat Dealers Licensing and Price Control Order, 1973. A notice to show cause under Section 6-B was given to the petitioner and in fact he did show cause against the order of confiscation. The decision regarding sale was an essential consequence that followed the order of confiscation. As such the order of sale is very much contemplated under Section 6-A of the Act. While showing cause, the petitioner never stated that the Collector had no jurisdiction or that the sale could not be directed. Rather his plea was that the bags of foodgrains were not meant for sale but were meant for storage at the shop of the respondent No. 2. The petitioner was carrying on the business of a dealer without a licence as laid down in clause 3 of the Order of 1973. Similarly he had stored foodgrains of more than 25 quintals in weight and there was a presumption that he stored them for the purpose of sale. That was also in accordance with the provisions of the Order of 1968.

3. The Collector further contended that the provisions of the Criminal Procedure Code (Section 516-A) were not applicable. Once the Collector assumed jurisdiction under Section 6-A, he had the authority to deal with the confiscated goods and he could proceed with a sale thereof without having recourse to Section 516-A of the Criminal Procedure Code. The order regarding confiscation and sale could be passed even without prosecution being instituted which is clear from Section 6-A and this has been done by the Collector.

4. With these allegations it was pleaded that the petition was misconceived and must be dismissed.

5. The jurisdiction of High Court under Article 227 is essentially meant to keep a subordinate tribunal within the bounds of its authority. If the order is not manifestly incorrect and the only purpose behind the petition is to set right a wrong decision, jurisdiction of Article 227 will not be invoked. This is what the petitioner has attempted to do in the present petition. I have gone through the order of the Collector, Una (Annexure A) and it is sufficiently exhaustive. The petitioner contravened the terms and conditions of the licence issued under the provisions of the two Orders of 1968 and 1973. Thus he committed an offence under Section 7 and an application was moved under Section 6-A to seize the property and to confiscate the same. The Collector issued a notice to show cause under Section 6-B and after hearing the petitioner seized the property and also ordered for its confiscation. It necessarily follows, that the property confiscated was to be dealt with by the Collector in the best manner considered by him. Accordingly he directed for the sale of the foodgrains. No exception could be taken to that order. In fact the order of disposal of the confiscated property is very much inherent in the order of confiscation itself passed under Section 6-A.

6. The learned counsel essentially argued that the provisions contained in Section 516-A of the Code of Criminal Procedure applied, and unless an enquiry or trial was pending before a Magistrate and the property was subject to speedy or natural decay, or it was otherwise expedient so to do, the Court could not order for its sale. It is manifest the general provision contained in the Code of Criminal Procedure must be displaced by the special provision provided by Section 6-A of the Essential Commodities Act, 1955. In my opinion, the amended provisions of Section 6-A of the Act impliedly limit the powers of the criminal Court in the matter of disposal of foodgrains etc. which are seized in contravention of the Act and Orders, whether or not prosecution is instituted against the accused. There is no condition precedent for making the order of confiscation that a prosecution case should be pending. This is so clear from Section 6-A itself. Therefore, the provisions of the Code of Criminal Procedure will not come into play and even without prosecution case being launched, the Collector will have the power to confiscate and also to deal with the property, may be by selling the same in public interest. Where a statute specifies a particular mode of enforcing a new obligation created by it, such obligation can, as a general rule, be enforced in no other manner than that provided by the

statute. Therefore, in my opinion, there can be no relevancy of Section 516-A of the Code of Criminal Procedure.

7. There was already a presumption that the foodgrains were meant for sale and the purpose of the petitioner is to get corrected the order passed by the Collector which according to him was incorrectly passed on the facts of the case. As I have remarked above, this is not the purpose of a petition under Article 227. Even if the order of the Collector was wrong on facts, it cannot be corrected by this Court. I am not sitting in appeal against that order. It is abundantly clear that the said order was well within the jurisdiction of the Collector and he passed it after going through the entire evidence.

8. It was not pointed out in what manner the Collector could not assume jurisdiction under Section 6-A or 7 of the Act. The Collector has given valid reasons in his order, and I have stated above, the order of sale was a natural consequence of the order of seizure and confiscation. It would be futile to say that Articles 19, 31 and 31-A were impinged in any manner.

9. It may further be stated that a remedy by way of appeal under Section 6-C was very much there. The petitioner has not availed of that remedy which was more than efficacious for him. That would be an additional ground why the petition should be dismissed.

10. In view of what I have stated above, there is absolutely no merit in the petition. The petition is dismissed with costs. Counsel fee to be assessed at Rs. 100.

Petition dismissed.

AIR 1975 HIMACHAL PRADESH 42

R. S. PATHAK, C. J.

Krishan Dass, Petitioner v. State of Himachal Pradesh and others, Respondents.

C. W. P. No. 160 of 1971, D/- 9-8-1974.

(A) Constitution of India, Art. 226 — Laches — Petition against order withdrawing petitioner's candidature as Kanungo and against his reversion filed beyond time prescribed for suit — Not maintainable. 1970 SLR 889, Dissented from.

The time spent by the petitioner who had prayed for relief against the order withdrawing petitioner's candidature as Kanungo and against the order of his reversion in making representations to au-

thorities against the impugned order cannot be taken into consideration as an extenuating factor for excusing delay when representations were not based on any statutory right. AIR 1964 SC 1006, Followed; 1971 Cur LJ 490 and 1966 Cur LJ 678, Distinguished; 1970 Serv LR 889, Dissented from. (Paras 5, 6)

Cases Referred: Chronological Paras
1971 Cur LJ 490 = (1971) 1 Serv LR 40 5
1970 Serv LR 889 = 73 Pun LR 364 5
1966 Cur LJ 678 (Punj.) 5
AIR 1964 SC 1006 = (1964) 6 SCR 261 5

H. S. Thakur, for Petitioner; Advocate-General, for Respondents.

ORDER:— The petitioner was appointed Office Kanungo in May 1960 against a permanent vacant post. In 1963 he was placed under suspension on account of a criminal proceeding against him. He was tried and was acquitted on March 29, 1966 by the Assistant Sessions Judge, Mahasu. Consequently the Collector, Mahasu reinstated the petitioner as Office Kanungo.

2. On August 19, 1966 the Collector made an order reverting him to his substantive post of Patwari. It was pointed out that the petitioner's candidature as Kanungo had been set aside by the Financial Commissioner by his order dated December 6, 1962, and that he had not been considered for acceptance as Kanungo again and was no longer an accepted Kanungo candidate. The petitioner represented against the order before the Collector and kept on making representations in the matter. The last representation sent by him is dated September 6, 1971. No reply was received by the petitioner to any of the representations. On September 24, 1971 the petitioner filed the present writ petition. The petitioner prays for relief under Article 226 of the Constitution of India against the order withdrawing the candidature of the petitioner as Kanungo and against the order of reversion.

3. It appears from the record that the order withdrawing the candidature of the petitioner as Kanungo was made by the Financial Commissioner as long ago as 1961. The order of reversion was made on August 19, 1966. The question arises at the outset whether the petitioner should be denied relief on the ground of laches.

4. The petitioner seeks to explain the delay in filing the writ petition by the plea that after the order of reversion was made he was making repeated representation to the authorities, and did not receive any reply from them. Having regard to his conduct, he contends, the court should condone any delay occasioned in filing the writ petition. After care-

ful consideration, it seems to me that the doctrine of laches bars relief to the petitioner.

5. The order depriving the petitioner of his status as an accepted candidate was made as long ago as 1961. It was communicated by an order dated December 6, 1962. About nine years elapsed before the present writ petition was filed challenging that order. The order of reversion made on August 19, 1966 is a consequential order, the reversion having been effected consequent upon the withdrawal of the petitioner's status as Kanungo candidate. There is no valid explanation for the delay in challenging the order by which the petitioner lost his status as an accepted Kanungo candidate. As regards the order of reversion, the petitioner, it is true, kept on filing representations to the Collector but it has not been shown that those representations were made on the basis of any statutory right conferred in that behalf. That being so, the entire time consumed in making the representations—a period of about five years—cannot be taken into consideration as an extenuating factor for excusing the delay in filing the petition. If a suit was filed by the petitioner against the orders of 1961 and 1966 mentioned above, it would have been barred by limitation long before the point of time when the writ petition was filed. It is urged for the petitioner that to such a suit Article 113 of the Limitation Act will apply, while the learned Advocate-General on behalf of the respondents points out that it is Article 100 of the Limitation Act which applies. The first prescribes a period of three years while the latter prescribes a period of one year. Plainly, whichever Article of the Limitation Act can be said to apply a suit would have been time barred in September, 1971. Reliance has been placed by the petitioner on *Roop Lal Nand Lal Rawla v. The State of Punjab*, 1971 Cur LJ 490. In that case the learned Single Judge of the Punjab and Haryana High Court held that the writ petition was not barred by laches but in doing so he relied on the circumstance that a suit for the same relief was not yet barred by limitation. In *State of Madhya Pradesh v. Bhailal Bhai*, AIR 1964 SC 1006, the Supreme Court expressed the opinion that where the delay in filing a writ petition was more than the period of limitation prescribed for civil action for the remedy it would almost always be appropriate for the court to hold that the delay was unreasonable. The petitioner relies on *B. S. Brar v. The State*, 1970 Serv LR 889 (Punj.). A learned Single Judge of the Punjab and Haryana High Court condoned the delay in filing the writ peti-

tion brought five years after the petitioner's services were terminated. In that case also the petitioner continued making representations against the order of termination and received no reply from the Government. The court held that the conduct of the parties was such as to entitle the petitioner to relief on the writ petition notwithstanding the delay with which it was filed. With great respect to the learned Judge, it appears from the judgment that he omitted to consider the observations made by the Supreme Court in *State of Madhya Pradesh v. Bhailal Bhai* (supra). Reference was also made to *Mrs. H. M. Dhillon v. The State of Punjab*, 1966 Cur LJ 673 (Punj.). That was a case where the petitioner contended that her prospects of appointment to a selection grade which was then about to take place were being affected adversely by a void order passed seven years ago. The learned Judges of the Punjab and Haryana High Court held that the petitioner was not guilty of laches. They proceeded on the reasoning that the original order being void it was not necessary to have it set aside and that it was open to the petitioner to apply to the court for relief when the effect of that void order was being visited on her. In the present case it has not been shown by the petitioner that any proceeding is being presently taken in respect of the petitioner pursuant to the orders which he has challenged in the writ petition.

6. In my judgment the writ petition must fail on the ground of laches.

7. The writ petition is dismissed, but in the circumstances there is no order as to costs.

Petition dismissed.

AIR 1975 HIMACHAL PRADESH 43 FULL BENCH

(Note:— In this case, the Judges of the Full Bench differ in their views. The majority view is taken by R. S. Pathak, C. J. and Chet Ram Thakur, J. and the minority view, by D. B. Lal, J. The judgments in the case are, however, printed in the order in which they are given in the certified copy.—Ed.)

R. S. PATHAK, C. J., D. B. LAL AND
C. R. THAKUR, JJ.

Surjit Singh, Petitioner. v. Pritam Singh, Respondent.

Civil Revn. No. 17 of 1969, D/- 12-12-1974.

(A) East Punjab Urban Rent Restriction Act (3 of 1949), S. 4 — Order fixing fair rent in terms of compromise — Void

DS/DS/B261/75/CWM

— Subsequent proceeding for fixing fair rent maintainable — Doctrine of estoppel by judgment — Not applicable — No estoppel by conduct — AIR 1958 Bom 1 and 1962-64 Pun LR 467 and Civ. Rev. No. 648 of 1960, D/- 6-4-1961 (Punj.), Dissented — (Evidence Act (1872), S. 115).

Per Majority (D. B. Lal J. Dissenting): The order of the Controller fixing fair rent in terms of the compromise between the parties is void and the doctrine of estoppel by judgment cannot be invoked against the tenant. It is open to the Rent Controller to entertain the subsequent application of the tenant and to take proceedings for fixing fair rent of the premises. AIR 1958 Bom 1; 1962-64 Pun LR 467 and Civil Revn. No. 648 of 1960, D/- 6-4-1961 (Punj.), Dissented from; AIR 1956 SC 346 and AIR 1973 SC 1311 and AIR 1970 SC 669 and AIR 1970 J & K 26 (FB); AIR 1971 SC 2213 and AIR 1962 All 147 (FB) and AIR 1972 Him Pra 125 and AIR 1964 All 1 (FB), Distinguished; AIR 1956 Cal 606 and AIR 1956 Punj 95 and AIR 1967 SC 591 and 1966-68 Pun LR 732 and 1971 RCJ 899 (Punj.), Relied on.

(Paras 15, 17 and 54)

Holding of an enquiry by the Controller is a mandatory requirement of Section 4 (1) and that an order fixing fair rent made without such enquiry is not an order contemplated by the statute. It is an order beyond the powers of the Controller and is, therefore void. (Para 7)

The Controller must apply his own judgment to decide what should be the fair rent. He cannot rest his decision on the bare statement of the parties as to what the fair rent is. Where the record does not disclose the basis on which the landlord and tenant agree upon a certain figure as the fair rent, the Controller cannot adopt, without enquiry, the figure suggested by the parties. If the figure suggested by the parties proceeds upon a compromise between them, the case for relying on it is even weaker. (Para 5)

The "fair rent" of a building is the fair rent for all landlords and tenants of that building. Such a determination must be had upon objective considerations, an objective consideration of all relevant factors which enter into the determination of rent. An agreement between a certain landlord and a certain tenant cannot bind subsequent landlords and tenants, and therefore cannot conclusively determine what is the "fair rent".

(Para 6)

An estoppel by judgment arises if the controversy has been finally determined by a competent court. The judgment must be one within its competence. If the decision of the court is a nullity there can be no basis for raising the plea

of estoppel. Where an earlier order of the Controller was not the kind of order contemplated by S. 4 (1) and was beyond his jurisdiction it cannot act as estoppel by judgment, as his order is a nullity.

(Para 10)

As the order of the Controller based upon the agreement is void, the matter must in law be considered to rest at the stage of agreement between the parties. Now that agreement cannot fix the fair rent; it is only an order of the Controller which can do so. Therefore, this is a case where no fair rent can be said in law to have been previously fixed. That being so, no question arises of the tenant being estopped by his conduct from challenging the order fixing the fair rent. (Para 16)

(B) East Punjab Urban Rent Restriction Act (3 of 1949), S. 4 (2), Clauses (a) and (b) — Fixation of fair rent — Duty of Controller to adopt criteria specified in Cls. (a) and (b).

Per Pathak, C. J. and Thakur J.:— The statute has imposed a duty on the Controller to fix the fair rent upon enquiry made by him and how that enquiry is to be made is indicated by clauses (a) and (b). In all cases where both clauses can be applied, the Controller has no option but to apply them. Where only clause (a) or clause (b) can be applied, it is that clause which must be applied. In an exceptional case it may be that the building in question is not matched by similar accommodation in the locality and neither clauses (a) and (b) can be applied, then it is open to the Controller to adopt his own basis for fixing the fair rent. So long as that basis is reasonable, no fault can be found with it.

(Para 18)

Per D. B. Lal, J.: If either of the two conditions cannot be physically satisfied because of the absence of any similar accommodation in the locality, or because of the absence of any entry in the property tax assessment register of the municipal, town or notified area committee or cantonment board, the case would be different. What is not physically possible to achieve cannot be enforced by the Court.

(Para 52)

Cases Referred: Chronological Paras

AIR 1975 Him Pra 15 = Civil Revn. No. 53 of 1972, D/- 19-6-1974 49

AIR 1974 SC 471 = (1974) 1 SCC 242 27, 39, 43, 46, 48

1974 Ren CR 58 = ILR (1974) 2 Delhi 63 45

AIR 1973 SC 1311 = 1973 Ren CR 342 11, 38, 39, 46, 48

AIR 1973 Him Pra 57 = ILR (1972) 1 Him Pra 35 14, 37

AIR 1972 Him Pra 125 = ILR (1972) 1 Him Pra 345 14, 37

AIR 1971 SC 2213 = 1971 Ren CR 320. 14, 36

1971 Ren CJ 899 = 73 Pun LR 954 13, 44
 AIR 1970 SC 669 = 1970 Ren CJ 98 12, 35
 AIR 1970 J & K 26 = (1969) 1 Ren CR
 648 (FB) 14, 25, 34
 AIR 1970 SC 794 = (1970) 3 SCC 181
 48, 49
 AIR 1970 SC 838 = (1969) 2 SCR 1048
 47, 49
 (1969) 2 SCR 432 = 1969 Ren CJ 276
 46, 49
 AIR 1967 SC 591 = (1964) 2 SCR 310
 10, 16, 41
 (1967) Civil Revn. No. 22 of 1967, D/-
 22-7-1967 (Delhi) 51
 (1966) 68 Pun LR 732 = ILR (1967) 1
 Punj 412 13, 24, 26, 43
 AIR 1964 All 1 = 1963 All LJ 406 (FB)
 14, 33
 AIR 1962 All 147 = 1961 All LJ 831 (FB)
 14, 25, 33
 (1962) 64 Pun LR 467 = ILR (1962) 2
 Punj 108 10, 13, 25, 32
 (1961) Civil Revn. No. 648 of 1960, D/-
 6-4-1961 (Punj) 10, 13, 40
 (1961) Civil Revn. No. 733 of 1960, D/-
 9-10-1961 (Punj.) 40
 AIR 1958 Bom 1 = 59 Bom LR 860 9, 13,
 14, 25, 26, 31, 43
 AIR 1956 SC 346 = 1956 SCR 72 10, 14,
 41
 AIR 1956 Cal 606 = 60 Cal WN 746 9
 AIR 1956 Punj 95 = 57 Pun LR 530 9
 (1955) 57 Pun LR 188 42
 (1954) Civil Revn. No. 272 of 1952, D/-
 24-3-1954 (Punj.) 51
 (1943) 1 KB 628 = 112 LKJB 577 9
 AIR 1921 Bom 224 (2) = 23 Bom LR 133
 9
 1919 WNKB 59 = 88 LKJB 839 9

K. D. Sud, for Petitioner; S. S. Ahuja,
 for Respondent.

R. S. PATHAK, C. J. (Majority View)—
 I regret I am unable to agree entirely
 with my brother D. B. Lal. The facts
 have been stated in his judgment and
 need not be repeated here.

2. The first question is whether
 the landlord and tenant are bound in a
 proceeding for the fixation of fair rent
 under Section 4 of the East Punjab Urban
 Rent Restriction Act, 1949 (which for
 convenience I shall call "the Act") by an
 earlier order of the Controller determin-
 ing the fair rent in terms of a compro-
 mise between the same parties in respect
 of the same building.

3. Section 4 of the Act provides
 for the fixation of the fair rent of a
 building by the Controller. Sub-section
 (1) provides that on application by the
 tenant or the landlord the Controller
 must fix the fair rent "after holding such
 enquiry as the Controller thinks fit".
 Sub-section (2) prescribes the scheme to
 be followed by the Controller. The sche-
 me provides that he should first deter-
 mine the basic rent. Two considerations

are laid down for that purpose; (a) the
 prevailing rates of rent in the locality
 for the same or similar accommodation
 in similar circumstances during the 12
 months prior to January 1, 1939, and (b)
 the rental value of such building if enter-
 ed in the property tax assessment regis-
 ter of the Municipal, Town or Notified
 Area Committee or Cantonment Board,
 as the case may be, relating to the afore-
 said period of 12 months. The fair rent
 is determined by reference to the basic
 rent, and the basic rent varies accord-
 ing as it is a residential building, a sche-
 duled building or a non-residential build-
 ing.

4. Now the important thing to
 note is that it is the fair rent of the
 building which is being determined. It
 is not the rent payable on the basis of
 any agreement between the landlord and
 the tenant, or by reference to the status,
 financial capacity or other circumstances
 particular to the one or the other. For
 fixing the fair rent, what has to be con-
 sidered is the building, and not the per-
 sonality or circumstances of the landlord
 or tenant. In the absence of any defini-
 tion in the Act, the expression "fair rent"
 must mean what is commonly understood
 by it. It is the rent which the building
 can be expected reasonably to fetch. The
 element of reasonableness is governed
 by such considerations as the nature and
 extent of the accommodation, the ameni-
 ties it affords and its location. So long as
 the circumstances affecting the building
 remain the same, the fair rent must re-
 main constant.

5. In the determination of fair
 rent the Controller is required by Sec-
 tion 4 (1) of the Act to hold an enquiry.
 It may be such enquiry as he thinks fit.
 But nonetheless it must be an enquiry,
 and that postulates that the Controller
 must apply his own judgment to decide
 what should be the fair rent. He cannot
 rest his decision on the bare statement
 of the parties as to what the fair rent is.
 Such a statement can at best reflect
 only the opinion of the parties as to
 what the fair rent is. If the evidence on
 the record discloses the material on the
 basis of which such statement is made,
 the Controller may take that material
 into consideration. But where the record
 does not disclose the basis on which the
 landlord and tenant agree upon a cer-
 tain figure as the fair rent, the Controller
 cannot adopt, without enquiry, the figure
 suggested by the parties. If the figure
 suggested by the parties proceeds upon
 a compromise between them, the case for
 relying on it is even weaker. As is well
 known, a compromise is often influenced
 by subjective considerations between the

parties and does not necessarily reflect the objective truth between them.

6. It is for good reason that Section 4 (1) requires the Controller to enquire into what should be the fair rent and to apply his own mind to the matter. The "fair rent" of a building is the fair rent for all landlords and tenants of that building. Such a determination must be had upon objective considerations, an objective consideration of all relevant factors which enter into the determination of rent. An agreement between a certain landlord and a certain tenant cannot bind subsequent landlords and tenants, and therefore cannot conclusively determine what is the "fair rent".

7. The conclusion must be that the holding of an enquiry by the Controller is a mandatory requirement of Section 4 (1) of the Act, and that an order fixing the fair rent made without such enquiry is not an order contemplated by the statute. It is an order beyond the powers of the Controller and is, therefore, void.

8. In the present case, there was an earlier proceeding under Section 4 of the Act in which the tenant stated that he was satisfied that the agreed rent of Rs. 75 per month was "the fair rent of the premises in dispute", and the landlord stated that upon the tenant's statement the fair rent may be fixed accordingly. The evidence discloses that the statement was the result of a compromise between the parties. The Controller then made an order fixing the fair rent of the premises at Rs. 75 per month "in view of the above statement of the parties". There is nothing on the record to suggest that the order of the Controller is based on any material, besides those statements, to show what the fair rent should be. Our attention has not been drawn to any material on the record of that proceeding which can truly establish the quantum of the fair rent. It is apparent that the Controller did not hold any enquiry when fixing the fair rent. He was content to rely upon the agreed statements of the parties. His determination of the fair rent, therefore, was no determination at all within the contemplation of Section 4 (1). His order fixing the fair rent is a nullity.

9. Great reliance has been placed by the landlord on *Popatlal Ratansey v. Kalidas Bhavan*, AIR 1958 Bom 1, where a Division Bench of the Bombay High Court, following the view of two learned Single Judges of the same court, held that it was open to the landlord and the tenant to agree to a certain sum as the standard rent of the premises and that a consent decree passed upon such agreement would operate as *res judicata*

in a subsequent application by the same tenant for fixing the standard rent and would operate as an estoppel against the tenant. With great respect, the learned Judges do not appear to have given sufficient weight to the consideration that the fixation of the standard rent affects not merely the existing landlord and tenant but future landlords and tenants of the same premises. In *Chapsi Umersi v. Keshavji Damji*, AIR 1921 Bom 224 (2) the Bombay High Court observed that "the standard rent is to be fixed in relation to premises and not in relation to persons and can, therefore, be only one and not varying as between different individuals". In England, the view was taken in *King v. York*, 1919 WNKB 59 that "the Act applied to houses, not to persons. The Act operated in rem not in personam. It stereotyped the rent of a house". The principle of estoppel by judgment can be legitimately invoked in a case where the decree is within the jurisdiction of the court. If the tribunal is required by the statute to exercise its jurisdiction in a certain manner and in no other for the purpose of deciding the controversy, an agreement between the parties representing a different manner of deciding the dispute cannot be made the basis of the tribunal's decision. Further, if the dispute is one the decision on which can bind persons not parties to the dispute an agreement between the parties cannot supply a basis for the decision. Where legislation is enacted in the general interests of the public, a plea of estoppel will not be sustained. In *Griffiths v. Davies*, (1943) 1 KB 628 the doctrine of estoppel by judgment was not applied against a tenant. The ground taken was that the result would be to compel a court to give a judgment which it was by statute prohibited from giving. One of the Lord Justices observed:—

"The standard rent is a sum which it is possible to fix by a calculation made in accordance with the Acts, and that standard rent cannot be altered by any admission or omission on the part of the tenant."

This case was cited before the learned Judges in *Popatlal Ratansey*, AIR 1958 Bom 1 (supra) and they distinguished it on the ground that the relevant statutory provision in (1943) 1 KB 628 (supra) operated "notwithstanding any agreement to the contrary". With great respect, it seems to me that the decision turned on considerations which had no reference to the non obstante clause. I find myself in agreement with the view taken by the Calcutta High Court in *Miss E. Scott v. M/s. Residence Ltd.*, AIR 1956 Cal 606 and by the Punjab High Court in *Niranjan Singh v. Murti Shri Bhagwan Ram*,

AIR 1956 Punj 95. To the extent that the view taken in Popatlal Ratansey, AIR 1958 Bom 1 (supra) is at variance with the considerations mentioned above I find myself, with respect, unable to agree with it.

10. An estoppel by judgment arises if the controversy has been finally determined by a competent court. The judgment must be one within its competence. If the decision of the court is a nullity there can be no basis for raising the plea of estoppel. As in my opinion the earlier order of the Controller was made in terms of the statements of the parties and no enquiry at all was held by the Controller as to what should be the fair rent of the building, the earlier order of the Controller fixing the fair rent was not the kind of order contemplated by Section 4 (1). It was an order beyond the jurisdiction of the Controller. The statute required him to make an enquiry and exercise his judgment in the matter. He did not do so when he adopted the figure named by the parties. His order is a nullity. In the circumstances, it was open to the petitioner landlord (sic) (respondent tenant) to ignore the earlier order and apply afresh for fixation of the fair rent. The plea of estoppel by judgment is not available to the respondent tenant (sic) (petitioner landlord). For this reason, I find myself unable to agree with Shiv Lal v. Shori Lal, (1962) 64 Pun LR 467 and Sat Parkash v. Parkash Chand, Civil Revn. No. 648 of 1960 decided by G. D. Khosla, C. J. (Punj). The petitioner relied on Sailendra Narayan Bhanja Deo v. The State of Orissa, AIR 1956 SC 346 where the Supreme Court has laid down that a plea of estoppel can be founded on a compromise decree. While that is so, the principle in my opinion cannot operate where the compromise decree itself is a nullity. At the same time, it may be added that in a later case Pulavarthi Venkata Subba Rao v. Valluri Jagannadha Rao, AIR 1967 SC 591 the Supreme Court held that a compromise decree could not operate as *res judicata* inasmuch as it did not represent a decision by the court but merely the acceptance by it of something to which the parties had agreed.

11. Learned counsel for the petitioner has drawn our attention to K. K. Chari v. R. M. Seshadri, AIR 1973 SC 1311 in support of the proposition that even where there was a compromise order it could fall within the jurisdiction of the Controller. The facts of that case show that the court was satisfied from the material on the record and the conduct of the parties that one of the statutory grounds for eviction of the tenant was made out, that it applied its mind to the

facts and circumstances relevant to that ground and then made the order of eviction. The court did not, as in the present case, refrain from exercising its own judgment and determining the point of controversy between the parties. Besides, it is worthy of note that the controversy between the parties in K. K. Chari (supra) concerned themselves alone, that is to say, whether the landlord was entitled to an order of eviction against the tenant. It was not a case where the determination of the issue bound subsequent landlords and tenants, as in the case of fixation of the fair rent.

12. Reliance has also been placed on M/s. Silver Screen Enterprises v. Devki Nandan Nagpal, 1970 Ren CJ 98 = (AIR 1970 SC 669). In that case the Supreme Court held that if a settlement arrived at outside court required that an appeal pending in court should be dismissed, the court was within its competence in dismissing that appeal. There was no contention in that case that the settlement was inoperative and could not be acted upon.

13. At this stage reference may be made to the view taken by a Division Bench of the Punjab High Court in Baij Nath v. F. Monga Lal Murari Lal, (1966) 68 Pun LR 732. The learned Judges did not agree with the view taken by the same court earlier in Sat Parkash, Civil Revn. No. 648 of 1960 (Punj.) (supra) and Hindu Rao v. Shori Lal, ILR (1962) 2 Punj 108 and distinguished the decision in Popat Lal, AIR 1958 Bom 1 (supra) on the ground that the provisions of the Bombay Act were not on all fours with those of the Punjab Act where the basic rent was required to be determined first by determining what was the rent of the same or similar premises in the year 1938 and then fixing the fair rent by making additions thereto. Falshaw, C. J. who spoke for the court observed that no attempt whatever had been made to determine the fair rent in the manner prescribed by the statute in the previous proceeding and there was no determination of the fair rent at all since the order of the Controller was based upon the agreement of the tenant. He opined that no question of *res judicata* could arise where the matter had not been judicially determined. The learned Chief Justice also took the view that no question of estoppel could arise in such a case and said:—

"The Punjab Act..... is intended mainly for the protection of tenants..... the Act protects tenants both from ejectment and the liability to pay excessive rent..... a tenant cannot be allowed to accept as the fair rent a rent which is in excess of the fair rent as it would be determined under the provisions of Section

4 of the Act. It is to be borne in mind that the rent is not for the tenant but for the premises and once the fair rent is determined it will remain the fair rent for those who succeed the present incumbent."

(Emphasis supplied)

It was further pointed out that an agreement between the parties as to the fair rent would be against the public policy incorporated in the Act which protected tenants against payment of excessive rent and required the fair rent to be determined on enquiry by the Controller. The court held that a compromise arrived at in the previous proceeding for fixation of fair rent would not bar a second application by the tenant. This decision was followed by the Punjab and Haryana High Court in *Raj Kumar Jain v. Girja Shanker*, 1971 Ren. CJ 899.

14. It is urged for the petitioner, relying on *Sailendra Narayan Bhanja Deo*, AIR 1956 SC 346 (supra), that in considering the order of the Controller fixing the fair rent it must be taken that every step required by law in the process of the determination of the fair rent was satisfied. That submission cannot be accepted when it is clear that the essential requirement of Section 4 (1), that is to say, an enquiry by the Controller was wanting when he fixed the fair rent. Reference was made by learned counsel for the petitioner to *Autar Singh v. Sohan Lal*, (1969) 1 Ren. CR 648 = (AIR 1970 J & K 26) (FB) where a Full Bench of the Jammu and Kashmir High Court laid down that an order of the court fixing the fair rent on the basis of an agreement between the parties operated as an estoppel against a subsequent application for fixation of fair rent. The learned Judges proceeded on the consideration that the statutory provision in question did not contain any express prohibition against the fixation of fair rent by consent of the parties and that no question of public interest was involved. The learned Judges relied on *Popatlal*, AIR 1958 Bom 1 (supra) and also on *Daulat Ram Sawhney v. Triloknath*, AIR 1962 All 147. It does not appear that the question whether an order of the Controller fixing the fair rent entirely on the basis of an agreement between the parties is a nullity was raised before the court. The question was also not raised before the Allahabad High Court in *Daulat Ram Sawhney* (supra) which was a case of rent being agreed to between the landlord and tenant and not for fixation of the fair rent. Under the U. P. (Temporary) Control of Rent and Eviction Act it is open to a tenant to agree to payment of rent in excess of reasonable rent. Our atten-

tion was invited to *Lachoo Mal v. Radhye Shyam*, AIR 1971 SC 2213 where the Supreme Court laid down that it was open to the landlord to waive the benefit of exemption from the U. P. (Temporary) Control of Rent and Eviction Act in respect of constructions made after January 1951. It is important to note that the decision rested on the consideration that the action of the landlord did not involve any question of policy, much less public policy, and therefore the agreement was neither illegal nor unlawful nor did it affect the provisions of any law within the meaning of Section 23 of the Contract Act. As regards *Bhagat Ram v. Smt. Lilawati Galib*, ILR (1972) 1 Him Pra 345 = (AIR 1972 Him Pra 125) placed before us by the learned counsel for the petitioner that was a case where a learned Single Judge of this court held that it was open to a tenant to waive the benefit conferred by Section 13 of the East Punjab Urban Rent Restriction Act of 1949 and by Section 14 of the Himachal Pradesh Urban Rent Control Act, 1971 and agree to vacate the premises. The case was carried in appeal in *Shri Bhagat Ram v. Smt. Lilawati Galib*, ILR (1972) 1 Him Pra 85 = (AIR 1973 Him Pra 57) but the point was not considered there. The facts of the case distinguish it from the one before us, for the reason that any decision there between the landlord and tenant could not by its nature affect future tenants. *Udhoo Dass v. Prem Prakash*, AIR 1964 All 1 (FB) was also cited before us. The Allahabad High Court held that a contract of tenancy in contravention of Section 7 (2) of the U. P. (Temporary) Control of Rent and Eviction Act requiring a landlord to let to any person accommodation which has fallen vacant or is about to fall vacant was not void under Sections 12 and 23 of the Contract Act. The case is clearly distinguishable. It did not raise a question of fixing the fair rent which, as it seems to me, binds future landlords and tenants in relation to the same premises.

15. Upon the aforesaid considerations I am of the view that the earlier order of the Controller fixing the fair rent in terms of the compromise between the parties is void and the doctrine of estoppel by judgment cannot be invoked against the respondent tenant.

16. It was observed by the Supreme Court in *Kelavarthi Venkata Subba Rao*, AIR 1957 SC 591 (supra) that a compromise decree might create an estoppel by conduct. The question then is whether the doctrine of estoppel by conduct can be invoked upon the facts of the present case. The facts show that in the earlier proceeding for fixation of rent the parties agreed that the fair rent was Rs. 75 per

Cases Referred: Chronological Paras
AIR 1963 SC 146 = (1963) 2 SCR 733 1

P. Krishnappa, for Appellant.

JUDGMENT:— I have heard Sri P. Krishnappa, learned counsel appearing for the appellant in support of the admission of the appeal. The learned counsel submitted that the judgment of the Prl. Civil Judge at Tumkur passed in R. A. 59 of 1971 is not a judgment in accordance with law, inasmuch as it does not conform with Order 41, R. 31, C. P. C. It was urged that though no arguments were advanced on behalf of the appellant in the lower appellate Court, the Court was bound to look into the grounds of appeal, and to record a judgment. The judgment of the Court below is a brief one and reads as follows:

"HSRS states that the matter may be taken as heard and that the Court may proceed to judgment on perusing the grounds of appeal. Perused the grounds of appeal and from the submission made, it is patently clear that the appellant has no arguments to advance in support of the grounds urged in the appeal. Hence in my view no grounds are substantiated and there is no merit in the appeal. Hence appeal dismissed.

Sd. D. P. Hiremath,
Prl. Civil Judge, 6-7-73."

The appellant was represented by counsel, whose initials are noted in the judgment as HSRS. It is not disputed that when the case was posted for hearing on the 6th July, 1973, the appellant's counsel HSRS was present in court, and he made a statement to the Court that the matter may be taken as heard and that the Court may proceed to judgment on perusing the grounds of appeal. This is precisely what the Civil Judge has recorded in his judgment. It is clear, from these admitted facts that the counsel appearing for the appellant did not submit any argument in support of the appeal, when the same came up for hearing before the learned Civil Judge. It is, no doubt, true that the learned counsel appearing for the appellant submitted to the Court that the Court may proceed to judgment on perusing the grounds of appeal. This submission of the learned counsel appearing for the appellant is not a substitute for the arguments in support of the appeal. It is the duty of the appellant or his counsel, who is aggrieved by the decree passed by the Court below, to advance reasons by way of arguments, before the appellate Court, to convince it that the conclusions arrived at by the Court below are wrong for the

reasons advanced by him. If no arguments, at all are advanced, and no reasons are given by the appellant's counsel in support of the appeal, the Court is not under an obligation to look into the grounds of appeal, and to decide the case on merits and in accordance with Order 41, R. 31, C. P. C. In such circumstances, the Court can proceed to dismiss the appeal for default. The judgment of the lower Appellate Court, in the circumstances, must be regarded as having the effect of dismissal of the appeal filed by the appellant for default, as no arguments at all were advanced on behalf of the appellant, before the lower Appellate Court. The Supreme Court in *Thakur Sukhpal Singh v. Thakur Kalyan Singh*, AIR 1963 SC 146 has laid down that the Appellate Court is not bound to decide an appeal on merits on the basis of the material on record when the appellant appears at the hearing but does not address the Court, and that the Appellate Court under such circumstances can dismiss the appeal for default. The Supreme Court has further observed as follows:

"It is the duty of the appellant to show that the judgment under appeal is erroneous for certain reasons and it is only after the appellant has shown this that the appellate Court would call upon the respondent to reply to the contention. It is only then that the judgment of the Appellate Court can fully contain all the various matters mentioned in Rule 31, Order 41. If the appellant submits nothing for its consideration, the Appellate Court can decide the appeal without any reference to any proceedings of the Courts below and, in doing so, it can simply say that the appellants have not urged anything which would tend to show that the judgment and decree under appeal were wrong."

2. In view of this authoritative pronouncement of the Supreme Court, it is impossible to accept the contention of Sri Krishnappa, learned counsel appearing for the appellant, that as the judgment of the lower Appellate Court is not in accordance with Order 41, Rule 31 of the C. P. C., this appeal merits admission.

3. For the reasons stated above, this appeal is dismissed.

Appeal dismissed.

AIR 1975 KARNATAKA 162

M. SADANANDASWAMY, J.

V. Narayana Bhat, Appellant v. E. Subbanna Bhat, Respondent.

Second Appeal No. 334 of 1971, D/- 2-12-1974.*

(A) Torts — Defamation — Defamatory statements made in complaint to a police officer are absolutely privileged and no action in damages can lie regarding such statements. 1905 App Cas 480 and AIR 1924 All 535 (FB) and AIR 1918 All 69 (FB) and AIR 1926 Mad 521 and AIR 1941 Mad 26 and AIR 1941 Mad 538 and AIR 1939 Cal 477 and AIR 1959 Raj 169, Followed; AIR 1943 Bom 167, Distinguished; ILR (1943) 1 Cal 250 and AIR 1959 Bom 443, Dissented from.

(Paras 7, 8)

Cases Referred: Chronological Paras

AIR 1959 Bom 443 = 61 Bom LR 143 6
AIR 1959 Raj 169 = 1959 Raj LW 222 5
AIR 1943 Bom 167 = 45 Bom LR 215 6
ILR (1943) 1 Cal 250 = 47 Cal WN 627

5, 6, 7

AIR 1941 Mad 26 = (1940) 2 Mad LJ 556

5, 6

AIR 1941 Mad 538 = (1941) 1 Mad LJ 200

5

AIR 1939 Cal 477 = 43 Cal WN 775

5, 6, 7

AIR 1926 Mad 521 = 50 Mad LJ 460

5, 6

AIR 1924 All 535 = 22 All LJ 597 (FB) 4

AIR 1918 All 69 = ILR 40 All 341 (FB) 4

1905 AC 480 = 74 LJ PC 151 4, 5, 6, 7

P. Ganapathy Bhat, for Appellant;
T. S. Krishna Bhat for U. L. Narayana Rao, for Respondent.

JUDGMENT:— The appellant is the plaintiff. The suit was for recovery of damages of Rs. 1,000 for defamation. The defendant-respondent presented a complaint on 28-11-1964 to the Station House Officer, Puttur Police Station, imputing an offence under Section 392 of the Indian Penal Code against the plaintiff. The plaintiff alleged that the defamatory statements contained in the complaint brought him disrepute and infamy in society. He alleged that Police Officers came to his house, questioned him about the contents of the complaint and wanted to search his house. He also alleged that he had to go with the police and remain in the Police station till the evening and had to visit the Police station on several occasions on account of this complaint. The defendant admitted having lodged a complaint against the plaintiff to the police and asserted that the plain-

tiff along with other persons mentioned in the complaint petition committed acts attributed to them in the complaint. He also pleaded that the statements made in the complaint were made in the interests of law and order and to seek justice. The trial court held that the complaint filed by the defendant is not false or frivolous or vexatious to the knowledge of the defendant, that the plaintiff failed to show that he was defamed in any way by the allegations in the complaint and dismissed the suit without going into the question of quantum of damages. The lower appellate court held that the imputations made in the complaint petition are defamatory per se. It further held that the defendant's plea of justification by proof had not been substantiated. But it came to the conclusion that the statements contained in the complaint are protected by absolute privilege and that the question of malice or want of justification does not arise. Hence, it confirmed the decision of the trial court.

2. The complaint was enquired into by the Police and found to be false. Thereafter, the police prosecuted the defendant for filing a false complaint and he was convicted, but the conviction was set aside in appeal.

3. It is contended by Mr. Ganapathy Bhat, appearing for the plaintiff-appellant, that the statements contained in the complaint filed by the defendant to the police are not covered by absolute privilege and that the defendant could claim only qualified privilege for the same. It is therefore urged by him that the defendant must prove that he made the statements in good faith and that if he succeeds in proving the same then the burden shifts on to the plaintiff to prove malice and that the finding of the lower appellate court is erroneous. The question for decision in this appeal is whether the defendant could claim absolute privilege for the statements made in the complaint or only qualified privilege for the same.

4. In *Watson v. McEwan*, (1905) AC 480, H.L., the question was whether absolute privilege protected a witness against the consequences of statements made to the client and solicitor in preparing the brief for trial. Lord Halsbury observed as follows at page 487:

"It appears to me that the privilege which surrounds the evidence actually given in a Court of Justice necessarily involves the same privilege in the case of making a statement to a solicitor and other persons who are engaged in the conduct of proceedings in Courts of justice when what is intended to be stated in a Court of justice is narrated to them

* (Against judgment and decree of Prl. Civil J., Mangalore in Appeal No. 149 of 1969, D/- 21-9-1970.)

that is, to the solicitor or writer to the Signet. If it were otherwise, I think what one of the learned counsel has with great cogency pointed out would apply—that from time to time in these various efforts which have been made to make actual witnesses responsible in the shape of an action against them for the evidence they have given, the difficulty in the way of those who were bringing the action would have been removed at once by saying, "I do not bring the action against you for what you said in the witness box, but I bring the action against you for what you told the solicitor you were about to say in the witness box". If that could be done the object for which the privilege exists is gone, because then no witness could be called; no one would know whether what he was going to say was relevant to the question in debate between the parties. A witness would only have to say, "I shall not tell you anything; I may have an action brought against me tomorrow if I do; therefore I shall not give you any information at all." It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony."

In AIR 1924 All 535 (Majju v. Lachman Prasad) the Full Bench held that in the case of a report made to a Police Officer, the question whether it is covered by absolute privilege is governed by the English common law and since the statements made in the course of a judicial proceeding are absolutely privileged in England, they must be held to be absolutely privileged in India following an earlier decision of the Full Bench of the same court in ILR 40 All 341 = (AIR 1918 All 69). In Halsbury's Laws of England, Vol. 24, third Edition, at page 49, it is stated as follows:—

"89. Absolute privilege: No action lies, whether against Judges, counsel, jury, witnesses, or parties, for words spoken in the ordinary course of any proceedings before any court or tribunal recognised by law. It is manifest that the administration of justice would be paralysed if those who were engaged in it were liable to actions of libel or slander upon the imputation that they had acted maliciously and not bona fide. Thus, all

witnesses or parties speaking with reference to the matter before the court have privilege for their evidence, whether oral or in writing, relevant or irrelevant, malicious or not. The privilege extends not only to words spoken but also to documents properly used and regularly prepared for use in the proceedings....."

The last sentence in the above quotation is based on the decision in 1905 AC 480. In Salmond on Torts, fifteenth Edition, page 208, it is stated as follows:—

"Judicial privilege.

The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor Judge can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against Judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised by law, and this though the words written or spoken maliciously without any justification or excuse, and from personal ill-will and anger against the person defamed. This absolute privilege has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them. The privilege extends to all courts, superior and inferior, civil and military.

..... The privilege extends not merely to Judges but witnesses, parties, and advocates. It includes not merely statements made by a witness in court but also statements made by him to a party, or to the party's solicitor, in the course of preparation for trial. For it would not be of much use to grant absolute privilege to what is said in court, if a plaintiff could say: 'I cannot sue you for what you said in the witness-box, but I am going to sue you for what you told your solicitor you were going to say in it.'

Here also reliance is placed on 1905 AC 480.

5. In AIR 1926 Mad 521—(Sanjivi Reddy v. Koneri Reddi) the defendant presented a petition to the Deputy Magistrate praying that the plaintiffs and some others should be bound over under Section 107 of the Code of Criminal Procedure. The Magistrate sent the petition to the Police for enquiry and report. The police reported after enquiry that there was no foundation for the allegations in the petition. The Magistrate thereafter dismissed the petition. It was held that

the statements made to the police officer with a view to their being repeated before the Magistrate were absolutely privileged. It was further held that the petition presented under Section 107, Cr. P. C. was invested under the common law of England with absolute privilege which attaches not merely to the actual proceedings of any tribunal exercising judicial functions but to all preliminary steps which are in accordance with the recognized and reasonable procedure of such a tribunal. The decision in 1905 AC 480 was followed. In AIR 1941 Mad 26 (Bapalal & Co. v. Krishnaswamy Iyer) it was held that a complaint to a Police Officer being a statement which the complainant is prepared if called upon to do so, to substantiate upon oath later is absolutely privileged following the decision of the Division Bench in AIR 1926 Mad 521 (Sanjivi Reddy v. Koneri Reddi). In AIR 1941 Mad 538 (Vattappa Kone v. Muthu Karuppan) the allegations made by the defendants in their statement to the village Magistrate were held to be absolutely privileged following the decision in AIR 1926 Mad 521. In AIR 1939 Cal 477 (Madhab Chandra v. Nirod Chandra) certain defamatory statements were made by the defendants against the plaintiff in certain reports to the police. The decision in 1905 AC 480 was followed. The observation by Lord Halsbury to the effect that "the overwhelming consideration that a witness must be protected for a preliminary statement or he has no protection at all" was referred to. The contention that witnesses and parties stand on a different footing was rejected, and it was observed:

"It may be said however that when a party comes to depose on oath there can be no distinction with regard to his liability to answer questions as between him and any other witness, and the same must be said with regard to statement preparatory to giving evidence on oath." It was further observed that in a sense the statements made to the police appear to be in this respect on a stronger ground than the statements made to the solicitor as reported in the English case 1905 AC 480 and it was observed as follows:—

"For statements made to a solicitor may or may not be followed up by judicial proceeding, the matter being at the option of the party consulting such solicitor, in which case the statements would slumber in the office of the solicitor, as Lord Halsbury said. But the party lodging information before the police has no option and the police are empowered to go on with the matter and investigate, leading to other results."

The decision in AIR 1926 Mad 521 (Sanjivi Reddy v. Koneri Reddy) was follow-

ed. In AIR 1959 Raj 169 (Lachhman v. Pyarchand) the defendants made a report to the Station House Officer of the police station. In a suit filed by the plaintiff, against whom defamatory statements had been made in the said report, it was held that the statements were absolutely privileged. The decisions in AIR 1941 Mad 538 and AIR 1939 Cal 477 were followed, and the decision of Blagden J. in ILR (1943) 1 Cal 250 (Mayr v. Rivaz) was dissented from.

6. Mr. Ganapathi Bhat relied on the decisions in Gangappagouda v. Basayya, AIR 1943 Bom 167; Maroti Sadasiv v. Godubai Narayana Rao, AIR 1959 Bom 443, and Mayr v. Rivaz, ILR (1943) 1 Cal 250 in support of his contention that the report to the police officer filed by the defendant is not covered by absolute privilege, but that the defendant could only claim a qualified privilege. In AIR 1943 Bom 167 a Mahalkari holding a preliminary enquiry relating to the conduct of a police patil, on the directions of the Collector in order to report to the Collector, recorded the statements of the defendants. It was held that the Mahalkari was not acting in a judicial capacity nor was exercising the attributes of a Court and that the evidence given before the Mahalkari in such an enquiry is not absolutely privileged. In AIR 1959 Bom 443 it was held that the defamatory statement made before the police officer in the course of investigation carried on under the Criminal Procedure Code cannot be regarded as absolutely privileged but that only a qualified privilege attaches to them. The learned single Judge who decided the case observed that the Police Officer who recorded the statement cannot be stated to have been acting in a judicial capacity or exercising the attributes of a Court and that the statements were not absolutely privileged. The decision in ILR (1943) 1 Cal 250 was followed and the decisions in AIR 1926 Mad 521 and AIR 1941 Mad 26 were dissented from since the learned Single Judge felt that he was bound by the decision of the Division Bench—AIR 1943 Bom 167. In ILR (1943) 1 Cal 250, the defendant wrote a letter to the Commissioner of Police containing passages admittedly defamatory to the plaintiff. The learned Single Judge Blagden J. considered the decision of a Division Bench of the same court in AIR 1939 Cal 477 but did not follow the same. The decision in AIR 1941 Mad 26 was also dissented from. It was held that the defendant was not protected by absolute privilege. The learned Judge considered two illustrations to show why a complaint to a Police Officer cannot come under the principle in 1905 AC 480 and should not

be considered as absolutely privileged. The first is a case of the Editor of a newspaper who publishes a statement that AB is a murderer and states therein that he would be prepared later to substantiate the statement upon oath in a judicial proceeding which may be taken by AB. In such a case, according to the learned Judge, if AB takes proceedings against the editor, he can plead absolute privilege if the aforesaid principle applies. The other illustration referred to by the learned Judge is that in case a report to the police is made which culminates in a prosecution and the accused is acquitted, it is open to the person charged to sue the complaint for malicious prosecution and in order to succeed in the suit, the plaintiff would have to prove malice; but if the charge appears to the police to be groundless and no prosecution follows, the person against whom the allegations are made in the report to the police would have no civil remedy at all; if those allegations are absolutely privileged; and it would appear odd that a person who makes baseless allegations in a complaint to the police is in a safer position than a person whose allegations to the police may be found to be sufficiently justified to result in a prosecution though it may prove unsuccessful.

7. The reason why absolute privilege is extended to the statement of a witness made prior to the commencement of a judicial proceeding is based on public policy as stated by Lord Halsbury in 1905 AC 480. There is no reason why the principle stated in the said decision should not be extended to a party and the absolute privilege confined only to the statement of a witness under such circumstances. Of the two instances referred to by Blagden J. in ILR (1943) 1 Cal 250 the first refers to the editor of a newspaper as stated above. But it is doubtful whether the editor of the newspaper in such circumstances can claim absolute privilege on the basis of the principle laid down in 1905 AC 480. With regard to the second illustration referred to by Blagden J., if the complaint to the police results in an unsuccessful prosecution then the person defamed can only claim damages for malicious prosecution and not for defamation. In case the complaint to the police does not result in a prosecution, then also the persons defamed have no remedy in respect of defamatory statements made in such a complaint to the police. But if a false complaint is made to the police, the person who makes such a false complaint would be punishable either under Section 182 or Section 211 of the Indian Penal Code. It cannot therefore be said that a person against whom false charges are made in

a complaint to the police, even if no further action is taken by the police authorities on such complaint, goes scot-free. I would, therefore, prefer to follow the earlier view of the Division Bench of the same High Court in AIR 1939 Cal 477 and the other decisions referred to above which take the view that a complaint to a police officer is absolutely privileged.

8. It must therefore be held that the statements made by the defendant in his complaint to the police officer are absolutely privileged. This appeal is accordingly dismissed. Parties shall bear their own costs in this appeal.

Appeal dismissed.

AIR 1975 KARNATAKA 165

G. K. GOVINDA BHAT, C. J. AND
M. K. SRINIVASA IYENGAR, J.

The Special Land Acquisition Officer, Hassan, Appellant v. M. S. Mallesha, Respondent.

Misc. First Appeals Nos. 196 and 228 of 1974, D/- 4-2-1975.*

(A) Land Acquisition Act (1894), S. 23 — Capitalisation — Agricultural lands.

A person investing his capital in agricultural lands ordinarily expects a slightly higher return than that obtained from gilt-edged securities. Thus where the Government securities earn 5½% return he would expect a minimum of 7% return. Hence the proper multiple to be employed for the purpose of capitalisation is 15. (Paras 6, 7)

N. Venkatachala, 2nd Addl. Govt. Advocate, for Appellant in both M. F. A. Nos.; S. V. Shama Rao, for Respondent in both M. F. A. Nos.

G. K. GOVINDA BHAT, C. J.:— These appeals by the Special Land Acquisition Officer, Hemavathi Reservoir Project, II, Hassan, are directed against the common Award and Decrees dated 17th November, 1973 made in L. A. C. Nos. 70 and 77 of 1973 on the file of the Court of the Civil Judge, Hassan.

2. Several acres of wet and dry lands situate in Mandira village, Alur Taluk in Hassan District, were acquired for the Hemavathi Reservoir Project, pursuant to the Preliminary Notification published in the Mysore Gazette dated 2nd January, 1971. The Land Acquisition Officer, in the award made by him under Section 11 of the Land Acquisition Act, fixed the market value at Rs. 2,200 an

*Against judgment and award passed by Civil J., Hassan, in L. A. C. Nos. 77 and 70 of 1973, D/- 17-11-1973.)

acre for dry lands and at Rs. 5,400 an acre for wet lands. The basis of his valuation was the capitalisation of the net income assessed by him. He assessed the net income of the dry land at Rs. 150 an acre and that of the wet land at Rs. 362 an acre. He employed the multiple of 15 and capitalised the net income for the purpose of arriving at the market value.

3. The claimant was not satisfied with the award of the Land Acquisition Officer and therefore sought reference to the Civil Court under Section 18 of the Act. Before the learned Civil Judge, the claimant did not adduce evidence of any transaction of sale of similar lands. The claimant alone was examined with regard to the yield from the lands. There was not much variance between the evidence of P.W. 1 regarding the yield and the income estimated by the Land Acquisition Officer. The Court was of the opinion that the deduction made by the Land Acquisition Officer for cultivation expenses was excessive, and therefore, fixed the net income at Rs. 180 an acre for dry lands and at Rs. 360 an acre for wet lands. The Court, however, adopted the multiple of 20 and thus arrived at the marked value of Rs. 3,600 an acre for dry lands and Rs. 7,200 an acre for wet lands.

4. In these appeals, the learned High Court Government Advocate, did not dispute the net income as assessed by the Court below and, in our opinion, rightly, as the same is based on the evidence on record. The learned Advocate, however, submitted that the learned Civil Judge was in error in employing the multiple of 20 for the purpose of capitalisation of the net income. He argued that there was no material for the learned Civil Judge to capitalise the net income by employing the multiple of 20 when the Land Acquisition Officer had employed the multiple of 15.

5. The only question for determination in these appeals is as to what is the proper multiple to be employed for valuation of the wet and dry lands acquired in the year 1971.

6. In the absence of evidence of transactions of sale of similar lands, one of the well-known methods of valuation is the method of capitalising the net income by employing a proper multiple, which is called the number of years' purchase value. The number of years' purchase value depends upon the rate of return which a prudent investor in the class of property would expect in the relevant year. A person investing his capital in agricultural lands ordinarily expects a return of 2% to 3% more than what he could obtain from Gilt-edged Security. Government Security is Gilt-edged Security. When the rate of return

has to be determined, the valuer has to start with the rate of return from Gilt-edged Security in the year 1971.

7. In the Government of Karnataka Publication called "Finance Accounts for 1972-73" at page 180, it is seen that the rate of interest on the Mysore State Development Loans issued in the years 1967, 1968, 1969, 1970, 1971 and 1972 was uniformly 5½%. Mysore Government's Loan is also Gilt-edged Security. Therefore, when the Government Securities earn 5½% return, an investor in agricultural lands would naturally expect a higher rate of at least 7% return. If an investor in agricultural lands like dry and wet lands in the State would expect a minimum of 7% return in the year 1971, the proper multiple to be employed for the purpose of capitalisation cannot exceed 15 which is the multiple adopted by the Land Acquisition Officer.

8. As already stated, the net income of dry lands has been assessed by the Court below at Rs. 180 an acre and that of the wet lands at Rs. 360 an acre. We capitalise the said amounts by 15 years' purchase value and arrive at the market value of the dry lands and wet lands at Rs. 2,700 and Rs. 5,400 an acre respectively.

9. Accordingly, we allow these appeals and fix the market value of the dry and wet lands at Rs. 2,700 an acre and Rs. 5,400 an acre respectively. The Award and the Decrees of the Court below are modified. The claimant will be entitled to the usual solatium of 15% of the market value fixed. Parties shall bear their own costs.

Appeals allowed.

AIR 1975 KARNATAKA 166

K. JAGANNATHA SHETTY, J.

S. R. M. S. Tourist Service Co., Bangalore and others, Petitioners v. The Secretary, Regional Transport Authority, Respondent.

Writ Petns. Nos. 3488, 3489, 3579, 3589, 3592, 3595, 3596, 3607 and 3645 of 1974, D/- 30-10-1974.

(A) Motor Vehicles Act (1939), S. 63 (6) — Application for special permit — Publication of scheme under S. 68-C proposing to nationalise contract carriages—Special permit is different from contract carriage permit and therefore application cannot be refused.

It is true that there is similarity in the use to which contract carriage permit and special permit are put to. But that by itself is no ground to hold that

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contract carriage permit and special permit are one and the same. To hold so, one will have to ignore the difference between the two, and the material provisions of the Act. The definition of the "contract carriage" under S. 2 (3) cannot be a guiding factor to determine the nature of the permit granted under Section 63 (6). Sec. 63 (6) does not refer to contract carriage, and therefore it is impermissible to rely upon the definition of the words "contract carriage" while construing the provisions of S. 63 (6).

(Paras 7, 8)

Further, the State of Karnataka or the Scheme published under S. 68-C of the Act proposing to nationalise the contract carriages cannot prevent the operation of public service vehicles under special permits granted by authorities outside the State of Karnataka. Such permits need not be countersigned by the corresponding authorities in the State of Karnataka for their validity. The State which cannot prevent such operators from plying their vehicles cannot deny the special permits to the operators of that State.

(Para 9)

T. Krishna Rao for M. R. Venkatanarasimhachar (in W. Ps. Nos. 3488, 3489, 3599, 3592, 3595 and 3589 of 1974); T. R. Subbanna for C. S. Shanthamallappa (in W. Ps. Nos. 3596, 3607 and 3645 of 1974), for Petitioners; K. S. Puttaswamy, 1st Addl. High Court Govt. Advocate. (in W. Ps. Nos. 3488 and 3489 of 1974) for Respondent.

ORDER:— These petitions raise a short but not, to my mind, an easy point. The question is, whether a special permit in relation to a public service vehicle granted under Section 63 (6) of the Motor Vehicles Act, 1939, hereinafter called the Act, falls within the meaning of a contract carriage permit.

2. All that I need state the facts are: The petitioners are operators of stage carriage or contract carriage services in the State of Karnataka. Often they undertake to carry tourist passengers or marriage parties to various places both inside and outside the State. They applied to the Secretary, Regional Transport Authority of their respective jurisdiction under Section 63 (6), to grant special permits for a couple of days to

(Contd. on Col. 2)

convey tourists from place to place. But the Regional Transport Officer rejected their applications on the sole ground that he has no jurisdiction to grant special permit since there is a Scheme published under Section 68-C of the Act proposing to nationalise the contract carriages throughout the limits of the Karnataka State to the complete exclusion of the other operators with an exception stated in the said Scheme itself. Challenging the validity of his decision, the petitioners have moved this Court with petitions under Articles 226 and 227 of the Constitution and that is how the matters are before me.

3. Before I proceed to consider the provisions of the Act bearing on the question, it is necessary to set out hereunder the relevant portions of the Scheme above referred to. The Scheme was published by notification dated 9th May, 1974 in the Karnataka Gazette of 16th May, 1974, and reads as follows:—

"OFFICE OF THE GENERAL MANAGER, STATE TRANSPORT UNDERTAKING, KARNATAKA STATE ROAD TRANSPORT CORPORATION, KENGAL HANUMANTHIAH ROAD, BANGALORE-27.

Notification dated 9th May, 1974.

FORM 'A'.

(See Rule 4 of the State Transport Undertaking, Karnataka Rules, 1963).
No. KST/CO/TR/PLN/1551/74-75

Whereas, the Karnataka State Transport Undertaking, is of the opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated Passenger Road Transport Services, it is necessary in the public interest that the Passenger Road Transport Services as per the particulars in the Schedule given below should be run and operated by the State Transport Undertaking and the same is hereby published for general information.

Any person affected by the Scheme, may file his objections addressed to the Commissioner for Home Affairs and Secretary to the Government, Home Department Vidhana Soudha, Bangalore, within 30 days from the date of publication of the Scheme in the Official Gazette in the prescribed manner under Section 68-D of the Motor Vehicles Act, 1939.

SCHEDULE

- (a) Route or routes (With their important intermediate points) or the area, in relation to which the Scheme is proposed.
- (b) Route length (in the case of Scheme, in relation to a route or routes only).

The area in relation to which the Scheme is proposed is for the entire State of Karnataka.

Does not apply.

(c) Class of Service: State Carriage/
Contract Carriage/Public Carriage:
Mofussil or City or Town Services
in the case of State Carriage.

(d) Whether the services are to be operated by the State Transport Undertaking to the exclusion complete or partial of other persons or otherwise:

Contract Carriage:

The State Transport Undertakings propose to operate the contract carriages in the State of Karnataka to the complete exclusion of other persons excepting—

(i) the other State Transport Undertaking as defined under Section 68-A (b) of the M. V. Act, 1939.

(ii) Holders of Contract Carriage permits for operation of vehicles owned by them exclusively for transportation of persons employed by them or students or members of their institutions from and to their residences and respective places of work or study and for occasional tours and excursions.

(iii) Existing holders of contract carriage permits granted to them exclusively for the daily transportation at appointed hours and between specified terminals and pick up points of only the persons employed by or studying in establishments and institutions with which the said permit holders have specific contractors for the purpose.

(iv) Holders of the permits granted to them to operate motor cabs as defined under Section 2 (15) of the M. V. Act.

(v) Persons holding permits issued under Section 63 (7) of the M. V. Act, 1939."

4. The above Scheme provides for the operation of contract carriages in the State of Karnataka by the State Transport Undertakings to the complete exclusion of all other persons except those five categories of holders of permits set out in clause (d) thereunder. It is seen therefrom, that the holder of a special permit in relation to a public service vehicle has not been specifically prevented from operating in the State. It is this omission that has been taken advantage of by the petitioners and formed the basis for their contention that the Scheme did not prohibit the grant of special permit. It was, however, urged for the respondents that a special permit is nothing but a contract carriage permit to which the Scheme is proposed for the entire State of Karnataka and, therefore none but the State Transport undertaking could operate any public service vehicle on such permit. If special permit is both factually and legally identical with contract carriage permit, then the petitioners have no case in these petitions; but, if one is different from the other, the Regional Transport Officer must be held to have acted illegally in rejecting the ap-

plications of the petitioners for the grant of special permits.

5. Learned counsel on both sides, in their usual style of addressing clear arguments, relied upon various provisions of the Act in support of their respective contentions, to which I now make a brief reference. Section 2 (20) defines "permit" to mean 'the document issued by the Commission or a State or Regional Transport Authority authorising the use of a transport vehicle as a contract carriage, or stage carriage, or authorising the owner as a private carrier or public carrier to use such vehicle.' No transport vehicle can be used save in accordance with a permit issued under Chapter IV of the Act. Four types of permits may be issued under Chapter IV, viz., stage carriage permit (Sections 46 to 48); contract carriage permit (Sections 49 to 51); private carriers permit (Sections 52 and 53); and public carrier permit (Sections 54 to 56). The Act also provides for the grant of three other kinds of permits; viz., Temporary permit (Section 62); Special permit [(Section 63 (6)); and Tourist permit [Section 63 (7)]:

6. The Act provides different procedures for granting different permits. I shall now proceed to outline at some length, the procedure prescribed for the grant of special permit and contract carriage permit. Section 45 provides general provisions as to applications for permits. Every application for a permit shall be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle or vehicles. If the applicant proposes to use his vehicle in two or more regions lying within the same State, the application shall be made to the Regional Transport Authority of the region in which the major portion of the proposed route or area lies. If it is proposed to use the vehicle in two or more regions lying in different States, the application shall be made to the Regional Transport Authority of the region in which the applicant resides or has his principal place of business, subject to any notification issued by the State Government in that behalf. Section 57 (1) states that an application for a contract carriage permit may be made at any time. Section 49 makes it obligatory for an applicant to state the particulars set out therein in his application for a contract carriage permit. When such an application is made, the Regional Transport Authority has to consider the need for an additional contract carriage in the public interest; and shall also take into consideration any representation made in that behalf, by persons holding similar permits or by any local authority or police authority. Section 51 confers power on the Regional Transport Authority to grant a contract carriage permit in accordance with the application or with such modifications as it deems fit. The duration of such permit shall be at least for a period of three years as provided by Section 58. Section 63 provides for validation of permits for use outside the region or State in which it is granted. It provides:

"63. (1) Except as may be otherwise prescribed, a permit granted by the Regional Transport Authority of any one region shall not be valid in any other region, unless the permit has been countersigned by the Regional Transport Authority of that other region, and a permit granted in any one State shall not be valid in any other State unless countersigned by the State Transport Authority of that other State or by the Regional Transport Authority concerned:

....."

These are some of the mandatory provisions governing the grant of a permit to use a motor vehicle as contract carriage. These provisions, however, are not required to be observed while granting a special permit. Section 63. (6) of the Act

provides a complete procedure for the grant of special permits. It reads:

"63. (6). Notwithstanding anything contained in sub-section (1), but subject to any rules that may be made under this Act, the Regional Transport Authority of any one region, may, for the convenience of the public, grant a special permit in relation to a public service vehicle for carrying a passenger or passengers for hire or reward under a contract, express or implied, for the use of the vehicle as a whole without stopping to pick up or set down along the line of route passengers not included in the contract, and in every case where such special permit is granted, the Regional Transport Authority shall assign to the vehicle, for display thereon, a special distinguishing mark in the form and manner specified by the Central Government and such special permit shall be valid in any other region or State without the countersignature of the Regional Transport Authority of the other region or of the State Transport Authority of the other State, as the case may be."

The Karnataka Motor Vehicles Rules, 1963 prescribe further procedure for obtaining special permit. Rule 127 of the Rules states that an application for a special permit shall be sent to the Regional Transport Authority of the region in which the vehicle is ordinarily kept. The Regional Transport Authority or its Secretary if empowered, may grant a special permit, if the application is found to be for bona fide purposes, without following the procedure laid down in Section 57 of the Act. A special permit so granted shall be valid and effective for such period as is specified in such permit and in any case, it shall not exceed three months, with liberty if necessary to extend it by one more month. Rule 127 (8) provides further facilities to the holder of a special permit. It reads as follows:

"127 (8). If before the expiry of the period of the special permit granted under sub-rule (5), it is intended to visit places, in addition to, or other than those indicated in such permit, the person in charge of the vehicle or any of the persons engaging the vehicle and acting on behalf of all of them present an application in form 'Special Permit Application' along with the permit granted under sub-rule (5), to the Regional Transport Authority, having jurisdiction over the place or places intended to be visited, whichever is nearer, setting forth the reasons for such alteration or addition."

7. From the above provisions, it is seen that there is a fundamental difference between the procedure for granting a contract carriage permit and a special permit. To summarise, the main and

central points of differences are these: A contract carriage permit could be granted only to contract carriage, whereas a special permit could be granted in relation to any public service vehicle, which by its definition includes also a contract carriage. The jurisdiction to grant a contract carriage by the Regional Transport Authority or State Transport Authority depends on the regions in which the vehicle is proposed to be used. If the vehicle is proposed to be used in two or more regions lying in the same State, the Regional Transport Authority of the region in which the major portion of the route or area lies, only has got the jurisdiction to grant contract carriage permit. But a special permit may be granted by any Regional Transport Authority of the region in which the vehicle is ordinarily kept. No other person or authority has got a right to make any representation for or against the grant of special permit. The special permit shall be valid in any other region or State without the counter-signature of the corresponding authority; whereas in the case of contract carriage permit, it must be countersigned for its validity by the corresponding authorities of the other region or State. With these vital differences, it is impossible to reach the conclusion that the Legislature intended to equate the contract carriage permit with the special permit. In my view, one is totally different from the other.

8. The argument of Mr. Puttaswami, learned counsel for the respondents was, however, based on the similarity in the use to which contract carriage permit and special permit are put to, and the conditions under which they are required to be operated. He said that both the permits could be used for the sole purpose; that is, for carrying passengers for hire or reward under a contract express or implied for the use of a vehicle as a whole without stopping to pick up or set down along with the line of route passengers not included in the contract. This kind of operation of any vehicle, according to him, could be only by a contract carriage. In support of the contention, he then referred me to the definition of 'contract carriage' under Section 2 (3) of the Act. The definition runs thus:

"Contract carriage means a motor vehicle which carries a passenger or passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum—

- (ii) from one point to another, and in either case without stopping to pick up or set down along the line of route passengers not included in the contract; and includes a motor cab notwithstanding that the passengers may pay separate fares."

It is true that both the permits are given for carrying a passenger or passengers for hire or reward under a contract, express or implied, for the use of the vehicle as a whole without stopping to pick up or set down along the line of route passengers not included in the contract. But that by itself is no ground to hold that contract carriage permit and special permit are one and the same. To hold so, one will have to ignore the difference between the two, and the material provisions of the Act, to which I have earlier referred to. The definition of the "contract carriage" under Section 2 (3) of the Act cannot be a guiding factor to determine the nature of the permit granted under Section 63 (6) of the Act. The said sub-section does not refer to contract carriage, and therefore it is impermissible to rely upon the definition of the word "contract carriage" while construing the provisions of Section 63 (6).

9. There is one other reason why I should reject the contention of Mr. Puttaswami. The State of Karnataka or the said Scheme cannot prevent the operation of public service vehicles under special permits granted by authorities outside the State of Karnataka. Such permits need not be countersigned by the corresponding authorities in the State of Karnataka for their validity. When the State cannot prevent such operators from plying their vehicles, I see no other purpose in the contention except that of self defeating by denying the special permits to the operators of this State.

10. The enunciation on the question of law as made above is sufficient to dispose of these petitions, since the special permits prayed for by the petitioners have already been directed to be granted by the interim orders issued by this Court at the time of preliminary hearing of these petitions.

11. The petitions are accordingly disposed of without any order as to costs.

Petitions allowed.

- (i) on a time basis whether or not with reference to any route or distance,
or

AIR 1975 KARNATAKA 171

K. JAGANNATHA SHETTY, J.

Y. R. Raju and another, Petitioners
v. Mysore Revenue Appellate Tribunal
and others, Respondents.

Writ Petns. Nos. 2496 and 2497 of
1972, D/- 31-10-1974.

(A) Motor Vehicles Act (1939), Ss. 57
(3); 64. — Appeal against order rejecting
application for permit — Death of res-
pondent-objector during its pendency —
Effect — Whether obligatory for appli-
cant to bring on record legal representa-
tive of deceased objector — (Civil P. C.
(1908), Order 22, Rule 11) — (Karnataka
Revenue Appellate Tribunal Regulations
(1969), Reg. 85).

The Motor Vehicles Act contains no
provision for impleading legal represen-
tatives of a deceased applicant or to bring
on record the person who succeeds to the
rights of a deceased objector. Order 22
of the Civil P. C. does not apply to the
proceedings under the Act.

The objector's right is no more than
to make a representation against propos-
ed grant of permit as provided by Sec-
tion 57 (3) of the Act. It is a right per-
sonal to him and cannot as of right be
claimed by his heirs unless and until the
Authority before whom the representa-
tion was made, allows their substitution.
The allowing of substitution of the heirs
is always within the judicial discretion of
the Authority and the heirs cannot claim
that they have right to come on record.
The heirs of deceased objector cannot be
regarded as necessary parties to the pro-
ceedings for the grant of permit and ap-
plicant for permit is under no obligation
to implead heirs of deceased objector. As
an appeal is a continuation of the origi-
nal proceedings, the heirs of deceased
respondent-objector cannot be considered
to be necessary parties to the appeal.
The appeal would not abate if they are
not impleaded. As such, the Tribunal
could proceed with the appeal without
them and grant permit taking into consid-
eration the interest of the public. AIR
1974 SC 1274, Rel. on. (Paras 6, 8)

Where the appellant claims no relief
against the deceased objector the Autho-
rities under the Act are not adjudicating
the inter se rights of the parties and
Regn. 85 of the Karnataka Revenue Ap-
pellate Tribunal Regulations is therefore
not attracted. (Para 9)

(B) Motor Vehicles Act (1939), S. 48
— Grant of permit under — Application
for permit not mentioning one or two
intermediate places in the order in which
they are on the route — Tribunal by its
order granting permit correctly setting

them out — Permit not invalid.

(Para 19)

Cases Referred: Chronological Paras
AIR 1974 SC 1274 = (1975) 1 SCJ 243 6
AIR 1970 SC 759 = (1969) 2 SCR 507 6

C. S. Shantamallappa, for Petitioners in
both W.P. Nos.; M. R. Venkatanarasimha
Char (for Nos. 4 and 5) in W. P. No. 2496
of 1972 and (for No. 4) in W. P. No. 2497
of 1972 and A. S. Viswanath (for No. 8)
in W. P. No. 2496 of 1972 and (for No. 7)
in W. P. No. 2497 of 1972, for Respon-
dents.

ORDER:— These two petitions under
Articles 226 and 227 of the Constitution
arise out of the common order dated 14th
September, 1972 made in Appeal No. 189
of 1970 (MV) on the file of the Karnataka
Revenue Appellate Tribunal, Bangalore.

2. The facts leading up to these
petitions are these:

Respondents 4 and 5 jointly filed an
application on 28th March, 1963, before
the Regional Transport Authority, Banga-
lore, for a permit to operate a stage carri-
age on the route Kelamangala to Banga-
lore and back. The said application was
published in the Gazette inviting repre-
sentations from the public. Among those
who filed the representations opposing
the grant of permit was, one Y. K.
Rudrappa, father of the petitioner in
W. P. No. 2496 of 1972. The petitioner in
W. P. No. 2497 of 1972 also filed his re-
presentation. The Regional Transport
Authority, after considering the repre-
sentations, refused to grant the permit to
the applicants by its Resolution dated
10th December, 1965. The Regional
Transport Authority was of the opinion
that there was no need for the grant of
permit and the applicants being new
entrants were also not entitled for it.
The applicants took up the matter in an
appeal before the Karnataka State Trans-
port Appellate Tribunal. The Tribunal
dismissed the appeal while affirming the
said findings recorded by the Regional
Transport Authority. Thereupon the ap-
plicants preferred a second appeal be-
fore the Karnataka Revenue Appellate
Tribunal, Bangalore. In the said appeal,
Y. K. Rudrappa was impleaded as re-
spondent 11 and the petitioner in W. P.
No. 2497 of 1972 as respondent 3. Both
of them were duly served with the noti-
ces of the appeal on or about the 22nd
November, 1968. On 6th April, 1969, dur-
ing the pendency of the appeal, Rudrappa
died. On 6th September, 1972 the appel-
lants therein filed an application praying
for deleting the name of Rudrappa and
that prayer was immediately granted by
the Tribunal. The appeal was thereafter
heard on merits without bringing on re-
cord the legal representatives of the de-
ceased Rudrappa. On 14th September,

1972 the Tribunal allowed the appeal and granted the permit to operate a stage carriage on the proposed route from Kelamangala to Bangalore via Dankanikota, Thail, Madhugondanahalli, Kalakondanahalli, Bylagondanahalli, Modahalli, Poonahalli border, Sammandur, Anekal, Bazadadenahalli, Iggalur, Chandapur, Madiwala. The grant was subject to the condition that the operators should not pick up or set down passengers on the monopoly route operated by the State Road Transport Corporation.

3. W. P. No. 2496 of 1972 has now been brought by the son of Rudrappa, challenging the validity of the permit on the main ground that he has succeeded to the interests of his father; that he was a necessary party to the appeal before the Tribunal and the permit granted by the Tribunal without notice to him was illegal and without authority of law. W. P. No. 2497 of 1972 has been preferred on the contention among others, that there was no need for the grant of permit.

4. Both these petitions can be conveniently disposed of by this common order.

5. The first question which arises for consideration is, whether it was obligatory for the appellants before the Tribunal to have brought on record the legal representative of the deceased Rudrappa who was a party respondent in the appeal. This question turns on the principle whether in the case of death of an objector, his legal representative is necessary party to the proceedings for the grant of permit under the Motor Vehicles Act. If the legal representative is held to be a necessary party, then it goes without saying that the Tribunal could not have proceeded with the appeal and granted the impugned permit since admittedly Rudrappa's legal representative was not brought on record.

6. The Motor Vehicles Act, does not provide provision for impleading the legal representatives of a deceased applicant for permit, or to bring on record the person who succeeds to the rights of a deceased objector. Order XXII of the Code of Civil Procedure does not apply to proceedings under the Motor Vehicles Act. The courts, however, by relying on Section 61 of the Motor Vehicles Act providing for transfer of permit on the death of the holder of a permit, have laid down that a successor to the possession of the vehicle could come on record, if the authority under the Act allows such substitution in the public interest. In *Dhani Devi v. S. B. Sharma*, AIR 1970 SC 759 the Supreme Court observed:

"We are inclined to think that in the case of death of the applicant before the

final disposal of his application for the grant of a permit in respect of his vehicles the Regional Transport Authority has power to substitute the person succeeding to the possession of the vehicles in place of the deceased applicant and to allow the successor to prosecute the application. As the relief sought for in the application is dependent upon and related to the possession of the vehicles, the application is capable of being revived at the instance of the person succeeding to the possession of the vehicles."

It was further observed:

"Where the successor is allowed to prosecute the application, the Regional Transport Authority may have to take into consideration many matters personal to the successor, such as his experience, the facilities at his disposal for operating the services and his adverse record, if any. The matters personal to the deceased applicant can no longer be taken into account."

In *M/s. Ramautar Lal Jain v. Maya Kaur*, AIR 1974 SC 1274, the Supreme Court after considering the principles stated in *Dhani Devi's* case AIR 1970 SC 759, observed thus:

"A person in possession of a transport vehicle is not entitled to a permit as a matter of right. The only right is to make the application for the grant of a permit. There is no provision in the Act as to what happens on the death of an applicant for permit during the pendency of the application. The Regional Transport Authority has jurisdiction and discretion in the matter of allowing or refusing substitution."

It was also observed:

"In the case of death of an applicant for the grant of a stage carriage permit before the grant of a permit the heirs can apply for substitution in place of the original applicant. There is no legal right to the grant of a permit. The Regional Transport Authority has jurisdiction and discretion in the matter of allowing or refusing substitution.

If the proceedings are likely to be delayed or a substitution will be detrimental to the interest of the public, the Regional Transport Authority is not bound to allow substitution. There is jurisdiction to grant or allow or refuse substitution. The Regional Transport Authority will exercise discretion in a judicious manner on the facts and circumstances of each case as to whether a substitution may be allowed."

From these decisions, it is clear that it is within the judicial discretion of the authorities under the Motor Vehicles Act to permit substitution of heirs in place of the deceased applicants. The heirs

cannot claim that they have a right to prosecute the application or appeal for permit.

What then is the right of the heirs of an objector who died after making a representation opposing the proposed grant of permit. Certainly, he cannot be in a better position than the heirs of an applicant for permit. The objector's right is no more than to make a representation against the proposed grant of permit as provided by Section 57 (3) of the Act. If he makes any representation, he gets a right of hearing either in person or by his duly authorised representative as provided by Section 57 (5) of the Act. It is a right personal to the objector and cannot as of right be claimed by his heirs, unless and until the authority before whom the representation was made, allows substitution of the heirs of the objector. The allowing or refusing substitution of the heirs as observed by the Supreme Court in *Ramautar Lal Jain's case*, AIR 1974 SC 1274 is always within the judicial discretion of the authority and the heirs cannot claim that they have right to come on record. From these principles, it can safely be observed that the heirs of a deceased objector cannot be regarded as necessary parties to the proceedings for the grant of permit and the applicant for permit is under no obligation to implead them.

7. Mr. Shanthamallappa, learned counsel for the petitioners did not dispute the above proposition of law. But he submitted that the position in the appeal would be different. According to him, Rudrappa was a necessary party to the appeal against the order rejecting the application for permit and, since Rudrappa died during the pendency of the appeal, his successor was also necessary party to the appeal and that appeal could not have been decided without impleading the necessary parties.

8. I do not see any logical distinction in the principles governing the original and the appellate proceedings. The appeal is a continuation of the original proceedings. If the heirs of an objector are not necessary parties to be impleaded in the original proceedings for the grant of permit, I fail to see any good principle why they should be considered to be necessary parties to the appeal.

9. Mr. Shanthamallappa, in support of the contention, relied upon Regulation 85 of the Karnataka Revenue Appellate Tribunal Regulations, 1969. The said Regulation provides:

"85. If the respondent or opponent dies while the appeal or petition is pending and the same cannot be proceeded with unless his legal representative is made a party to the appeal or petition,

the appellant or petitioner shall apply to the Tribunal for making legal representative of such deceased person a party to the appeal or petition within 90 days from the date on which the respondent or opponent dies. If the appellant fails to do so, the appeal petition shall abate as regards deceased. If the deceased be the sole respondent or opponent, then the appeal or petition shall be dismissed. Otherwise, it shall be proceeded with, in respect of the remaining respondents or opponents."

It was contended that, even if the Motor Vehicles Act does not provide procedure or provision for substitution of the heirs of a deceased objector, it was the duty of the appellants before the Tribunal to have impleaded the heirs of Rudrappa, under the said Regulation.

I do not think that that regulation is of any assistance to the contention urged. The said regulation provides for impleading the legal representative of the deceased respondent or opponent who dies during the pendency of an appeal or a petition which appeal or petition could not be proceeded with, for want of legal representatives. It is only in such cases the substitution of the heirs of the deceased would be obligatory, to avoid abatement of the appeal or petition. In the instant case, the appeal before the Tribunal would not have abated if the successor or heir of the deceased Rudrappa was not impleaded. The appellants did not claim any relief against Rudrappa. The authorities under the Motor Vehicles Act, are not adjudicating the inter se rights of the parties i.e. the applicants and the persons who file any representation. They are required to grant or refuse permits taking into consideration the interest of the public.

10. I shall now turn to the next contention urged for the petitioners, i.e., whether the impugned permit was contrary to Section 48 of the Motor Vehicles Act.

It was urged that the application made for permit on the route Kelamangala to Bangalore did not mention the intermediate places in the order in which they are on the route from Kelamangala to Bangalore, and the permit on such application should not have been granted under Section 48 of the Act. Section 48 provides:

"Subject to the provisions of Section 47, a Regional Transport Authority may, on an application made to it under Section 46, grant a stage carriage permit in accordance with the application or with such modification as it deems fit or refuse to grant such a permit."

It is true that the applicants have committed an error in mentioning one or

two names of the villages not in the order in which they are situated on the route from Kelamangala to Bangalore. But the Tribunal by its operative portion of the order has correctly set out the names of villages in the order in which they come on the said route. Under Section 48 of the Act, the authority could grant permit in accordance with the application made for the purpose, or with such modification as it deems fit. In the exercise of that power, the Tribunal has corrected the error committed by the applicants in their application. I, therefore, reject the contention urged for the petitioners.

Apart from that, the applicants asked for permit on the route from Kelamangala to Bangalore, and that was one which was granted by the Tribunal. The error, if any, in mentioning the intermediate villages on the said route, in my view, is not fatal to the application, so long as the intention of the applicants and the authority, remains the same, i.e., to obtain or grant permit on the route Kelamangala to Bangalore.

11. The next contention urged was relating to the schedule of timings. It was urged that the schedule of timings proposed by the applicants in their application would seriously prejudice the interests of the petitioners as they are rival operators on the sector of the route. Counsel for the grantee submitted before me that the schedule of timings is yet to be assigned and the permit has not yet been issued. If that is the position, the contention cannot be considered at this stage.

12. The last contention urged that there was no need for the grant of permit must also be rejected. I have perused the order of the Tribunal. The conclusion of the Tribunal that there is a need for the grant of permit is justified on the evidence on record. The Tribunal has reached that conclusion on the appreciation of evidence, which must be held to be conclusive in these petitions.

13. In the result, these petitions fail and are dismissed. In the circumstances, I make no order as to costs.

Petitions dismissed.

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M. SADANANDASWAMY, J.

D. S. Jayadeviah and another, Appellants v. Narasimhegowda and another, Respondents.

Second Appeal No. 105 of 1971, D/- 19-7-1974.*

(A) Civil P. C. (1908), Ss. 100-101 — Second appeal — Plea of fraud and collusion — Mixed question of law and fact — Not raised in first appeal — Cannot be urged in second appeal. (Para 5)

(B) Civil P. C. (1908), O. 32, R. 4 (4) — Suit by minor and mother with whom he was living — Both remaining absent though notice was served — No enquiry made before appointment of Court Officer as guardian — Mere irregularity — Court guardian raising proper defences — Proper representation of minor — Decree against minor not nullity.

As regards the contention that before the appointment of a Court guardian under clause (4) of Rule 4 of Order 32 is made, a separate application with an affidavit ought to have been filed and notice of such application also should have been issued to the minor and his natural guardian, there is no such provision in Rule 4 of Order 32 as is to be found in Rule 3 of Order 32. The absence of an enquiry by the Court under clause (4) of Rule 4 of Order 32 as to whether there is no other fit person to act as guardian for the minor could only be an irregularity when no prejudice has been caused to the minor plaintiff. (1899) ILR 26 Cal 267; AIR 1957 Pat 260; AIR 1968 Pat 12; AIR 1923 Mad 553; AIR 1915 All 62 (2) and AIR 1960 Ker 367, Dist. (Para 10)

(C) Civil P. C. (1908), O. 32, R. 3 — Guardian-ad-litem — Gross negligence of — Test of — Whether minor seriously prejudiced.

The test of gross negligence of guardian-ad-litem is whether serious prejudice is caused to the minor defendant. Where Court Officer as guardian-ad-litem raised proper defences and pressed the same, held that there was no gross negligence of the guardian as no prejudice was caused to the minor. Case law discussed.

(Paras 8 and 10)

Cases Referred: Chronological Paras
AIR 1968 Pat 12 = 1968 BLJR 658 6
AIR 1960 Ker 367 = 1960 Ker LJ 663 8
AIR 1957 Pat 260 6
AIR 1954 All 599 = 1954 All LJ 443 9
AIR 1954 Nag 135 = 1954 Nag LJ 50 9
AIR 1954 Pat 349 = 1954 BLJR 247 9
(1935) 13 Mys LJ 176 9

*(Against judgment and decree passed by Dist. J., Tumkur, in Appeal No. 28 of 1968, D/- 31-8-1970.)

AIR 1932 All 293 = 1932 All LJ 437 (FB)

AIR 1929 Pat 360 = 10 Pat LT 79

AIR 1923 Mad 553 = 44 Mad LJ 515

AIR 1915 All 62 (2) = ILR 37 All 179

(1903) ILR 30 Cal 1021 = 30 Ind App 182

(PC)

(1899) ILR 26 Cal 267 = 3 Cal WN 261

H. F. M. Reddy, for Appellants; B. K. Ramachandra Rao, for Respondent No. 1.

JUDGMENT:— The appellants are plaintiffs, the respondents are defendants. The suit is for a declaration that the decree obtained by the 1st defendant in O. S. 323/47-48 on the file of the Munsiff-Magistrate, Tiptur, is void and not binding on the plaintiffs, for recovery of possession of the schedule property and also to declare that the execution proceedings in Ex. No. 691/50-51 on the file of the Munsiff, Tumkur and the sale held thereon do not bind the plaintiffs and for mesne profits from the date of suit. The 1st defendant had filed O. S. 323/47-48 against the plaintiffs for recovery of Rs. 1,000 and interest thereon due on a promote executed by Siddananjappa, the father of the 1st plaintiff. The 1st plaintiff was a minor and the second plaintiff, mother of the 1st plaintiff was the proposed guardian of the 1st plaintiff. The plaintiffs alleged that the 1st defendant managed to see that endorsements of refusal were written both in the summons and in the notices issued on the application for appointment of a guardian, and thereafter he got the second defendant appointed as court guardian, to conduct the proceedings on behalf of the 1st plaintiff and obtained a decree against the plaintiffs, that the 1st plaintiff was not at all served with summons in the suit. It was also alleged that the first defendant fraudulently prevented the plaintiffs from having knowledge of the suit. The promote on the basis of which the suit was filed by the 1st defendant is alleged to have been a forged document. The second defendant is a Pleader. It was alleged that he did not raise proper defences and that he is guilty of gross negligence and that he was colluding with the 1st defendant in that suit. It is further alleged that the 1st defendant got the decree transferred to the Court of the Munsiff at Tumkur, with a view to prevent the plaintiffs from knowing the proceedings and has not proceeded against the properties of the plaintiffs in their village with the said purpose in view. The property has been allegedly sold for a low sum of Rs. 721 and has been purchased by the 1st defendant himself. The plaintiffs had also filed an application under Order 21, Rule 90, C.P.C. for setting aside the sale. But that application was dismissed.

2. The 1st defendant pleaded that the court guardian was got appointed since the 1st plaintiff refused to receive the summons and notices and that he effectively represented the 1st plaintiff in the suit. He also pleaded that the promote had been executed by Siddananjappa for consideration and denied that there was any collusion with the court guardian. The second defendant also denied the plaint allegations of fraud and collusion, as well as negligence on his part in conducting the suit on behalf of the minor 1st plaintiff.

3. Defendant 1 and Siddananjappa—the father of the 1st plaintiff, appear to have been on friendly terms. They purchased three different lands at various times jointly. On 29-11-1945, defendant 1 and Siddananjappa jointly purchased an arecanut garden from Nagamma for Rs. 2,000 under Ext. D-4. Towards his share of the consideration, Siddananjappa executed a promissory note on 30-11-1945 for Rs. 1,000 in favour of the 1st defendant along with the consideration receipt. Ext. D-2. This transaction gave rise to litigation. One Srinivasa Rao filed O. S. 37/46-47 in regard to this property which ended in a compromise under which both Siddananjappa and defendant 1 gave up the land and Srinivasa Rao deposited in Court Rs. 2,000 to be paid to both of them. Before the amount was withdrawn by them, Siddananjappa died. The 1st plaintiff was about 10 years old then. Thereafter, the 1st defendant filed O. S. 323/47-48. It was decreed on 30-9-48 for Rs. 1,666-9-0. Defendant 1 got attached the half share of Siddananjappa in the amount of Rs. 2,000 in deposit in court in O. S. 37/46-47. Thereafter he sued out execution for the balance of Rs. 666-9-0 and brought the suit property to sale. In the suit property Siddananjappa had a half share.

4. In O. S. 323/47-48, defendant 1 who was the plaintiff, is alleged to have filed I. A. I. proposing the present second plaintiff, the mother of the 1st plaintiff, as guardian for the present 1st plaintiff. He also filed I. A. II for attachment before judgment of the immovable properties, the personal properties of Siddananjappa in Tiptur taluk. The order sheet shows that on 13-3-1948, the court ordered issue of notices on I. A. I to the minor and the guardian on 30-3-48. It is noted that the guardian notice was served on house as the guardian refused the service. The notice to the minor was also served on house since the guardian refused service. The summonses in the suit were also served on house as defendants in that suit refused service. The court adjourned for the purpose of the plaintiffs proposing the name of an official guard-

ian. On 19-5-48, according to the order sheet, the server's affidavit was obtained. The service was held sufficient and the present second defendant was appointed the court guardian for the minor 1st plaintiff who was the 1st defendant in that suit. The court guardian pleaded in his written statement that he was not aware of the execution of the pronote by Siddananjappa or passing of consideration and put the plaintiff in that suit to strict proof of execution of the pronote and passing of the consideration.

5. The notice contemplated under Order 32, Rule 3, C.P.C. was filed and service was effected as contemplated under Order 5, Rule 17 of C.P.C. Under Order 5, Rule 19, the service of the said notice has been held to be duly served. The plea of fraud and collusion has been held to have been not established by the trial Court. In the lower appellate Court, this question was not urged on behalf of the plaintiffs. Since it is a mixed question of fact and law, it is not open to the plaintiffs to urge the same in this court.

6. Mr. H. F. M. Reddy, however, urged that a fresh application with an affidavit should have been filed before the court guardian was appointed and that the court should have held an enquiry whether there was no other person fit to act as guardian in the suit before appointing a court guardian under clause (4) of Rule 4 of Order 32. He has relied on (1899) ILR 26 Cal 267 (Jatindra Mohan Poddar v. Srinath Roy). In that case, there was no personal service of the summons on the minors or upon their guardian, nor was the summons affixed to the house in which the minors or their guardian actually resided. It was held that there was neither personal nor substituted service of the summons upon the minor defendants, that they were entitled to have the ex parte decree set aside. In that case, there was no order appointing a guardian-ad-litem for the purpose of the suit under Section 443 of the Code of Civil Procedure of 1882. Hence, it has no application to the facts of the present case. He next relied on the decision in AIR 1957 Pat 260 (Ramchandrar Singh v. Gopi Krishna). The question for decision in that case was whether in the eye of law a minor can be said to be a party to the suit or execution proceeding without the guardian-ad-litem appointed by the executing court, without complying with the provisions of sub-rule (4) of Rule 3 of Order 32. The notice under Order 32, Rule 3, clause (4) was not served either on the minor or on his mother, his proposed guardian. The Pleadar guardian-ad-litem was, however, appointed by the Execution Court. It was held that Order 32, Rule 3, Clause (4) is mandatory and

imperative and that unless notice in terms of Order 32, Rule 3 (4) is served on the minor and his guardian and when in spite of such service of notices they do not choose to appear, only then, and then, only, the court gets jurisdiction to appoint a guardian-ad-litem of such a minor. It was further held that the mere fact that the Pleadar guardian-ad-litem has been appointed by the court without complying with the provisions of Order 32, Rule 3 (4), C.P.C. and the further fact that such a pleader-guardian has acted on behalf of such a minor cannot clothe him with the power to act as such on behalf of such a minor and he must be considered to be disqualified from acting as such guardian, and therefore the minor is not properly a party to the proceeding and the judgment rendered or any order passed against him is without jurisdiction, and null and void. It was further observed that where there is a mere defect, such as absence of a formal order appointing a person as guardian-ad-litem, notwithstanding that the notices in terms of Order 32, Rule 3 (4) and under Order 32, Rule 4 (3) have been served, such a defect in the appointment of the guardian will not necessarily be fatal to the proceedings, unless it is shown that the minor was prejudiced by the defect, because such a defect is a mere irregularity, and a defect of mere form, and not of substance, and it does not go to the root of the jurisdiction of the Court to render any judgment against such a minor. It was further held that where the provisions of Order 32, Rule 3 (4) have been violated, the order appointing the guardian is null and void and that in such a case, the question of prejudice to the minor is irrelevant since the defect being one of substance, goes to the root of the jurisdiction of the court. It has to be noticed that under sub-clause (4) of Rule 3 of Order 32 a notice to the proposed guardian is contemplated to ascertain his consent under the rule as amended by the High Court of Patna. In that case, no notice was issued or served on the minor or his natural guardian. It is not a case of service of notice under Order 5. The decision was followed in AIR 1968 Pat 12 (Ramachandra v. Rampunit). That was also a case where notices under Order 32, Rule 3 (4) were not served either on the minor or the proposed natural guardian. The contention that even if there was no compliance with the said provisions, the decree passed in the mortgage suit was valid, was negatived, following the decision in AIR 1957 Pat 260 (Ramachandrar Singh v. Gopi Krishna). The decision in AIR 1957 Pat 260 is not an authority for the proposition that a notice to the court guardian is necessary under clause (4) of

Rule 4 of Order 32 as contended by Mr. Reddy, since the decision is based on Rule 4 of Order 32 as amended by the Patna High Court.

7. Mr. Reddy next relied on the decision in 44 Mad LJ 515 = (AIR 1923 Mad 553) (Rarichan v. Manakkal Raman Somyajipad). In that decision, the appointment of a court guardian was procured by means of a false affidavit. It contained a statement that besides the second defendant, the plaintiff had no next of kin. Since the second defendant was not willing to act as guardian, the petition to appoint him as guardian was dismissed. The statement in the affidavit was held to be false since there was at least one person known to the 1st defendant and his brother namely, the minor plaintiff's maternal uncle who was plaintiff's next of kin just like his father but this information was suppressed. The explanation offered was not accepted and it was held that the 1st defendant was guilty of fraud in law in making a false statement and thereby getting a Court Officer appointed as guardian. The appointment was held to be vitiated by fraud and of no legal effect. The decree and the subsequent sale were held not binding on the plaintiff following the decision in ILR 37 All 179 = (AIR 1915 All 62 (2)) (Bhagwan Dayal v. Param Sukh Dass). In the present case, there is no fraud committed by the 1st defendant on the court. Hence, this decision does not apply to the facts of the present case.

In ILR 37 All 179 = (AIR 1915 All 62 (2)) (Bhagwan Dayal v. Param Sukh Dass) the minor defendants were sought to be impleaded through their uncle as their guardian-ad-litem. The uncle refused to be the guardian-ad-litem and informed the court that the minors used to live with their mother and not with him. But without any notice being given to the minors or their mother in whose care they were, the court appointed the Amin as guardian-ad-litem of the minors. It was held that the decree passed against the minors was null and void against them as there was contravention of the provisions of Order 32, Rule 3. That was a case where no application had been made under Order 32, Rule 3. But in the present case, an application under Order 32, Rule 3 was made, the notices were issued and the service was held sufficient under the Order 5, Rule 19. In the present suit, the second plaintiff has no doubt stated in her evidence that she did not refuse service of the notice, but apart from her interested testimony, there is no other evidence to show that a false endorsement was made by the process-server, whose affidavit has been held to be sufficient for the purpose of service by the Court.

8. Mr. Reddy next relied on the decision in AIR 1960 Ker 367 (Narayan v. Gopalan) wherein it has been held that a minor can avoid a decree passed against him on the ground of gross negligence of the guardian-ad-litem even if the minor had not succeeded in proving fraud and collusion on the part of the guardian. It has been further held that the negligence of the guardian in order to be a good ground for the avoidance of a decree must be of such character as to justify the inference that the minor's interests were not at all protected and in substance though not in form the minor went unrepresented in the trial court and that gross negligence on the part of the guardian can be inferred from his conduct in not setting up proper defence. In that case, the minors had a perfectly good defence, the defence was put up but the guardian abstained later on from adducing any evidence at the trial and gave up contesting the suit and suffered a decree to be passed by entering into a compromise. The failure on the part of the guardian to defend the suit when there was perfectly good defence available, resulting in serious loss to the plaintiff, was held to amount to gross and culpable negligence which would enable the minors to get the decree set aside. In the present case, the plaintiffs pleaded that the 1st defendant obtained a decree on the basis of a forged pronote alleged to have been executed by the father of the 1st plaintiff. In the course of his evidence, when he was confronted with the signatures of his father on the promissory note and the consideration receipt, Exts. D-1 and D-2 the plaintiff stated that he cannot say if they were the signatures of his father.

The test as to when gross negligence was a sufficient ground to avoid a decree as stated by the Full Bench of the Allahabad High Court in AIR 1932 All 293 (FB) (Mt. Siraj Fatma v. Mahmood Ali) in the following words has been followed in the above decision:

"The test of negligence should be the not doing of what a reasonable man, guided by prudent considerations which regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The negligence in order to be a good ground for the avoidance of a decree must be of such a nature as to justify the inference that the minor's interest were not at all protected and therefore he was not properly represented. The direct result of the negligence must be a serious prejudice to the minor and the negligence must not be merely such as might be innocently committed even by a reasonable person taking the

ordinary precautions which he would have taken in his own case. Where the negligence is so gross as to amount to a clear violation of the duty cast upon the guardian although not brought to the notice of the court at the time, the decree can be avoided."

In the present case, the plaintiff does not disclose what valid defence he had to the suit filed by the 1st defendant. In his evidence also he has not disclosed any such defence. It is urged by Mr. Reddy that a prayer should have been made for grant of instalments under the Mysore Agriculturists' Relief Act, but there is no such plea in the present suit. The lower appellate Court has given a finding that the plaintiff would not have been entitled to any relief under the Mysore Agriculturists' Relief Act even if he had raised such a defence. There is no evidence in the present suit as to the income of the plaintiff at the relevant time in order to entitle him to the reliefs under the Mysore Agriculturists' Relief Act. The plaintiffs have not shown that such a plea was open to them in the previous suit.

9. Mr. Ramachandra Rao, appearing for the 1st respondent-defendant 1, has relied on the decision of the Privy Council in (1903) ILR 30 Cal 1021 (PC) (*Walian v. Banke Behari Pershad Singh*). In that case, there was no formal order appointing the mother as guardian-ad-litem. It was held that the minors were effectively represented in the suit by their mother and with the sanction of the court, that there was nothing to suggest that their interests were not duly protected and that the only defects were that no formal order appointing the mother of the plaintiffs as guardian-ad-litem was drawn up and that it is not definitely shown that an attempt was made to serve the summons upon the minors or upon their mother before serving it upon the karta and the only adult male members of the family. It was not shown that the alleged irregularities caused any prejudice to the minors and the debt was one for which the minors were liable. The mother of the minor defendants appeared throughout the proceedings as their guardian. In the plaint she was described as guardian and in the decree and execution proceedings the court so described her. It was held that the defects in procedure not having prejudiced the minors were only irregularities and not errors fatal to the suit. In AIR 1954 All 599 (*Brij Kishore Lal v. Satnarain Lal*) "the minor was represented by his elder brother as guardian in a partition suit. Though the elder brother was not formally appointed as guardian he accepted the guardianship, he also filed a written statement engaging a counsel. He went

up in appeal against the decree passed by the trial court against the minor and took up proper defence. There were others of the family and the grand-father of the minor was a party to the suit and the defence was common to all. There was no prejudice caused to the interests of the minor. It was held that even though some formalities in the appointment of the guardian were not observed, if the guardian has agreed to act as the guardian and has done something to show that he has agreed to act as guardian, it would not vitiate the proceedings or would not affect the result of the suit provided there has been no prejudice to the minor.

In (1935) 13 Mys LJ 176 (*Siddappa v. Rangappa*) one of the brothers represented the minor defendants as their guardian. As there was no valid defence, he refrained from contesting the suit and allowed an ex parte decree to be passed against himself and his minor brothers. There was nothing to show that the proceedings in the suit were either collusive or fraudulent. In that case, the application for the appointment of the mother of the minor defendants as guardian-ad-litem was filed and notices were issued to the defendants as well as to the proposed guardian. The defendants were represented by a Pleader, and as the 1st defendant stated that he was 20 years of age and also looked to be a major, he was permitted to contest the suit on his own behalf and as guardian of his minor brothers, there was no formal order of appointment. It was held the mere absence of a formal order of appointment is only an irregularity which, in the absence of any prejudice resulting therefrom to the minors concerned, will not afford a sufficient ground for setting aside the decree, where the defendants have been effectively represented by a guardian-ad-litem with the sanction of the court. It was also held that omission to issue notice as required by O. XXXXII, R. 3 (4) Civil Procedure Code to the minor defendants or their natural guardian can at best be only an irregularity, which will not vitiate the proceedings unless it is satisfactorily established that the minors have been prejudiced thereby in their defence. It was further held that prejudice is not a matter of assumption or presumption but one of proof depending on the facts and circumstances of each case, and that the real test in cases where gross negligence is imputed to the guardian-ad-litem is whether in fact there has been on the part of the guardian any act or omission in the conduct of the suit which has wrought prejudice to the minor, and that the guardian is expected to take care of the interests of the minors in the same way as a prudent man would look

after his own interests if he were himself a party.

In AIR 1929 Pat 360 (Hitendra v. Sukhdeb) the proposed guardian though served, did not appear and the Court without enquiring into the question whether there was any other person fit and willing to act as guardian in the suit appointed an officer of the court to be the guardian. It was held that this is an irregularity in the appointment but the appointment is not null and void and the minors cannot be said to be not properly represented in the suit. It was further held that where a guardian-ad-litem is negligent in the conduct of the suit and an ex parte decree is passed the court must be satisfied that there was a defence available to the minor defendants which could properly be taken in the suit, before deciding whether there was such negligence on the part of the guardian-ad-litem as would entitle the minors in a decree vacating the decree already passed against them. The practice of a natural guardian to refuse to act as the guardian-ad-litem so as to make it possible to urge afterwards that the minor was not properly represented in the litigation was deprecated. It was held that there was no valid defence open to the minors and that there was no reason to set aside the ex parte decree. In AIR 1954 Nag 135 (Tikaram Namaji v. Tarachand Gujoba) it has been held that the omission to issue notices to certain persons who are alleged to be fit and willing to act as guardian-ad-litem for the minor or failure to record the statement of one of them whether he was or he was not willing to act as guardian-ad-litem does not vitiate the appointment of Court Reader as guardian or render the decree null and void, and these would be irregularities which do not affect the decree unless the minor's interests are prejudiced. It was also held that the minor will not be entitled to get a decree set aside unless gross negligence on the part of the guardian is proved. In AIR 1954 Pat 349 (Krishna Behari v. Kedar Nath) it was held that when the Court, in ignorance of the fact that the minor has a guardian appointed by a competent authority, appoints another person, that does not by itself vitiate either the decree passed in the suit or the sale held in execution of the decree. It was further held that the whole question was whether any prejudice has been caused to the minor, and in the absence of any allegation of fraud or prejudice to the minor caused by the irregularity the proceedings must be regarded as valid. The amendment of Rule 4, clause (4) of Order 32 by the Patna High Court was also referred to. It was further held that it is not the business

or duty of the officer who is appointed as guardian-ad-litem by the Court to file all sorts of frivolous objections.

10. It is contended by Mr. Reddy that before the appointment of a court guardian under clause (4) of Rule 4 of Order 32 is made, a separate application with an affidavit ought to have been filed and notice of such application also should have been issued to the minor and his natural guardian. But there is no such provision in Rule 4 of Order 32 as is to be found in Rule 3 of Order 32. The absence of an enquiry by the Court under clause (4) of Rule 4 of Order 32 as to whether there is no other fit person to act as guardian for the minor could only be an irregularity since no prejudice has been shown to have been caused to the minor first plaintiff. P.Ws. 1 and 2, the relatives of plaintiff 1, appear to have no knowledge of the affairs of the plaintiffs' family as disclosed in their evidence. It is not denied that the first plaintiff was living with his mother, the second plaintiff, at the relevant time.

11. This appeal is therefore dismissed with costs.

Appeal dismissed.

AIR 1975 KARNATAKA 179

SADANANDASWAMY, J.

Pachakhan, Appellant v. H. D. Gopalakrishna Rao and others, Respondents.

Second Appeal No. 189 of 1968, D/- 10-7-1974.*

(A) Civil P. C. (1908), O. 1, Rr. 10 and 13; O. 34, R. 1 — Person claiming adverse/paramount title against both mortgagor and mortgagee may be joined in a mortgage suit. (T. P. Act (1882), S. 60) — AIR 1970 Andh Pra 153, Relied on. Case law discussed. (Paras 5 to 8)

(B) Civil P. C. (1908), O. 1, R. 13 and O. 2, R. 7 — Objection as to misjoinder — Will be deemed to have been waived if not taken at the earliest opportunity. AIR 1970 Andh Pra 153 and AIR 1961 Pat 28, Relied on. (Paras 7, 8)

(C) Evidence Act (1872), S. 167 — Finding of fact — Stands vitiated when based partly on admissible and partly on inadmissible evidence. AIR 1961 Mys 160, Followed; AIR 1956 SC 305 and AIR 1956 Mad 226 and AIR 1955 SC 271, Relied on. (Para 10)

*(Against order of Dist. and S. J., Tumkur in R. A. No. 102 of 1967, D/- 9-2-1968.)

(D) Evidence Act (1872), Ss. 11 and 13 — Document between party to suit and stranger — Admissibility of recitals in.

Recital in a document between party to suit and stranger is inadmissible in evidence unless such recital amounts to admission against the interest of such party. AIR 1961 Mys 160, Followed. Case law discussed. (Paras 9, 10)

Cases Referred: Chronological Paras
AIR 1970 Andh Pra 153 = (1970) 1 Andh

WR 45 5, 7

AIR 1969 SC 751 = (1969) 2 SCR 1061 3

AIR 1961 Mys 160 9

AIR 1961 Pat 28 5

AIR 1958 SC 886 = 1958 SCJ 1214 5

AIR 1958 Pat 110 = 1957 Pat LR 357 5

AIR 1956 SC 305 = 1956 SCR 1 9

AIR 1956 Mad 226 = (1955) 2 Mad LJ 687 9

AIR 1955 SC 271 = 26 ITR 736 10

AIR 1955 All 4 = 1954 All LJ 645 (FB) 5

AIR 1954 Punj 85 = 55 Pun LR 517 5

(1951) 29 Mys LJ 5 5

AIR 1951 Trav-Co 133 = 1951 Ker LT 64 7

AIR 1942 Nag 60 = 1942 Nag LJ 156 5

AIR 1941 Nag 133 = 1941 Nag LJ 81 6, 7

(1938) 16 Mys LJ 54 5

AIR 1937 All 251 = 1937 All LJ 536 5

AIR 1937 Mad 176 = (1937) 2 Mad LJ 165 5

AIR 1936 Mad 338 = 43 Mad LW 525 5

(1923) 1 Mys LJ 38 5

B. Ramachandra Rao, P. G. C. Chennappa and S. N. Ramaswamy, for Appellant; P. R. Srinivasan and S. Kastmath, for Respondents 1, 2 (a) and 2 (b).

JUDGMENT:— The appellant is defendant 4. Respondents 1 and 2 are plaintiffs. Respondent 3 is the first defendant, since deceased represented by his legal representatives. Respondents 4, 5 and 6 are respectively defendants 2, 3 and 5. The suit out of which this second appeal arises was filed in the year 1952 for redemption of Item 1 of the plaint schedule property which is Survey No. 45 of Kambalalu village, Tumkur taluk. It is unfortunate that even after all these years the litigation has not come to an end. According to the case of the plaintiff, the suit property was granted to one Tyagaraj and another land Survey No. 36 of the same village was granted to the father of the fourth defendant, both the grants being made by the Government. Under Ex. P-5 dated 24-4-1931 Tyagaraj sold Survey No. 45 to one Viswanath Mudaliar, who in turn sold it to Monterio under Ex. P-4 dated 4-1-1940. Monterio sold it to second defendant under Ex. P-3 dated 30-9-1946 and the second defendant sold it to the plaintiffs under Exs. P-1 and P-2 both dated 1-10-1948. Under Ex. P-8 dated 22-1-1949 the 2nd defendant

mortgaged the suit property in favour of the first defendant under a usufructuary mortgage. Defendant 3 claims to be a tenant of defendant 2. Sixth defendant is alleged to have purchased the other properties which formed the subject-matter of the mortgage under Ex. P-3 and has remained ex parte. Defendant 4 is the contesting defendant. He admitted that Survey No. 45 was granted to Tyagaraj and Survey No. 36 was granted to his father in the year 1925. But he pleaded that since Survey No. 45 was near other properties belonging to the father of the fourth defendant and since Survey No. 36 was near other properties belonging to Tyagaraj, they exchanged the said two lands; that Tyagaraj took possession and was in enjoyment of Survey No. 36 and that the father of the 4th defendant took possession and was in enjoyment of Survey No. 45 and after his death, the 4th defendant has been in possession and enjoyment of the same. He pleaded that he has established his title by adverse possession. Admittedly, there is no document evidencing the above said exchange of the two properties. According to defendant 4 Tyagaraj sold Survey No. 36 under Ex. P-5 and it is Survey No. 36 which formed the subject-matter of the sale deeds Exs. P-4, P-3 as well as Exs. P-1 and P-2 and what is purchased by the plaintiff is Survey No. 36 and not the suit property. Defendant 5 is stated to be colluding with defendant 4 in resisting the claim of the plaintiffs.

2. Six issues were framed on 2-6-1953. Thereafter defendants 4 and 5 were impleaded. After their written statements were filed additional issues were framed on 6-8-54 which relate to the plea of adverse possession raised by the fourth defendant. The plaint was thereafter amended with regard to the relief in respect of possession on 2-1-1958. Thereafter fourth defendant filed his additional written statement. Additional issues were framed on 17-2-1958. The evidence of both sides were recorded and the trial Court decreed the suit on 21-11-1958. The fourth defendant appealed to the Court of the Civil Judge, Tumkur in R. A. No. 17 of 1959. Since no finding had been given regarding possession, the appeal was allowed and the suit was remanded to the trial Court for fresh disposal after giving a finding on the question of possession on the basis of the evidence already recorded. After remand, the trial Court decreed the suit on 31-8-1965. The fourth defendant again appealed to the Court of the District Judge, Tumkur in R. A. No. 102 of 1967 and the lower appellate Court dismissed it on 9-2-1968. Thereafter the present second appeal has been filed by the fourth defendant.

3. The first contention urged by Sri B. Ramachandra Rao, learned counsel appearing on behalf of the appellant, is that the suit for redemption is not maintainable in view of the allegations in the plaint to the effect that the mortgage had already been redeemed by the sixth defendant. The lower appellate Court held on a consideration of the recitals in Ex. P-8 that the mortgage has not been redeemed by the sixth defendant. But it is contended by Mr. Ramachandra Rao that on the basis of the plaint allegations themselves the suit does not lie. Under Section 60 of the Transfer of Property Act the mortgagor has a right, while asking for redemption, to require the mortgagee (a) to deliver to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee (b) to deliver possession of the mortgaged property to the mortgagor where the mortgagee is in possession of the mortgaged property and (c) to get re-transfer of the mortgaged property at the cost of the mortgagor and to have a registered acknowledgment in writing to the effect that the right of the mortgagee has been extinguished. It has been held in AIR 1969 SC 751 (K. Manikchand v. Elias Saleh Mohamed Sait) that even if one of those three rights is claimed, it is a suit for redemption under Section 60 of the Transfer of Property Act. Hence merely because there is a statement in the plaint to the effect that the sixth defendant has redeemed the mortgage, the suit does not cease to be one for redemption under Section 60 of the Transfer of Property Act. Hence this contention has to be rejected. It was next contended that no relief has been asked against defendants 4, 5 and 6. But an amended plaint has been filed in the trial Court after impleading the additional defendants though the suit was originally filed against defendants 1 to 3 only. Hence, this contention also fails.

4. The fourth defendant filed an application I. A. No. XI for amendment of his written statement. This application was dismissed by the trial Court. The fourth defendant filed a revision petition C. R. P. No. 368/1962, which was dismissed at the stage of admission with the observation that it is open to the petitioner to take up the contention in the appellate Court if an appeal becomes necessary. In the judgment of the lower appellate Court there is no mention of any grievance made out by the 4th defendant, who was the appellant before it, with regard to dismissal of I. A. No. XI although a ground appears to have been taken in the Memorandum of appeal filed in the lower appellate Court. It is urg-

ed by Mr. Ramachandra Rao, that this contention was urged before the lower appellate Court but has not been considered by it. The reason given by the trial Court for dismissing I. A. XI is firstly, that it is belated and secondly, that the plea sought to be raised by the amendment was a new and totally different and inconsistent case. The fourth defendant filed his written statement on 15-2-1954 and his additional written statement was filed on 16-1-1958 in the trial Court. The plea taken by him was that he was in possession of the suit property in his own right and that he has established his title to the suit property by adverse possession. Issues were framed on the basis of these pleas and parties adduced evidence with regard to the same. The suit was decreed by the trial Court and on appeal by the fourth defendant it was remanded to the trial Court. It is after the remand that the fourth defendant filed I. A. No. XI. The suit was remanded by the lower appellate Court for purposes of giving a finding on the question of possession on the evidence already recorded. If I. A. No. XI was allowed, and the written statement amended, it would have been necessary to frame new issues. The correctness of the finding of the trial Court that the application is belated cannot be questioned. The plea sought to be raised by the amendment was that the 4th defendant was an unnecessary party and the question of paramount title cannot be decided in this suit. This plea ought to have been taken at the earliest stage if the fourth defendant felt embarrassed with the mis-joinder of causes of action. But it is only after both the parties adduced evidence that the fourth defendant sought to raise this new plea in order to see that the plaintiff is driven to a separate suit against the fourth defendant even if he succeeds in the redemption suit. The trial Court was therefore justified in rejecting the prayer of the fourth defendant on the ground that he sought at a very late stage, to set up a totally different and inconsistent case.

5. It is next contended by Mr. Ramachandra Rao that the question of paramount title should not have been gone into in the present suit since it is a suit for redemption. In (1923) 1 Mys LJ 38 (Krishnappa v. Ramalakshamma), it has been held that one of the exceptions to the rule that the question of a title paramount to that of the mortgagor or adverse to him cannot be investigated in a suit based on the mortgage is a case where the usufructuary mortgagee seeks to recover possession from a party who is in possession or who is interested in objecting to the delivery of possession and that such a person would be a neces-

sary party. In (1938) 16 Mys LJ 54 (Dodda Puttegowda v. Lange Gowda), it has been held that a plaintiff mortgagee cannot be allowed to frame his suit in such a way as to involve the question of paramount title set up by a third party, who is in no way connected with the mortgage. But the rule is one of convenience and the matter is more or less one of discretion with the Court, so long as no question of jurisdiction is involved. It has been observed that Order XXXIV, Rule 1, of the Code of Civil Procedure does not contain any express prohibition regarding the addition of a party to the suit claiming an adverse title. It has further been held that the conjoint effect of Rule 9, of Order I and Rules, 1, 3, 4 and 6 of Order II of the Code of Civil Procedure appears, to be that the Court has ample discretion in permitting a party to joint more causes of action than one in one suit so long as no inconvenience is occasioned thereby and so long as the jurisdiction of the Court is not affected. Parties who set up adverse title against the plaintiff were held to be necessary parties. It was further observed that the effect of denying relief against persons who set up adverse title to the hypothecated property on a purely technical ground would be to give the plaintiff a decree which is ineffectual and which will necessarily involve further litigation. In (1951) 29 Mys LJ 5 (Fakrud-din Khan v. Abdul Kareem) it has been held by Venkataramana Rao, C. J., that though ordinarily the question of paramount title is not gone into in a mortgage suit, the rule is not rigid and there can be cases in which such a question has to be gone into and the Court can try such an issue if it thinks it necessary in the interests of all the parties that such a trial should take place. In AIR 1936 Mad 338 (Veeraraghavalu Naidu v. Suryanarayana Panda) it has been held that ordinarily the title of persons who set up a claim adverse to the mortgagor and mortgagee should not be investigated in a suit upon a mortgage, but that it is not an inflexible or invariable rule, that such joinder does not affect the jurisdiction of the Court and that in each case the Court can exercise its discretion after considering whether it will lead to inconvenience or confusion in trying the issue as to paramount title in the same suit. It was also observed that when such a question has been gone into by the trial Court the appellate Court should not reverse the decision of the trial Court on that ground alone unless the decision has affected the jurisdiction of the Court or caused a prejudice to the parties by the trial on the merits. In the present case, it has not been shown how the fourth defendant has been prejudiced by

the trial of the issue raised by him. He has been afforded sufficient opportunity and has adduced the evidence in support of his plea. It is only after the suit was disposed of and the issue was held against him that he thought of raising the plea that he was an unnecessary party to the suit and that his title should not be gone into. The decision in AIR 1937 Mad 176 (Kazi Chettiar v. V. Ramasami Chettiar, Firm) related to a claim of self-acquisition by a member of a joint Hindu family. It was held that such a claim cannot be said to be a claim by a stranger asserting paramount title. Hence it does not apply to the facts of the present case. In AIR 1937 All 251 (Bisheshar Dayal v. Mt. Jafri Begum) it was held that there is nothing in Order 34, R. 1 of the Code of Civil Procedure or any other provision of the same Code which forbids a mortgagee from impleading a person who claims a paramount title to the mortgaged property. It was further observed that if the mortgagee is prevented from impleading a person who impugns his title as a mortgagee it will lead to unnecessary multiplication of suits. It was further held that all objections on the ground of non-joinder or misjoinder of parties must be taken at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and that any such objection not so taken shall be deemed to have been waived. On the facts of the present case also the fourth defendant should be deemed to have waived the objection to the frame of the suit.

In AIR 1942 Nag 60 (Laxmanrao Prabhakar Andhare v. Madho Prasad) it has been held that a rule that a person setting up a paramount title shall not be impleaded in a mortgage suit is not an absolute one and that questions of title may be investigated in a mortgage suit if it is necessary to give complete relief to the plaintiff or to secure to him, as a result of the decree in the mortgage suit, a quiet and unobstructed possession. It was further held that when a person claiming paramount title is in possession of the mortgaged property it is convenient to make him a party and to decide the rights of the parties inter se. In AIR 1954 Punj 85 (Aminchand v. Jugal Kishore). It has been held that in a suit for redemption where the adverse possession set up by one of the defendants does not extend to a period before the date of the mortgage, the paramount title set up by him should be determined in the suit and the mortgagor should not be made to litigate the same matter over again. In AIR 1955 All 4 (Mst. Satwati v. Kali Shanker). A Full Bench of the Allahabad High Court held that if in a

mortgage suit defendants set up paramount title and an issue is framed as regards their rights for decision on the merits and the issue is decided, it cannot be said that the Court either went beyond its jurisdiction or did anything which was so improper or illegal that the Court of appeal must even in the absence of any prejudice interfere and that the rule is more a rule of convenience and prudence than a rule affecting the jurisdiction of the Court. In AIR 1958 Pat 110 (Singesar Mahto v. Munari) it has been held that although in a mortgage suit, the issue with regard to paramount title is not a necessary issue it is not an absolute principle and where the leaving of such an issue undetermined would lead to inconvenience or hardship, it is proper that it should be tried in a mortgage suit. It was also held that if a defendant in a mortgage suit sets up a paramount title and without objection goes to trial upon that issue, neither party can afterwards say that the issue was irrelevant. In AIR 1970 Andh Pra 153 (R. Veeraswamy v. R. Jangamayya) the position of law on the question whether the persons claiming paramount title independently but not through the mortgagor or mortgagee can be called necessary or proper parties to a suit for the redemption of mortgage has been summarised as follows:—

"10. From the aforesaid discussion, the following principles emerge:

(1) The provisions of Order 1, Rule 10 (2), Civil P. C., as held by the Supreme Court in Razia Begum's case, AIR 1958 SC 886, should be construed very liberally and all persons who are found to have direct interest in the mortgaged properties must be held to be proper, though not necessary parties for a complete and effective adjudication of the rights of the parties.

(2) The objection of the Legislature in making Rule 1 to Order 34, Civil P. C. is to define the scope of a mortgage suit, pure and simple.

(3) The provisions of Order 34, Rule 1, Civil P. C. are subject to the provisions of Order 1, Rule 10 (2), but the provisions of Order 1, Rule 10 (2) are not controlled by Order 1, Rule 3, Civil P. C.

(4) The question as to who are all the necessary parties to be impleaded as party defendants in a suit on mortgage is not one of jurisdiction but at the most one of misjoinder or non-joinder of parties.

(5) Where a suit for redemption, foreclosure or sale of mortgaged property is brought by the respective parties to the mortgage, all persons interested in the equity of redemption and all those who claim right and interest through the mortgagee should ordinarily be necessary

parties and the persons who claim adverse title paramount in some or all of the mortgage properties but not through the mortgagor or mortgagee, need not be impleaded as parties normally to such a suit.

(6) But, the aforesaid rule is not inflexible or absolute and the Court, in each case, has to see whether such a course will lead to inconvenience or confusion and exercise its discretion judiciously and properly.

(7) In certain cases, where the court thinks it just, proper and necessary in the interests of all parties to adjudicate on the questions relating to paramount title, it is not only proper but even desirable to implead such parties and avoid multiplicity of litigation.

(8) Where it is alleged that the person claiming adversely or by title paramount, is a benamidar of the mortgagee, or is claiming to be in possession and enjoyment of all or some of the mortgaged properties, those who are likely to resist the decree-holder in case the decree is passed in terms of the plaint must be held to be proper, though not necessary, parties to such a suit on mortgage.

(9) Where the Court, on a consideration of the facts and circumstances of each case, is of the opinion that it would be just and convenient and desirable to decide the title of the persons who set up a paramount title, then those persons must be impleaded as party defendants, and in the interests of all parties, the question of title also should be adjudicated upon after framing appropriate and proper issues and giving opportunity to all the parties concerned."

The person claiming to be in possession of the mortgaged property and who claims adverse title has been held to be a proper though not necessary party to such a suit. The lower Appellate Court has relied on a decision in AIR 1961 Pat 28 (Aneshwar Prasad v. Misri Lall) wherein it has been held that where the defendants were trespassers in possession of the mortgaged properties without any lawful title, the decree for redemption obtained by the plaintiff would become infructuous and that in such a case it is desirable that such defendants should be impleaded as parties to the suit. It was further held that if a party on being impleaded does not object he cannot, after being cast in the suit, change front and complain of the error in impleading him. It was further held that if the defendants did not raise any objection to their being impleaded at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, they must be deemed to have waived it and

such a plea cannot be entertained in appeal.

6. Mr. Ramachandra Rao, however, relied on the decision in AIR 1941 Nag 133 (Mt. Shakuntalabai v. Roshanlal Malloram Agarwal). That was a revision petition under Section 115 of the Code of Civil Procedure against the order of the trial Court holding that the 2nd defendant in that case was a necessary party to the suit. She pleaded that her husband was separated from the mortgagor at all relevant times but that the property in suit was her husband's exclusive property in which the mortgagor has no right or authority to mortgage. It was held that she was an unnecessary party to a suit for redemption. The decisions relied on on behalf of the plaintiff in that case wherein the questions of paramount title were decided were distinguished on the ground that the defendants in those cases desired to fight out the question of the mortgage and were therefore necessary parties. It was also observed that paramount title may be investigated in such a suit if it is necessary to give complete relief to the plaintiff or to secure to him, as a result of the decree in the mortgage suit a quiet and unobstructed possession. It was further held that if a person is not interested in the equity of redemption it is not necessary to go into those other matters in order to give the plaintiff the relief which he claims, namely a right to enforce his security against those interested in the equity or redemption. It was also observed that when all parties desire this to be done, or when the person claiming a paramount title also pleads to the mortgage and claims a right to contest the mortgage it is open to the Court to decide on such issue. But the second defendant in that suit claimed a paramount title and claimed to be discharged. It was held that in these circumstances, she was bound to be discharged. It was also observed that the question of impleading parties and persons is fundamental and goes to the very root of jurisdiction. But that observation appears to have been made with regard to jurisdiction of the High Court under Section 115 of the Code of Civil Procedure. In any case, this is contrary to the decisions referred to above which lay down that the question of impleading the person claiming paramount title in a mortgage suit does not affect the jurisdiction of the Court or render the decision illegal.

7. Mr. Ramachandra Rao next relied on a decision in Padmanabha v. Aiyappan Pillai, AIR 1951 Trav-Co 133, in which it is held that in a suit to enforce a mortgage, ordinarily the necessary parties are those interested in the

properties primarily, viz., the mortgagors and their successors in interest and that persons claiming title independently of the mortgagors are ordinarily not necessary or even proper parties to a mortgage suit. In that case, the plaintiff himself raised the objection that defendants 20 and 21 were unnecessary parties to the suit. Then it was held that it would be improper to go into the question of paramount title since it was considered to be neither just nor convenient. The portions of the judgment of the court below relating to title paramount were deleted and the question was left open. It is apparent from the observations made in the judgment in that case that it was not laid down as an inflexible rule that the question of paramount title cannot be gone into in a mortgage suit. The observations in AIR 1941 Nag 133 cited by the learned single Judge also show that under certain circumstances the question of paramount title can be gone into in a suit on mortgage, for example, when all the parties desire it. This also shows that even according to the learned Judge it is not a matter going to the root of jurisdiction of the Court to try the issue of paramount title in a mortgage suit. The nine principles stated in AIR 1970 Andh Pra 153, represent, in my opinion, the correct statement of the position of law. I may also add that under Order 1, Rule 13 of the Code of Civil Procedure, unless the objection with regard to misjoinder has been taken at the earliest opportunity and, at or before settlement of issues, the party shall be deemed to have waived it. Similarly if the objection with regard to misjoinder of causes of action has not been taken at the earliest opportunity, it shall be deemed to have been waived as provided under Order 2, Rule 7 of the Code of Civil Procedure.

8. In the present case no such objections were taken by the 4th defendant. On the other hand, he wanted the issue as to his title to be tried and also adduced evidence in support of the same. It is only after the suit was decreed against him and it was remanded in appeal that he attempted to amend his written statement by raising objections as to misjoinder of parties and causes of action. From the decisions referred to above, it is clear that the rule that the question of paramount title should not be tried in a suit on a mortgage is not an inflexible rule and if the Court finds that it is necessary to try such an issue in order to give complete relief to the plaintiff, in case he succeeds in a suit for redemption, it would be just and proper for the Court to decide that question also. In the present case, the 4th defendant claims to be in adverse possession of the mortgage property. Hence, it is a fit case in which

the title of the 4th defendant should also be decided in this suit itself. Hence, I do not find any good grounds to interfere with the finding of the lower appellate Court in this regard.

9. It is next urged by Mr. Ramachandra Rao that the finding of the lower appellate Court that the 4th defendant has failed to establish his possession of the suit property is vitiated since it has relied on inadmissible evidence viz., Exhibits P-6, P-7 and P-9. The lower appellate Court has considered the recitals as to boundaries of the lands in these documents. Exhibit P-9 is a document executed by defendant 2 in favour of defendant 1. Hence, it would be admissible in evidence being a document inter partes, as has been held in *Harihar Prasad Singh v. Deonarain Prasad*, AIR 1956 SC 305. Mr. Ramachandra Rao has relied on a decision of this Court in *Kalappa Shiddappa Uppar v. Bhima Govind Uppar*, AIR 1961 Mys 160, in which it has been held that in a suit in which the plaintiff claims title to a land, the recitals of the boundary of another land in a document between him and a third party, which describes him as the owner of the suit land, is not admissible in evidence. Exhibit P-6 is the copy of a mortgage deed executed by the 2nd defendant in favour of a stranger. Exhibit P-7 is a Gutta deed executed by defendant 2 in favour of a stranger. It is contended by Mr. Ramachandra Rao that since these two documents are not inter partes they are not admissible in evidence under Sections 11 and 13 of the Evidence Act. In the above said decision *Das Gupta, C. J.* considered the decision in *Rangayyan v. Inmasimuthu Mudali*, AIR 1956 Mad 226, in which it has been held that in case where the recital is contained in a document between a party and a stranger, the recital is relevant against a party as an admission but is not admissible in his favour, unless the fact recited is deposed to in court by the executant of the document, in which case the recital will become admissible under Section 157 of the Evidence Act to corroborate the evidence of the executant. This principle appears to have been approved. But in that case it was held to be of no help to the plaintiff since both the documents in that case were executed by strangers in favour of the plaintiff.

10. Mr. Srinivasan, on the other hand, contended that since Exhibits P-6 and P-7 are documents between a party to the suit and a stranger, the recitals contained in these documents are admissible in evidence as admissions made by the executant viz., 2nd defendant. But the plaintiff claims his title through the 2nd defendant. Hence, the recitals in

those two documents cannot be considered to be admissions made against the interest of the plaintiff in the suit. Hence, the contentions of Mr. Ramachandra Rao that these two documents are inadmissible in evidence has to be upheld. It is urged by Mr. Ramachandra Rao that since the finding with regard to the adverse possession is based, though partly, on inadmissible evidence it is vitiated. But Mr. Srinivasan contended that the finding of the lower appellate Court is justified in view of the other evidence in the case even if Exhibits P-6 and P-7 are ignored. But such a contention was rejected by this Court in the above decision relying upon the decision in *Dhirajlal Girdharilal v. Commr. of Income-tax, Bombay*, AIR 1955 SC 271. In that case it is held that when a Court of fact, whose decision on a question of fact is final, arrives at a decision of fact by considering material which is irrelevant to the enquiry, or by considering material which is partly relevant and partly irrelevant, or bases its decision partly on conjectures, surmises and suspicions and partly on evidence, then in such a situation clearly an issue of law arises; and that in such a case, it is well established that when a court of fact acts on material partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material giving rise to an issue of law.

11. Mr. Srinivasan contended that the documents relied on behalf of the 4th defendant viz., Exhibits D-1, D-6 and D-7 are documents between strangers and therefore not admissible in evidence. This contention has to be upheld. The finding of the lower appellate Court on the issue of adverse possession must be held to be therefore vitiated since it has relied on inadmissible evidence.

12. The findings of the lower appellate Court on the additional Issue No. 2 framed on 6-8-54 and its finding with regard to the additional Issue No. 4 framed on 17-2-58 are therefore set aside. The lower appellate Court is directed to give fresh findings on the abovesaid issues viz., those relating to the adverse possession claimed by the 4th defendant and question of possession of the plaintiffs within 12 years prior to the suit, after affording the parties opportunity of being heard and submit its findings within three months from today. The records of the lower Court shall be despatched to the lower appellate Court within ten days. Parties are directed to appear before the lower appellate Court at 11 a.m., either in person or through

counsel, on 1st of August, 1974, which would be the first date of hearing in the lower appellate Court. There is no necessity for the lower appellate Court to issue fresh notices to the parties. It is open to the lower appellate Court to adjourn the hearing to such further date or dates as it thinks fit. It is to be noted that the documents which had been returned to the plaintiffs have been filed with a memo in this Court by Mr. Srinivasan.

Order accordingly.

AIR 1975 KARNATAKA 186

K. JAGANNATHA SHETTY, J.

Abdul Basheer Sab, Petitioner v. The State of Mysore and others, Respondents.

Writ Petn. No. 1053 of 1973. D/-14-6-1974.

(A) Karnataka Land Revenue (Amendment) Act (1964), Ss. 3, 8 — Resumption of land for contravention of terms of grant — Dy. Commissioner has no power.

The power to resume land for the contravention of the terms of any grant has not been given by any law to the Assistant Commissioner. Therefore, there is no question of the Deputy Commissioner exercising the power of the Assistant Commissioner. The Deputy Commissioner in the matter of resumption of land cannot act at the instruction of the Government. (Para 7)

Under the Rules, the Deputy Commissioner cannot exercise power which is not conferred upon him. He has no inherent power to regulate the land grant. He is not a chief controlling authority in matters relating to Government land. (That power vests in State Government under S. 3). He cannot also be considered as an agent of the Government while performing his functions under the Act. AIR 1955 Bom 1 (FB); Rel. on. (Para 8)

Cases Referred: Chronological Paras AIR 1955 Bom 1 = 56 Bom LR 1084 (FB)

8

T. S. Ramachandra, for Petitioner; B. B. Mandappa, High Court Govt. Pleader (for Nos. 1 to 3) and M. P. Eswarappa (for No. 4), for Respondents.

ORDER:— The question involved in this petition under Article 226, is of considerable importance and that is, whether under the Karnataka Land Revenue (Amendment) Rules, 1960 (hereinafter referred to as "the Rules"), the Deputy Commissioner of a district is competent to resume land for contravening the terms of its grant.

2. The facts leading up to this petition are:

In 1962, the Tahsildar, Shimoga Taluk, granted two acres of land each to some of the landless residents of the village. The grant was made at an upset price of Rs. 25 per acre followed by the issuance of grant certificate in which it was stated that the grantees shall not alienate the land for 15 years. The grantees remained in possession for about 6 years, and thereafter, they sold their land to the petitioner for valid consideration.

3. On coming to know of the alienation, the Deputy Commissioner issued notices to the grantees to show cause why the land granted to them, should not be resumed. In the enquiry held by him, the petitioner was also heard in the matter. He resisted in vain, the action of the Deputy Commissioner who by his order dated 20th February, 1971, cancelled the said grants and resumed the land free from all encumbrances with a direction to evict the petitioner therefrom.

4. Against the said order, the petitioner preferred an appeal to the Divisional Commissioner, who dismissed the appeal holding that the petitioner has no right to prefer an appeal. His further appeal to the Government, was also dismissed, but on different grounds.

5. This petition now brought is primarily on the contention that the Deputy Commissioner has no jurisdiction to resume the land. The relevant provisions which have material bearing on the question are Sections 3 and 8 of the Karnataka Land Revenue Act, 1964, and Rule 43-G (7) of the Rules. Section 3 provides:

"Chief controlling authority in revenue matters:— The State Government shall be the chief controlling authority in all matters connected with land and land revenue administration under this Act."

Section 8 provides:—

"Deputy Commissioner:— (1) The State Government shall by notification appoint for each district a Deputy Commissioner, who shall be subordinate to the Divisional Commissioner.

(2) The Deputy Commissioner shall in his district exercise all the powers and discharge all the duties conferred and imposed on him under the Act or under any law for the time being in force. He may also exercise such powers and discharge such duties as are conferred and imposed on an Assistant Commissioner under this Act or under any other law for the time being in force, and in all matters not specially provided for by law, he shall act according to the instructions of the State Government."

Rule 43-G (7) provides:—

"Grant of lands under the preceding rules shall be subject to the following conditions:—

xx xx xx
 xy xx xx

(7) the grant is liable to be terminated and the land resumed if any of the aforesaid conditions is not fulfilled, and on such resumption the land shall vest in Government free from all encumbrance:

Provided that no land shall be resumed under this clause except after giving an opportunity to the grantee or his successor in interest to show cause why the grant should not be terminated and the land resumed."

6. It may be relevant to refer to Rule 43-I of the Rules. The said rule confers power to cancel a grant on the authority which granted it, where the grant has been obtained by making false or fraudulent representations. Under the said rule, the authority which granted the land has no power to cancel it on the ground that the grantee has contravened the terms of the grant.

7. Rule 43-G (7) simply states that the grant is liable to be terminated and the land resumed if any of the conditions of the grant is not fulfilled. It does not specify the authority empowered to cancel the grant. In these circumstances, whether it would be competent for the Deputy Commissioner to terminate the grant and resume the land to Government is the only question for decision.

The power of the Deputy Commissioner is located under Section 8 of the Karnataka Land Revenue Act. He could in his district exercise all the powers and discharge all the duties conferred and imposed on him under the Land Revenue Act or under any law for the time being in force. Obviously, there is no specific provision in the Land Revenue Act conferring power on him, to cancel any grant either made by him or any other authority. There is no other law by which such power is conferred upon him. The Deputy Commissioner may also exercise such powers and discharge such duties as are conferred and imposed on Assistant Commissioner under the Land Revenue Act. But the power to resume land for the contravention of the terms of any grant has not been given by any law to the Assistant Commissioner. Therefore, there is no question of the Deputy Commissioner exercising the power of the Assistant Commissioner. In all other matters which are not specially provided for by law, Deputy Commissioner shall act according to the instructions of the State Government. But so far as the grant of land and its resumption are concerned, it cannot be said that they are matters not specially provided for by law. They are regulated by the provisions of the

Land Grant Rules. Therefore, the Deputy Commissioner on the said matters could not have acted at the instructions of the Government. Apart from that, it is not the case of the respondents that the Deputy Commissioner has terminated the grant and resumed the land at the instruction of the Government. It seems to me, therefore, that the impugned order made by the Deputy Commissioner must be held to be without authority of law.

8. The view taken by the Government that in the absence of an authority specified under Rule 43-G (7), the Deputy Commissioner shall be held to have power to resume the land, cannot be sustained. Under the Rules, the Deputy Commissioner cannot exercise power which is not conferred upon him. He has no inherent power to regulate the land grant. He is not a chief controlling authority in matters relating to Government land. Under Section 3, it is the State Government which shall be the chief controlling authority in all matters connected with land and land revenue administration. Therefore, the Deputy Commissioner cannot be held to have any implied power in matters pertaining to land and land revenue administration. He cannot also be considered as an Agent of the Government while performing his functions under the Act. The same was the view taken by the Bombay High Court in *State of Bombay v. Chhaganlal Gangaram Lavar*, 56 Bom LR 1084 = (AIR 1955 Bom 1) (FB), wherein it was observed at p. 1095:

"..... Now it is wrong to introduce the principles of agency when considering the various functions to be discharged by officers under the Land Revenue Code. These functions are not discharged by these officers as agent of Government. These functions are discharged by them as officers upon whom certain obligations are imposed by statute and certain discretion is vested by statute. Therefore, in exercising these functions, they are exercising statutory duties and not duties as agents for Government. To talk of agent and principal is, in our opinion, again introducing principles well understood in the law of contract which have no application whatsoever when we are dealing with statutory rights and obligations." With respect, I entirely agree with the above observation.

9. In this context, it may not be out of place to refer to Karnataka Land Grant Rules, 1969, in which there is a special provision conferring power to resume land on an authority which granted the land in all matters where the grant has been obtained by making false or fraudulent representations, or for the contravention of the terms of the grant.

Under the said Rule, the authority which granted the land would be competent to resume it even for the contravention of the terms of the grant. But, there was no similar rule when the Deputy Commissioner made the order which is impugned in the present case. It must, therefore, follow that the Deputy Commissioner then had no power to terminate the grant and resume the land.

10. In the result, and for the reasons stated above, this petition is allowed and the orders impugned are quashed.

11. In the circumstances, no order as to costs.

Petition allowed.

AIR 1975 KARNATAKA 188

K. JAGANNATHA SHETTY, J.

M. S. Ranganath, Petitioner v. The Institute of Chartered Accountants of India and others Respondents.

Writ Petn. No. 243 of 1973. D/- 3-4-1974.

(A) Chartered Accountants Act (1949), S. 15—The Council of the Institute of Chartered Accountants cannot be stopped from reviewing its own decision when that decision particularly relates to professional conduct and activities of members of the Institute.

Under S. 15 the duty of carrying out the provisions and the power to take disciplinary action against the Chartered Accountants vests in the Council. With a view to achieve its objects where the Council reviewed its earlier opinion and asked the Directors of a consultant Company to dissociate themselves from the company, as they were Chartered Accountants the Council is entitled to hold this opinion provided it is not ultra vires of the Act and the regulations made thereunder. Where the decision of the Council is not contrary to the Act and Regulations, the Council cannot be stopped from reviewing its own decision when that decision particularly relates to the professional conduct and activities of the members of the Institute. AIR 1968 SC 718, AIR 1971 SC 1021, AIR 1964 Cal 131 and (1962) 1 QB 416, Ref. to.

(Paras 11, 13)

(B) Chartered Accountants Act (1949), Ss. 15, 25 — Council calling upon Directors of a Company to dissociate themselves from the Company — Opportunity not afforded to Directors of being heard — Impugned directions liable to be set aside. (Constitution of India, Art. 226).

The direction given to the Directors of the Company was to dissociate them-

selves from the Company on the ground that the consultancy service offered by them or through their Company is a part of the practice of a Chartered Accountant and therefore forbidden by the provisions of Section 25. Disobedience of this direction of the Council would entail penal consequences and the Directors would be liable to be dealt with for professional misconduct. When such is the position, the Council ought to have afforded an opportunity of being heard to the Directors before taking the decision and issuing the impugned direction, particularly when the Council had no opportunity or benefit of looking into the actual works performed by the Directors of the Company. AIR 1967 SC 1269, AIR 1973 SC 205 and AIR 1970 SC 150. Rel. on.

(Para 15)

Cases Referred: Chronological Paras
AIR 1973 SC 205 = (1970) 1 SCWR 194

14
AIR 1971 SC 1021 = (1970) 3 SCR 854 10
AIR 1970 SC 150 = (1970) 1 SCR 457 14
AIR 1968 SC 718 = (1968) 2 SCR 366 10
AIR 1967 SC 1269 = (1967) 2 SCR 625 14
AIR 1964 Cal 131 = 67 Cal WN 772 11
(1962) 1 QB 416 = (1961) 2 All ER 46 12
(1949) KB 227 = (1948) 2 All ER 767 10

A. V. Albal, for Petitioner; A. J. Sadashiva for G. R. Ethirajulu Naidu (for No. 1); Smt. Yashoda Rao for B. V. Krishnaswamy Rao (for Nos. 2 to 7), for Respondents.

ORDER:— In this petition under Article 226, the petitioner who is a Chartered Accountant, has challenged the validity of an order made by the Institute of Chartered Accountants of India (hereinafter referred to as 'the Institute'). The Institute is a body created under the Chartered Accountants Act, 1949 (hereinafter referred to as 'the Act').

2. The facts leading to the petition are these:— The petitioner and respondents 3 to 7 wanted to promote a company known as "Datacons Private Limited". The object of the said Company as envisaged by its Memorandum and Articles of Association is to carry on the business of consultancy services in all aspects relating to the management, economics, marketing, agriculture, engineering, project design and execution, development of proto-types and software techniques, to conduct work studies, research, systems-analysis, surveys, investigation, planning, designing and execution, in all matters relating thereto and to provide their clientele with the necessary advice, guidance, reports, expertise, technique or know-how in relation to any or all the matters; to establish and run a Data Processing Centre with the aid of calculating machines, electronic com-

puters and other gadgets and to establish or assist companies, businesses, firms, projects or enterprises to undertake works, projects and schemes of all descriptions and to provide them with necessary advice and expertise in all engineering, technical, marketing financial and other allied matters. The promoters of the Company, before it was registered, forwarded the Memorandum of Association to the Institute for the opinion and approval of the Council, so that they may not, afterward, be found fault with for their association with the Company. It would be useful now to refer to the correspondence exchanged between the promoters of the Company and the Institute. On 12th April, 1971, the Secretary of the Institute wrote a letter to respondent 3, suggesting certain changes in the Memorandum of Association of the Datacons Private Limited. His letter reads as follows:—

12th April, 1971.

My dear Mr. Ramadhyani,

I am in receipt of your telegram and letter forwarding the Memorandum and Articles of Association of the proposed company. As I have explained in my earlier letter, Section 25 of the Chartered Accountants Act prohibits companies from practising as Chartered Accountants. Your attention is also invited to Section 2 (2) of the said Act and Regulation 167 of the Chartered Accountants Regulations as to what constitute practice as a chartered accountant. In view of these provisions, a member of the Institute associating himself with any limited company set up for the purpose of performing all or any of the functions which are considered to be within the ambit of practice of a chartered accountant would be rendering himself liable for disciplinary action.

From a first reading of the Memorandum and Article of Association sent by you and having regard to what I have explained above, before you or any of your partners could associate as Directors of the proposed company, it would appear that the same would have to be amended appropriately omitting all reference to services which fall within the definition of 'practice'. All the same I am referring the matter to our Standing Counsel and I shall revert to this subject on receipt of his reply during the course of the next few days.

As for the case of another member mentioned by you, as far as I have been able to see from the correspondence, no definite reply has yet been given to him granting the permission.

Yours sincerely,

Sd/-
(C. Balakrishnan)."

3. On 15th April, 1971, respondent 3, after effecting the necessary amendments to the 'object clause' in the Memorandum of Association, replied as follows:—

My dear Sri Balakrishnan,

DATACONS PRIVATE LTD. (under formation)

May I refer you to para. 2 of your letter dated 12th April, 1971.

In accordance with the suggestions contained therein, it is proposed to amend the Main Objects Clause 1 of the Memorandum of Association, omitting all reference to service within the definition of 'practice' so as to read as under:

"1. To carry on the business of consultancy services in all aspects relating to Management, Economics, Marketing, Agriculture, Engineering, Project Design and Execution, development of Prototypes and Software Techniques, to conduct work-studies, Research, Systems-Analysis, Surveys, Investigation, Planning, Designing and Execution, in all matters relating thereto and to provide their clientele with the necessary advice, guidance, reports, expertise, technique or know-how in relation to any or all of the matters hereinbefore mentioned."

In the light of the above change in the Objects Clause of the Memorandum, I shall be much obliged if you will please let me know per return of post whether the proposed amendment of the Objects Clause of the Memorandum is acceptable to your esteemed Institute and permission can accordingly be granted to me to be the Managing Director of the proposed Company.

With kind regards,

Yours sincerely,

Sd/-

B. K. Ramadhyani.

Shri C. Balakrishnan,
Secretary,
The Institute of Chartered
Accountants of India,
New Delhi."

4. In the above letter, respondent 3 has specifically sought permission from the Institute for his becoming the Managing Director of the Company, if the Institute has no objection for the registration of the Company. Similar requests were made by the petitioner and respondents 4 to 7 for becoming the Directors of the said Company. On 24th April, 1971, on behalf of the Institute a letter was addressed to respondent 3, stating that the Institute has obtained legal opinion on the matter and the Standing Counsel of the Institute has opined that the activities of the Company would not offend the provisions of Section 25 of the Act. It was further stated that respondent 3

could become the Managing Director, while others would be entitled to function as Directors of the Datacons Private Limited. Accordingly, on 3rd May, 1971, the said Company was registered and it started catering to the needs of its clientele, with respondent 3 as the Managing Director and the petitioner and others as directors of the company. The Company undertook huge outlay of expenditure. It made arrangements to get various sophisticated machines from the IBM. It installed many other machines at its new premises at Lalbagh Road, Bangalore. It borrowed loans from the Banks and third parties directly under the authorisation and responsibility of the Managing Director of the Company.

5. When the company was thus functioning, for a little over one year, the petitioner received a letter dated 31st July, 1972, from the Institute, stating that the Council at its recent meeting, reviewed the whole position, and came to the conclusion that the permission granted to enable him to act as a Director of the Company would offend the provisions of Section 25 of the Act. By the said letter, the petitioner was given six months' time for dissociating himself from the Company. Similar directions were also issued to the other Directors. Respondent 3, taken by surprise, addressed a detailed letter to the Institute, inter alia contending as follows:—

That the Managing Director or other Directors do not engage themselves in offering consultancy services through the Company. They function in the same way as a Chartered Accountant would do if he were the Director of the IA or, IVL. They do not give or offer their professional services directly to the Company's clients. The Company has its own technical staff, to perform its day-to-day functions. The Directors have acted on the strength of the permission accorded to them by the Institute. They have provided to the Company with substantial working funds and have incurred heavy financial commitments and their withdrawal at this stage would result in a total financial loss to them.

6. In the said letter, respondent 3 further reiterated that the provisions of Section 25 of the Act, are not attracted since the company does not indulge directly in performing any professional work, such as, audit, certification of accounts, income-tax work, etc., which form part of the normal functions of a practising Accountant. It was further stated that the Company has several long-term contractual obligations with its clients, and, if the Directors are asked to withdraw from the Company, leaving its clients in doldrums, it would affect

the reputation of the Directors and expose them to legal action including one for damages. With these and other stated circumstances, respondent 3 requested the Council to permit him and other Directors to continue to function as Directors of the Company.

7. The Council of the Institute, did not however, change its opinion. It reiterated its views by its letter dated 4th January, 1973, stating that the petitioner and other Directors should dissociate themselves from the Company to avoid penal consequences and to be free from professional misconduct.

8. The petitioner, finding himself with no other alternative, has preferred this petition challenging the action of the Council of the Institute.

9. On behalf of the Institute, a counter-affidavit has been filed by its Secretary in which he has not denied the statement of facts alleged by the petitioner. He has also not denied that the Council permitted the petitioner and others to become directors of the Company, after considering that they would not be rendering themselves liable for disciplinary action. He has, however, stated as follows:—

"The rendering of consultancy services and other work which comes within the ambit of a Chartered Accountant's work in all aspects relating to management, is in the opinion of the Council, a part of the practice of a chartered accountant under Section 2 (2) (iv) of the Act. Section 25 (1) of the Act forbids the rendering of any such services by a company. It is immaterial whether the Managing Director or other Directors of Datacons Private Limited are personally rendering any of the services which can be rendered by a chartered accountant. So long as the company whose affairs they are controlling, is rendering such services, they come under the mischief of Section 25 (2) of the Act. In other words, the fact that the petitioner is a director of the company is actionable in itself under Section 25 (2) of the Act. Even if the directors are not actually controlling the day to day affairs of the company, if the company is rendering such services as a chartered accountant would, then, it would come within the ambit of Section 25."

10. With these pleadings, it is necessary now to deal with the submissions on the merits of the case. The claim of the petitioner is firstly founded upon equity or estoppel which is said to arise in his favour as a result of the representation made or permission accorded by or on behalf of the Council of the Institute. The estoppel is a complex legal no-

tion. It is rule of equity. The principle upon which this rule rests is that it would be most inequitable and unjust that if one person, by a representation made, or by conduct amounting to representation, has induced another to act as he would not otherwise have done, the person who made the representation should not be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. This rule has gained new dimensions in recent years. It has been extended to the representation made by the State and the public bodies. In *Union of India v. M/s. Anglo Afghan Agencies*, AIR 1968 SC 718 the Supreme Court held that the following observations made by Denning, J., in *Robertson v. Minister of Pensions*, (1949) 1 KB 227 applied in India:

"The Crown cannot escape by saying that estoppels do not bind the Crown; for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity, that is, the doctrine that the Crown cannot bind itself so as to fetter its future executive action."

In *Century Spinning and Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council*, AIR 1971 SC 1021 the Supreme Court extended the rule of estoppel against public bodies. It was observed:

"If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is in our judgment, not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position, to his prejudice."

It was also observed in that case that public bodies are as much bound as private individuals to carry out representations of facts and promises made by them; relying on which other persons have altered their position to their prejudice.

11. The principles of estoppel are now well established and, any difficulty that arises is due only to the application of well settled principles in an individual case. The question before me is whether these principles apply a fortiori to fettering the effective discharge of statutory duties by the Council of the Institute. The answer to the question, to my mind, depends upon the scheme of the Act and the purpose for which the Institute is constituted. The Act is a self-contained code of conduct of the chartered accountants. The Institute of the Chartered Accountants of India is a body corporate. All the chartered accountants in India are its members. For the management of the affairs of the Institute, Sec-

tion 9 provides for the constitution of a Council of the Institute. Under Section 15, the duty of carrying out the provisions of the Act, shall be vested in the Council. It has got, among others, the power to take disciplinary action against the Chartered Accountants. It is the Council which is primarily responsible to guide its members in the discharge of their professional duties and to maintain a high standard. In *Kishorilal Dutta v. P. K. Mukherjee*, AIR 1964 Cal 131 the Calcutta High Court observed that the aim of the Act was mainly to protect the public from 'unscrupulous, negligent or dishonest' chartered accountants who are entrusted with the safety of the interest of the public. The Chartered Accountants Regulations, 1964 provide in detail the method and manner in which the chartered accountants have to conduct themselves while they are in practice. They shall not do any act which the Act forbids or their profession disapproves. On a perusal of these provisions of the Act and the said Regulations, I have no doubt that the Act was intended for the benefit of the public and the Council of the Institute is charged with the duty of carrying out the provisions of the Act. Such a public body, in my judgment, shall not be disabled or estopped from properly guiding the chartered accountants. A public authority cannot abdicate its statutory duty in the public interest. My view finds supports from the following passage from *Judicial Review of Administrative Action* (Second Edition) by S. A. de Smith at page 459:

"A public authority is created for the purpose of discharging responsibilities for the public benefit, and it is vested with specific powers and duties in that behalf. If it impedes the discharge of its responsibilities by permitting others to do things that it has no power to permit, the public interest requires that it shall not be disabled from reasserting those responsibilities notwithstanding its previous conduct."

12. In *Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd.*, (1962) 1 QB 416 an officer of a planning authority told a firm that if they bought certain property they would not need planning permission to use it as a builder's yard since it had already been used for this purpose so that the purchaser would have the benefit of the "existing use of right". In fact this was proved to be wrong information, and planning permission was subsequently refused. It was observed by Lord Parker, C. J. at page 422 as follows:

"It is perfectly clear that that proposition is sound, at any rate to this extent, that estoppel cannot operate to pre-

vent or hinder the performance of a positive statutory duty. That, indeed, is admitted by Mr. Forbes on behalf of the respondents, but he maintains that it is limited to that and that it does not extend to an estoppel which might prevent or hinder the exercise of a statutory discretion. I can see no logical distinction between the two."

13. It is in the public interest, that this Court shall not extend the rule of estoppel in respect of a representation made or act performed or advice tendered by the Council of the Institute in relation to the professional conduct of the members of the Institute. The Council is under a duty to guide correctly the members of the Institute. It is a professional body of people who are the best judges to decide and lay down what the standard of their conduct should be. It is perhaps with that end in view the Council reviewed its earlier opinion and asked the petitioner to dissociate himself from the Company. The Council is now of the opinion that the consultancy service offered by the Directors of the Company individually or through the Company, in all aspects relating to management, is part of the practice of a chartered accountant as described under Section 2 (2) (iv) of the Act, and it would offend the provisions of Section 25. In my view, the Council is entitled to hold this opinion provided if it is not ultra vires of the Act and the regulations made thereunder. It is not the case of the petitioner that that decision of the Council is contrary to the Act and Regulations. Therefore, the Council cannot be estopped from reviewing its own decision when that decision particularly relates to the professional conduct and activities of the members of the Institute.

14. The next question is whether an opportunity should have been afforded to the petitioner, before he was called upon to dissociate himself from the Company. The need to observe the rules of natural justice depends upon the effect of the decision of the Council on the rights of the petitioner. The petitioner is a Director of the Company; so also respondents 3 to 7. They became Directors only after the Council expressly permitted them. They have undertaken huge outlay of expenditure and have committed themselves on various contracts. They have been functioning as such for more than one year when the Council made the impugned direction. They have stated, that the consequences of their withdrawing from the Company, would not only affect their reputation, but they will be exposed to legal action including one for damages. These facts and allegations have not been denied in the coun-

ter-affidavit filed by the Secretary of the Institute. I have, therefore, to proceed on the ground that the impugned direction of the Council has prejudicially affected the petitioner and respondents 3 to 7.

In *State of Orissa v. Dr. (Miss) Binapani Dei*, AIR 1967 SC 1269, the Supreme Court observed that the rule that a party to whose prejudice, an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. This principle has been reiterated by the Supreme Court in the *D. F. O., South Kheri v. Ram Sanahi Singh*, (1970) 1 SCWR 194 = (AIR 1973 SC 205).

In *A. K. Kraipak v. Union of India*, AIR 1970 SC 150 it was observed:

"..... The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words, they do not supplant the law of the land but supplement it....."

"..... If the purpose of the rules of natural justice is to prevent miscarriage, one fails to see why those rules should be made inapplicable to administrative enquiries....."

15. Apart from the applicability of these principles to the case on hand, there is one other strong reason as to why the petitioner should have been given an opportunity of being heard. The direction given to the petitioner and other Directors of the Company was to dissociate themselves from the Company on the ground that the consultancy service offered by them or through their Company is a part of the practice of a chartered accountant and therefore forbidden by the provisions of Section 25. Disobedience of this direction of the Council would entail penal consequences to the petitioner and other Directors and they would be liable to be dealt with for professional misconduct. This was made clear by the Secretary in his letter dated 4th January, 1973 addressed to the petitioner. When such is the position, the Council ought to have afforded an opportunity of being heard to the petitioner and respondents 3 to 7 before taking the decision and issuing the impugned direction. After all, the decision of the Council rested solely on the "Main Objects Clause" in the Memorandum of Association of the Company. It is said that the Council has had no opportunity or benefit of looking into the actual works performed by the Directors of the Company. The impugned direction must, therefore, be set aside on the simple ground that it

for the cheques and also the finding that the plaintiff is a holder in due course. We will necessarily have to deal first with the plea of the appellant that the lower court ought to have found the suit was sustainable in law.

6. Section 69 of the Indian Partnership Act reads:

"69. (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in a firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect—

(a) the enforcement of any right to sue for the dissolution of a firm, or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency Towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.

(4) This section shall not apply:—

(a) to firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in areas to which, by notification under Section 56, this Chapter does not apply, or.

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which in the Presidency towns, is not of a kind specified in Section 19 of the Presidency Small Cause Courts Act, 1882, or, outside the Presidency towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim."

This is not claimed to be a suit against a firm or against any person alleged to be or to have been a partner in the firm. Evidently therefore Section 69(1) is not applicable. Reliance is placed on Section 69(2). According to learned counsel

for the first defendant the suit on the dishonoured cheques must be found to be a suit to enforce a right arising from a contract instituted against a third party and such a suit would not lie in a Court unless the firm is registered and further the persons suing are or have been shown in the Register of Firms as partners in the firm. There is controversy on the question whether the firm is registered. Though plaintiff averred in the plaint that it was registered and the first defendant categorically refuted it in the written statement and an issue had been framed in the suit, no evidence was let in by the plaintiff to show that the firm was registered. The certificate of registration was the best evidence. That was not produced. On the evidence the Court below was right in holding that the plaintiff firm was not registered. The plaintiff relies on Ext. A-8, which is a memorandum acknowledging receipt of documents by the Registrar of Firms, issued to the plaintiff. This is seen dated 3-6-1964. This does not indicate that the plaintiff's firm was registered. Any application made under Section 58 must satisfy certain requirements, and it is for the Registrar of Firms to decide whether registration could be granted or not. Registration is not retrospective from the date of application, but is operative only from the date the firm is registered. Therefore unless the plaintiff succeeds in showing that there has actually been registration, by the mere production of evidence to show that he had applied for registration, his case cannot be found. Even here there has been no attempt to produce evidence to show that the firm was registered, though it would appear from the memorandum of appeal filed as early as in 1971 that sufficient opportunity has not been granted is one of the grounds in appeal urged by the appellant. Hence on that question we must agree with the Court below.

7. Now that we find that the firm is not registered, the question is how far the Court below was right in dismissing the suit. This arises because it is not every suit by a partner of an unregistered firm that will have to be dismissed as infringing Section 69(2) of the Act. It is necessary that the party contending that the suit is not maintainable must show that it is a suit to enforce a right arising from a contract. Necessarily therefore whenever a plea that the suit is not maintainable by reason of Sec. 69(2) of the Partnership Act is raised the Court will have to examine (1) what right is sought to be enforced in the suit (2) does such right arise from a contract? If the right which is sought to be enforced arises otherwise than as in torts

or from rights conferred by statutory provisions necessarily the bar under Section 69 (2) of the Indian Partnership Act will not operate.

8. The Negotiable Instruments Act is a self contained enactment and provides for the rights and obligations of parties to the negotiable instruments and parties who acquire rights to such instruments in accordance with law. It may be necessary, in this context, to refer to certain provisions of the Negotiable Instruments Act relating to cheques. Section 30 of the Act defines the liability of a drawer. It provides that a drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received, by the drawer as provided in the Act. Section 36 defines the liability of prior parties to the holder in due course and Section 37 concerns the liability of a maker of a cheque. Section 36 provides that every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied. Sec. 37 provides that the maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker. Section 92 of the Act relates to dishonour by non-payment. It defines that a cheque is dishonoured by non-payment when the drawee of the cheque makes default in payment upon being duly required to pay the same. When it is so dishonoured the holder thereof or some party thereto who remains liable thereon has to give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon and to some one of several parties whom he seeks to make jointly liable thereon. This is the provision in Section 93 of the Act.

9. Reference has been made to these provisions to indicate that the obligation of the drawer of a cheque as well as the indorser to the indorsee who is the holder in due course arises by virtue of statutory provisions. It is not as if there is any privity of contract between the maker of a cheque and the holder in due course. Any right of action available to such holder is not under any contract, for, he would be a third party to the contract and would not come within one of the exceptions enabling a third party to a contract to sue. But he is entitled to sue on his cheque by reason of the right conferred upon him by the sta-

tute. In fact, in the case of an indorsement of a promote or of a cheque it is not an assignment of the debt as such but only of the property in the note or the cheque and it is by virtue of obtaining such property in the note or the cheque that the indorsee sues thereon. It is not necessary to advert to the several decisions which indicate that a person suing on a negotiable instrument is not suing by virtue of the assignment of the debt. That, we think, is well settled and therefore we are not referring to the decisions cited by counsel on this point. It is sufficient to state here, for the purpose of this case, that the right of action available to an indorsee of a cheque who comes to hold the cheque in due course is based upon conferment on him by the statutory provisions the right to sue the maker of the cheque and also the indorser. If that be the case the right that is sought to be enforced does not arise from a contract. It is not a suit by the indorsee to enforce a right arising out of a contract and therefore the bar under Section 69 (2) of the Partnership Act will not operate in such a case.

10. We have not been referred to any decision directly bearing on the point. No doubt there is a decision of this Court by a learned single Judge reported in *Sankaralinga Nadar v. Chacko*, 1963 (1) Ker LR 443. That was a case where a similar suit on a cheque was found to be sustainable since it was said that it did not arise out of a contract. But there is no discussion on this question in that decision.

11. Having found that the suit would not be bad for the reason found by the Court below, we have necessarily to consider the objections urged by the defendant to the findings in the judgment under appeal which are against him. According to him the Court was not right in holding that the cheques were supported by consideration. Counsel for the respondent urges that the Court ought to have found that the evidence in the case indicated that the cheques were issued not as price of any goods supplied nor in satisfaction of any money received, but purely as an arrangement by way of advance towards the value of goods agreed to be supplied in due course and these could have been presented only after such supplies were made. These questions have been urged before the Court below. But we may state here that both parties adduced very little evidence on this in the lower Court. Oral evidence is only that of the managing partner of the plaintiff firm as PW1 and the manager of the defendant firm as DW1. Reliance is sought to be placed by the first defendant on an account book, Ext. B1. It

would appear that the first defendant is a very well established firm and we are surprised that the only account book produced is Ext. B1 which does not appear to us to be an account book at all. Anyhow there are entries in regard to certain transactions in that book and probably those entries might have been regularly made. But that book must have been kept, in addition to the regularly kept account books. We cannot conceive a state of affairs when the first defendant firm was having only a book like Ext. B-1 and no day book or ledger. Whatever that be, we think the criticism made by the Court, below of Ext. B-1 is not well founded. There are entries in Ext. B-1 which would show that the second defendant firm had been receiving advances by way of cheques even earlier. That is what the entries indicate in spite of what the Court below says to the contrary. We are saying this because the Court below seems to think that the entry in page 125 of Exhibit B-1 to the effect "otherwise can return cheques" is written in a different ink and assume this to be a correction made subsequently. Possibly so. The rest of the entry which of course could not have been any interpellation refers to the cheques having been handed over to the second defendant by way of advances for the goods to be supplied and therefore even if the words which are said to be made by way of interpellation are omitted the idea conveyed by the entry which is relied on is that the second defendant received these cheques as advances against goods agreed to be supplied. Further the book contains other entries of similar advances received by the second defendant firm. Unfortunately this aspect of the matter has not been noticed by the Court below. Not that this is conclusive of the issues between the parties, but this is relevant in properly assessing the merits of the controversy. It is true that Ext. B-1 has not been produced before the Sales Tax Department. It is also not been produced before the Income-tax authorities. Probably there are other books which have been so produced. There has not been a proper cross-examination also on this point. The disputed entries in Ext. B-1 are seen signed by the representative of the second defendant. There is no cross-examination as to whether the signatures appearing as that of the second defendant are really that of the second defendant. None has been examined on behalf of the second defendant. The first defendant would have been well advised to take steps to properly prove the acknowledgment by the second defendant in regard to these entries. Thus we feel that, while on the evidence the Court below was possibly

right in coming to the conclusion reached by it, this is a case where the parties would have been well advised to adduce better evidence and therefore when the first defendant prays for a further opportunity to adduce evidence we are inclined to view it favourably. It is not that merely for the asking we are inclined to give an opportunity. That should not be the case. But taking into account the circumstances and the nature of the evidence in the case, we are not happy that the matter should be left as it is and in the interests of justice we are inclined to grant an opportunity to the first defendant provided he is agreeable to comply with the heavy terms that we propose to impose. In case the entire costs of the appellant in this appeal is paid by the first defendant to the appellant's counsel in this Court within one month from this date, the decree of the Court below will stand set aside and the case will stand remitted to the Court below for enabling the parties to adduce evidence and in that event the Court below will take up the matter immediately and post the case day-to-day and dispose it of within four months from the date of receipt of records in that Court. In case the condition is not complied with, there is no question of further opportunity and on the evidence the first defendant must lose his case on the merits. Now that we have found that the suit is maintainable that would mean that the plaintiff would be entitled to a decree in terms of the plaint. In that event the plaint will stand decreed with costs throughout.

Order accordingly.

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G. VISHWANATHA IYER, J.

Vannarath Parvathi Amma and others, Appellants v. Vannarath Lakshmi Amma and others, Respondents.

Second Appeal No. 248 of 1971. D/-18-12-1974.

(A) Hindu Law — Marumakkthavam — Acquisition by karanavan and senior anandiravan — If and when will be tarwad property.

A presumption that an acquisition by karanavan is for the tavazhi will arise only when it is established that he had in his hands sufficient tarwad nucleus with which the acquisition might have been made. Therefore when at the time of the acquisition by the karanavan and senior anandaravan the tavazhi was in debts and difficulties and as such no sufficient tarwad nucleus could have been in their hands for such presumption to arise.

CS/ES/A996/75/JRM

the acquisition must be held to have been acquired by them with their own funds. AIR 1966 SC 411. Explained; 1969 Ker LR 1, 1971 Ker LT (SN) 41. Followed; 1968 Ker LT 568 and AIR 1967 Ker 90, Rel. on. (Paras 2 and 3)

However when such property was subject to kanakuzhikanom and the karanavan who had been receiving income from the tarwad properties had not discharged the kanakuzhikanom, he cannot claim a benefit out of his own default. He was bound to discharge the debt when the tarwad funds came to his hand. He had a duty to protect the interests of the tavazhi. When the amount so received by him is far in excess of the amount in respect of the acquisition made by him, in spite of that acquisition being out of his funds, the liability must be deemed discharged and he cannot claim separate allotment thereof to him in partition.

(Para 3)

Cases Referred: Chronological Paras

1971 Ker LT (SN) 41	2
1969 Ker LR 1	2
1968 Ker LT 568 = 1968 Ker LR 273	2
AIR 1967 Ker 90 = 1967 Ker LT 637	2
AIR 1966 SC 411 = (1966) 1 SCWR 74	2
AIR 1947 Mad 137 = (1946) 2 Mad LJ 175	2
AIR 1926 Mad 643 = 23 Mad LW 575	2
AIR 1925 Mad 430 (2) = 47 Mad LJ 695	2

V. Bhaskaran Nambiar, C. R. Natarajan, M. K. Anandakrishnan and H. Sivaraman, for Appellants; P. M. Balasubramoniam, A. Gangadharan Nair and T. C. Mohandas, for Respondents.

JUDGMENT:— Defendants 4 to 14 are the appellants in this second appeal. Plaintiffs and the defendants are members of an undivided tavazhi tarwad and the suit is for partition of the B and C schedule properties. The appellants claim reservation of their rights under Exhibit B-10 which is an assignment of Exhibit B-2 kanakuzhikanom deed in respect of Item 1 and some trees in Item 2. There is no controversy regarding the validity of Ext. B-2 kanakuzhikanom deed. That was executed by a prior karanavan of the tavazhi in favour of a junior member by name Kamaran and a stranger by name Kannan. Kamaran was unmarried and died. On his death his half right devolved on the tavazhi. Kannan's right was transferred under Ext. B-6 to one Cheevvayi and the latter assigned under Ext. B-7 her rights to defendants 1 and 2. They subsequently transferred their rights to the 4th defendant who is the first appellant in this second appeal. The controversy relates to the character of Ext. B-7 assignment. The appellants contend that the acquisition was with the separate funds of defendants 1 and 2 whereas the

other members of the tavazhi claimed it to be an assignment in the name of the present karanavan and for and on behalf of the tarwad. The trial Court upheld the appellants' contention. But, the first appellate Court came to a different conclusion and hence this second appeal.

2. B schedule consists of two items. These and two other items were obtained under an earlier partition by two tavazhies jointly. These tavazhies were enjoying portions of the properties separately. While so, under Ext. B-1 of 1910 the two tavazhies recognised their separate possession and also recognised the improvements effected by each. Though the improvements alone were recognised as belonging to the respective tavazhies separately, the arrangement under Exhibit B-1 was by the subsequent transactions treated for all effects as a partition between the two tavazhies. The tavazhi of the parties to this suit was always finding it difficult to make both ends meet. This tavazhi had to incur debts. It was to discharge some of the debts that Ext. B-2 kanakuzhikanom was executed and an amount of Rs. 500/- borrowed. The income of the property included in Exhibit B-2 was not sufficient to cover the interest on the amount borrowed. So, there was a separate undertaking in Ext. B-2 to pay the interest on Rs. 100/- out of Rs. 500/- borrowed.

I am referring to this to show the condition of the family and the family property. It was not possible for the members to manage their affairs with the family income; and naturally the male members went to work—defendants 1 and 2 were masons — to earn a livelihood. The rights of the other tavazhi over Items 1 and 2 were taken assignment of in 1927 under Ext. A-1 for Rs. 1,500/-. For this the family had to sell away the remaining items for Rs. 500/- and make good the balance otherwise. That shows that the position of the family did not improve even by 1927. It has come out in evidence that the female members of the family were residing in the building in Item 1 and that the family cannot get on with the yield from the old trees referred to in Ext. B-1. The income of the properties covered under Ext. B-2 was being taken by the kuzhikanomdars; and that arrangement continued until the death of Kamaran and the transfer of Kannan's right to defendants 1 and 2 under Ext. B-7. No doubt, Kamaran's half right was treated as having devolved on the tavazhi; but there was hardly any time to make up anything out of the income of his share for defendants 1 and 2 to acquire Ext. B-7. There is nothing in Ext. B-7 to show that defendants 1 and 2 took the deed in their capacity of the

karanavan and senior anandiravan of the tavazhi. The consideration is ready cash of Rs. 400/-; and it is difficult to presume that family funds were available with defendants 1 and 2 to acquire the rights under Ext. B-7. The evidence let in by the plaintiff is practically of no use to show that there was any tarwad nucleus for defendants 1 and 2 to acquire the rights under Ext. B-7. The respondents' counsel contended that there is a presumption that the acquisition under Ext. B-7 was for the tavazhi, because the assignees are the karanavan and senior anandiravan of the tavazhi; and in support of this reliance is placed on some of the observations of the Supreme Court in *Achuthan v. Chinnamu*, AIR 1966 SC 411. He referred, in particular, to the following passage from it:—

"But it is settled law that if a property is acquired in the name of the karanavan, there is a strong presumption that it is a tarwad property and that the presumption must hold good unless and until it is rebutted by acceptable evidence: see *Chathu Nambiar v. Sekharan Nambiar*, AIR 1925 Mad 430 (2); AIR 1926 Mad 643 and AIR 1947 Mad 137."

This passage, if taken out of the context, may be capable of an inference that any acquisition in the name of a karanavan will be presumed to be tarwad property even if it is not shown that the tarwad is possessed of sufficient nucleus with the aid of which the property might be acquired. But, Subba Rao, J. (as he then was) was referring to the presumption available in the case of an acquisition by the members of a joint Hindu family, and the acquisitions in the names of members of Marumakkathavam tarwad. In the case of a joint Hindu family it is incumbent upon those asserting that an acquisition is a joint family property to establish it and if they prove that the family is possessed of sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. This presumption was said to be not available in the case of an acquisition of properties in the name of a junior member of a tarwad. It was held that there is no presumption either way and the question has to be decided on the facts of each case. It is after stating this that Subba Rao, J. made the above quoted observation. In the context the availability of tarwad nucleus is assumed. His Lordship was distinguishing the presumption available in the case of a karanavan who is shown to be possessed of sufficient tarwad nucleus from

the non-availability of such a presumption in the case of an acquisition by a junior member even if he was shown to be in possession of tarwad nucleus. The above observations cannot be understood to mean that those who claim an acquisition in the name of a karanavan need not prove that the karanavan was possessed of sufficient nucleus with the aid of which the property might have been acquired. In *Kunhukuttan Nair v. Devaki Amma*, 1968 Ker LT 568. Madhavan Nair, J. before quoting the above observations of Subba Rao, J. in (AIR 1966 SC 411), observed thus at page 574:—

"When a member of a tarwad, whether he be the karanavan or a junior member, is proved to have been in management of tarwad properties yielding appreciable income, a presumption arises that his acquisitions enure to the tarwad. That rule of presumption has in no way been affected by AIR 1966 SC 411 x x x". In *Narayani Amma v. Narayani Amma*, 1967 Ker LT 637 = (AIR 1967 Ker 90) Krishnamoorthy Iyer, J. after referring to the Supreme Court decision referred to above and referring to the earlier Hindu law cases requiring the proof of existence of a nucleus held that in that case there was sufficient nucleus for the karanavan to acquire the properties. That shows the existence of a nucleus has to be established before a presumption is drawn. Again, in *R. Gopala Menon v. Rugmani*, 1969 Ker LR 1 a Division Bench of this Court had occasion to consider the scope of the above mentioned Supreme Court decision. Krishna Iyer, J. at p. 19 observed thus:—

"It may be observed, in this context, that the leading case on the point at present is that of the Supreme Court reported in (1966) 1 SCWR 74 = (AIR 1966 SC 411). Their Lordships applied the presumption to the case of a manager of a tarwad who was not the karanavan under the law and also to the karanavathi of the tarwad provided that there was sufficient nucleus in his or her hands wherewith the acquisition could be made." (underlining is mine)

Again, another Division Bench in A. S. Nos. 414 and 419 of 1966 (see 1971 Ker LT (SN) 41) considered the effect of the abovementioned decision and held that the presumption is available if it is proved or admitted that the family possessed sufficient nucleus with the aid of which the member might have made the acquisition. Thus, according to me, it is well settled that a presumption will apply only if it is established that the karanavan had in his hands sufficient tarwad nucleus with the aid of which the acquisition might have been made. In this case I

have tried to show that defendants 1 and 2 have not been shown to have had sufficient tarwad nucleus in their hands to raise a presumption. Therefore, Exhibit B-7 must be taken to be obtained with their own funds.

3. Then the further question is whether the claim of the 4th defendant for reservation of this one-half right of the kanakuzhikanom can be allowed. Defendants 1 and 2 are the karanavan and the senior anandiravan. The property belongs in jenmom to the tavazhi. One-half kanakuzhikanom right also devolved on the tavazhi on the death of Kamaran. There was no impediment in the karanavan paying off the kanakuzhikanom amount. It was really a mortgage transaction. He was bound to discharge the debt when tarwad funds came into his hands. He cannot claim a benefit to himself on his own default. He was taking the income of the property at least from 1932. He has stated as P. W. 1 that he was not paying anything out of the income to other members of the tarwad. He has a duty to protect the interest of the tavazhi. The amount that has come into his hands from out of the half right of the tavazhi for a period of 30 years will be much more than what was due to him for taking Ext. B-7. Therefore, though I have found that Ext. B-7 was taken with his own funds, the tarwad income which had come into his hands subsequently being more than the amount due to him, that liability must be deemed discharged. Therefore, the assignment deed Ext. B-10 does not avail to the 4th defendant-appellant to claim any separate allotment of any portion of the property. Therefore, I agree with the learned Judge, though for different reasons, that the assignment deed Ext. B-10 does not confer any special right on the 4th defendant-appellant.

4. Another point pressed before me relates to the reservation of Ext. B-8 right claimed by the 4th defendant. That lease has been found to be invalid right; and since it is only of the year 1961, protection under Section 7-B of Act 1 of 1964 is not also available to the 4th defendant. She cannot be said to be holding the property bona fide believing herself to be a tenant. Therefore, I agree with the Courts below in holding that the 4th defendant is not entitled to get any reservation for Ext. B-8 lease.

5. No other point arises for consideration. Hence, I dismiss the second appeal. But, in the circumstances, I make no order as to costs.

Appeal dismissed.

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GEORGE VADAKKEL, J.

Kollanchil Padinhakkara Abdulrahiman and another, Appellants v. Kunhimohamad and others, Respondents.

Second Appeal No. 970 of 1972. D/-25-11-1974.

(A) Civil P. C. (1908), O. 6, R. 4 — "Undue influence" — Issue not raised, no specific averments made about relationship between the parties — No supporting evidence forthcoming — Plea cannot be considered. AIR 1967 SC 878, Rel. on.

(Para 4)

(B) Muhammadan Law — Gift to joint donees is valid notwithstanding the doctrine of musha. 1961 Ker LT 959 and 1970 Ker LT 237, Rel. on. (Para 5)

(C) T. P. Act (1882), S. 123 — Gift — Proof of some act on the part of the donor showing that he has parted with possession is sufficient. (Muhammadan Law — Gift).

The gift deed recited that the donor had along with the title deeds completely and absolutely surrendered possession of all her rights and interests in the properties scheduled to that document without receiving any consideration and by way of gift, to be enjoyed by them and that they may possess and enjoy the properties (physical) possession of which had been given to them from then onwards, and the properties outstanding on leases, by recovering possession thereof etc. It was not shown that the admission made in this document was erroneously made or that the real state of affairs was not as admitted by the donor. The admission of surrender of possession and the handing over of such of the title deeds the donor was in possession of and of the gift deed itself (by enabling the donee to collect it from the registry) established beyond doubt that the donor parted with possession of the gifted property and the donee (brother's children) came to be possessed of the same. The gift has been completed by the donor's act, for there remained nothing else to be done by the donor. Case law discussed. (Para 16)

Cases Referred: Chronological Paras

1970 Ker LT 237 =	1970 Ker LJ 91	5
AIR 1967 SC 878 =	(1967) 1 SCWR 271	4
AIR 1966 SC 1194 =	(1966) 2 SCWR 170	10, 15
AIR 1964 SC 275 =	1964 Ker LJ 57	10, 13
AIR 1963 SC 1279 =	(1964) 1 SCR 270	4
1961 Ker LT 959 =	1961 Ker LJ 1370	5
1958 Ker LT 37 =	1958 Ker LJ 300	15
AIR 1937 All 547 =	1937 All LJ 486	14
AIR 1935 Cal 393 =	39 Cal WN 882	12
AIR 1932 PC 13 =	59 Ind App 1	10, 15
AIR 1931 Oudh 7 =	7 OWN 1055	15

AIR 1928 PC 108 = 55 Ind App 171 15
 AIR 1922 PC 281 = 49 Ind App 195 12.
 13
 (1889) ILR 11 All 460 = 16 Ind App 205
 (PC) 10.15
 (1885) ILR 9 Bom 146 15
 (1882) ILR 6 Bom 650 10

K. Kuttikrishna Menon and A. P. Chandrasekharan, for Appellants; T. R. G. Warriar and K. Ramakumar, for Respondents.

JUDGMENT:— In respect of the suit properties the plaintiff — she was the sole plaintiff; plaintiffs Nos. 2 and 3, her husband and one of her two sisters, came in on her death as her legal representatives — executed Ext. B-1 gift deed on 30-11-1960 in favour of her deceased brother's children, defendants Nos. 1 to 3, and got it registered on 4-12-1960. Thereafter on 10-12-1960 she executed Ext. A-10 cancellation deed, and on 21-12-1960 filed the suit out of which this appeal arises for cancellation of Ext. B-1 gift deed. Pending trial of the suit she died issueless on 2-6-1961. The 4th defendant is her other sister. She is neither contesting the suit nor seeking any relief in respect of the suit properties. The trial Court decreed the suit but the lower appellate Court reversed the same. Plaintiffs Nos. 2 and 3 have come up in appeal.

2. Admittedly, the plaintiff was not well at the time of the execution of Ext. B-1, and thereafter also. The evidence of P. W. 1, the son of the 3rd plaintiff is to the effect that she was suffering from rheumatism for five or six months previous to her death, and that she was bed-ridden. However, it is also borne out from P. W. 1's evidence that she was mentally and intellectually alert ('no defect with her brain') and that her eyesight and hearing capacity were good. He also says that she could not get up from her bed without the help and assistance of another. It is common case that she was at that time residing at Kottopadam, in a building suit Item No. 17 gifted to her, her two sisters — 3rd plaintiff and 4th defendant — and P. W. 1 jointly by the mother of the first three persons aforementioned as per Ext. A-4 of 1943 and kept in common as per Ext. A-5 partition deed of the year 1947. The suit properties Items Nos. 1 to 16 are properties included in Ext. A-4 and allotted to the 1st plaintiff under Ext. A-5. Admittedly, she was removed to the contesting defendants' Ambalakattu Puthan Veedu, about two miles away from Kottopadam house. According to the plaintiffs she was made to believe that she was being taken to Kottakal for treatment whereas according to the defendants she was removed to their house since there was no one to

look after and nurse her, she having no children, and her husband being about 30 miles away at Cheruthuruthy, in his own house, with his children by a former marriage. Whatever be the reason for taking her from Kottopadam house, and wherever was that (according to the plaintiffs on 2-12-1960 and according to the defendants much earlier) both sides are agreed that she was removed from Ambalakattu Puthan Veedu to P. W. 1's house about 10 miles away from Kottopadam house. This was on the 9th December according to the plaintiffs and on the 10th December according to the defendants. Ext. A-10 already referred to was executed thereafter.

3. Ext. B-1 gift deed is attacked before me on three grounds: (1) that it is vitiated by undue influence; (2) that it is bad being gift of 'musha' (undivided part of a property capable of division); and (3) that it is invalid since it was not accompanied by delivery of possession.

4. I am afraid that I am not called upon, by the pleadings in this case, to examine the first point raised, for under Order VI, Rule 4 of the Code of Civil Procedure, 1908, it is incumbent on the party pleading undue influence to set out full particulars thereof. The Supreme Court emphasised the need for stating full particulars in such cases in *Ladli Prasad v. Karnal Distillery Co. Ltd.*, AIR 1963 SC 1279 = ((1964) 1 SCR 270) and again in *Subhas Chandra v. Ganga Prasad*, AIR 1967 SC 878 = ((1967) 1 SCWR 271). In the second case that Court said:—

"Before, however, a Court is called upon to examine whether undue influence was exercised or not, it must scrutinise the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud," and quoted in support thereof the following passage from the earlier case:—

"A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other."

The averments regarding execution of Ext. B-1 are contained in paragraphs 4 and 5 of the plaint. The case set out in these paragraphs is one of successive misrepresentations whereby the 1st plaintiff was made to believe that she was being taken to Kottakal, and again, she was made to believe that she was executing only a document to raise funds for her treatment. She also says in that paragraph 4 that she executed Ext. B-1 with-

out knowing the real purport of it and its contents. There is no averment that the relationship between the 1st defendant (all the allegations are only against him) and the 1st plaintiff was such that the former was in a position to dominate the will of the latter, or in other words, that the former was in a position to influence the latter, and that the former taking advantage of that position used the same so as to render the influence he had over her 'undue'. There is also no issue raised on this point. No evidence is also forthcoming to substantiate such a case. The averments in the immediately preceding paragraph in the plaint, on the other hand lead me to infer that the 1st plaintiff was really on her guard, or at least, would have been on her guard.

5. In view of the decisions of this Court in *Assankutty v. Mohammed Kurikkal*, 1961 Ker LT 959 and *Khader v. Kunhamina*, 1970 Ker LT 237 the second point founded on the doctrine of 'musha' has no force. In the 1st of the aforesaid two cases Velu Pillai, J. held that a gift to joint donees is valid notwithstanding the doctrine of musha, and in the later cases Krishna Iyer, J. said:

"that rule can be virtually removed from the armoury of a desperate Muslim donor (and his heirs) who wants to attack his own gift but has no rational ground to do so."

I fully subscribe to the views expressed in these decisions.

6. The next question for consideration is: Was the gift completed by delivery of possession. On this, the lower Courts expressed divergent views, according to the trial Court there was no delivery of possession but according to the lower appellate Court, there was.

7. I will have here to remind myself that the case of misrepresentation or misrepresentations pleaded, and sought to be developed in evidence, but which was found against was not raised before me, possibly because no such case could be advanced, for:

"A representation does not render a contract voidable unless it was intended to cause and has in fact caused the representee to make the contract. It must have produced a misunderstanding in his mind, and that misunderstanding must have been one of the reasons which induced him to make the contract. A false statement, whether innocent or fraudulent, does not per se give rise to a cause of action." (Cheshire and Fifoot on the Law of Contract, Seventh Edition, p. 242). The lower Courts concurrently held that the donor was on good terms with the defendants 1 to 3, and that it was on her own accord that she went to Ambalakattu Puthen Veedu since it was convenient for

her treatment, as there were several persons like the mother of 1st defendant and the wife of the 2nd defendant besides the sisters of defendants 1 to 3 to look after and nurse her. The learned munsiff believed D.W. 3, the 1st attesting witness who deposed that the document Exhibit B-1 was read out to the donor before she signed it, that she fully understood that it was a gift deed in respect of her properties and that he had seen her writing her name and signing it. The learned Munsiff also believing D. W. 2, the Sub-Registrar came to the conclusion that the donor fully understood the nature of the document she was executing. Both the Courts, therefore, held that Ext. B-1 is not vitiated in any manner, and the same is not liable to be set aside. And as already pointed out, the learned counsel for the appellant fairly and rightly, did not dispute the correctness of the above finding.

8. In Ext. B-1 the donor declares: (omitted in this report—Ed.)

The above declaration means (roughly translated) that the donor has along with the title deeds completely and absolutely surrendered possession of all her rights and interests in the properties scheduled to that document without receiving any consideration therefor and by way of gift in lieu of her love and affection towards the donees, to be enjoyed by them, and that, they may possess and enjoy the properties (physical) possession of which had been given to them from then onwards, and the properties outstanding on leases, by recovering possession thereof with future and arrears of rent. Ext. B-17 is the sworn statement given upon oath by the donor before D. W. 2, the Sub-Registrar. (There was some controversy at the bar as to the need or necessity in law of such a sworn statement, but there was no dispute as regards the Sub-Registrar's competency to administer oath and take the sworn statement). In Ext. B-17 the donor has deposed that she was laid up for the past five months due to rheumatism, that she has good eyesight, hearing capacity and memory, that she has by Ext. B-1, document presented for registration and read over to her, gifted the properties to her brother's children and that she was agreeable to have it registered. D. W. 2's evidence shows that the document in full including the schedules was read out to the donor and that he was satisfied that she had fully understood the nature and contents of the document. This means, that she affirmed the declaration made in paragraph 3 of Exhibit B-1 before the Sub-Registrar.

9. No significance can be attached to the fact that the title deeds in respect of Items Nos. 1 to 17, Exts. A-4 and A-5,

which as per the provision in clause 7 of Ext. A-5 had to be in the custody of the 3rd plaintiff or Exts. A-8 and A-9 which on his own admission were with P. W. 1 he having found the former document in some case records collected back from the donor's vakil and having got executed the latter document and kept it with him from thence onwards have not been handed over by the donor to the donees. Exhibit B-11, the copy of title deed in respect of Items Nos. 18 to 22 (original is admittedly unavailable) applied for and obtained in 1943 along with Exts. B-2 to B-10 and B-12 to B-16 — original subsequent documents relating to the properties — were handed over by the donor to the donees. Discarding the theory advanced by the plaintiffs that defendants came by Exts. B-2 to B-16 clandestinely the trial Court as well as the lower appellate Court held that these documents were handed over by the donor to the donees. Therefore, the statement in Ext. B-1 that title deeds have been handed over to the donees is true and correct, so far as the title deeds that were in her possession are concerned. Ext. B-1 also contains the declaration that the donor has surrendered possession of the gifted properties to the donees. One other fact to be noticed is that Ext. B-1 was got back from the registry by the 1st defendant as per authorisation by the executant. This means that the donor in effect handed over the gift deed to the donees.

10. Section 150 (4) of Mulla's Principles of Mahomedan Law (Seventeenth Edition at page 143) is as follows:—

"A declaration in a deed of gift that possession has been given binds the heirs of the donor. But such a declaration is not conclusive and a recital in a deed of gift that possession has been given to a minor nephew (without the intervention of a father or guardian—Section 156) was on the facts held to be insufficient to support a gift as against the heirs of the donor."

To the same effect is Section 421 in Tyabji on Muslim Law (4th Edition, page 393):—

"From the donor's acknowledgement of having made a gift and delivered possession it may be presumed against the donor and persons claiming under him, that the gift was completed as acknowledged".

Note (2) to the above section (at p. 394) further says:—

"Acknowledgement by the donor that that he has transferred possession (though it has not really been transferred) may, it is stated in the Sharai'ul-Islam, take the place of actual transfer of possession. The declaration of the donor that he has given possession is sufficient to denote

real possession"—Tohfa IV. 59, cited by Kembball, J. in (Mohinudin v. Mancher-shah, (1882) ILR 6 Bom 650, 656, para. 2). A declaration on the deed that possession was transferred, "as a declaration of fact, must be regarded as binding on the heirs of the donor."

The last sentence in the above extract is from Sir Barnes Peacock's judgment delivered on behalf of the Board in Muhammad Mumtaz Ahmad v. Zubaida Jan, (1889) ILR 11 All 460 (PC) at pp. 475-76 where it was said:—

"The lady had merely proprietary, not actual, possession of the greater portion of the property, that is to say, she was merely in receipt of the rents and profits. In the deed of gift she declared (an admission by which Usman as her heir and all persons claiming through him were bound) that she had made the donee possessor of all properties given by the deed; that she had abandoned all connection with them; and that the donee was to have complete control of every kind in respect thereof. Ahmad Husain, the daughter's husband was the general manager of both mother and daughter; and would doubtless take care that the deed of gift should be carried into effect. Their Lordships have no doubt that sufficient possession was taken on behalf of the daughter to render the gift effectual. If possession were once taken and the deed of gift took effect, no subsequent change of possession would invalidate it." In Md. Sadic Ali Khan v. Fakr Jahan Begam, AIR 1932 PC 13 at p. 19 the Board reiterated the above principle relying on Muhammad Mumtazahmad's case. However, if the declaration is to the effect that possession is given to a minor who has not attained discretion direct and not to the guardian these principles are not applicable. In Katheesa Umma v. Kunhamu, AIR 1964 SC 275 = (1964 Ker LJ 57) Hidayatullah, J. (as he then was) delivering the judgment of the Court said:—

"It is only actual or constructive possession that completes the gift and registration does not cure the defect nor is a bare declaration in the deed that possession was given to a minor of any avail without the intervention of the guardian of the property unless the minor has reached the years of discretion." (para 11) (underlining by me).

In a subsequent decision, Maqbool Alam Khan v. Mst. Khodaija, (1966) 2 SCWR 170 = (AIR 1966 SC 1194) the Supreme Court said that the view that a property in the possession of an usurper cannot be gifted is too rigid a view, and added:—

"But a gift of a property in the possession of a trespasser is not established by mere declaration of the donor and ac-

ceptance by the donee. To validate the gift, there must also be either delivery of possession, or failing such delivery, some overt act by the donor to put it within the power of the donee to obtain possession. If, apart from making a declaration, the donor does nothing else, the gift is invalid". (para 8) (underlining by me).

11. The learned counsel for the respondents submits that in view of the above referred to authorities and decisions, I should deduce that where the donor is in possession of the gifted property—actually, or, constructively through mortgagee or lessee etc.—and the donee is one who has attained the years of discretion or at any rate, is one who has attained majority and is sui iuris, a declaration of gift coupled with an admission in the gift deed that possession is given completes the gift. The learned counsel further argues that in any event such a declaration and an admission followed by the overt acts of handing over of the title deeds, and also of the gift deed (by authorising the donee to get it back from the registry) completes the gift, and that it is not necessary for the donor to go through the formal and conventional method of handing over of the several immovable properties gifted by accompanying the donee to each and every one of the items of the gifted properties, and by causing usufructs to be gathered and handed over to the donee, or by doing some such other act. The learned counsel also points out that the donor in this case, was at the time of the gift bed-ridden, unable to move about. These submissions, I think, are well founded, but with a rider.

12. In *Gani Mia v. Walid Ali*, AIR 1935 Cal 393, Mitter, J. has extracted the following passage from Baillie's Digest:—

"Its pillar (i. e., of a donation) is the declaration of the donor (Wahib), for that constitutes the gift, and it is completed by the act of the owner alone, acceptance being required only for the purpose of establishing the property in the donee (Mowhoob Lechoo); (Baillie's Digest, Book 8, Ch. I, p. 507)."

and has also quoted the Prophet's verse:—

"A gift is not valid unless possessed. (Inayah Vol. 4, p. 24)".

The donee should therefore, get such possession as the subject-matter of the gift is, capable of and the donor should complete the gift by his own act. Shortly put, the donor should transfer or deliver possession of the subject-matter of the gift to the donee. However, I do not think that the Muslim law requires or insists upon any particular mode of delivery of possession. At any rate, no

such rule was brought to my notice. The decision of the Privy Council in *Mohammed Abdul Ghani Khan v. Mt. Fakhr Jahan*, AIR 1922 PC 281 is very illuminating on this point. The Judicial Committee said:

"In considering what is the Mohammedan law on the subject of gift, inter vivos their Lordships have to bear in mind that when the old and admittedly authoritative texts of Mohammedan law were promulgated there were not in the contemplation of anyone any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of the possession of land, or any zamindari estates large or small, and that it could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed.

The object of the Mohammedan law, as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee, and that the handing over by the donor and the acceptance by the donee of the property had been given by the donor and had been accepted by the donee as a gift."

That this is so is clear from the fact that the rigour of the Rule that delivery of possession can be effected only by the donor physically departing from the property leaving nothing of his own there was gradually toned down in that it came to be recognised that in some circumstances it is sufficient that the character, or nature of donor's possession changes by his intention to treat the property as that of the donee and he divests himself of his ownership (See *Tyabji on Muslim Law*, 4th Edition, Section 417, page 389 and *Mulla's Principles of Mahomedan Law*, Seventeenth Edition, Section 152 (3), pages 146-47).

13. The Supreme Court in *Katheesa Umma's case* (AIR 1964 SC 275) already referred to has dealt with this aspect of Muslim law on gifts exhaustively. The Supreme Court has also cited with approval some of the decisions which have pointed out that 'the Muhammadan Law of gifts, though strict could not be taken to be made up of unmeaning technicalities', and has quoted the passage from *Md. Abdul Ghani's case* (AIR 1922 PC 281) which I have extracted above approvingly.

14. In *Jamil Unnissa v. Sheik Mohammad Zia*, (AIR 1937 All 547) Sulaiman, C. J., repelled the contention that the donor should have taken the donee to the spot and pointed out the land and informed the donee that possession was delivered" stating that the donee was a pardanashin lady and a relation of

the donor. I am of the view that what Muslim law requires is proof of some recognised act by the owner (donor) which will go to show that the donor has parted with possession of the subject-matter of the gift, and not any specified manner of delivery of possession.

15. According to Mr. Govinda Warriar, the learned counsel for the respondents, every declaration and acknowledgment of transfer of possession to the donees, constitutes the best evidence of transfer of possession, and this principle cannot be confined to cases West, J. had in mind when he in *Shaik Ibrahim v. Shaik Suleman*, (1885) ILR 9 Bom 146 said:—

"When a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession."

The Privy Council in *Md. Sadiq Ali Khan's case* (AIR 1932 PC 13) relied on the above passage to hold that in the case of gift by a husband to his wife it is not necessary for the husband actually to vacate the premises, and said that the Board was not deciding whether the above principle was of universal application between Mahomedan donors and donees. An admission, so long as the same is not established to be erroneous or one given under mistake, misapprehension, or duress or on account of undue influence, fraud or misrepresentation, under the ordinary rules of evidence is the best evidence of the fact admitted. Would it make any difference that the admission is contained in a gift deed whereby a Muslim declared a gift? I do not think it would, and as I understand the decision of the Privy Council in *Muhammad Mumtaz Ahmad's case* (1889) ILR 11 All 460 (PC) it is this rule of evidence that the Board expounded when it said: '(an admission by which Usman as her heir and all persons claiming through him were bound)'. The learned counsel for the appellants relying on *Aisha Beevi v. Kochu Pillai*, 1958 Ker LT 37 submits that this is not so. In that case the mother of the donees (the 5th defendant therein) gifted her properties to them, and thereafter as their guardian sold the property to the father of the 1st defendant therein. The 1st defendant, in a suit by the donees for recovery by way of defence raised the contention that the gift is invalid and that therefore, the plaintiffs have no right to bring the suit. The contention that possession did not pass to the donees, or their guardian the 4th defendant, was upheld by the lower Courts concurrently. This concurrent finding was attacked, relying *inter alia* on the statement in the gift deed that possession was given to the donees. Joseph, J. referring to the deci-

sions of the Privy Council in *Muhammad Mumtaz Ahmad's case*, *Musa Miya v. Kadar Bax*, AIR 1928 PC 108 and to the Oudh case, *Jhumman v. Husain*, AIR 1931 Oudh 7 said: 'this does not mean that the declaration is conclusive'. I do not think that this decision in any way goes against what is stated above. The other case relied on by the learned counsel on this part of the case is *Maqbool Alam Khan v. Mst. Khodaija*, AIR 1966 SC 1194 = ((1966) 2 SCWR 170). That was a case where a trespasser was in possession of the gifted property and the gift was an oral one. Necessarily any admission that possession was handed over was erroneous.

16. The plaintiffs have failed to establish that the admission in Ext. B-1 was erroneously made by the 1st plaintiff, or that the real state of affairs was not as admitted by her in Ext. B-1. No evidence to brush aside the admission was placed before me. So far as the case on hand is concerned, the admission of surrender of possession in Ext. B-1 and the handing over of such of the title deeds the donor was in possession of and of the gift deed itself (by enabling the donee to collect it from the registry) establish beyond doubt that the donor parted with possession of the gifted properties, and the donee came to be possessed of the same. The gift has been completed by the donor's act, for there remained nothing else to be done by the donor.

17. The second appeal fails. The same is dismissed with costs.

Appeal dismissed.

AIR 1975 KERALA 155

T. CHANDRASEKHARA MENON, J.

Sankaran and others, Appellants v. Rajamma and others, Respondents.

Second Appeal No. 180 of 1971. D/-20-6-1974.

(A) T. P. Act (1882), S. 52 — Doctrine of *lis pendens* applies to property directly involved in the earlier suit.

The decree-holder purchased and obtained possession of certain property in execution of a decree for mesne profits. Subsequently, decree-holder sued Defendants for declaration of her title to and possession of the property and for injunction wherein Defendants denied plaintiffs' obtaining of possession and contended that they were in possession of the said property by way of assignment from the judgment-debtor prior to said execution and that therefore Section 52 did not apply. Held that property in question was directly involved in the suit in which

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decree for mesne profits was passed and hence Section 52 did apply; further held that Plaintiff had obtained possession in the said execution and her (present) suit was rightly decreed. (AIR 1959 Andh Pra 280; (1907) ILR 29 All 339 (PC); 1857-1 De G & J 566, referred to). (Paras 6. 7)

Cases Referred: Chronological Paras

AIR 1968 Ker 179 = 1967 Ker LT 667 8

AIR 1959 Andh Pra 280 = (1959) 1 Andh 6

WR 72 6

(1907) ILR 29 All 339 = 34 Ind App 102 6

(PC) 6

(1857) 1 De G & J 566 = 118 R. R. 228 6

V. Vyasan Poti, for Appellants;
Joseph Augustine, for Respondents.

JUDGMENT:— This second appeal is filed by defendants 1 and 2 in a suit for declaration of title to, and possession of the plaintiff property and for consequential injunction. The plaintiff claimed title and possession on the basis of a Court sale and delivery through Court. Ex. P-1 is the sale certificate and Ex. P-2 the copy of delivery list in the matter. Patta for the property was also issued in her name. Ex. P-2, and she paid tax for the property for which she obtained Ex. P-4 receipt. Before delivery of property the first defendant had filed the original of Ex. P-5 petition objecting to the delivery on the ground that the plaintiff schedule property belongs to him and it is not liable to be sold for the decree debt concerned. Ex. P-5 petition was rejected. The order of rejection has not been produced in the case. Sri Vyasan Poti, learned counsel for the petitioner submitted that he may be allowed to produce the said order as it would indicate that Ex. P-5 was rejected only on the ground that it was an anti delivery obstruction petition and as such not maintainable in law and the dismissal was not on the merits of the matter. As there is no application made under O. 41, R. 27, I have not allowed the document to be produced and marked in the case. I would state, however that even proceeding on the basis that Ex. P-5 was disposed of not on the merits but only on the ground of its maintainability will not make my conclusion in the case any different.

2. The suit in which delivery is alleged to have been taken by the plaintiff was a suit for setting aside a partition deed and recovery of the plaintiff's 1/4th share in the plaintiff schedule properties in that suit. The present plaintiff item was included in the plaintiff schedule as Item No. 12. In that suit the allegations were that all the properties scheduled to the plaintiff absolutely belonged to one Ummini Kochan, maternal grandfather of the plaintiff in the suit (who is the plaintiff in the present suit also) as

well as of the third defendant therein. 1st defendant there was Ummini Kochan's wife and the 2nd defendant, a daughter. One Narayanan Sreedharan through whom the defendants in the present suit claim title was the 4th defendant in that suit (which was O. S. 1229/1113 of Trivandrum Munsiff Court). The partition deed that was sought to be set aside in that suit was a deed of 1113 entered into by defendants 1 to 7 therein. By that document Narayanan Sreedharan had got the properties. The preliminary decree was passed in the suit on 18-1-1943 (the preliminary decree and the final decree are contained in Ex. D-10 marked in the case). That had set aside the partition deed of 1113 and the plaintiff was declared entitled to get 1/4th share in the properties. There was also a direction therein for partition by metes and bounds of plaintiff's 1/4th share. Defendants 1 and 2 were made liable for costs and mesne profits were to be provided in the final decree. As per the final decree we find properties which do not take in Item 12 of the plaintiff in that suit (plaintiff schedule property in the present suit) allotted to plaintiff, 3rd defendant and 4th and 5th defendants. Defendant 1 is made liable for mesne profits of the properties to be paid to plaintiff and 3rd defendant. A charge is also created for the mesne profits over the 1st defendant's share in the properties. It is in pursuance of this that the plaintiff got the present plaintiff property sold in Court auction and is now alleged to have got delivery of the same.

3. The appellants (defendants in the present suit) were admittedly not parties to the earlier suit. However, they claim through Narayanan Sreedharan, who was the 4th defendant in the earlier suit. According to the appellants Narayanan Sreedharan was the owner of the plaintiff schedule property and his rights were assigned to 1st appellant by Ex. D-7 dated 11-9-1953. They have also produced Exs. D-4, D-5 etc., to prove that Ummini Kochan had only a leasehold right in the property, which Narayanan Sreedharan got in the partition of 1113 and then from the jenmi, the lessor's right was also obtained by Sreedharan. The appellants contended that the plaintiff never obtained delivery of property and they were in possession and enjoyment of the property.

4. Both the Courts below held against these defendants and therefore they have come up in second appeal.

5. Mr. Vyasan Poti learned counsel for the appellants strongly contended before me that the basis of the finding entered into by the lower Court as well as by the trial Court, namely, that the

defendants are bound by the decision in the earlier suit and that the transfer to them is affected by *lis pendens*, cannot be sustained. According to him though this property was taken in by the earlier suit, by the decree plaintiff has not got any rights over the same. Plaintiff claims her right on the Court sale and delivery in pursuance of the decree in that suit. Before that the defendants had got possession from Narayanan Sreedharan. It was argued that the decree in O. S. 1229 of 1113 was only a decree for mesne profits and not one which involved the plaintiff property. It was further submitted that Ex. P-2 was only a paper delivery without actually dispossessing the persons in possession of the property.

6. In regard to the first point argued before me that the transfer is not vitiated by *lis pendens* the learned counsel for the appellants placed before me a decision of the Andhra High Court. *Ahamad Ali v. Veerallu*, AIR 1959 Andh Pra 280 where the principle of *lis pendens* has been very pithily explained. The statement of the doctrine in the words of Cranworth, L. C. as being "pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent" which was quoted with approval by Lord Macnaghten in *Faiyaz Husain Khan v. Prag Narain*, (1907) ILR 29 All 339 (PC) has been extracted in this Andhra decision. This principle which is embodied in S. 52 of the Transfer of Property Act, as correctly pointed out by Seshachalapathy, J., in the aforementioned case, does not declare that all the transfers made pendente lite are null and void, but what is provided for is that such transfers will be subject to the decree or order passed or made in the suit. The transfer will be effective only subject to the decree or order. It is also a consequential inference from this that if the decree or order does not create a right in any party in respect of any specific property transferred, no question of *lis pendens* can possibly arise. To get at this principle one need not go to any decision at all. It is apparent on "the face of the section" itself. The principle behind this doctrine of *lis pendens* has been stated in the well known English case *Bellamy v. Sabine*, (1857) 1 DeG & J 566. In that case Turner, L. J. said:

"It is as I think, a doctrine common to the Courts both of law and Equity, and rests, as I apprehend upon this foundation—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment

or decree, and would be driven to commence his proceedings de novo subject again to be defeated by the same course of proceeding."

In the same case Lord Cranworth said:

"It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party."

These have been approved of by the Privy Council in *Faiyaz Kussain Khan's* case mentioned earlier.

7. Therefore, what we have to look at is whether the right to the property was directly in question in the earlier suit and whether the transfer would affect the right of any party to the decree. In this case I am of the view that the doctrine applies. The property concerned was one of the items in plaintiff schedule with respect of which the plaintiff sets up the case that they belong to her maternal grandfather and she has got a share in the same. Though it is not set apart to her share it is obvious from the decree that it falls to the first defendant's share (1st defendant of the earlier suit) over which a charge is given for mesne profits due to plaintiff. It is in execution of that decree for mesne profits that plaintiff has got this property sold in Court auction and delivered over to her. The defendants' predecessor-in-interest who is bound by the decree gets no right over this item of property. In the light of Ex. D-10 one need not go into the earlier documents Exs. D-4 and D-5 to see whether it has conveyed any right to Narayanan Sreedharan. I might also here state that Ex. D-4 does not really take in the plaintiff item as stated by the lower Court.

8. In regard to possession by the plaintiff, Mr. Poti put forward the plea that as the lower Courts proceed on the alleged delivery of the property to plaintiff as per Ex. P-2 and on a misconception of law that the burden is on the defendants to show that they were in possession in spite of the delivery, the finding in respect of possession is erroneous in law. He cited a decision of this Court in *Vellakutty v. Karthiyani*, 1967 Ker LT 667 = (AIR 1968 Ker 179) in support of his contention. There Madhavan Nair, J. stated that it is not correct to say that in every case a delivery proceeding would bind not only the judgment debtor but any and every one in the world. Rights in immovable property cannot be left to the mercy of the Amin deputed to carry out a delivery order of the Court. They can be affected only by judicial determina-

tions. A decree for money or for property and an execution sale would affect only the right, title and interest of the judgment-debtor. It follows that a proceeding had in pursuance of such a decree or Court sale cannot affect a larger interest or a larger group of persons.

9. However, in this case the delivery was taken in pursuance of a decree in a suit where the assignor of the defendants Narayanan Sreedharan was a party and in which suit Sreedharan did not claim the right which he is said to have conveyed to his assignee as per Ex. B-7. On the basis of the Court sale and delivery, the plaintiff has obtained patta in her name. Though patta is never conclusive evidence of title or possession, it certainly should be given due weight in considering the question of possession. Mutation in the registry is not without any significance. Official acts are presumed to be properly done unless proved otherwise. Therefore, I do not think the Courts below committed any error in this respect.

10. In the light of these, I confirm the judgment and decree of the Court below and dismiss the appeal. As there was no appearance on behalf of the respondents there will be no order as to costs.

11. Before concluding I express my gratitude to Sri Joseph Augustine, who in the absence of any appearance on behalf of the respondent-plaintiff, on my request was kind enough to assist the Court, by placing the relevant factors in support of the plaintiff's contentions before me

Appeal dismissed.

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M. U. ISAAC, J.

K. S. Cyriac, Petitioner v. Vice-Chancellor, Kerala University, Trivandrum and others, Respondents.

O. P. No. 3274 of 1973, D/- 25-3-1974.

(A) Constitution of India, Art. 226 — Domestic enquiry — Right of the party to be represented by an advocate — Enquiry against student accused of malpractice at examination — (Natural justice, principles of — Right to be represented by counsel).

While it is a fundamental right of a person to be heard before he is condemned of any charge, that right would not comprehend the right to be represented by an agent including an advocate except where on the facts and in the circumstances of the case, principles of natural

justice require that he should be allowed a hearing through any agent or advocate. Physical incapacity to defend himself would be one instance. Engagement of a legally trained person or advocate by the prosecution may be another ground which would entitle an accused to engage an agent or advocate to defend him. The right to be heard through an agent or advocate is not a common law right in this country. All that is required is that the principles of natural justice should be complied with. In the absence of any statutory provision or other rule of procedure, the question whether denial of representation through an advocate amounts to denial of natural justice is one of fact to be decided on the particular facts and circumstances of the case. A student who is accused of malpractice in an examination and who is called upon to submit to a domestic enquiry to be conducted by one of the Professors of his college has no right to be represented through an advocate in that enquiry. Case law discussed. (1968) 2 All ER 545. Dismissed from. (Paras 6, 9)

(B) Constitution of India, Art. 226 — Domestic enquiry — Reasonable opportunity of showing cause — Rustication of student for malpractice at examination. (Natural Justice, principles of).

The Controller of Examinations issued a notice dated 30-7-1973, to the petitioner-student calling upon him to show cause within 15 days of the receipt thereof why the proposed punishment that he be debarred from appearing for any examination of the University for a certain period should not be imposed on him. This notice was received by him on 7-8-1973. The petitioner replied by his letter dated 9-8-1973, stating that the petitioner should have true copies of the evidence recorded at the enquiry and the report of the enquiry officer. He also requested for a personal hearing through his advocate after furnishing him copies of the above documents. The Controller did not pay any heed to the letter but he informed the petitioner by his letter dated 20-8-1973 that it had been decided to impose on the petitioner the punishment proposed in the notice:

Held that as the Enquiry Officer did not conduct any oral enquiry since the petitioner did not appear for the enquiry there was no question of giving him copies of the evidence; but he was entitled to get a copy of the enquiry report, and a reasonable opportunity to submit his explanation to the findings therein. As admittedly this was not done; and the impugned order dated 20-8-1973 was issued even before the expiry of the period allowed to him by the notice to submit his explanation the order was bad under law. (Para 4)

Cases Referred: Chronological Paras
 AIR 1972 SC 2178 = 1972 Lab IC 1049 9
 (1968) 2 All ER 545 = (1968) 2 WLR 1471 5
 (1961) 2 Lab LJ 417 = (1961) 3 Fac LR 526 (SC) 9
 AIR 1960 SC 914 = (1960) 3 SCR 296 9
 AIR 1948 Mad 379 = (1948) 1 Mad LJ 6 8
 AIR 1944 FC 72 = ILR(1944) Kar FC 162 8
 AIR 1937 Mad 735 = (1937) 2 Mad LJ 189 8
 (1929) All ER 468 = (1929) 1 Ch 602 5, 7
 (1891) 1 QB 378 = 60 LJ MC 52 5
 (1886) 35 Ch D 162 = 56 LJ Ch 406 5
 (1861) 9 CBNS 793 = 127 RR 886 5

Manuel T. Paikeday, for Petitioner;
 K. P. Radhakrishna Menon and Govt.
 Pleader, for Respondents.

ORDER:— The petitioner was a pre-degree student of the Newman College, Thodupuzha. He sat for the University examination held in April-May 1972 at that college. On 6-6-1972, when he was writing Mathematics Paper I, the invigilators detected the petitioner committing malpractice. They reported the matter to the Chief Superintendent, who immediately came to the scene, and took the petitioner's answer book into custody; but the petitioner ran away with the paper from which he was copying. The Chief Superintendent appointed the third respondent, who is the Professor of Chemistry in that college, to enquire into the above misconduct. The third respondent framed charges against the petitioner and issued a notice Ext. R-1 dated 9-8-1972, calling upon the petitioner to submit his explanation, and show cause why he should not be punished. The petitioner submitted an explanation Ext. R-2 dated 14-8-1972 denying the charges, and requesting that he may be allowed to engage a lawyer to cross-examine the witnesses. He also objected to the competency of the third respondent to conduct the enquiry on the ground of bias.

The third respondent did not accede to the petitioner's objection to the validity of the enquiry, nor did he allow the engagement of an advocate by the petitioner. The third respondent furnished to the petitioner copies of the relevant documents as well as the names and particulars of the witnesses proposed to be examined at the enquiry, and gave him notice fixing the enquiry on 30-8-1972. But before that date, the petitioner filed O. P. No. 3918 of 1972, and obtained from this Court an ex parte order of interim stay of the enquiry. Accordingly, the enquiry did not take place on 30-8-1972. The O. P. was dismissed by this Court on 10-11-1972. The petitioner then filed W. A. No. 338 of 1972 from the judgment in that case; and it was dismissed sum-

marily. Then the petitioner issued a registered notice, Ext. P-1 dated 3-4-1973 through his advocate to the first respondent calling upon him to drop the enquiry for the numerous grounds stated therein and to announce the examination result of the petitioner. The first respondent replied by his letter, Ext. P-2 dated 11-4-1973, stating that the University rules did not permit the announcing of the result of an examination of a student charged with malpractice, until the enquiry was completed, and that the Principal of the College had been requested to expedite the enquiry. The petitioner's advocate, by his letter, Ext. P-3 dated 15-4-1973, again wrote to the first respondent objecting to the validity of the proposed enquiry and quoting a few English and Indian decisions in support of his contention.

2. On 16-5-1973, the third respondent issued a notice Ext. P-5 to the petitioner fixing the enquiry to 22-5-1973. The petitioner sent a reply to Ext. P-6 dated 20-5-1973 refusing to participate in the enquiry for the reasons which he had already stated. Thereupon the third respondent considered the materials in support of the charges against the petitioner, found him guilty of the same, and sent a report to the Chief Superintendent, who forwarded the same to the University. It appears that the first respondent considered the matter; and, in consultation with the Sub-Committee on Discipline he held that the examination taken by the petitioner be cancelled and that the petitioner be debarred from appearing for any examination of the University earlier than in October 1973. Accordingly, the second respondent, the Controller of Examinations issued a notice, Ext. P-7 dated 30-7-1973, to the petitioner, calling upon him to show cause within 15 days of the receipt thereof why the proposed punishment should not be imposed on him. This notice was received by him on 7-8-1973. The petitioner replied by his letter Ext. P-8 dated 9-8-1973, stating that the petitioner should have true copies of the evidence recorded at the enquiry and the report of the enquiry officer. He also requested for a personal hearing through his advocate after furnishing him copies of the above documents. The second respondent did not pay any heed to Exhibit P-8; but he informed the petitioner by his letter Ext. P-9 dated 20-8-1973 that it had been decided to impose on the petitioner the punishment proposed in the notice Ext. P-7. Thereupon, this Original Petition has been filed on 28-9-1973 to quash Exts. P-3, P-7 and P-9, and to command the second respondent to announce the result of the petitioner's examination.

3. Counsel for the petitioner urged three grounds. Firstly an enquiry by the third respondent was violative of natural justice, since he is biased in the matter. Secondly, the petitioner has a right to be represented by an advocate in the enquiry; and enquiry is bad under law, since this right was denied to him. Thirdly, the punishment imposed on him as per Ext. P-9 is bad under law, since that was done without giving him a proper opportunity of being heard.

4. The petitioner is entitled to succeed on the third ground. The show cause notice, Ext. P-7 was served on the petitioner only on 7-8-1973, and it gave him 15 days time to show cause. Immediately on receipt of that notice, the petitioner wrote to the second respondent requesting for copies of the evidence of the witnesses and the report of the enquiry officer for enabling him to submit his explanation. There was no response to this request. The third respondent did not conduct any oral enquiry, since the petitioner did not appear for the enquiry. Therefore, there was no question of giving him copies of the evidence; but he was entitled to get a copy of the enquiry report, and a reasonable opportunity to submit his explanation to the findings therein. Admittedly this was not done; and the impugned order, Ext. P-9, was issued even before the expiry of the period allowed to him by Ext. P-7 to submit his explanation. So this order is bad under law.

5. The first ground raised by the petitioner is concluded against him by the decision of this Court in the previous O.P. In the judgment in that case, the learned Judge stated—

"The basis of the petitioner's argument is that the principles of natural justice require that the inquiry into the charge of misconduct should be done fairly and impartially in accordance with rules of natural justice, and in circumstances which ensure that the enquiry and disciplinary authorities are free from any bias against the petitioner. It was said that the unsolicited sermon or advice delivered by the 2nd respondent to the petitioner in his room on 7-6-1972 in the presence of the 1st respondent, amounted really to a conviction of the petitioner before the enquiry or trial began, and that in such circumstances he cannot expect justice at the hands of the 1st respondent, or the 2nd respondent, or both. This was emphasised by pointing out that the 2nd respondent had filed no counter-affidavit at all in this writ petition.

The 1st respondent has denied the allegation made against him that he advised the petitioner to confess his guilt and preached to him the futility of defending

himself at the enquiry or carrying the matter to a Court. I am not prepared to accept the petitioner's averments on this aspect. No foundation has therefore been laid for any bias on the part of the Respondents or any reasonable apprehension for the petitioner that he will not get justice. There is also the fact that according to Ext. P-3 rules which are to govern the enquiry, cases of mal-practice are to be reported to the University which, on being satisfied of a prima facie case, will request the Principal of the college centre where the candidate appeared for the examination, to appoint the Enquiry Officer and submit the report of the enquiry. The Principal has to appoint a person not below the rank of a Professor employed in the college as an Enquiry Officer. The Enquiry Officer should frame charges together with the statement of allegations, send the same to the student, receive his explanation and conduct the enquiry and submit the enquiry report to the Registrar. The Vice-Chancellor in consultation with the Sub-Committee on discipline constituted by the Syndicate shall take a provisional decision as to the penalty to be imposed, which is to be finally done by the Vice-Chancellor. These being the Rules for enquiring into the misconduct, the 2nd respondent is only a conduit pipe to conduct the enquiry and transmit report to the University, the final decision having to be taken only by the Vice-Chancellor. Any allegation of bias in such circumstances, against the 2nd respondent or the 1st respondent, or both seems to have no foundation and carries little weight."

The learned Judge has also briefly considered in the same judgment the second ground raised herein. He stated.—

"As for the petitioner's contention that he is entitled to the services of a lawyer to defend him at the enquiry, it was not shown that he is entitled as a matter of right, to engage a lawyer to appear at the enquiry. I am not satisfied, at this stage, that he is entitled to the service of a lawyer as part of the rules of natural justice entitling him to a reasonable opportunity of defending himself."

In the light of the very guarded language used in the above passage, and in view of the fact that the petitioner is now seeking the right of being heard through an advocate not only at the stage of examination of witnesses at the enquiry but also at the final stage of the enquiry, his counsel submitted that the question has to be considered afresh. He submitted that it is the fundamental right of every person who is accused of a delinquent act and who would be visited with serious consequence, if found guilty of the

woman goes to term, she may have deformed children. It is, however, quite clear from Dr. Swami's statement that syphilis is curable. To the same effect is the statement of Dr. (Mrs.) Jamdar (P. W. 3). She has stated that the disease is curable after treatment. She has also stated that a woman who has suffered from syphilis may become sterile or may have repeated abortions or her issues may be deformed. In the opinion of Dr. Raja Indurakhya (P. W. 2), if treatment is taken seriously and religiously for about a month, the disease can be cured. The evidence of all the three doctors produced by the husband establishes that syphilis in general or at least syphilis with which the wife suffered is curable, but a woman who has once suffered may as a precautionary measure be advised to avoid conception. As stated earlier, the statement of Dr. Raja Indurakhya was definite on the point that a patient could be cured after one month's serious treatment."

10. Modern therapy with the antibiotic penicillin gives a satisfactory result in the treatment of syphilis undreamt of prior to 1943. The standard treatment is P.A.N. (Procaine Penicillin with aluminum monostearate) 2 ml. or 6 lacs (600,000) units given intramuscular daily for 10 days; [Text Book of Medicine, Rustom Jal Vakil (1973), p. 121]. The same treatment is recommended in Price's Text Book of the Practice of Medicine (1956), p. 222. It is also stated therein that "success from this treatment may be anticipated in 95 per cent. or more of the cases". Although treatment is generally over after 10 days, observation after treatment should continue, for about 2½ years. After 2½ years of observation, cure may be presumed [Price, p. 222]. It is further stated in Price's text book (pp. 224, 225) that for complete safety the syphilitic patient should be advised not to marry, or if already married, not to cohabit until cure may be presumed following 2½ years of observation after treatment. But then it is stated that most clinicians are satisfied with, a lessor standard and permission to marry or resume co-habitation may be given after a year of observation.

11. After considering the evidence of the doctors produced by the husband and the statements in the text-books referred to above, we are satisfied that there is no merit in the argument that the syphilis is an incurable disease. The modern therapy with the antibiotic penicillin has made the disease generally curable. Indeed, the penicillin treatment that the wife received appears to have been successful and, therefore, the doctors who examined her at Raipur did not

find any symptoms of the disease present in her.

12. The learned Advocate-General also contended that the wife was suffering from the venereal disease for a period of more than three years preceding the date of presentation of the petition. In our opinion, there is no material to hold this fact to be proved. We have already referred to the opinion of doctors. The opinion of Dr. (Mrs.) Jamdar (P.W. 3) was that the disease must have been 1½ months to 3 months old. It will thus be seen that according to Dr. Jamdar, the disease was of recent origin. Dr. Swami (P.W. 1) said that the ulcer was not less than six months old. Dr. Raja Indurakhya's opinion was that the disease must have been of more than four months' duration and the maximum limit of the disease could have been upto four to five years. Even believing the statement of Dr. Indurakhya (P.W. 2) it cannot be safely inferred from his statement that the disease in the instant case was three years old at the time of presentation of the petition. The more reasonable view to take on this evidence is that the disease was of recent origin.

13. The learned Advocate-General relied upon a document (Ex. P-4) which is said to have been executed by the wife on 14th January, 1973, when she was living with the husband, in presence of two witnesses, namely, Harbans Singh (P.W. 5) and Parmeshwar Jodhi (P.W. 4). This document contained an admission that the wife has had sexual intercourse with one Harshad Chetwani for a period of five or six years before the marriage and that this resulted in her contracting syphilis. It is also recited in this document that she was treated for syphilis before marriage for three or four years. It is further recited in it that the disease used to recur from time to time even after treatment. It is also admitted in the document that the marriage was arranged after concealing this fact from the husband. A reading of Ex. P-4 would show that it was a complete admission of the husband's case by the wife. It is highly improbable that the wife would execute such a document willingly. The witnesses Parmeshwar Jodhi (P. W. 4) and Harbans Singh (P. W. 5) state that they were invited for lunch and they saw the wife writing and signing this document. It is clear that they were called by the husband to become witnesses. They are friends of the husband and his family members. Their evidence, however, cannot establish that the wife was free agent while writing Ex. P-4. The husband did not refer to this document in the plaint. All that he stated was that on being pressed to disclose, the wife gave

out the facts. The stamp paper on which the document is written was purchased by the husband on 12th January. The document is styled as IKRARNAMA. Its language is such that a person like the wife who is not conversant with legal language could not have written it on her own. The trial Court has not believed the husband that the wife executed Ex. P-4 in her own free will. It was argued before us that the wife merely denied the document and did not state that she wrote or executed it under coercion. But in a matrimonial cause the Court must be satisfied, apart from any plea of the respondent, that the evidence adduced by the petitioner is reliable. We agree with the finding of the trial Court that no reliance can be placed on Ex. P-4.

14. The next point to be considered is whether the wife or her parents knew at the time of marriage that the wife was suffering from syphilis. As regards the parents, there is no evidence whatsoever that they knew that the wife was suffering from any venereal disease. So far as the wife is concerned, it may be assumed that the ulcer was present at the time of marriage. It cannot, however, be ascertained as to when the ulcer first appeared before the marriage. We have already referred to the opinion of the doctors relating to the duration of the disease. Even if it be accepted that the ulcer appeared a few months before the date of the marriage, there is no further reason to assume that the wife came to know that this is a symptom of syphilis. She could have mistaken it for a local ulcer. Indeed, even Dr. (Miss) Swami (P.W. 1) first thought that it was a local ulcer and the diagnosis of syphilis was made only after blood examination. In the circumstances, it cannot be assumed that the wife knew at the time of the marriage that she was suffering from syphilis.

15. We are now in a position to recapitulate our findings on material facts. These findings are that the wife was suffering from syphilis on the date of marriage; that the disease was of a recent origin; that it was curable; that it is not proved that the wife at the time of the marriage knew that she was suffering from syphilis; and that it is also not proved that the disease was present for a period of three years before the date of the presentation of the petition.

16. On the finding that the husband has failed to prove that the wife was suffering from syphilis for a period of three years before the presentation of the petition, the husband's relief for judicial separation under Section 10 (1) (d) must be held to have been rightly rejected.

17. Coming to the question of fraud, Section 12 (1) (c) enables the annulment of a marriage if "the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under Section 5, the consent of such guardian was obtained by force or fraud". In the instant case both the parties were major at the time of marriage and, therefore, no question of consent of guardian under Section 5 arises. The question only is whether the consent of the husband was obtained by fraud. The learned Advocate-General contended that fraud here means, fraud as defined in the Indian Contract Act, 1872, and that if the husband's consent to the marriage was obtained by concealing the fact that the wife was suffering from syphilis, it would be said that the consent was obtained by fraud. Even assuming that this is a true construction of Section 12 (1) (c), the argument of the learned Advocate-General cannot be accepted, because it has not been proved that the wife or her parents knew that she was suffering from syphilis. The question of inducing the consent of the husband by concealment of a fact can only arise when the fact was known to the wife or her parents. When neither the wife nor her parents knew that she was suffering from syphilis, there can be no question of concealing that fact from the husband or obtaining his consent by practising fraud. The case of fraud, therefore, cannot be said to be made out.

18. We are further of opinion that the construction placed by the learned Advocate-General on Section 12 (1) (c) cannot be accepted. The word "fraud" has not been defined in the Hindu Marriage Act. It would not be permissible for us to incorporate in the Act the definition of fraud contained in Section 17 of the Indian Contract Act, for these Acts are not in pari materia. It is pertinent to note that Section 25 (iii) of the Special Marriage Act, 1954, which provides for annulment of marriage on the ground of coercion or fraud, specifically refers to "coercion or fraud as defined in the Indian Contract Act, 1872". If the intention was to incorporate the definition of fraud as given in the Contract Act in Section 12 (1) (c) of the Hindu Marriage Act, Parliament would have adopted the same method and would have specifically referred in that section to fraud as defined in the Contract Act. This is a strong indication that the word "fraud" in Section 12 (1) (c) was not used in the sense as defined in the Contract Act.

19. Section 19 of the Indian Divorce Act, 1869, authorises the High Court to make decrees of nullity of marriage on the ground that the consent of

either party was obtained by force or fraud. This section has been generally construed to mean that misrepresentation inducing consent to marry cannot upset a marriage and that for the annulment of the marriage on the ground of fraud the party imposed upon must be deceived to such an extent that there is in reality no consent at all to the marriage; [Alfred Robert Jones v. Mt. Titli, AIR 1933 All 122]. So misrepresentation as to a party's origin, social status and financial circumstances inducing consent to a marriage were held to be ineffectual to invalidate the marriage. But misrepresentation as to religion of a party was held to invalidate a marriage on the ground that the policy of the Divorce Act did not contemplate a valid marriage between a Christian and a person professing a religion which is not monogamous; [Aykut v. Aykut, AIR 1940 Cal 75 and Jude v. Jude, AIR 1949 Cal 563]. Similarly, in English law fraud that invalidates a marriage does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent"; [Moss v. Moss, 1897 P 263 at p. 269]. This case gives instances of such fraud. The first instance is of personation, where a person assumed a name to conceal himself from a person to whom he was to be married. The second instance is of taking advantage of a mind not absolutely insane but weak, to induce a person to enter into a contract which he or she did not understand. In Rayden on Divorce, 11th Edition, page 120. (Article 10) it is stated that "apart from duress or imbecility of mind amounting to insanity and apart from the grounds for avoiding a marriage in the circumstances originally introduced by the Matrimonial Causes Act, 1937, fraudulent misrepresentation, or concealment does not affect the validity of a marriage to which the parties freely consented with a knowledge of the nature of the contract". The foot-note (c) to Article 10 refers to the judgment in 1897 P 263 (supra) as indicating the nature of fraud as would amount to duress. In 1897 P 263 it was held that concealment by a woman from her husband at the time of marriage of the fact that she was then pregnant by another man did not render the marriage null and void. By the Matrimonial Causes Act, 1937, certain grounds of annulment of marriage were provided by statute. These grounds are continued by the Matrimonial Causes Act, 1965. Under these grounds marriage can be annulled "where the respondent was at the time of the marriage suffering from venereal disease in a communicable form, or where the respondent was at the time of the marriage pregnant by some person other than the petitioner"; [See

Rayden on Divorce, 11th Edition, p. 169, Article 76].

20. It will thus be seen that the word "fraud" in matrimonial law has a technical meaning. It does not include cases of misrepresentation or active concealment even of material facts including (sic) (inducing?) consent of a party. Fraud, as already stated, in the context of annulment of marriage means such fraud which procures the appearance without the reality of consent, i.e. where there is no real consent at all. In our opinion, the word "fraud" in Section 12 (1) (c) of the Hindu Marriage Act must be understood in the same sense. It is interesting to notice that Section 12 (1) of this Act although providing in clause (d) that the marriage can be annulled if the respondent was at the time of the marriage pregnant by some person other than the petitioner, a ground introduced in the English Law by Matrimonial Causes Act, 1937, does not provide that the marriage can be annulled simply on the ground that the respondent was at the time of marriage suffering from venereal disease in a communicable form, a ground which was also introduced in the English Law by the Matrimonial Causes Act, 1937. It is further to be noticed that the provision for judicial separation is made under Section 10 (1) (d) on proof that the respondent has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner. A similar ground for divorce is included in Section 13 (1) (v). The provisions of Section 10 (1) (d) and Section 13 (1) (v), where venereal disease has been made a ground for judicial separation and divorce, go to suggest that if Parliament intended to make a marriage voidable on the ground that the respondent was suffering from a venereal disease at the time of marriage, it would have specifically said so in Section 12. For all these reasons, we are of opinion that even assuming that the wife knew that she was suffering from venereal disease, which fact she concealed from the husband, this cannot be held to be fraud within the meaning of Section 12 (1) (c) making the marriage voidable and entitling the husband to obtain a decree for annulment of marriage.

21. The view that we have taken of Section 12 (1) (c) of the Hindu Marriage Act is supported by the current trend of authorities. In Harbhajan Singh v. Smt. Brij Balab, AIR 1964 Punj 359, it was held that a petition alleging past immoral conduct of respondent and fraudulent misrepresentation about her charac-

ter at the time of obtaining consent of the petitioner did not disclose any cause of action for annulment of marriage under Section 12 (1) (c). A Division Bench of the Calcutta High Court in *Rani Bala Debnath v. R. K. Debnath* 73 Cal WN 751 held that fraud referred to in Section 12 (1) (c) is such fraud which procures the appearance without the reality of consent and thereby becomes an act fitted to deceive. It was further held in that case that concealed unchastity of the wife before marriage is not fraud which invalidates consent under Section 12 (1) (c). Similarly, in *Raghunath v. Vijaya*, AIR 1972 Bom 132 the Bombay High Court held that mere non-disclosure prior to marriage or concealment of curable epilepsy of girl and false representation that she was healthy did not amount to fraud within Section 12 (1) (c). In *Rajaram v. Deepabai*, 1973 MPLJ 626 = (AIR 1974 Madh Pra 52) a Division Bench of this Court also held that fraud within the meaning of Section 12 (1) (c) is not each and every representation or concealment which may be fraudulent. It was further laid down that the test was whether there was real consent to the solemnization of the marriage with the other party.

22. The learned Advocate-General relied upon the case of *Birendra Kumar v. Hemlata Biswas*, AIR 1921 Cal 459. In this case dealing with Section 19 of the Divorce Act and relying upon certain American authorities, a Division Bench of the Calcutta High Court held that concealment of a loathsome and incurable form of syphilis is recognised as fraud sufficient to warrant divorce or annulment, specially where the existence of the disease is discovered by the other party before the marriage is consummated and the parties immediately separate. The basis of the decision, as explained by the learned Judge is: "It is the permanent or probably permanent character of the malady, rendering sexual intercourse impracticable throughout the continuance of the marriage that furnishes the reason for the annulment". The Division Bench, after explaining the legal principles that were relevant, remanded the case. The judgment after remand is also reported; *Birendra Kumar Biswas v. Hemlata Biswas*, AIR 1921 Cal 464. It will appear from the judgment delivered after remand that the marriage was annulled not on the ground of fraud but on the ground of impotency. The learned Judge, who decided the case after remand, held that having regard to the state of the wife's health, the husband could not consummate the marriage without the very gravest risk to his health and to that of any offspring who might

be born of the connection. The disease in that case had not yielded to treatment and even if curable could not be taken as cured until after the lapse of several years. This case is thus distinguishable on facts. We have already said that now syphilis has been brought under control and is curable. This is the opinion of the doctors examined by the husband. The finding in the Calcutta case was that the disease with which the wife in that case suffered was incurable. In the instant case the disease is found to be curable. Even otherwise, the Calcutta case was decided essentially on the ground of impotency, i.e. practical impossibility of consummation of marriage. In the instant case as the disease is curable, that question does not arise. Moreover, the marriage here has admittedly been consummated. The Calcutta case, therefore, cannot help the husband.

23. Professor Derrett in his book "A Critique of Modern Hindu Law (1970) pp. 320, 321, has advocated that if there is misrepresentation as to chastity of the wife or as to the fortune and financial prospects of the husband, it should be held that the misrepresentation goes to the root of the marriage vitiating consent. The learned author recommends that the Indian Courts should make a departure in this respect from the English law. It is interesting to notice that Prof. Derrett in his Introduction to Modern Hindu Law (1963 Edition) had said that "fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consented with the knowledge of its nature and with the clear and distinct intention of entering into the marriage in question". We feel that the opinion expressed by Prof. Derrett in his Introduction to the Modern Hindu Law represents the law correctly and the change in this aspect advocated by him in A Critique of Modern Hindu Law cannot be accepted. Fraud in the context of matrimonial law in India has been construed in the same sense in which it was understood in England. If Parliament wanted to make a departure in the concept of fraud, so far as Hindu marriages are concerned, it would have said so specifically. We have already stated that the Special Marriage Act, which was passed only seven months before the Hindu Marriage Act, while dealing with fraud as a ground for annulment of marriage, specifically referred to fraud as defined in the Contract Act. There is no such reference made in the Hindu Marriage Act. That shows that the Parliament intended to use the word "fraud" in Section 12 (1) (c) in the sense in which it had normally been understood in India under the matrimonial law.

24. For the reasons given above, the appeal fails and is dismissed. We shall, however, make no order as to costs.

Appeal dismissed.

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G. P. SINGH AND B. R. DUBE, JJ.

Madhya Pradesh State Road Transport Corporation, Petitioner v. The State Transport Authority, M. P., Gwalior and another, Respondents.

Misc. Petn. No. 215 of 1972, D/- 6-9-1974°.

(A) Motor Vehicles Act (1939), Ss. 68-C, 68-D (3), 68-F (1) (1-D) Proviso — Stage carriage permit granted to A expiring on 4-9-1971 — Application for renewal made by A on 29-4-71 — Temporary permit granted to A on 5-9-1971, which was to expire on 4-1-1972 — Meanwhile publication of scheme made under Section 68-C on 22-10-1971 — Application for renewal cannot be granted, but must be kept pending the publication of the approved scheme under Section 68-D (3).

Where A, the holder of a stage carriage permit which was to expire on 4-9-71, applied on 29-4-71 for renewal of the permit, and on 5-9-71 he was granted a temporary permit which was to expire on 4-1-72, and in the meanwhile on 22-10-71, a scheme was published under Section 68-C.

Held (a) that the original permit and the temporary permit were different and distinct, and the life of the original permit was not extended by the temporary permit although the latter was granted pending the application for renewal.

(Para 4)

(b) It cannot therefore be said that the original permit expired after the date of the publication so as to attract Proviso to Section 68-F (1D).

(Para 4)

(c) After publication of a scheme under Section 68-C a permit that had been granted cannot be renewed. The renewal would be without jurisdiction.

(Para 8)

(d) An application for renewal of a permit expiring before the publication of a scheme under Section 68-C in respect of a route covered by it is not to be dismissed under Section 68F(1)(1-D). Such an application should be kept pending till the publication of the approved scheme.

(Para 9)

(B) Motor Vehicles Act (1939), Sec. 68-E — 'Scheme' meaning of — Proposal to modify or cancel a scheme when can be said to be a 'scheme'.

°(To quash order passed by State Transport Authority, M. P., Gwalior, D/- 2-12-1971).

A 'scheme' under the Act, means a proposal prepared and published by a State Transport Undertaking indicating the nature of the services proposed to be run and operated by the undertaking in relation to any area or route whether to the exclusion, complete or partial, of other persons or otherwise.

(Para 7)

Whether a proposal to modify a scheme can itself be called a 'scheme' depends upon the nature of the proposal. If the proposal for modification of an approved scheme carried out the object of nationalisation and supplements the approved scheme, the proposal will, in itself, amount to a scheme. But if the proposal is merely to cancel an approved scheme, it will be difficult to call it a scheme. To see whether a proposal emanating under Section 68-E is, in its true sense, a scheme, it has to be seen whether it has the essentials of a scheme under Section 68-C. In other words, it may be examined whether the proposal advances the policy of nationalisation of road transport services, which is the object behind Section 68-C.

(Para 7)

Cases Referred: Chronological Paras
AIR 1974 Madh Pra 181 = 1974 MPLJ 160 4
(1960) 62 Bom LR 958 = ILR (1961) Bom 147 4

D. V. Nigudkar, for Petitioner; S. Q. Hazan and P. C. Pathak, for Respondent No. 2.

SINGH J.:— The facts giving rise to this petition are that Ratanlal Agarwal, respondent No. 2 in this petition, was holder of a stage carriage permit for the route Shivpuri to Jhansi via Karera which is an interstatel route. The permit expired on 4th September 1971. Ratanlal applied for renewal of this permit on 29th April 1971. The Madhya Pradesh State Road Transport Corporation opposed the grant of the renewal on the ground that the route was covered by Scheme 27-M which was published in the Government Gazette on 22nd October 1971. The State Transport Authority allowed the renewal of the permit by its order dated 2nd December 1971. The Corporation then filed the present petition under Article 226 of the Constitution challenging the order of renewal.

2. The learned counsel for the petitioner contended that the State Transport Authority had no jurisdiction to renew the permit in view of Section 68F (1-D) of the Motor Vehicles Act, 1939. In reply it was contended by the learned counsel for Ratanlal that a temporary permit was granted to Ratanlal on 5th September 1971 during the pendency of his renewal application and this temporary permit expired on 4th January 1972 after the publication of the scheme, hence it must be held that the original permit itself expired after the publication of the scheme and Ratanlal became entitled to renewal under the proviso to S. 68 (1-D). It was also contended that the Scheme 27-E was made under Section 68-E for modification of approved

Scheme No. 27 and to such a scheme the provisions of Section 68F (1-D) have no application. Lastly it was contended that if the application for renewal cannot be allowed, it should be kept pending till the publication of the approved scheme as no provision has been made for rejection of such an application.

3. The subject of preparation and publication of a scheme is dealt with in Section 68-C which reads as under :

"Preparation and publication of scheme of road transport service of a State Transport undertaking. — Where any State Transport undertaking is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that road transport services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State Transport undertaking, whether to the exclusion, complete or partial, of other persons or otherwise, the State Transport undertaking may prepare a scheme giving particulars of the nature of the services proposed to be rendered, the area or route proposed to be covered and such other particulars respecting thereto as may be prescribed and shall cause every such scheme to be published in the official Gazette and also in such other manner as the State Government may direct."

After hearing the objections to the scheme, the State Government may approve or modify the scheme. The scheme as approved or modified by the Government is published under sub-section (3) of Section 68-D in the Official Gazette. On publication, the scheme becomes final and is called the approved scheme. An approved scheme can be modified or cancelled only by recourse to the procedure provided in Section 68-E. The relevant part of this section reads as follows:

68-E. "Cancellation or modification of scheme.— (1) any scheme published under sub-section (3) of Section 68-D may at any time be cancelled or modified by the State Transport Undertaking and the procedure laid down in Section 68-C and Section 68-D shall, so far as it can be made applicable, be followed in every case where the scheme is proposed to be cancelled or modified as if the proposal were a separate scheme."

What consequences are to follow after publication of a scheme or approved scheme are dealt with in Section 68-F. Sub-section (1) provides for issue of permits to the State Transport Undertaking in pursuance of an approved scheme. Sub-sections (1-A) and (1-C) provide for grant of temporary permits after the publication of a scheme. Subject to these sub-sections, sub-section (1-D) contains a ban for grant or renewal of a permit after the publication of a scheme. Sub-section (2) (a) provides for non-entertainment and rejection of pending applications for

grant or renewal of permits after publication of approved scheme. Sub-sections (1-D) and (2) (a) of Section 68-F read as follows:

"(1-D) Save as otherwise provided in sub-section (1-A) or sub-section (1-C), no permit shall be granted or renewed during the period intervening between the date of publication, under Section 68-C of any scheme and the date of publication of the approved or modified scheme, in favour of any person for any class of road transport service in relation to an area or route or portion thereof covered by such scheme:

Provided that where the period of operation of a permit in relation to any area, route or portion thereof specified in a scheme published under Section 68-C expires after such publication, such permit may be renewed for a limited period, but the permit so renewed shall cease to be effective on the publication of the scheme under sub-section (3) of Section 68-D."

xx xx xx
"(2) For the purpose of giving effect to the approved scheme in respect of a notified area or notified route, the State Transport Authority or as the case may be, the Regional Transport Authority concerned may by order,—

(a) refuse to entertain any application for the grant or renewal of any other permit or reject any such application as may be pending."

4. We have already stated that Scheme 27-M was published under Section 68-C on 22nd October 1971. The permit of Ratanlal expired on 4th September 1971. Even if we assume that during the pendency of renewal application Ratanlal was granted a temporary permit on 5th September 1971 which was effective till 4th January 1972, it cannot be held that the life of the original permit was extended by the temporary permit. The permit that expired on 4th September and the temporary permit granted on 5th September were different and distinct although the latter was granted pending disposal of application for the renewal of the former. Learned counsel for the respondent referred to us Section 58 (4) which provides that the renewal of a permit shall have effect from the date of its expiry, whether or not a temporary permit has been granted pending disposal of the renewal application and where a temporary permit is granted, the fee paid in respect of such temporary permit shall be refunded. This provision was inserted by the Amending Act 56 of 1969. Before it the law was that the renewal took effect from the date of order of renewal and not from the date of expiry of the permit: *Shree Laxmi Bus Transport Co. v. Regional Transport Authority, Rajkot* (1960) 62 Bom LR 958 and *M. P. S. R. T. Corporation v. S. T. A., Authority, M. P.* AIR 1974 Madh Pra 131. Sec. 58 (4) brings about a change in law on this point by providing that the renewal

will take effect from the date of expiry of the permit. It also provides that if the permit-holder gets a temporary permit during the pendency of his application for renewal, the fee for that permit will be refunded. The reason behind this seems to be that as now the renewal will relate back to the date of expiry and the renewed permit will cover the period for which the temporary permit is granted, it would not be just for the Government to tax the permit-holder twice for the same period, when he actually gets the benefit of operation of only one permit. The Section operates when the renewal is granted. It has not the effect of extending the date of expiry of the permit and it does not make the temporary permit a continuation of the expired permit. It is, therefore, impossible to accept the contention of the learned counsel for the respondent Ratanlal, that his permit did not expire on 4th September 1971 and that it was extended by the temporary permit and expired on 4th January 1972. The permit clearly expired on 4th September 1971 before the publication of Scheme 27-M under Section 68-C on 22nd October 1971 and the proviso to Section 68F (1-D) is not attracted.

5. We next come to the contention that Scheme 27-M is not a new scheme but a proposal under Section 68-E to vary the approved Scheme 27 and, therefore, Section 68F (1-D) is not attracted. Section 68F (1-D) comes into operation on the publication "under Section 68-C of any scheme". The question, therefore, is whether Scheme 27-M which has been published under Section 68-C is really a scheme.

6. The preamble of Scheme 27-M as published in the Government Gazette reads as follows :

"Whereas the Madhya Pradesh State Road Transport Corporation 'State Transport Undertaking' is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service on the routes specified in clause (2) of the Scheme given below (Scheme No. 27-M) and in modification of approved scheme No. 27, it is necessary in the public interest that the Road Transport Service in relation to the said routes should be run and operated by the Madhya Pradesh State Transport Corporation 'State Transport Undertaking' in accordance with the Scheme given below :—

Now, therefore, in exercise of the powers conferred by Section 68-C and Section 68-E of the Motor Vehicles Act, 1939 as amended till date read with rule 3 (2) of the Madhya Pradesh State Road Transport Services (Development) Rules, 1959, the Madhya Pradesh State Road Transport Corporation, 'State Transport Undertaking' hereby publishes the scheme given below in respect of the State Road Transport Services framed in pursuance of Section 68-C and Section 68-E of the said Act. Copies of the Scheme will also be found pasted on the office board of the Office of

the State Transport Authority, and the Regional Transport Authority concerned."

The routes for which the scheme is proposed are mentioned in clause (2) and the schedule mentions the nature and extent of services to be provided on these routes by the State Road Transport Corporation. Clauses (4) and (5) indicate the routes for exclusive operation of the Corporation and clause (7) mentions the permits of the private operations which are proposed to be cancelled or curtailed. Earlier to the publication of Scheme 27-M the Corporation had proposed Scheme 27 for these routes. The permits of the respondent Ratanlal and some other operators were not included for cancellation when this scheme was published under Section 68-C, but at the time of final approval of the scheme under Section 68-D these permits were included. The High Court in M. P. No. 158 of 1970, decided on 16th August 1971 to set aside the approved Scheme 27 in so far as it affected the permits of the respondent and other operators which were not included in the scheme as earlier published under Section 68-C. The Corporation by preparing and publishing Scheme 27-M seeks cancellation and/or curtailment of the permits of the respondent and other private operators which remained unaffected by the approved Scheme 27, and thereby it proposes to make the routes mentioned in clauses (4) and (5) of the proposed scheme routes of complete exclusion. The real object of Scheme 27-M is to supplement the approved Scheme 27 by filling up the gaps which were accidentally left out.

7. The word 'scheme' has not been defined in Chapter IV-A or elsewhere in the Act. Reading Section 68-C it is, however, clear that a scheme is a proposal prepared and published by a State Transport Undertaking indicating the nature of the services proposed to be run and operated by the Undertaking in relation to any area or route, whether to the exclusion, complete or partial, of other persons or otherwise. A scheme can only be prepared and published when the State Transport Undertaking is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service it is necessary in the public interest that road transport services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State Transport Undertaking whether to the exclusion, complete or partial, of other persons or otherwise. After the approval is given by the State Government, a scheme becomes an approved scheme under Section 68-D. An approved scheme can be modified or cancelled under Section 68-E. One of the modes of modification or cancellation of an approved scheme is contained in the first part of sub-section (1). Under this provision the State Transport Undertaking can cancel or modify an approved scheme by following the procedure laid down in Sections 68-C and 68-D "as if the proposal (for cancellation

or modification) were a separate scheme". An approved scheme can be modified by the State Transport Undertaking without following the procedure under Sections 68-C and 68-D in cases covered by the proviso to sub-section (1) of Section 68-E. The State Government can also independently modify an approved scheme under sub-section (2) of Section 68-E. We are not in this case concerned with the proviso to sub-section (1) or sub-section (2) of Section 68-E. We are only concerned with the first part of sub-section (1). The point is whether a proposal to modify or cancel a scheme to which the procedure under Sections 68-C and 68-D has been applied as if the proposal were a separate scheme, can itself be called a scheme. The answer to this question, in our opinion, must depend upon the nature of the proposal. We have already seen that a scheme is a proposal prepared and published by the State Transport Undertaking in public interest to provide transport services to the complete or partial exclusion of others in any area or route. If the proposal for modification of an approved scheme carries out the object of nationalisation and supplements the approved scheme, the proposal will in itself amount to a scheme. But if the proposal is merely to cancel an approved scheme, it will be difficult to call it a scheme, for such a proposal does not envisage that road transport services be provided by the Road Transport Undertaking, rather it envisages the cancellation of the existing road transport services provided by the State Transport Undertaking under the approved scheme which it proposes to cancel. A proposal to cancel an approved scheme aims at denationalisation of road transport services and although for making the cancellation effective the procedure under Sections 68-C and 68-D is made applicable "as if the proposal were a separate scheme", it will be difficult to call the proposal a scheme. To put it differently, although every proposal for modification or cancellation of an approved scheme is to be treated for procedural purposes as if it were a separate scheme, every proposal is not in true sense a scheme as envisaged by Section 68-C. To see whether a proposal emanating under Section 68-E is in true sense a scheme, it has to be seen whether it has the essentials of a scheme under Section 68-C. In other words, it may be examined whether the proposal advances the policy of nationalisation of road transport services, which is the object behind Section 68-C.

8. Tested in the light of these principles, it is clear that Scheme 27-M fulfils all the characteristics of a scheme under Section 68-C and it is in true sense a scheme. The object behind it is to exclude the private operators which were accidentally left out in the approved scheme and to complete the nationalisation of the routes mentioned in its clauses (4) and (5). In our opinion, the scheme is a true scheme and not merely a proposal which is treated for procedural pur-

poses under Section 68-E as if it were a scheme. Scheme 27-M being a scheme published under Section 68-C, the embargo contained in Section 68F (1-D) was clearly attracted. The respondent's permit is mentioned for cancellation and the route on which this permit operated is entirely covered by the scheme. The State Transport Authority had, therefore, no jurisdiction to renew the permit after publication of the scheme.

9. The next question is whether the application for renewal of the respondent's permit is to be dismissed or it is to be kept pending till the publication of the approved scheme. Section 68-F(1-D) provides for the consequences that are to follow the publication of a scheme under Section 68-C. The Section provides that no permit shall be granted or renewed during the period intervening between the date of publication of a scheme under Section 68-C and the date of publication of the approved scheme. The proviso to the section enables grant of renewal for a limited period of a permit which expires after the publication of a scheme. The section does not in terms provide that the applications for grant of a permit or for renewal of a permit which has expired before the publication of the scheme will be rejected. All that it provides is that no permit shall be granted or renewed, which means that an application for grant of a permit or renewal of a permit will not be allowed. But the question is whether the application is to be dismissed. It will be noticed that Section 68F(2), which provides for the consequences to follow on publication of an approved scheme, uses very clear language to the effect that the Authority concerned may by order "refuse to entertain" an application for the grant or renewal of a permit or "reject any such application as may be pending." Parliament could have used similar language in Section 68F(1-D) if the intention were that applications for grant or renewal of permits on routes covered by a scheme published under Section 68-C are to be rejected or dismissed. Use of different languages suggest that the intention was not to authorise rejection of the applications. Another consideration which supports this construction is that the object behind Section 68F (1-D) is to enact a ban for a limited period; the ban under this section is lifted after the publication of the approved scheme. The approved scheme may or may not cover the routes that were proposed to be covered under the scheme. If a route covered by a scheme continues to be covered by the approved scheme, Section 68F(2) will apply; otherwise the ban would be entirely lifted. If an application for renewal of a permit expiring before the publication of a scheme is rejected under Section 68-F (1-D) and later the permit or route covered by it is excluded from the approved scheme, the rejection of the application will work a serious hardship to the permit-holder. On the other hand, if such an application is kept pending till the

publication of the approved scheme, no injustice will result to any party. If the approved scheme covers the permit or route, the application will be rejected under Section 68F(2)(a); whereas, if the approved scheme does not cover it, the application will be disposed of in accordance with the provisions of Chapter IV. Having regard to all these considerations, we are of opinion that an application for renewal of a permit expiring before the publication of a scheme under Section 68-C in respect of a route covered by it is not to be dismissed under Section 68F (1-D). Such an application should be kept pending till the publication of the approved scheme.

10. The petition is allowed. The order of the State Transport Authority dated 2nd December 1971 renewing the respondent's permit is quashed. The application for renewal will be kept pending till the publication of the approved scheme under Section 68-D and shall thereafter be disposed of according to law. There shall be no order as to costs. The amount of the security deposit shall be refunded to the petitioner.

Petition allowed.

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R. J. BHAVE J.

On Difference Of Opinion Between
SHIV DAYAL AND G. P. SINGH, JJ.

Narsoo, Appellant v. Madan Lal and others, Respondents.

Letters Patent Appeal No. 19 of 1971,
D/- 25-7-1974.

(A) Easements Act (1882), Sections 15, 17, 18, 27, 32, 33 and 35 — Right to use surface water — Acquisition of, by prescription or custom — Extent of — Disturbance of plaintiffs' right to irrigate his fields — Suit for declaration of right, injunction and damages — Reliefs to which plaintiff is entitled.

The defendant was the Bhumiswami of Khasra No. 164 a part of which was cultivable and the other part being a depression rain water from the adjoining hill, abadi and other lands used to accumulate therein and the excess water used to flow into adjoining tank Khasra No. 165 enclosed by embankments. In the village papers it was recorded that cultivators having their fields towards eastern side of khasra Nos. 164 and 165 had a right to irrigate their fields with the tank water collected in these khasras. The defendants having constructed embankments in khasra No. 164 the collection of water in the tanks naturally diminished causing interference in the irrigation of the fields of the plaintiff. He therefore brought a suit for a declaration of his right to irrigate from the water collected in the tanks in khasra Nos. 164 and 165, for injunction to restrain the obstruction to the flow of water collecting in the tanks and for damages to his crops amounting to Rs. 2300/-.

Held Per Bhave J. (agreeing with Shiv

Dayal and G. P. Singh JJ.): (i) that the plaintiff had a customary as well as a prescriptive right to irrigate his fields from the water collected in khasra Nos. 164 and 165 and was entitled to a declaration to that effect.

(Paras 11, 13)

(ii) Per Bhave, J. (Agreeing with G. P. Singh, J. and dissenting from Shiv Dayal, J. on difference of opinion between them):— that the plaintiff was entitled to a permanent injunction restraining the defendant from creating any obstruction within the tank area of khasra Nos. 164 and 165 but was not entitled to any injunction restraining the defendant from intercepting the surface water till it reached the tank in khasra No. 164. Nor was he entitled to a decree for damages as plaintiff had not proved any obstruction within the tank area.

(Paras 11 to 13)

Under Section 17 (c) of the Easements Act, a right to surface-water not flowing in a stream, and not permanently collected in a pool, tank or otherwise, cannot be acquired. Easement rights can only be acquired over water which is already collected in a pool or a tank, and no rights are acquired over the collecting of the same. Hence no right of easement could be acquired over the surface water till it reached the depression and, as such, the defendant was entitled to impound the surface water or to divert it before it reached the depression.

(Para 11)

In the instant case Sections 27 and 32 were not applicable.

(Para 11)

As the entry in the Wazib-ul-arz only recorded that certain fields lying to the east of Khasra No. 165 and Khasra No. 164 had a right to take the water collected in those khasra numbers for irrigation and also prohibited the owner of Khasra No. 164 from cultivating the land over which the water was collected, no customary right could be acquired by the plaintiffs over the surface water till it reached the depression, and the only right recognised was over the water that was collected in the depression of Khasra No. 164 or in the tank Khasra No. 165.

(Para 12)

(B) Easements Act (1882), Section 17 — "Stream" — Meaning.

Bhave J. (on difference of opinion between Shiv Dayal and G. P. Singh JJ.):— The expression "stream" used in Section 17 of the Easements Act should in the absence of any contrary intention be interpreted as is ordinarily understood by a common man and not in any technical manner. When one uses the word "stream", the idea conveyed is that the body of water flows through a defined channel, having a bed and banks on both the sides. A flow of excess rain water, though in a body and in one direction, spread over a very large area in width without any bed or having any banks within which the flow is confined, cannot be treated as a "stream".

(Para 12)

J. P. Dwivedi, for Appellant; S. K. Seth, for Respondents.

BHAVE, J.:— In the Letters Patent Appeal there was difference of opinion be-

tween Justice Shiv Dayal and Justice Singh who heard the appeal. The case has, therefore, been referred to me.

2. In the village in question Khasra No. 165 is a village tank, bounded on all sides by embankments. Immediately to the southern side of this tank is situate Khasra No. 164, belonging to the defendant. In an area of 3.32 acres which is sort of a depression rain water used to collect. This portion has no embankment. The excess rain water in this area used to flow in the tank Khasra No. 165. This area of Khasra No. 164 is known as "Munda tank", not having embankments on all its sides. In the village papers it is recorded that the cultivators having their fields towards the eastern side of the tank Khasra No. 165 and the Munda tank in Khasra No. 164 have a right to use the water collected in those tanks for irrigating their fields. The natural slope in the village is from west to east. As a result of this geographical condition, excess rain water from the hills, the abadi and the lands towards the western portion of Khasra Nos. 165 and 164 has a tendency to flow towards Khasra No. 164 and thus some water is collected in the depression, referred to above.

3. In the year 1956 the defendant purchased Khasra No. 164, having an area of 5.32 acres, out of which an area covering 3.32 acres is the depressed area. Soon after his purchase the defendant constructed embankments, running north-south one on the western border of Khasra No. 164 and the other near the depressed portion. He had also constructed embankments, running east-west, joining the two embankments. The plaintiffs' case was that as a result of this construction of embankments the quantity of water which used to be collected in the depressed portion of 3.32 acres of Khasra No. 164 was reduced and the flow of excess water in the tank Khasra No. 165 was also prevented which substantially affected the right of irrigation of the plaintiffs. They, therefore, brought the suit for injunction permanently restraining the defendant from obstructing the flow of water in Khasra No. 164 and Khasra No. 165 and for damages amounting to Rs. 2,300/-.

4. Both the Courts below came to the conclusion that the water coming from the hill side over the abadi and other intervening fields was 'surface water' over which no right of easement could be claimed and the defendant was free to utilise that water in any manner he liked or to throw it out from his field. As to the entry in the wazib-ul-arz it was held that the plaintiffs had a right to irrigate their fields from Khasra Nos. 164 and 165 to the extent any water was collected therein but they had no right to prevent the defendant from impounding the water coming to Khasra No. 164 or diverting it otherwise. In this view of the matter, the plaintiffs' claim was negatived in toto.

5. In second appeal the then Chief Justice (Shri Bishambhar Dayal) did not dis-

turb the finding of the Courts below that what reached in Khasra Nos. 164 and 165 was surface water. The learned Chief Justice, however, felt that the Courts below misapplied the law of surface water to the facts of the case. The learned Chief Justice felt that such a right was capable of acquisition both as a matter of local custom recognised by Section 18 of the Indian Easements Act and entered in the Wazib-ul-arz and that it was also capable of acquisition under section 15 of the Easements Act. It was held that in the particular case the water permanently collected in the pool or tank from which the plaintiffs used to take water for irrigation and thus the plaintiffs had acquired a right both under local custom as well as by prescription. Having come to the conclusion that such a right was acquired, the learned Chief Justice came to the conclusion that the defendant could be restrained from so using his own land as to prevent water reaching the tank. The learned Chief Justice was of the view that if the defendant was not prevented from allowing the flow of water into Khasra Nos. 164 and 165 as well, the easement right acquired by the plaintiffs would be defeated and what could not be done directly by preventing the taking of water could not also be done indirectly by preventing the accumulation of water in the depressed portion of Khasra No. 164. In this view of the matter, it was held that the plaintiffs were entitled to a declaration of the right to irrigate their fields from the tanks Khasra Nos. 164 and 165 and a decree for injunction restraining the defendant from preventing rain water from collecting in the tank, area 3.32 acres, of Khasra No. 164 and Khasra No. 165 as also a decree for damages as may be found by the Courts below. As the lower Courts had not determined the damages, the case was remanded for assessing the same and passing a proper decree. However, as no direct authority was cited before the learned Chief Justice, His Lordship suo motu granted permission to file a Letters Patent Appeal. This is how the case came before the Division Bench.

6. It is clear from the judgment of the learned Chief Justice that the finding of the lower Courts that the rain water which collected in part of Khasra No. 164 retained its character as surface water till it entered the depression in that khasra number was not disturbed by His Lordship; but His Lordship felt that inasmuch as the plaintiffs had acquired an easement right to use the water so collected, both by prescription and under the local custom, the defendant was not entitled to disturb the flow of water into the depression of Khasra No. 164, as that act would affect the easement right of the plaintiffs which could not be done by the owner of the servient tenement. The only controversy that was, therefore, open before the Division Bench was as to whether the defendant had lost his right to utilise the surface water in any manner he liked only because the plain-

tiffs had acquired either a prescriptive right or a customary right to use the water in the said two khasra numbers.

7. Justice Singh was of the opinion that no right of easement or customary right was created over whole of Khasra No. 164. The portion of Khasra No. 164 which was not covered by water could not be treated as a servient tenement and that the defendant was free to use the other portion in any manner he liked and utilise the surface water on it to the best possible advantage or to repel it. He was, therefore, entitled to impound the surface water in the rest of Khasra No. 164. As to the entry in the Wazib-ul-arz it was held by His Lordship that the entry was confined to only an area of 3.32 acres of Khasra No. 164 with a direction that that area would not be cultivated by the defendant. In the absence of any specific record that the holder of Khasra No. 164 or the holders of other fields lying towards the western side were prevented from utilising the surface water in any manner they liked, it could not be held that any customary right was created in favour of the plaintiffs so as to prevent the defendant from impounding the surface water before it reached the depression, area 3.32 acres. It appears that an argument was also advanced before the Bench that the water that collected in Khasra No. 164 was not 'surface water' but it was a stream which emptied itself in the depression and, as such, a right of easement could be acquired over the whole flow of water. Justice Singh, on an elaborate discussion and citing a number of Indian and foreign authorities, came to the conclusion that the rain water had not lost its identity as surface water and had not become a stream.

8. Justice Shiv Dayal, on the other hand, came to the conclusion that once it was recognised that a right of easement was acquired on Khasra No. 165 and part of Khasra No. 164, that right could not be disturbed by anyone by any act of commission or omission. In support of his conclusion, Justice Shiv Dayal relied on Section 32 of the Easements Act which provides that the owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person. It was held by His Lordship that this section applies both to customary easements acquired under S. 18 of the Easements Act and those acquired under S. 15 by prescription. His Lordship also referred to Sec. 27 which protects the right of easement from being defeated. His Lordship was of the opinion that the restrictions which Section 27 imposes come into play only after the right of easement has been acquired by prescription. Until such acquisition, it was open to the defendant to intercept the water reaching Khasra No. 164 or 165, but he could not place any obstacles or intercept or divert water, as he pleases, after he allowed a continued and uninterrupted use for over 20 years. In this view of

the matter, Justice Shiv Dayal concurred with the decision of the learned Chief Justice. His Lordship also considered the question as to whether the water that collected in Khasra No. 164 was surface water till it reached the depression in Khasra No. 164 or was a stream and came to the conclusion that it was a stream, and on this view also it was held that the defendant had no right to impound the water on the rest of Khasra No. 164 or to divert it, the plaintiffs having acquired a right of easement over such water.

9. Both the learned Judges had agreed on the point that the plaintiffs had a right to irrigate their fields from water collected in the depression of Khasra No. 164, area 3.32 acres, and in the tank Khasra No. 165 and were entitled to a declaration to that effect, but they differed on the question whether the defendant must, by a permanent injunction, be restrained from preventing the rain water from collecting in the depression of Khasra No. 164 over an area of 3.32 acres and consequently the kind of injunction that can be issued against the defendant.

10. After having gone through the judgments of both the learned Judges and having heard the parties, I am inclined to agree with Justice Singh on the basis of the authorities cited by him in his judgment and on the reasoning adopted by him. I will, however, add a few reasons of my own.

11. Under Sec. 17 (c) of the Easements Act, a right to surface-water not flowing in a stream, and not permanently collected in a pool, tank or otherwise, cannot be acquired. It is no longer disputed before me that in the context the word "and" should be interpreted as "or". From a plain reading of Section 17 (c) it would appear that easement rights can only be acquired over surface water if it is flowing in a stream, or if the surface-water is collected in a stream. The expression used is "collected" and not "collecting". Thus, easement rights can only be acquired over water which is already collected in a pool or a tank, and no rights are acquired over the collecting of the same. I have already noted that the finding of the Courts below that the rain water did not lose its character as surface water till it reached the depression was not disturbed by the learned Single Judge. It, therefore, follows that no right of easement could be acquired over the surface water till it reached the depression and, as such, the defendant was entitled to impound the surface water or to divert it before it reached the depression. His or his predecessor's action in not impounding the water or diverting it for a long time would not create any right of easement over the surface water as that is prohibited by Section 17 of the Easements Act. That right which cannot be acquired directly because of the provisions contained in Section 17 of the Easements Act, in my opinion, cannot be acquired indirectly as well. If it is held that only because the plaintiffs had acquired a

right of easement over the water collected in the depression in an area of 3.32 acres of Khasra No. 164 they had also acquired a right of insisting on the flow of surface water in the depression, it will have to be held that the plaintiffs had acquired easementary rights over the surface water as well. This conclusion cannot be reached as there is specific prohibition in the Indian Easements Act. Inasmuch as we in India are governed by statutes, the rights are to be strictly spelt out from the provisions themselves and their ambit cannot be enlarged either on the basis of analogies or decisions based on foreign law. It is no doubt true that under Section 27 of the Easements Act an owner of the servient heritage is prohibited from doing any act tending to restrict the easement, or to render its exercise less convenient. But this provision is applicable to doing any act on the servient heritage which may result in restricting the easement, or rendering the exercise less convenient. This provision is not applicable to any land which is not a servient heritage. In the case in question the right was created over the water collected in an area of 3.32 acres of Khasra No. 164 only. That area could alone be treated as servient heritage. Rest of the area of Khasra No. 164 was not the servient heritage and, as such, it was open to the defendant to impound the surface water or to divert it in the rest of the area or from it. Section 27 is not thus attracted in this case. Similarly, Section 32 of the Easements Act is of no help to the plaintiffs. It is no doubt true that under Section 32 the owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person. But before Section 32 is invoked it is necessary to determine as to the extent of the right of easement acquired by the owner or occupier of the dominant heritage. If he had acquired or if he could acquire legally only the right to use water collected in the pool or the tank and under law could not acquire a right over the free flow of the surface water, it cannot be said that any disturbance is caused by anyone in the enjoyment of the easement by impounding the surface water before it reached the pool or the tank or by diverting it. In my opinion, therefore, the defendant was within his rights to impound the surface water or to divert it before it reached the pool or the tank and the plaintiffs had no right to seek injunction against the defendant preventing him from doing so.

12. This brings me to the consideration of the question as to whether under the Wazib-ul-arz the plaintiffs had acquired any such right. The area in question is a paddy growing area where necessary embankments are put up to collect the rain water and whatever remains in excess is only allowed to escape. It is an admitted fact that the rain water coming from the hill side over the abadi and on the lands of others comes to Khasra No. 164 and ultimately gets collected, if it is in excess, in the depression in Khasra

No. 164. Now, if it is held that the plaintiffs had acquired a customary right over the rain water, which is surface water, in the depression in Khasra No. 164, it will have to be assumed that the said right was acquired by the plaintiffs not only in respect of Khasra No. 164 but in respect of all the land lying towards the west, upto the hill side. If this interpretation is put on the entry in the Wazib-ul-arz recording the right the right would be rendered unreasonable. When any custom is pleaded before the Court, it is essential for it to first determine whether the custom is reasonable and to the extent it is reasonable it can be recognised by the Court. That is why it is necessary to carefully scrutinise the entry in the Wazib-ul-arz. The entry only records that certain fields lying to the east of Khasra No. 165 and Khasra No. 164 have a right to take the water collected in those khasra numbers for irrigation. It also prohibits the owner of Khasra No. 164 from cultivating the land over which the water is collected. This entry has thus both a positive as well as a prohibitory content. If the custom was so wide as to prevent all landholders lying to the west of Khasra Nos. 165 and 164 from interfering with the free flow of surface water, that custom would surely have been recorded, especially when the prohibition preventing the owner of Khasra No. 164 from cultivating 3.32 acres was specifically mentioned. It is quite obvious to me that a right preventing all the landholders from utilising the surface water to the best of their advantage was not recorded and could not have been recorded because it would have been unreasonable. Thus, even though under Section 18 of the Easements Act customary easements can be acquired without any restrictions as is the case under Section 17, I am of the view that no customary right was acquired by the plaintiffs over the surface water till it reached the depression, and the only right recognised was over the water that was collected in the depression of Khasra No. 164 or in the tank Khasra No. 165. Justice Shiv Dayal has also held that the rain water which flowed from the hill side, from west to east so as to reach Khasra No. 164 was a stream as it flowed in a body and in a specific direction. I find it difficult to concur with this conclusion. Water has a natural tendency to flow from higher level to lower level. As in this particular village the slope was from west to east, the excess rain water would naturally flow in that direction. When the rain is heavy and the whole of it is not absorbed in the fields, it would naturally flow in a body. But only because intermittently it flows in a body and in a particular direction, it cannot be reasonably held that the rain water forms into a stream. The expression "stream" used in Section 17 of the Easements Act should be interpreted as is ordinarily understood by a common man unless the context requires its interpretation in a technical manner. There is nothing in sec-

tion 17 of the Easements Act or other Sections to impel us to interpret it in any technical manner. When one uses the word "stream", the idea conveyed is that the body of water flows through a defined channel, having a bed and banks on both the sides. A flow of excess rain water, though in a body and in one direction, spread over a very large area in width without any bed or having any banks within which the flow is confined, cannot, in my opinion, be treated as a "stream". In Black's Law Dictionary, Fourth Edition, at page 1590, the word "stream" is defined to mean "A water course having a source and terminus, banks and channel, through which water flows at least periodically, and it usually empties into other streams, lakes, or the ocean." The stream thus consists of a bed, banks and water-course. It must also be noted that there is an admission by the plaintiff that the rain water coming from the western side does not flow only in Khasra No. 164 but it flows towards its southern side also and enters some of his fields. This is because of the natural flow of the water from west to east and the flow was not confined only to Khasra No. 164. Justice Singh has elaborately discussed the law on the point and has come to the conclusion that the flow of the water in question did not form into a stream. For the reasons given by him and the ones I have noted, I entirely agree with him.

13. In the result, I concur with the conclusion of Justice Singh allowing the appeal and passing a decree on the terms enumerated by him in paragraph 17 of his judgment in substitution of the decree in second appeal passed by the learned Chief Justice.

14. The appeal shall now be placed before the Division Bench for final disposal.
k Answer accordingly.

AIR 1975 MADHYA PRADESH 189.

S. M. N. RAINA, J.

Suresh Kumar, Appellant v. Town Improvement Trust, Bhopal, Respondent.

Misc. (First) Appeal No. 78 of 1974, D/- 20-3-1974.

(A) Court-fees Act (1870), Section 4 — 'Court' — Tribunal under M. P. Town Improvement Trusts Act is 'Court'. (M. P. Town Improvement Trusts Act, 1960 (14 of 1961), Section 147). (Constitution of India, Article 227).

The Tribunal has almost all the attributes of a Civil Court inasmuch as it has to function judicially on the basis of evidence adduced by parties and as such it is a "Court" within the meaning of Section 4. The Tribunal is no doubt subject to the superintendence of the High Court under Article 227 of the Constitution. Thus the Tribunal is a

Court subject to the superintendence of the High Court and hence the contention that no Court-fee is at all leviable on the memorandum of appeal against the decision of the Tribunal is without substance.

(Paras 4, 5, 20)

(B) Court-fees Act (1870), Sections 6, 8 — Heading of Chapter III is misleading — Section 8 applies to High Court. (Interpretation of Statutes — Headings prefixed to sections).

Headings or Titles prefixed to sections or group of sections may be referred to as aids to construction of doubtful expressions; but the title of a chapter cannot restrict the plain terms of an enactment. Though it appears from the heading of Ch. III that the chapter is not applicable to High Court, the various provisions of the chapter show that the heading is misleading and Section 8 applies to High Court. AIR 1932 Cal 346 Followed.

(Paras 7, 10)

(C) Court-fees Act (1870), Section 8, Sch. I, Article 1A and Sch. II, Article 11 — Appeal against award of Tribunal under M. P. Town Improvement Trusts Act — Court-fee payable. (M. P. Town Improvement Trusts Act, 1960 (14 of 1961), Section 147).

Article 11 of Sch. II is not attracted because the award of the Tribunal is an order having the force of a decree within the meaning of Article 11. Court-fee on appeal by a claimant is payable ad valorem on the amount of compensation claimed by him in excess of that awarded by the Tribunal, under Article 1A of Sch. I read with Section 8. In the case of an appeal by the Trust ad valorem Court-fee is payable on the difference between the amount awarded by the Tribunal, and the amount which, according to the Trust, should be awarded as compensation, under Article 1A of Sch. I read with Section 8. Case law discussed.

(Para 20)

Cases	Referred:	Chronological	Paras
AIR 1970 Delhi 44	= 72	Pun LR (D)	
311			16
AIR 1968 Andh Pra 348	= (1968) 1	Andh	13, 18
WR 298			
AIR 1968 Madh Pra 228	= 1968	MPLJ	18
461			
AIR 1959 SC 960	= 1959	Cri LJ 1223	9
AIR 1959 Cal 609	= 63	Cal WN 325	12
AIR 1957 Punj 32	= 58	Pun LR 471	17
(1947) 2 All ER 276	= 1948	KB 29	8
AIR 1945 Bom 348	= 47	Bom LR 327	17
AIR 1939 All 127	= 1938	All LJ 1124	12
AIR 1932 Cal 346	= 35	Cal WN 1108	10
AIR 1931 PC 149	= 58	Ind App 259	5

A. K. Chitley, for Appellant; J. P. Bajpai, Deputy Advocate General, for Respondent.

JUDGMENT:— This is an appeal under Section 147 (a) of the Madhya Pradesh Town Improvement Trusts Act, 1960 (hereinafter referred to as 'the Act') against the decision of the Tribunal relating to compensation.

2. Land belonging to the appellant has been acquired under the Act. As the

appellant did not accept the compensation offered by the respondent, the Trust made a reference to the Tribunal under Section 72(3) of the Act. The Tribunal awarded to the appellant compensation at the rate of Rupees 6,000/- per acre for the land, Rs. 5,000/- for the building, Rs. 3,000/- for the well and Rs. 815/- for the trees. Thus the Tribunal awarded a total sum of Rs. 1,20,060/- inclusive of interest as compensation to the appellant. The contention of the appellant is that he is entitled to compensation at the rate of Rs. 20/- per sq. yard for the land, Rs. 20,000/- for the building, Rs. 5,000/- for the well, Rs. 2,500/- for the trees and Rupees 10,000/- for loss of business and earnings. He thus claims a sum of Rs. 13,39,056/-. He, however, affixed a Court-fee of Rs. 7.50 on the memorandum of appeal treating it as an appeal under Article 11 of schedule II to the Court-fees Act. The office is of the view that ad valorem Court-fee is payable on the amount of compensation claimed by the appellant in excess of that awarded by the Tribunal under Article 1-A of Schedule I read with Section 8 of the Court-fees Act. As the appellant did not agree with this view of the office, the matter went before the Taxing Officer who has referred it to the Taxing Judge for a decision whether ad valorem Court-fee is payable.

3. There are fifteen other connected appeals of a similar nature out of which thirteen have been filed by the Improvement Trust for reducing the amount of compensation awarded by the Tribunal. A similar point is involved in these appeals and has been referred to this Court for decision by the Taxing Officer.

4. Although the main contention of the learned counsel for the appellants is that the matter is governed by Article 11 of Schedule II of the Court-fees Act, a feeble argument was advanced at the hearing that such an appeal is not governed by the provisions of the Court-fees Act at all. It would be proper to deal with this argument before proceeding to consider by which provisions of the Court-fees Act, these memoranda of appeal would be governed.

5. It was urged that Court-fee is not leviable on the memorandum of appeal in question either under Section 3 or under Section 4 of the Court-fees Act. Section 3 provides for levy of fees in High Courts on their original side. It is, therefore, obvious that it is not attracted in this case. The main point for consideration, therefore, is whether Court-fee is leviable under Section 4 of the Court-fees Act. Section 4 provides, inter alia, that no document of any of the kinds specified in the First or Second Schedule of the Act shall be received by the High Court in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said Schedules

as the proper fee for such document. It has been urged that the Tribunal cannot be said to be a Court subject to the superintendence of the High Court. I find no merit in this contention. The word 'court' has not been defined in the Court-fees Act and must, therefore, be construed in its widest sense as including Tribunals which perform judicial functions. In *Secy. of State v. H. C. I. Society* AIR 1931 PC 149 their Lordships, while dealing with a case under the Calcutta Improvement Act, 1911, expressed a doubt whether the Tribunal constituted under the said Act was a Court; but that was apparently because it was a body free from the control and superintendence of the High Court. Their Lordships expressly observed at page 153 that they did not consider it necessary to express any opinion on the question and, therefore, this decision is of no help to the appellants. It appears that under the Calcutta Improvement Act there was no provision for an appeal against the award of the Tribunal, which was final, and an appeal lay only on a certificate by the President. The position under the Madhya Pradesh Town Improvement Trusts Act is different. An appeal lies against the decision of the Tribunal to the High Court under Section 147 of the Act. Moreover, the Tribunal consists of a President and two assessors. The President must be a member of the State Judicial Service who has at least served for three years as a District Judge or an Additional District Judge, or is a barrister of not less than ten years standing vide sub-section (3) of Section 73 of the Act. Clause (b) of sub-section (1) of Section 78 of the Act provides that the President may summon witnesses and enforce their attendance and may compel the production of documents in the same manner as a Civil Court under the Code of Civil Procedure. It is thus clear that the Tribunal has almost all the attributes of a Civil Court inasmuch as it has to function judicially on the basis of evidence adduced by parties and as such it is a Court within the meaning of Section 4. There can be no doubt that the Tribunal is subject to the superintendence of the High Court under Article 227 of the Constitution of India. Thus the Tribunal is a Court subject to the superintendence of the High Court and as such Section 4 of the Court-fees Act is attracted.

6. Before I proceed to consider whether the matter is governed by Article 11 of Schedule II or not, it is necessary to refer to Section 8 of the Court-fees Act which is reproduced below:

"The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes, shall be computed according to the difference between the amount awarded and the amount claimed by the appellant."

7. Learned counsel for the appellants urged that the said section is not applicable to fees payable to the High Court because it

occurs in Chapter III, the heading of which is as under :

"Fees in other Courts and in Public Offices."

If we compare this heading with the heading of Chapter II, it no doubt appears that Chapter III is not applicable to High Court; but if we carefully scrutinize the various provisions in Chapter III, it would be clear that the heading of the Chapter is not at all appropriate and is misleading. Headings or Titles prefixed to sections or group of sections may be referred to as aids to construction of doubtful expressions; but the title of a Chapter cannot be used to restrict the plain terms of an enactment.

8. In *R. v. Surrey* (North Eastern Area) Assessment Committee (1947) 2 All ER 276, at p. 278. Lord Goddard, C. J., observed as under:

"While, however, the Court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is clear that those headings cannot be used to give a different effect to clear words in the section where there cannot be any doubt as to the ordinary meaning of the words."

9. In *Bhinka v. Charan Singh*, AIR 1959 SC 960 their Lordships quoted with approval at page 966 the following rule of construction of statutes from "Maxwell on Interpretation of Statutes."

"The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute but they may explain ambiguous words."

10. In *re Aranda Lal* AIR 1932 Cal 346, Rankin, C. J., held Section 8 to be applicable to the High Court; and I entirely agree with this view.

11. There can also be no doubt that the award of the Tribunal amounts to an order relating to compensation for the acquisition of land for public purposes. Learned counsel for the appellant argued that the word 'order' occurring in this section should be construed in the sense in which it is defined in S. 2 (14) of the Code of Civil Procedure. According to clause (14) of S. 2 of the Code of Civil Procedure 'order' means the formal expression of any decision of a Civil Court which is not a decree. As pointed out above, although Tribunal is a Court, it is not a Civil Court for the purposes of the Code of Civil Procedure and, therefore, an order of the Tribunal does not fall within the purview of Section 2 (14) of the Code of Civil Procedure. But in the absence of any definition of the word 'order' in the Court-fees Act there appears to be no justification for construing it

(contd. on col. 2)

in such a restricted sense. As would appear from Section 6 of the Court fees Act and various other provisions in the Act, the Act provides for fees payable on documents filed or exhibited in a Court of Justice as well as in any public office. As the provisions of the Court-fees Act relate not only to Civil Courts but to any Court of Justice and even a public office, it would not be proper to construe the word 'order' occurring in Section 8 in a limited sense as defined in Section 2 (14) of the Code of Civil Procedure. In fact the expression "order relating to compensation under any act for the time being in force for the acquisition of land for public purposes" shows that it covers all orders of Courts and Tribunals relating to compensation for the aforesaid purposes under any enactment. There is also ample authority for this view.

12. In *Satya Charan v. State of West Bengal*, AIR 1959 Cal 609 an award under Section 7 of the Requisitioning and Acquisition of Immovable Property Act, 1952 was held to fall within the purview of Section 8 of the Court-fees Act. In *Debi Din v. Secy. of State* AIR 1939 All 127 an order of compensation passed by a Tribunal constituted under the U. P. Town Improvement Act was held to be an order of Civil Court. With respect, I am unable to agree with this view. In my view, although the order does not amount to an order of a Civil Court, it is an order within the purview of Section 8 of the Court-fees Act.

13. In *Sringuri Lakshminarayana Rao v. Revenue Divisional Officer, Kakinada* AIR 1968 Andh Pra 348 it was held that an award made under the provisions of the Requisitioning and Acquisition of Immovable Property Act 1952 was an order within the meaning of S. 8 of the Court-fees Act and ad valorem Court-fee is payable. I, however, agree with the learned counsel for the appellant that Section 8 is not a charging section. It merely provides how the court-fee is to be computed in respect of appeals falling within the purview of the said section. The charging provisions are contained in the Schedules read with Sections 3 and 4 of the Court-fees Act. We have, therefore, to examine under which Article the matter falls.

14. I now proceed to consider whether Court-fee is payable under Article 11 of Schedule II of the Court-fees Act or under Article 1-A of Schedule I to the said Act. From the language of Article 1-A of Schedule I to the Court-fees Act, it is clear that it is not attracted if the matter is governed by any other Article. The only Article suggested is Article 11 of Schedule II; and we have, therefore, to consider whether the matter falls within the purview of this Article. The said Article is re-produced below for facility of reference:

"11. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree.

(a) When presented to a High Court.
(b) When presented to a Civil Court other than High Court.

Seven rupees & fifty paise
Three rupees".

It is clear from the language of this Article that it would not be attracted where an appeal is from a decree or an order having the force of a decree. The basic question for consideration, therefore, is whether the decision of the Tribunal can be said to be an order having the force of a decree within the meaning of the said Article. In connection with the construction of this Article also it was urged by the learned counsel for the appellant that the word 'order' should be construed as defined in the Code of Civil Procedure. In clause (14) of Section 2 of the Code of Civil Procedure 'order' means the formal expression of any decision of a Civil Court which is not a decree. I do not, however, find any justification for construing the word 'order' in Article 11 in such a restricted sense for the reasons already given above while discussing the construction of the word 'order' occurring in Section 8 of the Court-fees Act.

15. The next point to be considered is whether the decision of the Tribunal has the force of a decree. Sub-section (3) of Section 78 of the Act provides that every decision of the Tribunal shall be enforced by a competent Civil Court as if it were a decree of that Court. From this provision it is clear that the decision of the Tribunal is enforceable as a decree of the Civil Court and as such has the force of a decree within the meaning of Article 11 of Schedule II to the Court-fees Act. The learned Deputy Advocate-General in this connection also referred to Section 148 of the Act which provides that the provisions of the Code of Civil Procedure with respect to appeals from original decrees shall apply to appeals under the Act. He urged that the section creates a fiction whereby the decision of the Tribunal is treated as an original decree of a Civil Court. It would be difficult to accept this contention because Section 148 of the Act only deals with the procedure in appeals. We do not find any provision in the Act corresponding to section 26 of the Land Acquisition Act which provides that an award under the said Act shall be deemed to be a decree. But, although there is no provision in the Act creating a legal fiction whereby the decision of the Tribunal may be treated for all purposes as a decree of the Civil Court, there can be no doubt that such a decision has the force of a decree in view of sub-section (3) of Section 78 of the Act.

16. Learned counsel for the appellants has relied on the decision of the Delhi High Court in *Mangal Sen v. Union of India* AIR 1970 Delhi 44. In that case it was held that an appeal against an order relating to compensation for acquisition of land under Section 7 of the Resettlement of Displaced Persons (Land Acquisition) Act is chargeable with Court-fee under Schedule II, Article 11 of the Court-fees Act, as such an order is neither a decree nor an order having the force of a decree. The ratio of the said decision would be clear

from the following observations in paragraph 27:

"Section 8 no doubt provides for mode of computation of Court-fee on an order relating to compensation but before any question of computation of Court-fee can arise the order itself must fit in the strait-jacket of one or the other provision of Schedule I or II and this can only be if it is held that Sec. 8 is confined to orders as understood in the Civil Procedure Code and where any document does not fall within a decree or an order having the force of a decree it should be held to be covered by Art. II of Schedule II."

17. I entirely agree with the view expressed in the aforesaid case that Section 8 of the Court-fees Act deals only with computation of Court-fee. It is not a charging section and in view of the provisions of Section 4 Court-fee is chargeable under either of the Schedules to the Act. But in my view Article 11 of Schedule II is not applicable because the order of the Tribunal is an order having the force of the decree within the meaning of the said Article. In the Delhi case the learned Judges seem to have proceeded upon the view that an order contemplated by the said Article is an order of the Civil Court as defined in S. 2 (14) of the Code of Civil Procedure. Coming to this conclusion they relied upon the decision of the Bombay High Court in *Hirji Virji Jangbari v. Govt. of Bombay*, AIR 1945 Bom 348 and *Kanwar Jagat Bahadur Singh v. Punjab State*, AIR 1957 Punj 32. With great respect, I am, however, unable to agree with this view for the reasons already given above.

18. The learned Deputy Advocate-General relied on the decision of this Court in *Rishiraj Singh v. Raghubar Singh* 1968 MPLJ 461 = (AIR 1968 Madh Pra 228); but that was a case under the Land Acquisition Act and it was held therein that a decision by the Additional District Judge on a reference made under Section 30 of the Land Acquisition Act was a decree. That decision cannot, however, be considered to be an authority for this case, as the provisions of the said Act are not in pari materia with those of the Act in question. Another case relied upon by the learned Deputy Advocate-General is *Laxminarayana v. Revenue Divisional Officer* AIR 1968 Andh Pra 348 to which reference has already been made above. In that case it was held that in an appeal against an award under Section 7 of the Requisitioning and Acquisition of Immovable Property Act, 1952, ad valorem Court-fee is payable under Article 1 of Schedule I to the Court-fees Act. I entirely agree with this view for the reasons already given above.

19. I, therefore, hold that ad valorem Court-fee is payable on the memorandum of appeal under Article I-A of schedule I of the Court-fees Act read with Section 8 thereof on the subject matter of the claim in appeal.

peal dealing with the point found that Ex. B-1 was acted upon and Bangarammal was in possession of the suit properties on the strength of the settlement deed and that Muthal Naidu had no vested right in him after Ex. B-1, so as to be able to confer an absolute interest on his daughter Bangarammal on the date of Ex. A-1. The learned Judge further held that under the settlement deed, Muthal Naidu conveyed a life estate on his daughter and a contingent interest on the defendants namely that if Bangarammal should die issueless, his heirs should take the property, and there was no vested interest conferred on the settlor by that document, and when there is no vested remainder, then Muthal Naidu cannot execute Ex. A-1 in 1938 so as to confer an absolute interest on Bangarammal. Whether a vested or contingent interest is created the settlor had no further interest. Even if a contingent interest alone was created, that contingent interest could be conveyed. As far as the heirs are concerned, they had no present vested right and what they could hope to get was on the happening of an uncertain event, namely, Bangarammal dying issueless. We find that Muthal Naidu had no right to execute the subsequent document Ex. A-1 before the death of Bangarammal, which would have the effect of conveying an absolute right on Bangarammal.

3. In the result, we agree with the view of the learned Judge and dismiss the Letters Patent Appeal. No order as to costs.

Appeal dismissed.

AIR 1974 MADRAS 257

RAMANUJAM AND
V. RAMASWAMI, JJ.

Karuppanna Thevar (died) and others,
Appellants v. Rajagopala Thevar and
others, Respondents.

Appeal No. 390 of 1968. D/- 30-1-1974.*

(A) Evidence Act (1872), Ss. 67, 74 —
Marking of document by consent — Effect.

The consent of the party for marking the document only relieves the plaintiff of his obligation to prove that the original is a public document within the meaning of Section 74. But where document is alleged to have been signed by the defendant and that fact is disputed the plaintiff must prove the signature of the defendant or that the defendant signed the

*(Against order of Sub. J., Coimbatore in O. S. 25 of 1964).

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document as required by Section 67. The consent given by a party for marking a document does not dispense with either the proof of contents of the document or the truth or otherwise of the contents. AIR 1948 Mad 298, Relied on. (Para 6)

Cases Referred: Chronological Paras
AIR 1972 SC 608 = (1972) 2 SCR 646 5
AIR 1948 Mad 298 = (1947) 2 Mad LJ 535 6

D. Ramaswami Iyengar and R. Krishnamachari, for Appellants; M. R. Narayanaswami, for Respondents.

V. RAMASWAMI, J.:— The first defendant is the appellant. The suit was filed by respondents 1 to 4 for partition and separate possession of their 4/5th share in the plaint schedule properties which consisted of two items. The first item is a pucca house bearing door No. 3/135 and comprised in T. S. 10/2191 of Kattur village in Coimbatore town. The second item is given as vacant site measuring 51 cents forming part of T. S. 1771/1-A and situate in Pankaja Mills Road, Coimbatore. The appellant and respondents 1 to 4 are brothers, the appellant being the eldest. The respondents in their plaint stated that they and the first defendant have been living for a considerable time separately each following his own avocation and calling but they have not divided the joint family properties by metes and bounds. Item 1 in the schedule is the ancestral family house in which the plaintiffs are living separately with their own families in different portions. The first defendant has also retained for his own use a portion of the said item. Item 2 is a vacant site measuring 51 cents situate in Pankaja Mills Road. The first defendant appears to have put up some tiled flimsy structures in some portion of the site. He is residing with his family in a structure in a portion of the site and has rented out the other portions without reference to the plaintiffs and without any right or authority to do so. The plaintiffs claim that they are entitled to vacant possession after removal of the superstructure. On these allegations the plaintiffs sought a decree for partition of their 4/5th share in both the items.

2. In the written statement filed by the appellant herein he stated that in an oral partition sometime 30 years ago before 1964, the first defendant became separated and Item 1 properties were allotted to the plaintiffs and Item 2 which was an unproductive vacant land with number of pits was allotted to him for his share and that the first defendant was driven out of the family house and thereafter the first defendant had nothing to do with the family or its properties or the income therefrom. He also pleaded that by his own exertions by doing cooley

work and a small milk vending business he earned some income and with that he put up the buildings on Item 2 which was allotted to his share in the said oral partition. The cost of these constructions was stated in the written statement as Rupees 20,000. The defendant also denied that he retained any portion in the first item for his own use and characterised the assertion in the plaint in regard thereto as a deliberate falsehood and asserted that the plaintiffs alone are in possession and enjoyment of the entire house. The second defendant remained absent and was set *ex parte*.

3. The trial Court came to the conclusion that the first defendant has not proved the oral partition pleaded by him and that, therefore, the plaintiffs are entitled to the partition as prayed for. So far as the superstructures on Item 2 are concerned, it was found that the first defendant constructed the same at his own cost and that, therefore, in the final decree proceedings the allotment should be made in such a way so as to make the buildings fall to the share of the first defendant, and if this was not possible a Commissioner will have to be appointed to suggest suitable compensation for the buildings.

4. In this appeal, the learned counsel for the appellant submitted that the admitted long course of conduct of the parties clearly showed that there should have been an oral partition as contended for by the appellant and that only in assertion of his title as per the oral partition, the appellant could have built all the superstructures. As already stated, the superstructures were built by the appellant and this was admitted by the plaintiffs respondents even in the plaint. In the oral evidence of P. W. 1 he had stated that the appellant had been in possession of Item 2 for more than 20 years, that at that time when he came to originally occupy the site there was no building in Item 2 and that later on the first defendant constructed these superstructures from his own income and not from the joint family or other income. Again, the appellant in his written statement had stated that the construction had cost him about Rs. 20,000. A Commissioner was appointed by the lower Court to inspect the property and report as to the nature of the superstructures and their value and he has submitted a report in which he had valued the superstructures at Rupees 17,075. The investment of such a large amount over item 2 by way of construction of buildings in our view lead to the inference that it should have been only on the basis of a claim of ownership to the property which could be only on the basis of the oral partition pleaded by the

first defendant. This inference is fortified by the fact that though the plaintiffs were aware of the construction even 20 years before, admittedly they did not make any written objection or was there any written demand for partition. Of course, the first plaintiff would say in his evidence that he orally objected and was orally demanding partition for more than 20 years but the first defendant would not accede to that request. This is hardly believable. If in spite of the objection of the plaintiffs the first defendant was going on constructing buildings and refusing to accede to the request for partition, the plaintiffs would not have kept quiet for all these 20 years. In addition to this we have the house tax receipts produced by the first defendant which are marked as Exs. B-7, B-8 and B-10. These receipts refer to the building in respect of which the tax is as door Nos. 4/41 to 44. For almost the same period the plaintiffs produced Exs. A-7 to A-21 which are purported to be tax receipts issued by the Coimbatore Municipality. The property in respect of which that tax was paid is stated in those receipts as door No. 4 Pan-kaja Mills Road. It is not clear whether door No. 4 relates to the suit Item 2. But we have the admission that the tax receipts Exs. B-7, B-8 and B-10 relate to the superstructure on Item 2. But there is no clear evidence to show that Exs. A-7 to A-21 relate either to the vacant site in Item 2 or to any other property. If they relate to the vacant site on Item 2 and if that vacant site is a joint family property as contended by the plaintiffs, then one would have expected that the tax receipts should be either in the name of all the persons or the tax should have been paid by all of them. It is not the case of the plaintiffs that with reference to Item 2 the first defendant had at any time either contributed to the plaintiff for payment of the tax evidenced by Exs. A-7 to A-21 or that they paid the amount including the share of the first defendant. We are, therefore, unable to place any reliance on these Exs. A-7 to A-21. That leaves us with two other sets of evidence in this case. One set of evidence is the mortgage documents executed by the fourth plaintiff and the third plaintiff. Ex. A-1 dated 29-1-1954 was executed by the fourth plaintiff in favour of one Rangammal and this related to the 1/5th share of the fourth plaintiff in Item 1. Since this document does not relate to Item 2, this does not in any way help the plaintiffs to prove that there was no partition. Ex. A-2 is a mortgage deed dated 24-10-1958 executed by the third plaintiff in favour of one Ayyammal. The property mortgaged is stated to be the one-fifth share of the third plaintiff in Items 1 and 2. The curious feature in this case is

that neither the third plaintiff nor the mortgage had been produced. The learned counsel for the appellant argued that both Exs. A-1 and A-2 are attempts by the plaintiffs to create documents in evidence of title in view of the fact that Item 2 had gone up in value subsequent to the oral partition. There is great force in this argument. These are of the year 1954 and 1958 which are long subsequent to the admitted construction of the superstructures over Item 2 by the first defendant. Though the plaintiffs would now admit that they have no right over the superstructures, Ex. A-2 on its terms would include a right over the superstructures as well. Further, these two documents are self-serving documents of the plaintiffs and could not be of any evidentiary value against the first defendant. The next set of documents are land acquisition proceedings which are marked as Exs. A-4 to A-6. Exs. A-4 and A-5 are certified copies of two awards and Ex. A-6 is a notice issued under Section 19 of the Land Acquisition Act to the 4th plaintiff. The land acquisition related to a small portion of Item 2. It is true that in all these documents there is a reference to the plaintiffs and the first defendant as joint owners of T. S. 1771/1-A. It is not clear whether the portion acquired was entirely in Item 2 or any other portion in T. S. 1771/1-A. The plaint describes Item 2 as part of T. S. 1771/1-A. It might be that T. S. 1771/1-A included some other portion in which the plaintiffs were interested. In any case there is no explanation as to how the plaint describes the property as T. S. 1771/1-A, part and whether the entire land acquired under the Land Acquisition proceedings formed part of Item 2. Even assuming that the property acquired formed part of Item 2, it cannot be stated that the award and the notice issued conclusively establish the title of the plaintiffs to a joint ownership of the same. It might be noted that the compensation awarded itself was a sum of Rs. 637 of which the first defendant's share is shown as Rs. 317-05 and the share of each of the plaintiffs is shown as Rs. 80-15. It might be that the defendant considered that it is not worthwhile to fight it especially if the title had been disputed it should have been referred under Section 31. It is true the defendant had not come forward with any explanation for not disputing the claim. But it should not be forgotten that the award made by the Land Acquisition Officer treating the property as the joint property cannot be treated to be a binding order relating to the title between the parties, and it is always open to the parties to dispute the question of title in subsequent proceedings. Therefore, Exs. A-4 to A-6 though of some value are not

enough to dislodge the consistent course of conduct which showed that the plaintiffs must have had title to the property.

5. The only other important evidence which the learned counsel for the respondents would rely is Ex. A-3 which is a certified copy of the alleged statement made by the four plaintiffs and the defendant before the Land Acquisition Tahsildar. In this statement of course, there is a reference that suit Item 2 is a joint family property belonging to the four plaintiffs and the defendant and that each is entitled to a 1/5th share in the same and so far as the superstructures thereon are concerned, the first defendant alone is entitled to the same. In the certified copy at the end it is stated that the statement was signed by the plaintiffs and the first defendant. But unfortunately for the plaintiff the original statement itself had not been produced. The first defendant in his evidence as D. W. 1 flatly denied having given any such statement and having signed any such statement. On this denial, it was necessary for the plaintiffs to have proved either by calling the Tahsildar who recorded the statement or by producing the original statement or by other means that the first defendant had given such a statement. But he had satisfied himself with filing Ex. A-3 a certified copy of the alleged statement. The learned counsel for the respondents relied on the fact that this document was marked by consent on 14-2-1968. The learned counsel submitted as a proposition of law that when a document is marked by consent not only there was no further need for a formal proof of the document but also it would amount to proof of whatever the document contains. In support of this contention the learned counsel relied on the decision of the Supreme Court in *Purshothama v. Perumal*, AIR 1972 SC 608. That was a case in which the point in controversy was as to whether the respondent in that case held four election meetings admitted by him in his counter affidavit in the election petition. It was found that the practice in Pondicherry was that before every meeting the person who wants to hold that meeting will have to apply to the Inspector of Police for permission to hold the meeting mentioning the date, place and the time of the meeting. The unsuccessful candidate who filed the election petition marked four applications filed by the respondent for grant of permission for the meetings and the orders made thereon by the Inspector of Police granting such permissions. The Inspector of Police was examined as a witness and he spoke to the factum of filing of those applications and the grant of permission by him. He also stated that when such a permission

was given by him, he used to depute a Head constable to cover that meeting and report about the same. The reports of the Head Constable received with reference to the four meetings were filed as evidence through the Inspector of Police. The Supreme Court relied on these reports as evidencing the holding of the meeting on those particular days. It was argued before the Supreme Court that the reports of the head constable were inadmissible in evidence on the ground that the head constable who covered those meetings had not been examined. The Supreme Court pointed out that the reports were marked by consent and, therefore, it is not open to the respondent to object to their admissibility. With reference to the argument that though the reports in question are admissible because of the consent the Court cannot look into the contents of those documents, the Supreme Court observed that once the document is properly admitted the contents of that document are also admitted in evidence though those contents may not be conclusive evidence. It could be seen from the facts that so far as the reports of the Head Constable are concerned, the Inspector of Police himself spoke to the fact that he deputed the head constable to cover the meetings and report about the same. He produced the original reports submitted to him by the Head Constable. The Inspector had also spoken to the fact that those reports disclosed that as per the permission granted the meetings were held. It has to be noted that only with reference to the factum of holding the meeting that those reports were relied on by the Supreme Court and not for any of the other statements as to what transpired or what was spoken to in that meeting. Since the reports themselves were filed through the Inspector at whose instance the head constable covered the meeting, the Supreme Court considered that that would be admissible to prove the holding of the meeting on those days. Even here the Supreme Court hastened to add that those contentions may not be conclusive evidence.

6. In this case, the fact in issue is as to whether there was an oral partition sometime 30 years before the filing of the suit. With reference to this fact in issue any fact which is inconsistent with this fact in issue would be a relevant fact. Therefore, if the first defendant had made any statement subsequent to the alleged oral partition that the suit Item 2 is a joint family property, that would be a relevant fact which has to be proved in any of the modes stated in the Evidence Act. Since this statement is stated to be in writing and given to a particular per-

son, it should be proved as provided in Chapter V of the Evidence Act relating to documentary evidence. Under Section 64 documents must be proved by primary evidence except in the case thereafter mentioned. Primary evidence is defined to mean document itself produced for inspection of the Court. One of the exceptions referred to this rule is the one to be found in Section 65, clause (e) which is to the effect that where the original is a public document within the meaning of Section 74, secondary evidence may be given of the existence, condition or contents of the document. When secondary evidence is sought to be admitted, it is necessary for the party who produce the secondary evidence to prove that the document is one of those mentioned in Section 65 and that therefore, he is entitled to adduce that secondary evidence. In this case the certified copy of the alleged statement was produced by the plaintiffs. If this has to be admitted in evidence it would have to be shown that the original of the same is a public document within the meaning of Section 74. Whether it is the primary evidence of the production of the original document itself or the secondary evidence of a certified copy, the document will have to be proved with reference to the person who executed the document, attestation and the handwriting of the person by whom it is purported to have been executed under Sections 67, 68 and 69. The consent of the party for marking the document only relieves the plaintiff of his obligation to prove that the original is a public document within the meaning of Section 74. But still since the document is alleged to have been signed by the first defendant and since that fact is disputed by the first defendant the plaintiff is under an obligation to prove the signature of the first defendant or that the first defendant signed the document as required by Section 67. The consent given by a party for marking a document does not dispense with either the proof of contents of the document or the truth or otherwise of the contents. In this connection we may refer to the decision of a Division Bench of this court reported in *Palaniappa Chettiar v. Bombay Life Assurance Co. Ltd.*, 1947-2 Mad LJ 535 = (AIR 1948 Mad 298) which considered the effect of marking a document by consent. That was an appeal from a suit filed against an Insurance Co. for payment of an amount assured on the death of the insured. The Insurance Co. produced the documents, one was a report given by the doctor who attended on the deceased at the time of his death and the second was the answers given by the same doctor for a questionnaire sent by the Insurance Co. These two documents contained some materials as to the ail-

ments of the insured which are of such a nature that if they had been disclosed at the time when the policy was issued the company would not have accepted the proposal. These two documents were marked by consent. The doctor who issued those certificates was not examined. The question for consideration was whether the contents of the documents could be relied on by the company against the plaintiff. This court held that permitting a document to be marked by consent only means that the party consenting is willing to waive his rights to have the document in question proved, that is the plaintiff was prepared to admit that the documents were what they purported to be namely a certificate given by the doctor and sent to the defendant and a reply given by the doctor to the questionnaire sent by the company. But agreeing to the document being marked by consent did not mean that the plaintiff accepted the correctness of every statement made by the doctor in those two documents. The correctness of the allegations contained in the certificate given by the doctor and in his reply would have to be proved only in the recognised ways as contained in the Evidence Act. With great respect, we are in entire agreement with this view of the learned Judge. Therefore, the statement in Ex. A-3 cannot be relied on by the plaintiffs as disproving the oral partition contended for by the first defendant. We are also unable to rely on Ex. A-3 since it purports to be a statement by five people and signed by all of them. It could not be stated that all of them gave such a statement. It must have been given by one of them and assented to by others if at all. But there is no evidence as to who gave that statement and who assented to the same. The Tahsildar who examined the parties would have been in a position to state as to whether the first defendant did give a statement as contained in Ex. A-3 and as to whether the signature in the original of Ex. A-5 was that of the first defendant. But he had not been examined. Even the plaintiff in his evidence did not state that the statement contained in Ex. A-3 is the statement given by the first defendant. He satisfied himself by stating merely that the plaintiffs and the defendants gave a statement to the Tahsildar to the effect that it is a joint family property. In those circumstances, we are unable to place any reliance on Ex. A-3. We have already noticed that the preponderance of evidence adduced by the first defendant showed that there ought to have been an oral partition and allotment of item 2 to the first defendant and only thereafter, he could have invested such large sums of money for construction of houses over the same. We therefore hold that the first defendant

had established that there was a normal partition about 30 years prior to the suit and in that partition item 2 was allotted to the first defendant. On this finding no other point arises. The appeal is, therefore, allowed, the judgment and decree of the lower court are set aside and the suit is dismissed with costs. There will, however, be no order as to costs in this appeal.

Appeal allowed,

AIR 1975 MADRAS 261

V. RAMASWAMI, J.

T. M. Pambayan Ambalam (dead) and others, Appellants v. K. R. Veeranan Ambalam and another, Respondents.

Second Appeal No. 1129 of 1971, D/-18-1-1974.*

(A) Civil P. C. (1908), O. 41, Rr. 4, 33 — Suit on pro-note — Suit decreed holding that endorsement by both defendants was genuine and saved suit from limitation—Appeal by first defendant alone — Lower appellate court found both signatures to be forged and dismissed the suit as against both — Held that dismissal against second defendant was unjustified.

(Para 2)

Cases Referred: Chronological Paras
AIR 1954 Mad 848 = (1954) 2 Mad LJ 559

AIR 1941 Mad 110 = (1940) 2 Mad LJ 326

AIR 1933 Mad 529 = 65 Mad LJ 15

AIR 1929 Mad 881 = 57 Mad LJ 588

R. Gopalaswami Iyengar and M. Srinivasan, for Appellants; A. Varadarajan, for Respondents.

JUDGMENT:— The plaintiff is the appellant. He filed the suit for recovery of a sum of Rs. 2329-67 being the principal and interest due on a promissory note executed by the two defendants who are the respondents herein. The promissory note is dated 4-5-1959. The plaintiff relied on an endorsement of payment of a sum of Rs. 350 made on 27-4-1962 and signed by the defendants as saving the suit from the bar of limitation. The first defendant filed a written statement which was adopted by the second defendant in which it was stated that the promissory note was executed as security in connection with certain lease of a coconut thope and it was not supported by consideration. It was also pleaded that the signature of the defendants in the endorsement dated 27-4-1962 was a forgery and that therefore, the suit is barred by limitation.

*(Against decree of Sub-J., Madurai in Appeal No. 143 of 1969.)

HR/JR/D250/74/RSK

2. The trial court rejecting the defence held that the suit promissory note was supported by consideration and that the signature of the defendants in the endorsement is that of the defendants and not a forgery. In that view he held that the suit is not barred by limitation and decreed the suit as prayed for. The first defendant alone preferred an appeal impleading the plaintiff and the second defendant as respondents in the appeal. The lower appellate court held that the promissory note was supported by consideration but differing from the finding of the trial court held that the signature of the first and second defendants on the endorsement dated 27-4-1962 was a forgery and that, therefore, that endorsement could not save the suit from the bar of limitation. In that view the lower appellate court allowed the appeal and set aside the decree against the defendants and dismissed the suit. In this appeal the learned counsel for the appellant sought to challenge the finding that the signature of the defendants was a forgery. But I am unable to permit him to challenge that finding as it was a finding on a question of fact and it could not be stated that it is not supported by any evidence or that the finding was perverse. The learned counsel, therefore, proceeded on the assumption that the signature of the defendants in the endorsement was not the signature of the defendant. It was the contention of the learned counsel that the lower appellate court had no jurisdiction to go into the question of the genuineness of the signature of the second defendant in an appeal filed by the first defendant alone, though the second defendant was a party in the appeal. According to the learned counsel the decree as against the second defendant could not be challenged in the appeal and that the decree against him had become final. He therefore wanted to sustain the decree as against the second defendant at least. The powers of the lower appellate court in an appeal filed by one of the defendants alone is to be found in Order 41, Rule 4 and Rule 33. Under Rule 4 where there are more defendants than one in a suit and the decrees appealed from proceed on any ground common to all the defendants, any one of the defendants may appeal from the whole decree and thereupon, the appellate court may reverse or vary the decree in favour of all the defendants. A similar power is also contained in Rule 33 which provides that the appellate court shall have powers to pass any decree and make any order which ought to have been passed or made and to pass or to make such or further decree or order as the case may require and this power may be exercised in favour of all or any of the respondents or parties al-

though such respondents or parties may not have filed any appeal or objection. This power also could be exercised by the court notwithstanding that the appeal is as to part only of the decree. These two rules are not mutually exclusive but they are complementary to each other. But it is seen from the provisions that the powers under Rule 4 could be exercised only when the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants. Rule 33 is a little wider than Rule 4 in the sense that it is not only in cases where the decree appealed from proceeds on any ground common to all but also in cases where the result of interference in favour of the appellant necessitates the readjustment of the rights of the other parties as given in the illustration to that rule itself. I may at this stage refer to a few of the decided cases where this principle was applied. In *Thirumala Chariar v. Athimoola Karyalayar*, 65 Mad LJ 15 = (AIR 1933 Mad 529) the suit was for specific performance of an agreement to sell. The suit was filed against the legal representatives of the owner. The defence was that the agreement was not genuine. This being a common question in which all the defendants are interested and a finding on that will dispose of the entire suit it was held in that case that a finding on that question in an appeal filed by one of the defendants alone will enure for the other defendants as well. This is clearly a case which will come under either Rule 4 or Rule 33 as the suit was for specific performance of particular agreement, and if that agreement was found to be not genuine, the suit could not be decreed against any person. In *Krishna Reddi v. Rami Reddi*, 1954-2 Mad LJ 559 = (AIR 1954 Mad 848) a Division Bench of this court, after referring to the wide and unlimited jurisdiction of the courts to pass a decree against a party who has not preferred an appeal under Rule 33, referred to the principles in accordance with which that jurisdiction will have to be exercised and formulated the principles as falling under three different categories. One is where as a result of interference in favour of the appellant it becomes necessary to re-adjust the rights of other parties as set out in the illustration to Rule 33. The second class of cases is where the question is one of settling mutual rights and obligations between the same parties and the third class of cases is where the relief claimed is single and indivisible but is claimed against a number of defendants. But they hastened to add that these three classes of cases cannot be taken to be exhaustive enumeration of the class of cases in which the courts could interfere under Order 41, Rule 33. It is not necessary, therefore, to refer to all

the other decisions cited by the learned counsel for the appellant which all deal with questions where a common point on a question of fact was involved. Coming to the case on hand, if the finding of the lower appellate court on the question as to whether the promissory note was supported by consideration was that it was not supported by consideration, the learned counsel for the appellant would concede that that would dispose of the suit itself and the benefit could be given to the second defendant who did not file an appeal. But according to the learned counsel the question whether the endorsement was genuine or not is not such a common question. The signature of both the defendants may be true or both may not be genuine or either one of them may be genuine. Each of the defendants is interested only in the defence that his signature is not genuine and not in the question whether the signature of the other was genuine or not, because unless it is established that his signature is not genuine, he is not entitled to be relieved from the liability. Sections 18 and 19 of the Limitation Act, 1963, deal with the effect of acknowledgment and effect of payment on account of a debt. An acknowledgment in writing signed by the party against whom the right is claimed gives a fresh period of limitation from the time when the acknowledgment was so signed under Section 18. If payment on account of a debt appears in the handwriting of the person making the payment such payment also would give a fresh period of limitation under Section 19. But these two provisions are subject to clause (2) of Section 20 which provides that where there are more than one executant the written acknowledgment should be signed by every one of them and the period of limitation could not be extended against a person who had not signed except in cases where the person who signed proves that the payments or the acknowledgment was made by him as an agent for all the executants. But in the case of more than one promisor and when the acknowledgment was made only by one of them, the decree could be made against the person who acknowledged alone and the suit need not necessarily be dismissed as against all. This has been so held in *Thayammal v. Muthukumarasami*, AIR 1929 Mad 881. That was a case where a mortgage was executed by three persons. There was an endorsement of payment by only two of the mortgagors. In an appeal filed by the mortgagors against the decree obtained by the mortgagee this court found that the endorsement was made only by two of the defendants and that will not save the bar of limitation as against the mortgagor who did not sign the endorsement. The decree

of the lower court was, therefore, set aside in so far as the mortgagor who did not sign the endorsement but confirmed as against the mortgagors who signed the endorsement. This decision was followed by this court in *C. K. Kunjandi v. Chinnavava*, AIR 1941 Mad 110. Therefore, in this case if the signature of the second defendant was found to be genuine, a decree could have been made against the second defendant alone though the suit against the first defendant is dismissed. The second defendant alone is interested in establishing that his signature is not genuine in order to relieve himself of his liability. The finding of the lower appellate court that the signature of the first defendant is not genuine also does not necessitate the grant of relief to the second defendant as the relief asked for against them is not alternative, and, no question of readjustment of the rights of the parties also would arise. In fact, it was not necessary for the lower appellate court to go into the genuineness of the signature of the second defendant in order to give any relief to the first defendant who was the appellant. The lower appellate court, therefore, erred in going into that question and dismissing the suit in its entirety. The second defendant had also not appeared in this case or before the lower appellate court. He also did not examine himself as a witness in the trial court. The question whether there was a proper or justifiable excuse for the second defendant for not filing an appeal and asking for relief in the appeal filed by the first defendant does not, therefore, arise.

3. The second appeal is, therefore, allowed in part and the judgment and decree of the lower appellate court in so far as it sets aside the decree as against the second defendant is set aside and the suit is decreed as against the second defendant alone and dismissed as against the first defendant. The first defendant will be entitled to his costs in this second appeal. No leave.

Appeal partly allowed.

AIR 1975 MADRAS 263

MAHARAJAN, J.

V. Srinivasan, Appellant v. Rajalakshmi and others, Respondents.

A. A. O. No. 289 of 1971, D/- 30-11-1973.*

*(Against award of M. A. C. T., Madras in O. P. No. 482 of 1969.)

IR/KR/D851/74/JHS

(A) Motor Vehicles Act (1939), S. 95 — Insurance policy — Accident taking place few hours before conclusion of insurance contract — Liability — Question depends on intention to be gathered from document.

The contract of insurance was concluded at 11 a.m. on 6-6-69 and the period covered by the policy was 'From 6-6-69 to 5-6-70' (both days inclusive). The accident took place at 8 a.m. on 6-6-69. It was held that the Insurance Company was liable to pay compensation. Since the Insurance Company had undertaken to cover risk beginning from and inclusive of 6-6-69 there was no question of giving any retrospective effect to the contract. If there was any retrospectivity, it was in the terms of the contract itself because the contract in unambiguous words covered the risk occurring at any hour on 6-6-69. AIR 1954 Bom 148, Ref.

(Para 6A)

Cases Referred: Chronological Paras

AIR 1954 Bom 148 = 55 Bom LR 874 6-A
AIR 1924 Mad 257 = 45 Mad LJ 557 (SB)

(1904) 1 KB 1 = 72 LJKB 931	6
(1898) 1 Ch 203 = 67 LJ Ch 113	6
(1895) 1 QB 378 = 64 LJQB 200	6
(1891) 1 QB 402 = 60 LJQB 47	6
(1885) 29 Ch 204 = 54 LJ Ch 720	6
(1879) 4 QBD 230 = 48 LJMC 95	6
(1870) 5 Ex 296 = 39 LJ Ex 189	6
(1805) 6 East 120 = 2 Smith 255	6

JUDGMENT:— This is an appeal filed by the owner of a lorry against the judgment of the Motor Accidents Claims Tribunal, Madras, awarding as against him a compensation of Rs. 15,300, in respect of the death of one Venkatachala Iyer in a lorry accident, and exonerating the Insurer of all liability. The accident took place at about 8 a.m. on 6-6-1969 in the Kathivakkam High Road opposite to the Indian Oil Company depot near Ennore. Venkatachala Iyer was cycling along the north to south road in a southerly direction when lorry No. MDH 4939 belonging to the appellant, coming from the opposite direction, collided with his cycle and ran over him. The victim was killed on the spot. Ex. P-2 is the sketch drawn by the Inspector of Police, who took over the investigation soon after the accident. It shows that the highway is about 37 ft. 6 inches broad, the middle tarred portion being 17 ft. and the mud portion on one side being 9 ft. wide, and the mud portion, on the other, 11 ft. 6 inches. The sketch shows that the collision between the cycle and the lorry took place at a point 5 ft. to the west of the eastern edge of the tarred portion. This means that at the time of the accident the lorry had gone beyond the midline of the tarred portion into the wrong side of

the road and collided against the cyclist. The evidence of P.W. 4, who is the only eye witness to the occurrence, is that as he was standing near a betel stall in Ennore High Road, he found the lorry coming at a high speed from the south and dashing against the front side of the cycle, and that he saw the cyclist falling down and one of the wheels of the lorry running over his back. It is also the case of P.W. 4, that the accident took place after the lorry had proceeded to the wrong side of the road. In fact, his evidence, which is inherently acceptable, is also corroborated by the conduct of R.W. 1, Ekambaram, the driver of the lorry, who, when prosecuted in the Criminal Court for rash and negligent driving, pleaded guilty and was convicted. It is idle for him to say from the witness box now that he was not guilty of rashness or negligence. I have little hesitation in agreeing with the Tribunal and holding that the death of the victim was the result of rashness or negligence on the part of the driver of the lorry.

2. The next question that arises for consideration is, what is the quantum of compensation payable? The deceased used to peddle textiles by going from house to house, and according to P.W. 1, the widow, he used to pay her Rs. 100 every week. The Tribunal did not accept this evidence, as it was evidently exaggerated, but fixed the pecuniary loss to the claimants arising from the death of Venkatachala Iyer at Rs. 100 per mensem. The Tribunal also found that the deceased should have been 55 years at the time of his death, and it estimated that he might have lived for another 15 years. Had he lived for 15 years, he would have, according to the Tribunal, paid Rs. 18,000 into the hands of the claimants; and as a lump sum payment was being made, the Tribunal made a deduction of 15 per cent. out of this amount, and fixed the compensation at Rs. 15,300. I see no reason to interfere with this figure, because it cannot be said to be shockingly high.

3. The last question that arises for determination is, whether the Co-operative General Insurance Society Ltd., the insurer of the lorry, is liable? The Tribunal held that it was not, because, in its view, the policy itself was issued some hours after the accident had taken place, and without that fact having been disclosed to the Insurance Co. In fact, the Tribunal went so far as to say that the owner of the vehicle had obtained a policy by playing fraud upon the Insurance Co. This is a finding, which has no relation to the pleadings. Even the Insurance Co. did not contend in its counter that the policy was vitiated by any fraud or misrepresentation. In fact, the owner

of the vehicle lives at Tambaram, whereas the accident itself took place near Ennore, about 28 miles away from Tambaram. The evidence of R.W. 2 (the son of the owner) is that he went to the Insurance Co. office even at 4-30 p.m. on 5-6-1969 and offered Rs. 100 odd to a clerk of the company for effecting insurance for the vehicle, that the clerk asked him to come to the office the next day, as the Manager was not available, that he returned home, and went back to the Insurance Co. at 9-45 a.m. on 6-6-1969, and that he received Ex. R-1, the insurance policy on that day. It is also his case that he was not aware of the accident that had taken place at about 8 a.m. that day near Ennore. R.W. 3, the Accountant of the Insurance Co. denies that R.W. 2 came to the office the previous day and says that he came there only at 11 a.m. on 6-6-1969, paid Rs. 124 and obtained Ex. R-3, the certificate of insurance on that occasion. I am unable to believe R.W. 2, when he says that he went to the Insurance Co. and tendered the amount even the previous day. I am prepared to assume that he went to the Insurance Co. office at 9-45 a.m. or 11 a.m. on 6-6-1969. The only question is whether at the time he received the insurance policy, he or his father could have been aware of the accident. Admittedly, the lorry had been insured with the same company for the previous year, and the policy for the previous year had expired on 31-5-1969. It is not as if the owner of the lorry was insuring the lorry for the first time on 6-6-1969. What he did was to renew the policy which he already held, and not to take out a new policy for the first time. If he had not delayed in the renewal of the policy and had taken care to renew it on 1-6-1969, there would have been no basis for the present plea of the Insurance Co. But unfortunately, he delayed renewal for five days. There is no material to justify the inference that at the time of the renewal on 6-6-1969, the owner of the vehicle or his son, was aware of the accident. If they were unaware of the accident, they could not have misled the Insurance Co. by suppression of a material fact, of which they had no knowledge. Further, the finding of the Tribunal that the policy is vitiated by fraud is based neither upon any plea raised by the insurance company, nor upon any evidence available. It is an unfair and illegitimate conjecture on the part of the Tribunal. I shall, therefore, proceed to discuss the legal position on the basis that neither the insurance company nor the owner of the lorry was aware of the accident at the time Ex. R-3, the certificate of insurance was issued at 11 a.m. on 6-6-1969.

4. Ex. R-1, which is the Insurance policy, issued by the Insurance Company, sets out the terms of the contract between the owner of the vehicle and the insurer. Against the column 'Period of Insurance', we find the words 'From 6-6-1969 to 5-6-1970 (both dates inclusive)'. Admittedly, the premium had been paid by the lorry owner for the full period of one year. If the intention of the Insurance Co. was to cover the period of one year excluding 6th June, 1970, one would have expected the Insurance Co., to mention the period from 7-6-1969 to 6-6-1970. On the contrary, the Insurance Co. has expressly committed itself to liability for any risk from 6-6-1969 upto 5-6-1970, making it clear that both the dates were included in the period of cover. If all the 24 hours in the 6th June, 1969, were intended to be part of the period of cover, then the accident, which took place at 8 a.m. on 6-6-1969, would certainly be covered by the policy, because 6-6-1969, would commence from the midnight of 5/6th June, 1969.

5. Learned counsel for the Insurance Co., says that if the company had known that the accident had taken place at 8 a.m. on 6-6-1969, it would never have entered into this contract. That might be so. But it is not the case of the company that the owner of the vehicle had knowledge of the accident and that the contract had become void by reason of any material misrepresentation or fraud. Both parties to the contract must, therefore, be pinned down to the terms thereof. It is open to the Company to have stated that the contract would be effective from 11 a.m. on 6-6-1969 upto 11 a.m. on 6-6-1970, in which case it could certainly escape liability for an accident which had taken place a few hours before the conclusion of the contract. In Venkataramayya's Law Lexicon, 'day' has been defined to be the period from midnight to midnight.

6. While interpreting Section 9 of the Indian General Clauses Act X of 1897 Coutts-Trotter J. (as he then was) has in *In re Court Fees*, AIR 1924 Mad 257 (SB), speaking for the Special Bench consisting of three Judges, made certain observations, which are of some guidance in solving the problem before me, and those observations are as follows:—

"Section 9 enacts that in any Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from' and for the purpose of including the last in a series of days or any other period of time to use the word 'to'. In my opinion this case is not really affected by the consideration of whether the English Interpretation Act or the Indian General

Clauses Act is to be looked to for the guiding rule in this case. The whole argument of Mr. Srinivasa Iyengar is based on the use of the preposition 'from' in the notification instead of the mere obvious 'on'. To my mind no useful purpose is served by drawing distinction between particular prepositions such as 'on', 'from' 'from and after', and so forth and for that I have the authority of Doe v. Spence, 1805-6 East 120 and of Lindley L. J. in *Sidebotham v. Holland*, 1895-1 QB 373. It appears to me that while it is true that no one general rule exists as to the computation of time..... The English common law has evolved two perfectly clear principles and they are the principles which I conceive that the draftsman of the Indian General Clauses Act intended to embody in the sections which I have quoted. What I conceive to emerge from the decided cases is this: that as the law in general neglects fractions of a day, you must either exclude or include the whole of the day with which a given statute or rule or regulation deals. And the exclusion or inclusion, I think, is clearly provided in two other rules. If you are fixing the point of time at which a certain state of things is to be called into existence, that state of things comes into existence at midnight of the day preceding the day at which or on which or from which or from and after which the new state of things begins. In such cases the statute or rule is only concerned in fixing the terminus a quo of a new state of law which is enacted to continue indefinitely, in other words, until repealed by a new enactment of the legislature where, in short, you have a terminus a quo but no terminus ad quem. This principle is well illustrated by the case of *Tomlinson v. Bullock*, 1879-4 QBD 230. It is one of obvious convenience for it would be an intolerable burden upon the litigant public to require it to ascertain at which precise hour of the day a particular statute is passed or a particular rule or regulation is promulgated. The other rule is this. When you have a period delimited by statute or rule which has both a beginning and an end, the word 'from' excludes the opening day and any words fixing the closing day includes that day. As was pointed out by Day J. any other canon of construction would lead to an absurdity. For instance, a policy of insurance to be good for one day from 1st January might be valid only for a few hours or even for a few minutes or conceivably not at all, unless you exclude the 1st January from the computation. Illustrations of the application of this principle are to be found in *Isac v. Royal Insurance Co.*, 1870-5 Ex 296. In *re Railway Sleepers Supply Co.*, 1885-29 Ch 204, *South Staffordshire Tramway Co. v. Sick-*

ness & Accident Assurance Assn., 1891-1 QB 402, *Sheffield Corporation v. Sheffield Electric Light Co.*, 1898-1 Ch 203 and *Goldsmiths Co. v. West Metropolitan Rly.*, 1904-1 KB 1. The distinction appears to me vital and reconciles all the cases referred to in the argument. I think the rule that emerges is this: Where a statute fixes only the terminus a quo of a state of things which is envisaged as to last indefinitely, the common law rule obtains that you ought to neglect fractions of a day and the statute or regulation or other order takes effect from the first moment of the day on which it is enacted or passed, that is to say, from midnight of the day preceding the day on which it is promulgated; where on the other hand, a statute delimits a period marked both by a terminus quo and a terminus ad quem, the former is to be excluded and the latter to be included in the reckoning."

The observations made by the learned Judge in respect of the commencement date of an Act, when the Act uses the word 'from', or 'from and after' throw some light on how to interpret the commencement date recited in an instrument, such as, an insurance contract. As the insurance contract before me speaks without ambiguity, there is no need to make any speculative inference. It is true the contract delimits a period marked both by a terminus a quo and a terminus ad quem but then it expressly declares that the date from which it would come into effect is included within the period of one year in the same way as the date on which it is to terminate will be included.

6-A. As has been pointed out by Chagla C. J. in *Indian Trade and General Insurance Co. v. Bhailal*, AIR 1954 Bom 148, in order to decide whether a contract of insurance should apply to a loss which had already taken place, the court must try and gather the intention of the parties, and the intention should be gathered primarily from the document itself, which is the repository of the terms of the contract. Here, even learned counsel for the Insurance Co. does not contend that the contract did not intend to include the 6th June, 1969, but what he contends is that if the company had known that an accident had occurred a few hours earlier at 8 a.m. on that day, it would not have agreed to include that date in the period of cover. But, then, it is open to him to have attacked the contract as invalid on the ground that it has been the result of collusion or fraud. But no such attack has been made in the counter itself, and there is no evidence in support of such an attack. It is next contended by the learned counsel for the Insurance Co., that the contract having

been concluded only at 11 a.m. on 6-6-1969, it would be wrong to hold that it could cover an accident, which had taken place three hours before the conclusion of the contract. I am unable to agree. It was open to the Insurance Co. to have stipulated that the contract would come into force only from 11 a.m. on that day. Instead of doing so, the Insurance Co. has undertaken to cover any risk for the entirety of the year beginning from and inclusive of 6-6-1969, and ending with and inclusive of 5-6-1970. By holding that the Insurance Co. is liable for the accident, which took place at 8 a.m. on 6-6-1969, I am not giving any retrospective effect to the contract at all. If there is any retrospectivity, it is in the terms of the contract itself, because the contract, in unambiguous words, covers the risk occurring at any hour on 6-6-1969. I, therefore, hold that the Insurance Co. by the terms of its own contract, is liable to pay compensation to the claimants.

7. The appeal is consequently allowed, and an award is made against both the appellant and the Insurance Co. for payment of compensation of Rupees 15,300 to the claimants. There will be no order as to costs. Time for payment two months.

Appeal allowed.

AIR 1975 MADRAS 267

MAHARAJAN, J.

Kuppayee Ammal, Appellant v. Guruswami Padayachi and others. Respondents.

A. A. A. O. Nos. 36 and 37 of 1969, D/- 17-10-1974 *

(A) Civil P. C. (1908), S. 60 (1) (n) — T. P. Act (1882), S. 6 (dd) — Right to future maintenance — Amount payable to judgment-debtor under maintenance deed is not attachable. AIR 1935 Mad 815, Not followed in view of AIR 1917 Mad 79 (2) and AIR 1924 Mad 22.

The execution petition was filed for issue of pro-order to the mother of the judgment-debtor prohibiting her from delivering ten bags of paddy payable by her annually to her son under the maintenance deed. What the decree-holder seeks to attach in this case is clearly a right to future maintenance which is not attachable under S. 60 (1) (n). AIR 1954 Mad 946, Followed; AIR 1935 Mad 815, Not followed in view of AIR 1917 Mad 79 (2) and AIR 1924 Mad 22. (Para 7)

*(Against order of Sub-J., Cuddalore in C. M. A. Nos. 140 and 70 of 1967. D/- 27-6-1968.)

Cases Referred: Chronological Paras
AIR 1954 Mad 946 = 1954-2 Mad LJ 324 6

AIR 1935 Mad 815 = 69 Mad LJ 264 5, 6

AIR 1933 Bom 350 = ILR 57 Bom 507 4

AIR 1925 PC 176 = ILR 47 All 385 = 49 Mad LJ 244 4, 6

AIR 1924 Mad 22 = ILR 46 Mad 659 6

AIR 1917 Mad 79 (2) = ILR 40 Mad 302 6

K. Sarvabhauman and K. Sampath, for Appellant; N. Sivamani, N. K. Mitra and V. Narayanaswami, for Respondents.

JUDGMENT:— These appeals arise under the following circumstances. One Guruswamy Padayachi, the first respondent in both these appeals obtained a decree against Thillai Govinda Padayachi, who is the appellant in A. A. A. O. No. 37 of 1969 and who is the son of Kuppayee Ammal, the appellant in A. A. A. O. No. 36 of 1969. He filed E. P. No. 989 of 1966 on the file of the court of the District Munsif of Cuddalore, for execution of the decree by the issue of a pro-order to the mother of the judgment-debtor prohibiting her from delivering 10 bags of paddy payable by her annually to her son under a maintenance deed dated 15-1-1963. The court issued notice to the garnishee, but as the garnishee did not appear, a pro-order was passed. Against that order, the garnishee preferred C. M. A. No. 140 of 1967 whereas the judgment-debtor preferred C. M. A. No. 70 of 1967 on the file of the Sub-Court, Cuddalore. Both the C. M. As. were dismissed by the Sub-Court. It is against the dismissal of these C. M. As. that the present civil miscellaneous second appeals have been filed.

2: Under clause (n) of the proviso to Section 60 (1) of the Code of Civil Procedure, the right to future maintenance shall not be liable to attachment and sale in execution of a decree. There are some rulings to the effect that, once maintenance has fallen due and arrears of maintenance have become payable, the same may be attached. But the law is clear that a right to future maintenance is not attachable. The execution petition itself says that the ten bags of paddy, which the garnishee would be liable to pay to the judgment-debtor in future, should be attached. There is no allegation in the Execution Petition to the effect that the amount which the garnishee was liable to pay to the judgment-debtor under the maintenance deed had become due on the date of the execution petition. As the amount sought to be attached is not in the nature of past maintenance, but in the nature of future maintenance, the executing court ought to have refused to order attachment. Both the Courts below went wrong in holding that the amount is attachable.

3. Learned counsel for the respondent, Mr. N. Sivamani, has cited before me a plethora of authorities in support of his contention that the amount payable to the judgment-debtor under the maintenance deed is attachable. Before considering the authorities cited, it is necessary to bear clearly in mind two distinct provisions of law which, if I may say so with great respect, have been confused, with the result that a clear juridical principle could not be evolved. The first is the principle enshrined in Section 60 (1) (n), Code of Civil Procedure, which says that a right to future maintenance shall not be liable to attachment or sale. The other provision is Section 6 (d) of the Transfer of Property Act which provides that an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him. The scope for confusion between these two provisions arises in cases where the right to future maintenance is charged upon immovable property or where possession of immovable property is given to the maintenance holder in lieu of his right to future maintenance. In such a case, the court has to apply the double test, namely, (1) Is it an arrangement to secure the right to future maintenance;

(2) Is it an interest in property restricted in its enjoyment to the owner personally? Evidently, to remove a conflict that may arise in the application of these two provisions of law, the legislature incorporated clause (dd) to Section 6, of the Transfer of Property Act, by Act 20 of 1929. That clause is to the effect that a right to future maintenance, by whatsoever manner arising, secured or determined, cannot be transferred.

4. In *Rajendra Narain Singh v. Sundara Bibi*, ILR 47 All 385 = (AIR 1925 PC 176). (This is a decision delivered before the incorporation of clause (dd) to Section 6 of the Transfer of Property Act) the Privy Council was called upon to consider the terms of a compromise deed which provided that the judgment-debtor in that case was to hold and possess sixteen villages yielding a profit of Rs. 8,000 a year in lieu of his maintenance without power of transfer during the lifetime of his brother, to whom he was to pay Rs. 7,872 a year in respect of the Government revenue, cesses and malikana. It was held by the Privy Council, when the interest of the judgment-debtor in the villages was sought to be attached and sold, that the judgment-debtor's interest was future maintenance within the meaning of Section 60, sub-section (1) (n) of the Code of Civil Procedure and therefore could not be attached and sold. But their Lordships, however, directed that in such a case, a re-

ceiver should be appointed to realise the rents and profits, with a direction to pay thereout a sufficient and adequate sum for the maintenance of the judgment-debtor and his family, and to apply the balance (if any) to the liquidation of the judgment-debtor's debt. I am unable to perceive why Beaumont, C. J. in *Secretary of State for India v. Bai Some*, ILR 57 Bom 507 = (AIR 1933 Bom 350) should have observed that the above judgment of the Privy Council is a difficult one to interpret. It appears to me that the Privy Council has given an interpretation which gives the fullest effect to two apparently conflicting concepts. Where the right to future maintenance is secured by giving a large extent of immovable property fetching an income far in excess of the subsistence needs of the maintenance holder and his family, it is certainly equitable that a receiver should be appointed to collect the rents and profits of the property and to pay out of the collections, an amount adequate for the maintenance of the maintenance holder and apply the balance for the liquidation of his debts. Though, no doubt, the property is not attachable or saleable in execution, the appointment of a receiver is a specific relief which is granted to a decree-holder under Section 51 (d) of the Code of Civil Procedure. The grant of such a relief would not violate either the provision contained in Section 60, Code of Civil Procedure interdicting attachment of the right to future maintenance or the provision contained in Section 6 (d) of the Transfer of Property Act, which places an embargo upon the alienability of an interest in property restricted in its enjoyment to the owner personally. It appears that even the introduction of clause (dd) of Section 60 Transfer of Property Act does not substantially affect the proposition laid down by the Privy Council. All that Section 6 (dd) says is that a right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred. But, where under the guise of securing the right to future maintenance, possession of vast properties is given to the maintenance holder or a charge is created in his favour in respect of the property for an amount far in excess of what would be reasonable for his maintenance, it is certainly open to the court to appoint a receiver and equitably execute the decree without violating either the provisions of Section 60, Code of Civil Procedure or the provisions of clauses (d) or (dd) of Section 6 of the Transfer of Property Act. I shall explain a little later that the principle of the Privy Council ruling is not attracted by the facts of this case.

5. I may now refer to the ruling of King, J. in *Sivaji Govinda Rao v. Chidambaram Chettiar*, 69 Mad LJ 264 = (AIR 1935 Mad 815). There, the judgment-debtor had usufructuarily mortgaged all his property and had provided as one of the terms of the mortgage transaction that the mortgagee should pay him an allowance of Rs. 100 a month. Be it noted that the mortgagee in that case was neither morally nor legally liable to maintain the mortgagor, nor does it appear that the mortgage deed in that case characterised the monthly allowance payable to the mortgagor as a maintenance allowance. However, when that allowance was sought to be attached by the decree-holder, the judgment-debtor-mortgagor contended that the allowance was payable to him by the mortgagee specifically for his maintenance and it was his sole means of support, and consequently, exempt from attachment under Section 60 (1) (n) of the Code of Civil Procedure. The learned Judge, upon an interpretation of the case law, held that the allowance payable by the mortgagee to the mortgagor was not exempt from attachment. This is what the learned Judge says at page 268 = (817 of AIR):—

"In all those cases, the provision for an annuity or allowance was made by a vendor or a mortgagor as part of the transaction by which he sold or mortgaged his property, and as I have said, in all the cases, the annuity or allowance was held not to be exempt from attachment". No doubt, in an earlier part of the judgment the learned Judge, while referring to the view of the District Judge made the following observations:—

"On the other hand, the view taken by the learned District Judge is that there must first exist the right to maintenance independently of contract, a right derived from the personal law and personal relationship of the parties, and only when such a right has been commuted can protection be afforded. Where the right is created for the first time by contract it is always alienable and subject to attachment. It seems to me from a study of the authorities that of these two views, the latter must prevail."

I am afraid that in this part of the judgment, which is really in the nature of obiter dicta, the learned Judge has put the juridical basis of his proposition a little too broadly. Learned counsel relying upon this obiter contends that under the personal law of the judgment-debtor in this case, there was no obligation on the part of his mother to pay any maintenance to the son and therefore inasmuch as the maintenance allowance payable to the judgment-debtor in this case is not a right derived from the per-

sonal law, but only a right which has been created for the first time by contract, the allowance is attachable in execution. I am unable to agree. In the execution petition itself the decree-holder has characterised it as maintenance allowance. It is stated at the Bar that the judgment-debtor is a tuberculosis patient and that is why he conveyed all his properties to his mother and was content to receive maintenance from his mother under the deed of maintenance dated 15-1-1963. Further, the quantum of maintenance payable is only ten bags of paddy per year and that too in two half yearly instalments. It cannot be said that the quantum is suspiciously in excess of what would be necessary for keeping the body and soul of the judgment-debtor together. In fact, the decree-holder himself has valued the ten bags of paddy at Rs. 380, which would be hardly adequate for the annual subsistence of the judgment-debtor.

6. Reference may also be made to a ruling in *Venkataram v. Sathiraju*, 1954-2 Mad LJ 324 = (AIR 1954 Mad 946). There, Mack, J. refused to follow the ruling of King, J. in 69 Mad LJ 264 = (AIR 1935 Mad 815) by saying that the learned Judge made a differentiation which was difficult to apply practically. I would refuse to follow the ruling of King, J. referred to above on the ground that it is in conflict with the earlier Division Bench judgment of this court in *Palikandy Mammad v. Krishnan Nair*, ILR 40 Mad 302 = (AIR 1917 Mad 79 (2)) as well as the decision of a Full Bench in *Subraya v. Krishna*, ILR 46 Mad 659 = (AIR 1924 Mad 22) I respectfully adopt the following observations of Mack, J. in 1954-2 Mad LJ 324 = (AIR 1954 Mad 946):—

"There may be cases where a wealthy father may constitute a trust out of which a large sum of money has to be paid each month for the maintenance of his son or in lieu of his maintenance. It is manifestly inequitable that this sum which is far in excess of the needs of the son for maintenance should be put out of the reach of decree-holders; nor with respect to the view taken by King, J. in 69 Mad LJ 264 = (AIR 1935 Mad 815) can a practical distinction be drawn in these cases between maintenance dependent on personal law, personal relationship and personal obligation and a right to maintenance created by a contract. It is for the executing court on the facts of each case to determine how much of an allowance should be made attachable having regard to the circumstances of each case. In a case involving collection of rents from property out of which any maintenance is payable, the appropriate remedy, des-

cribed as equitable execution or indirect execution by appointment of a receiver adopted by the Privy Council in 49 Mad LJ 244 = (AIR 1925 PC 176) appears to be in harmony with this view. In this particular case, I have no hesitation in holding that Rs. 60 a month maintenance provision made by a father to his son is, taking into consideration the cost of living today, a minimum maintenance provision, no portion of which is attachable by a decree-holder, who must look to some other asset or income of the judgment-debtor to proceed against in execution. Everything would depend upon the meaning of the word "maintenance", that is, what in the opinion of the executing court is, in the circumstances of the case, a reasonable maintenance. I can myself see no impediment in restricting the exemption in S. 60 (1) (n) to maintenance pure and simple and anything, which, in the opinion of the executing court, is in excess of maintenance not being exempt from attachment."

7. In this case, I am satisfied that the quantum of maintenance prescribed in the maintenance deed in favour of the judgment-debtor is hardly sufficient for his maintenance, and what the decree-holder seeks to attach in this case is clearly a right to future maintenance which is not attachable under Section 60 (1) (n) of the Code of Civil Procedure. Unfortunately, the deed of maintenance has not been produced by the judgment-debtor in this case. It is the complaint of the decree-holder that the arrangement whereby the judgment-debtor transferred all his properties in favour of his mother and obtained a deed of maintenance from her is an arrangement entered into to defraud the creditors of the judgment-debtor. Nothing that I have said in this judgment shall be construed to prejudice this contention of the decree-holder.

8. In the result, the concurrent orders of the Courts below are reversed and the Execution Petition is directed to be dismissed. Both the appeals are allowed; but in the circumstances of the case, there will be no order as to costs in both appeals. Leave refused.

Appeals allowed.

AIR 1975 MADRAS 270

FULL BENCH

K. VEERASWAMI, C. J. NATARAJAN
AND MOHAN, JJ.

Century Flour Mills Ltd., Petitioners
v. S. Suppiah and others, Respondents.

C. M. P. No. 10347 etc. of 1974 in O.
S. Appeal No. 64 of 1974, D/- 11-3-1975.

ES/ES/B655/75/DHZ

(A) Civil P. C. (1908), S. 151 — Holding of meeting in contravention of order of stay granted by Court — Effect.

Order XXXIX, C. P. C. should not be considered as placing any limit on the scope of the inherent power under Section 151. The inherent powers of the High Court under Section 151 are wide and are not subject to any limitation. Where in violation of a stay order or injunction against a party, something has been done in disobedience, it will be the duty of the court as a policy to set the wrong right and not allow the perpetuation of the wrong doing. The inherent power will not only be available in such a case, but it is bound to be exercised in that manner in the interest of justice. If a meeting held was in violation of the court's order and the parties affected approach the High Court and ask for relief on the ground that what happened at the meeting would be destructive of their standpoint the High Court on a consideration of the entire circumstances and facts will have to put back the parties in the same position as they stood prior to the holding of the meeting. That is not to say that, in doing so, the court interferes with third parties' rights. All that the High Court would do in such circumstances is that, since the meeting was prohibited, but all the same it was held in violation of the order of the High Court, it would refuse to recognise the holding of the meeting as a legal one. The parties are put back in the same position as they stood immediately prior to the service of the stay order of the High Court, which means that the meeting and the resolutions passed at that meeting, would have no effect whatsoever. (Paras 5, 7, 9, 10, 12)

Cases Referred: Chronological Paras

AIR 1975 All 48	8
1972 Tax LR 1667 = (1974) 44 Com Cas 210 (Delhi)	10
AIR 1969 Pat 72	8
AIR 1967 SC 1386 = (1967) 3 SCR 84	5
AIR 1966 Mad 53 = 1966 Cri LJ 146	7
AIR 1963 Raj 3 = 1961 Raj LW 217	8
AIR 1962 SC 527 = 1962 Supp (1) SCR 450	7
AIR 1956 Pat 455	8
AIR 1930 All 387 (2) = 127 Ind Cas 577	10
AIR 1919 Mad 772 = 35 Mad LJ 96	10

N. Panchapagesa Iyer, for Petitioners in C. M. P. No. 10347 of 1974 and Respondents in C. M. P. No. 10935 of 1974; Anand Dasgupta and Sagar, for Petitioners in C. M. P. Nos. 13855 and 13856 of 1974; Advocate-General, T. Raghavan and T. Seshadri, for Respondents in C. M. P. Nos. 10347 of 1974, 13855 and 13856 of 1974 and for Petitioners in C. M. P. No. 10935 of 1974.

VEERASWAMI, C. J.:— An extraordinary general body meeting of the shareholders of the Century Flour Mills Ltd., Madras, was fixed for 14-9-1974. The appellants in the Original Side Appeal applied under Section 186 of the Companies Act for naming an Advocate-Chairman and fixing the venue of the meeting. Though it was contended that the court had no power to appoint an Advocate-Chairman, the learned Judge sitting on the company side declined to appoint an advocate on the ground that there was no need therefor. The appeal is from that order. Pending the appeal, a Division Bench of this court, by an order dated 12-9-1974, on a relative application, directed 'that the convening of the General Body meeting of the respondent herein on 14-9-1974, be and is hereby stayed pending further orders on this petition'. A certified copy of this order, as we find from the record of evidence, was served at the registered office of the company on 30-9-1974. Nevertheless, the meeting as notified was allowed to take place the next day. An application for contempt was taken out in consequence against one of the Managing Directors and another. But, on their tendering apology, which the Division Bench accepted since it was unqualified, the contempt petition was closed.

2. C. M. P. No. 10935 of 1974 has been taken out in the form of a Judge's summons under Rule 9 of the Company Court Rules, 1959 read with Section 151, C. P. Code, to declare as void, illegal and inoperative the resolutions passed at the meeting of 14-9-1974. On the other hand, an application has been taken out by the respondents to dismiss the appeal itself on the ground that it has become infructuous since the meeting had already taken place.

3. In the first instance, these matters were heard by a Division Bench, to which two of us were parties, but because of one or two decisions of this court rendered by Division Benches, it was considered necessary to refer the matters to a fuller Bench and that is how these matters have come before us.

4. The only question for decision in these matters is whether the resolutions passed at the meeting on 14-9-1974, can validly stand, notwithstanding the fact that the meeting was held in violation of the inhibitory order aforesaid. What the appellants contend is that, since the meeting was held in violation of the inhibitory order, no wrong doer in respect thereof should be allowed to derive any benefit out of his own wrong. Alternatively, it is also put that in exercise of the inherent powers of this court under Section 151, C.P.C., this court, should in

such circumstances, and in order to meet the ends of justice, put back the parties in the same position as they had been immediately before the order staying the proposed meeting was issued. We shall first examine whether in such circumstances this court can invoke its inherent power under Section 151, C.P.C.

5. Since the matter is not res integra, the best way to approach the question is to refer to the decided cases and in the light of it, to come to a conclusion. Cases are all agreed that, whether it is a stay order, or an injunction, essentially, there is no difference between them except that in the case of a stay order, it is addressed to the court concerned, and in the other, to the person inhibited from doing a certain thing. There is also no difference that, so far as Order XXXIX, C.P.C. is concerned, it confers only limited powers and would not be of assistance in circumstances as in the present case.

In *Mulraj v. Murti Raghunathji*, AIR 1967 SC 1386, the Supreme Court observed—

"As we have already indicated, an order of stay is as much a prohibitory order as an injunction order and unless the court to which it is addressed has knowledge of it, it cannot deprive that court of the jurisdiction to proceed with the execution before it. But there is one difference between an order of injunction and an order of stay arising out of the fact that an injunction order is usually passed against a party while a stay order is addressed to the court. As the stay order is addressed to the court, as soon as the court has knowledge of it, it must stay its hand; if it does not to so, it acts illegally. Therefore in the case of a stay order as opposed to an order of injunction, as soon as the court has knowledge of it, it must stay its hand and further proceedings are illegal, but so long as the court has no knowledge of the stay order, it does not lose the jurisdiction to deal with the execution which it has under the Civil Procedure Code."

It went on to observe that, though the court to which the stay order was addressed, when it had no knowledge of the stay order, could not be said to be acting without jurisdiction in making an order contrary to the stay order, nevertheless, it is not powerless to undo any possible injustice that might have been caused to the party in whose favour the stay order was passed during the period till the court had knowledge of the stay order. The Supreme Court went on—

"We are of opinion that Section 151, C.P.C. would always be available to the court executing the decree, for in such a case, when the stay order is brought to

its notice, it can always act under Section 151 and set aside steps taken between the time the stay order was passed and the time it was brought to its notice, if that is necessary in the ends of justice and the party concerned asks it to do so."

6. On facts, that was a case of stay.

7. In *Manoharlal v. Seth Hiralal*, AIR 1962 SC 527, the view was expressed that Section 151, C.P.C. itself said that nothing in the Code should be deemed to limit or otherwise affect the inherent power of the court to make orders necessary for the ends of justice. It, therefore, follows that Order XXXIX, C.P.C. should not be considered as placing any limit on the scope of the inherent power under Section 151. In *Senapathi v. Sri Amba Mills*, AIR 1966 Mad 53, which was quite akin to the circumstances in the instant case, a Division Bench consisting of Anantanarayanan, Offg. C. J. and Natesan J., after accepting the apology and dismissing petition for contempt for violating an injunction prohibiting the holding of a meeting, observed—

"most certainly the proceedings of the meeting were void, the meeting itself having been conducted in disobedience of the interim injunction, and that will equally apply to the resolution or resolutions passed therein. We make a record to that effect. This situation of law has not been disputed by any of the learned counsel."

Though the learned Judges did not give the reason for their view, we are inclined to think, with respect, that the conclusion so drawn is unexceptionable, as we shall show presently.

8. *Subodh Gopal v. State of Bihar*, AIR 1969 Pat 72 and *Harinandan v. S. N. Pandit*, AIR 1975 All 48, are cases of injunction against parties. In the earlier case, the lease deed executed was in violation of an injunction. After holding that Order XXXIX did not provide for relief, the court was of opinion that, in exercise of its inherent power, it could set aside the lease deed as it was violative of the injunction order. In AIR 1975 All 48 a similar view was held and it was said that in such circumstances the parties in the interests of justice should be put back in the same position as they stood prior to the issuance of the order of injunction. This is what the Allahabad High Court said—

"So far as F. A. F. O. No. 251 of 1973 and C. R. 875 of 1972 are concerned, it may be pointed out that the mere fact that the applicants had been dispossessed after the interim injunction order had been issued would not be enough to treat the chapter in regard to possession

over the house as closed. If a person had been dispossessed by wilfully disobeying an order of injunction the court which issued the order of injunction can after considering the circumstances of each case and the conduct of the parties always pass such an order in the ends of justice as would undo the wrong done to the party in whose favour the order of injunction had been issued. The exercise of this inherent power vested in the court is based on the principle that no party can be allowed to take advantage of his own wrong in spite of the order to the contrary passed by the court; see *State of Bihar v. Ushadevi*, AIR 1956 Pat 455 and *Magna v. Rustam*, AIR 1963 Raj 3."

9. In our opinion, the inherent powers of this court under Section 151 C.P.C. are wide and are not subject to any limitation. Where in violation of a stay order or injunction against a party, something has been done in disobedience, it will be the duty of the court as a policy to set the wrong right and not allow the perpetuation of the wrong doing. In our view, the inherent power will not only be available in such a case, but it is bound to be exercised in that manner in the interests of justice. Even apart from Section 151, we should observe that as a matter of judicial policy, the court should guard against itself being stultified in circumstances like this by holding that it is powerless to undo a wrong done in disobedience of the court's orders. But in this case it is not necessary to go to that extent as we hold that the power is available under Section 151, C.P.C.

10. Mr. Panchapakesa Iyer, for the respondent, however, contends that our view, as indicated above, would prevail only as between the parties in court, but when third parties have acquired rights by reason of something happening though it is in contravention or in disobedience of the order of court, the legal position would be different. He says that, since the resolutions had been passed at the meeting on 14-9-1974, which had vested rights in third parties, it would be beyond the power of this court to make an order, which will have the effect of affecting or interfering with or setting aside such rights in third parties. In our opinion, the question of third parties' rights being affected does not arise in the context. We are concerned with a meeting which had been prohibited and not with what happened at the meeting. If the meeting held was in violation of the court's order and the parties affected approach this court and ask for relief on the ground that what happened at the meeting would be destructive of their standpoint; this court on a consideration of the entire circumstances and facts

will have to put back the parties in the same position as they stood prior to the holding of the meeting. That is not to say that, in doing so, the court interferes with third parties' rights. All that this court would do in such circumstances is that, since the meeting was prohibited, but all the same it was held, in violation of the order of this court, it would refuse to recognise the holding of the meeting as a legal one.

Our attention has been invited for the respondents to Puzhakkal v. Mahadeva Pattar (AIR 1919 Mad 772). That was an extreme case where a Karnavan was held to be liable to repay the debt which he had incurred for necessity of the tarwad in contravention of an order forbidding him from incurring debts. The defence in the suit to enforce the debt was that the incurring of the debt was in violation of a prohibitory order. The court declined to accept the defence. It may be seen at once that the justice of the case demanded that the Karnavan was made liable to the debt, more especially when it was incurred for necessity of the tarwad. In that case, the learned Judges confined themselves to a consideration of Order XXXIX and their attention was not drawn to their inherent power under Section 151, C.P.C. Even if their powers under Section 151 had been invoked, in that case too, we have no doubt that the court would have come to the same conclusion because of the exigencies of justice in that case. In Bal Bhaddar v. Balla, AIR 1930 All 387 (2) the court was concerned with an alienation made contrary to the order of injunction. It was no doubt held that the alienation could not be held to be invalid. But that was solely on the basis of the provisions of Order XXXIX, Lord Krishna Sugar Mills Ltd. v. Abanash Kaur, (1974) 44 Com Cas 210 = (1972 Tax LR 1667) (Delhi), which was cited for the respondents, was concerned with a different situation and we do not think it is of assistance in the present case. We are of the view that none of these cases cited for the respondents, which we have referred to above, leads us to the conclusion that this court cannot legitimately invoke its inherent powers in the present circumstances.

11. Another contention for the respondents was that the conduct of the appellants and the circumstances of the case showed culpable negligence on their part and on that basis they should be regarded also as wrongdoers and should be prevented from deriving a benefit out of their own wrong conduct. We think that this argument is adding insult to injury because, having obtained an interim order of stay of the meeting, and also

having served a copy of the order at the registered office, they could not be expected, as the respondents would have it, to attend the meeting and then warn the shareholder at the meeting against passing any resolution contravening the order of this court. We do not think that there is any substance in this contention of the respondents.

12. On the above view of the matter, we are of opinion that C. M. P. No. 10935 of 1974 should be allowed. Accordingly we declare that the parties are put back in the same position as they stood immediately prior to the service of the stay order of this court, which means that the meeting on 14-9-1974, and the resolutions passed at that meeting, would have no effect whatsoever.

13. C. M. P. Nos. 10347, 13855 and 13856 of 1974 will stand dismissed. No costs.

Order accordingly.

AIR 1975 MADRAS 273

FULL BENCH

VEERASWAMI, C. J., NATARAJAN
AND SETHURAMAN, JJ.

Velayya Reddiar, Appellant v. Errachi Reddiar and another, Respondents.

Letters Patent Appeal No. 39 of 1968 and S. A. Nos. 607 and 608 of 1965, D/- 11-11-1974.*

(A) Madras Indebted Agriculturists (Temporary Relief) Act (5 of 1954), Ss. 3, 4 — Statutory stay — Effect. S. A. No. 698 of 1963, D/- 25-1-1968 (Mad.), Reversed.

In a money suit there was attachment before judgment which was later made final. There was a money decree on 30-1-1953. Pending execution proceedings by the decree-holder the plaintiff purchased the property privately from the widow of the judgment-debtor on 30-11-1953. On 5-12-1953 came the Madras Ordinance 5 of 1953 which was later replaced by Madras Act 5 of 1954. When the execution matter was taken up on 7-12-1953 the District Munsif passed the following order:— "No steps taken, Petition closed. Attachment to continue for two months."

Held: Section 4 (2) made it clear that status quo must be maintained, unless resort was to be had to the provision contained in the sub-section during the period of stay. It was apparently because of the statutory stay that the decree-holder took no steps. In fact, the words

*(Decided by Full Bench on order of reference made by Veeraswami, C. J. and Raghavan, J., D/- 5-4-1971.)

in the District Munsif's order 'No steps taken' would be inappropriate, because no steps at all could be taken by the decree-holder in view of the statutory stay. Therefore, those words of the Munsif could not be the basis for closing the petition. When the Munsif said, 'petition closed', it was only for statistical purposes. The use of the words 'attachment to continue for two months' by the Munsif was contrary to the statutory direction and, therefore, those words had no meaning. The stay had the effect of paralysing the proceedings as on the date of stay and, when the stay ended, the status quo as at the stage of stay emerged and further progress had to be registered. That being the effect of the statutory stay, the order of the Munsif dated 7-12-1953 when read in the light of such effect of the statutory stay, did not have the effect of continuing the attachment for two months or preventing at any time within that period the valid resumption of proceedings when the statutory stay came to an end. The plaintiff's suit on the basis of the private sale had to be dismissed. S. A. No. 698 etc. of 1963, D/- 25-1-1968 (Mad.), Reversed. (Paras 3, 4)

Cases Referred: Chronological Paras
AIR 1950 Mad 2 = ILR (1950) Mad 39

1, 2

K. S. Champakesa Aiyangar, for Appellant in L. P. A. 39 of 1968; V. Vedantachari, for Respondents in L. P. A. 39 of 1968 and for Appellants in S. A. Nos. 607 and 608 of 1965; K. Raman, for Respondents in S. A. Nos. 607 and 608.

VEERASWAMI, C. J.:— L. P. A. 39 of 1968— On the view we take, it is not necessary to deal with the correctness of the decision in Venkatarao v. Suryarao, ILR (1950) Mad 39. The suit, out of which the Letters Patent appeal arises, was instituted by the respondent for declaration and injunction or in the alternative for possession. There was a money decree in O. S. No. 362 of 1950, on the file of the District Munsif Court, Kulittalai. On 16-7-1950, there was attachment before judgment of the suit property. The attachment was made absolute on 23-8-1950. On 30-1-1951, followed a money decree. On 2-4-1953, when an execution petition was taken up, the judgment-debtor having died, his widow was brought on record. On 24-9-1953, there was an order to proclaim and sell on 25-11-1953. On 30-11-1953, the matter was called again. Though the sale was held on 25-11-1953, there was no bid and so, on 30-11-1953, there was an order made that since there was no bid steps should be taken in a week. The matter was directed to be called on 7-12-1953. On 30-11-1953, the plaintiffs purchased the suit land and other properties from

the widow of the judgment-debtor by a private treaty. On 5-12-1953, came into force the Madras Indebted Agriculturists (Temporary Relief) Ordinance, V of 1953. Section 3 of the Ordinance barred any suit or application to enforce agricultural debts for a period of one year. If the proceeding is pending in suit or execution, it should, as directed by Section 4, stand stayed until expiry of a year from the date of commencement of the Ordinance. So, when the matter was taken up on 7-12-1953, the District Munsif said—

"No steps taken. Petition closed. Attachment to continue for two months." Madras Act V of 1954, which replaced the Ordinance and which was effective from 5-2-1954, was amended by Madras Act I of 1955 with effect from 1-3-1955. The effect of the amendment was that the stay of operation of any proceeding continued in force until 30-6-1955. Thereafter, on 14-9-1955, E. P. 377 of 1955 was filed and there was attachment on 18-10-1955. On 30-1-1957, there was sale by public auction and the defendant was the purchaser. The sale was confirmed and a sale certificate issued on 29-3-1957. The records show that even possession was delivered to the defendant on 30-7-1957. The suit, out of which the appeal arises, was instituted on 30-11-1959. The first two courts dismissed the suit on the view that the sale by private treaty on 30-11-1953, could not prevail in view of the pending attachment. Natesan J. in the second appeal, took a contrary view. He did so on a construction of the order of the District Munsif dated 7-12-1953.

2. Since we do not agree with Natesan J., on the scope of the order of the District Munsif, aforesaid, the question whether the attachment before judgment, which was made absolute and before the decree, would be within the purview of Order XXI, does not arise; nor would arise the question of correctness of the decision in ILR (1950) Mad 39 = (AIR 1950 Mad 2).

3. The effect of the Munsif's order will have to be ascertained in the light of the provisions of the Ordinance. Madras Ordinance V of 1953 was promulgated, because agriculturists had borrowed or added to their debts during the years of drought and might, if freed for a year from the pressure of creditors, be enabled to rehabilitate themselves. That was the intention of the Ordinance. Section 3 of the Ordinance said—

"No suit for the recovery of a debt shall be instituted, and no application for the execution of a decree for payment of money passed in any such suit shall be made, against any agriculturist in any civil court before the expiry of a year from the commencement of this Ordinance."

nance."

Section 4 directed that the proceeding shall stand stayed until expiry of a year from the date of commencement of the Ordinance. This period of one year was extended by Madras Act V of 1954 and for a further period, by Madras Act I of 1955. By the end of June 1955, the statutory stay came to an end. Sub-section (2) of Section 4 of Madras Act V of 1954, which gives an agriculturist debtor option to waive the benefit of stay and have the suit or application proceeded with, says that on an application made by the defendant or respondent as the case may be, the statutory stay shall be dissolved and the suit or application shall be proceeded with from the stage which had been reached when further proceedings in the suit or application were stayed. This provision makes it clear that status quo must be maintained, unless resort is had to the provision contained in the sub-section referred to above during the period of stay.

4. When a court stays, or a statute directs that a certain proceeding is stayed, the effect is normally the status quo will be maintained and no progress in the proceeding will be made. It is apparently because of the stay, the decree-holder took no steps. In fact, the words in the District Munsif's order, 'No steps taken', would be inappropriate, because no steps at all could be taken by the decree-holder in view of the statutory stay. Therefore, those words of the Munsif could not be the basis for closing the petition. In fact, the Munsif could not do so, because the matter was stayed. When he said, 'petition closed', it was only for statistical purposes. The use of the words 'attachment to continue for two months' by the Munsif was contrary to the statutory direction and, therefore, those words have no meaning. The Munsif, in view of the statutory stay, could neither close the petition nor could grant an attachment nor could continue the attachment if it existed. The stay has the effect of paralyzing the proceedings as on the date of stay and, when the stay ends, the status quo as at the stage of stay would emerge and further progress be registered. That being the effect of the statutory stay, when read in the light of such effect of the statutory stay, the order of the Munsif dated 7-12-1953, did not have the effect of continuing the attachment for two months or preventing at any time within that period the valid resumption of proceedings when the statutory stay came to an end. It is true that there was another attachment on 19-10-1955. But that was valid, as the attachment which was made absolute was still effective and could not be said to have come to an end.

5. On that view, the Letters Patent Appeal is allowed with costs throughout.

6. S. A. Nos. 607 and 608 of 1965:— In view of our judgment in L. P. A. No. 39 of 1968, the second appeals are dismissed. No costs.

Order accordingly.

AIR 1975 MADRAS 275

FULL BENCH

K. VEERASWAMI, C. J., NATARAJAN AND SETHURAMAN, JJ.

Narayani Ammal and another, Appellants v. Govindaswami Naidu, Respondent.

Second Appeal No. 649 of 1970, D/- 28-10-1974.*

(A) Hindu Law — Succession — Stridhana — Term "daughter" includes an illegitimate daughter — Legitimate son cannot exclude an illegitimate daughter. AIR 1915 Mad 63, Overruled — (Hindu Succession Act (1956), S. 3 (j)).

The textual Hindu Law as well as decided cases have clearly laid down that succession to stridhana property is quite different and distinct from succession to the property of a male Hindu and the difference in the lines of succession is based on different theories or concepts. Succession to stridhana property is based on the blood relationship of the mother to her stridhana heirs. There is no legitimate reason why the term 'daughter' should be confined only to a legitimate daughter. Thus an illegitimate child must be recognised as an heir and the stridhana line of succession cannot be entirely departed from with a view to favour the son exclusively. It is only when the stridhana line of succession is unavailable that it is permissible to the other line of succession. AIR 1915 Mad 63, Overruled. (Para 7)

Where there is no inhibition expressly or impliedly to be found in the original text, Courts cannot lose sight of the progressively changing views of social outlook and insist upon only applying the old notions. The change in the social outlook in respect of succession is reflected in the recent legislations, particularly the Hindu Succession Act, 1956, which has done away with the distinction between legitimacy and illegitimacy within certain limits in the matter of succession either to property of a male or a female, dying intestate. It is also to be noted that Section 3 (j) which defines the word

*(Decided by Full Bench on order of Reference made by Ramanujam J., D/- 28-6-1972.)

'related' has a proviso according to which illegitimate children shall be deemed to be related to their mother and to one another. In fact it goes further and says that their legitimate descendants shall be deemed to be related to them and to one another and any word expressing relationship or denoting a relative shall be construed accordingly. It seems that, having regard to this trend of legislation reflecting the changing social approach to succession, interpretation of the word 'daughter' as including an illegitimate daughter would be justified. When such an illegitimate daughter is available for succession of stridhana property of the mother, the son who is not in the nearer line of stridhana heirs cannot have preference and exclude an illegitimate daughter. (Para 8)

Cases Referred: Chronological Paras
AIR 1954 Mad-136 = 66 Mad LW 801

2, 5
AIR 1940 Mad 463 = 51 Mad LW 336 6
AIR 1915 Mad 63 = 1 Mad LW 704 2, 4,
5, 7, 8

R. Mohan and A. R. Jayaraman, for Appellants; T. R. Rajagopalan, for Respondent.

K. VEERASWAMI, C. J.:— This reference raises an interesting question of Hindu Law—Whether the widows of a legitimate son are entitled to succeed to his mother's stridhana property in preference to her illegitimate daughter?

2. Thulasi was the mother who died in 1947, leaving her legitimate son who died in 1949 and an illegitimate daughter by name Manickam. The two widows of the son survived. During her lifetime, Thulasi made over portions of certain properties which she had purchased earlier, to Manickam. The defendant's father purchased a small extent of property from the daughter which was not covered by the conveyance of Thulasi in her favour. The suit was brought by the two widows for title and recovery of possession. The first court decreed the suit. But it was reversed by the lower appellate court on the view that Manickam, though an illegitimate daughter, was entitled to succeed to Thulasi as her stridhana heir. The second appeal arising out of the first appellate Court's decree has been referred to a Bench of three Judges because there was a conflict of opinions between *Meenakshi v. Muniandi Panikkan*, 1 Mad LW 704 = (AIR 1915 Mad 63) and *Venkanna v. Narayanamma*, 66 Mad LW 801 = (AIR 1954 Mad 136).

3. There is no text directly governing the matter. Chapter I, Section XI of Mitakshara dealing with the separate property of women only lays down that, if a woman dies without issue, that is to say, without a daughter, or a grand-

daughter, or daughter's son, or son or son's son, her property shall be taken by her kinsmen, namely, her husband and certain others mentioned in the text. We also find it stated in the text that in all forms of marriage, if the woman leaves a progeny, that is, if she has an issue her property devolves on her daughters, which term would also include grand-daughters. Gautama points out that a woman's property goes to her daughters unmarried or unprovided or provided as is implied by the conjecture particle in the text. On failure of daughters, the grand daughters in the female line take the succession under the text. At the Bar too, it was not suggested that there was any other text of Hindu Law, which dealt with the rights of an illegitimate daughter.

4. *Meenakshi v. Muniandi Panikkan*, 1 Mad LW 704 = (AIR 1915 Mad 63) held that except in the case of illegitimate sons of Sudras, illegitimate children have no right of succession under the Mitakshara law. That was a case of a woman leaving a legitimate son and an illegitimate daughter. Seshagiri Ayyar, J. if we may say so with respect, took an extreme view that illegitimate children had no place in Hindu law, at least under the Mitakshara system, except in the special cases he referred to. He thought that Section XI, which we referred to earlier, should be interpreted in the normal sense, that is to say, reference to a daughter there means only a legitimate daughter. The learned Judge observed—

"If the words 'son and daughter' are used in Chapter II, Section XI, placita 8, 9 and 19, in their ordinary and natural sense, it is clear that there is no foundation for the suggestion that an illegitimate daughter is within those rules." He pointed out that if by a son in the text, only a legitimate son is understood, the word 'daughter' must be similarly understood. Oldfield J. substantially agreed with Seshagiri Aiyar J. and said—

"It was then contended that references to daughters in the Mitakshara should be read as including all daughters, both legitimate and illegitimate, and that all alike should be preferred to the legitimate son as heirs to their mother. But, firstly, that is not the primary sense of these references and is unauthorised by the rules of interpretation recognised by both English and Hindu law."

There were other approaches to the succession there, one of which was the, unchastity of the woman to whose estate the succession was in dispute. We are not concerned with that question. 1 Mad LW 704 = (AIR 1915 Mad 63) has thus clearly ruled that an illegitimate daughter should give way to a legitimate son in the mat-

ter of succession to the stridhana property of their mother and this result was arrived at by what the learned Judges described as interpretation by the primary sense of the word 'daughter' as indicative of only a legitimate daughter.

5. Venkanna v. Narayanamma, 66 Mad LW 801 = (AIR 1954 Mad 136) was a case of a contest to a woman's stridhana property between her husband's brother and her illegitimate daughter. Mack and Krishnaswami Nayudu, JJ. held that an illegitimate daughter was entitled to succeed. The learned Judges in their judgment referred to 1 Mad LW 704 = (AIR 1915 Mad 63), and though the decision was not overruled, as they could not possibly, they definitely differed from it in effect. Both Mack and Krishnaswami Nayudu, JJ. examined the texts and the decided cases as well as leading text books on Hindu law and opined that the property which the daughter succeeded to being stridhana, there could not be any nearer heir than the daughter and the illegitimate daughter being held entitled to succeed, any condition as to there being no nearer heirs could not have any force and the daughter's right to succession to their mother was not based on any other basis except that she was an issue born to the mother and, therefore, heir to her stridhana. Krishnaswami Nayudu J. after referring to textual and decided cases and leading publications on Hindu law, summed up—

"Neither the language of the Mitakshara text nor the application of any reasonable rule of interpretation would justify the exclusion of the illegitimate children of a Hindu married woman from succeeding to their mother's estate."

In fact they have felt that a legitimate daughter and an illegitimate daughter, should be placed equally in the matter of succession to their mother's stridhana property. Mack J. in this connection, stated 'if a woman has a legitimate daughter and an illegitimate daughter, they will both, in conformity with the ancient Hindu texts, take equally'. This means that the learned Judges were not prepared to apply that 1 Mad LW 704 = (AIR 1915 Mad 63) which regarded that in the primary sense of the word daughter it had reference only to a legitimate daughter.

6. Meenakshi Ammal v. Murugayya Moopanar, 51 Mad LW 336 = (AIR 1940 Mad 463) notices that an illegitimate daughter is an heir to her mother's stridhana property, though it held that she could not succeed to stridhana property of her maternal grandmother. But the process of reasoning by which they arrived at that conclusion, we are not con-

cerned with in the present case as it is confined to the conflict between a legitimate son and an illegitimate daughter of a married woman with reference to her stridhana property.

7. Mulla on Hindu Law, 14th Edition, points out that the illegitimate children of a Hindu woman are not excluded from inheritance to their mother's stridhana. But he would add on the authority of Meenakshi v. Mumandi Panikkan, 1 Mad LW 704 = (AIR 1915 Mad 63) that when a woman dies leaving both legitimate and illegitimate children, the legitimate children are preferred to the illegitimate. The textual Hindu law as well as decided cases have clearly laid down that succession to stridhana property is quite different and distinct from succession to the property of a male Hindu and the difference in the lines of succession is based on different theories or concepts. Succession to stridhana property is based on the blood relationship of the mother to her stridhana heirs. There is no legitimate reason why, when the blood relationship is the basis for stridhana succession, we should interpret the word daughter in the original text above referred to as confined only to a legitimate daughter. As Trevelyan in his book on Hindu Law, Edition 3, at page 500, observed, "illegitimacy is not a bar to the succession of children to their mother's property". It is true that he also stated that in a competition between legitimate and illegitimate children, the rights of the former prevail. Perhaps that would be so and we doubt its correctness; when the competition is between a legitimate and an illegitimate daughter. But this point we do not decide in this case as it does not arise. When once an illegitimate daughter is recognised as an heir both by interpreting the word in the original text as including an illegitimate child and also on the basis of decided cases, there is no reason why the stridhana line of succession should be entirely departed from, with a view to favour the son exclusively. It is only when the stridhana line of succession is unavailing that it is permissible to go to the other line of succession.

8. On the question which we are called upon to answer, where there is no inhibition expressly or impliedly to be found in the original text, Courts cannot lose sight of the progressively changing views of social outlook and insist upon only applying the old notions. We are with great respect, unable to concur with Seshagiri Aiyar, J., that an illegitimate daughter has no place at all under the Hindu Law except in limited cases which he pointed out. The change in the social outlook in respect of succession is reflect-

ed in the recent legislations, particularly the Hindu Succession Act, 1956, which has done away with the distinction between legitimacy and illegitimacy within certain limits in the matter of succession either to property of a male or a female, dying intestate. We also note that Section 3 (j) which defines the word 'related' has a proviso according to which illegitimate children shall be deemed to be related to their mother and to one another. In fact it goes further and says that their legitimate descendants shall be deemed to be related to them and to one another and any word expressing relationship or denoting a relative shall be construed accordingly. It seems to us that having regard to this trend of legislation reflecting the changing social approach to succession, we will be justified in interpreting the word daughter in the original text as including an illegitimate daughter as well. We are also of opinion that once an illegitimate daughter is an heir, as we hold she is, to succeed to her mother's stridhana property, so long as she is available, the son, who is not in the nearer line of stridhana heirs, cannot have preference and exclude an illegitimate daughter. On that view, we are of opinion that 1 Mad LW 704 = (AIR 1915 Mad 63) should be overruled.

9. The second appeal is dismissed with costs throughout.

Appeal dismissed.

AIR 1975 MADRAS 278

MOHAN, J.

D. Damodaran, Plaintiff v. D. Leelavathi Ammal and another, Defendants.

C. S. Nos. 6 and 157 of 1973, D/-18-7-1974.

(A) Transfer of Property Act (1882), S. 41 — Benami transaction — Tests for determining whether transaction is benami, indicated — Purchase of house in name of wife held was not benami.

The tests for determining whether a transaction is benami are: (1) the source from which the money came, (2) the nature and possession of the property after purchase, (3) motive, if any, for giving the transaction benami colour, (4) position of the parties and relationship, if any, between the claimant and the alleged benamidar, (5) custody of title deeds after the sale and (6) conduct of the parties in dealing with the property after the sale. Where the husband alleged that the purchase of the house in the name of his wife was benami for his benefit and it was found that the husband did not contribute any money for the purchase and

the wife alone had been in possession and enjoyment of the property and no motive was suggested for giving the transaction a benami colour and the title deeds were produced from the custody of the wife and the property had been mortgaged by her in her own capacity as owner thereof, it was held that the wife was the owner and not benamidar for the husband. AIR 1974 SC 171, Rel. on.

(Paras 16, 20)

(B) Evidence Act (1872), S. 115 — Mortgage of house by wife as owner — Mortgage attested by husband — Husband is estopped from claiming share in house.

Where a mortgage of a house executed by a wife in her own capacity as the owner thereof was attested by her husband, the husband is estopped from denying the title of the wife and from claiming any share in the mortgaged property. (1971) 84 Mad LW 176 and AIR 1972 Mad 390, Rel. on.

(Para 19)

Cases Referred: Chronological Paras AIR 1974 SC 171 = (1973) 2 SCWR 569

16
AIR 1972 Mad 390 = 85 Mad LW 112 19
AIR 1971 Mad 370 = (1971) 1 Mad LJ 272 20

(1971) 84 Mad LW 176 = (1971) 1 Mad LJ 392 19

Sampath Kumar and A. P. Kasturi Rangam, for Plaintiff; K. Ramaswami, A. Sarojini Devi and V. Vasudevaswami, for Defendants.

JUDGMENT:— C. S. No. 6 of 1973. Suit for declaration relating to the half share in house and ground No. 31, Basin Water Works Street, G. T. Madras, for division, and for separate possession of the said half share.

2. The plaint allegations inter alia are:

3. The first defendant is the wife of the plaintiff. They were married in or about 1937. They have two daughters and one son. The first defendant's father had a small old superstructure, namely, No. 31, Basin Water Works Street, G. T. Madras. The land belonged to the Corporation of Madras. In 1954, the Corporation of Madras filed an Ejectment Suit No. 41 of 1954 in the Court of Small Causes, Madras to evict the first defendant. An application was filed to purchase the land as the tenancy was covered by the provisions of the Madras City Tenants' Protection Act of 1922. Ultimately, a sum of Rs. 1,292 was paid as the price of the land and a sale deed was obtained in the name of the first defendant with the money paid by the plaintiff. In 1962, the superstructure thereon was rebuilt from the money advanced by the lessees Messrs. Southern Roadways which was a sum of Rs. 12,000. The plaintiff raised a loan of Rs. 9,000 in 1965 from one Lakshmana

Chetty and discharged the amount borrowed from M/s. Southern Roadways. A mortgage in favour of Lakshmana Chetty was executed at the direction of the plaintiff by the first defendant. Another mortgage was executed by the first defendant in favour of one Boodevi Ammal for a sum of Rs. 10,000. In order to celebrate the marriage of the second daughter Vijayalakshmi yet another mortgage in favour of one Pukhraj Chordia was executed for Rs. 15,000. The mortgage in favour of the second defendant is for Rs. 20,000. The plaintiff submits that the mortgage is not binding on him and the second defendant has been impleaded as a party in order that the plaintiff's right may be protected and the plaintiff's case is that the purchase in the name of the first defendant is benami for the benefit of the plaintiff and since the first defendant denies the title of the plaintiff the present suit has come to be filed.

4. The written statement of the first defendant is to the following effect: The plaintiff's parents did not own any property and the plaintiff had no where-withal to contribute to the purchase of the suit site or for the construction of the superstructure thereon. The plaintiff was employed as a clerk on a meagre salary in S. R. V. S. Limited and his monthly income was not sufficient to meet the needs of the family. It is not true to say that the plaintiff paid Rs. 1,292 towards the cost of the site. The superstructure was put up from the monies borrowed by executing mortgages in favour of Messrs. Southern Roadways which was discharged by executing a later mortgage in favour of Lakshmana Chetty. The money borrowed under the mortgage in favour of Boodevi Ammal was utilised to complete the additional construction. The money borrowed under the mortgage in favour of Pukhraj Chordia was used only for the marriage of Vijayalakshmi, the second daughter. On 4-12-1970 a sum of Rs. 20,000 was borrowed from the second defendant in order to discharge the prior mortgage in favour of Lakshmana Chetty and also the debt under the promissory note and to meet the other family expenses. The suit property is not jointly owned by the plaintiff and the first defendant, nor is the plaintiff in joint possession and enjoyment of the property and it belongs to the first defendant absolutely. The plaintiff has no right, title or interest and hence the suit is liable to be dismissed.

5. It may be stated at this stage that pending the suit, the mortgage in favour of the second defendant was discharged by the first defendant and therefore, he has not filed any written statement.

6. On these pleadings the following Issues were set out for trial:

1. Whether the suit property was purchased in the name of the first defendant benami for the benefit of the plaintiff?
2. Whether the suit as framed is not maintainable without a prayer for declaration that the suit property belongs to the plaintiff?
3. Whether the suit has been properly valued and proper court-fee paid thereon?
4. Whether the plaintiff is entitled to partition and separate possession of a half share as claimed in the plaint?
5. Whether the plaintiff was in joint possession of any portion of the suit property at any time as alleged in the plaint?
6. Whether the plaintiff is estopped from claiming any share in the suit property for any of the reasons alleged by the first defendant?
7. To what relief?

C. S. No. 157 of 1973.

7. The suit was originally filed before the City Civil Court, Madras and the same has been transferred to this Court. The suit is one for injunction filed by the first defendant in C. S. No. 6 of 1973, restraining the defendant (Plaintiff in C. S. No. 6 of 1973) from interfering with the possession and enjoyment of the plaintiff.

8. The allegations in the plaint are more or less similar as contained in the written statement in C. S. No. 6 of 1973 but with this addition namely that the defendant in this suit, namely the husband of the plaintiff is intimidating the tenants who offered to take the first floor on lease under the plaintiff and since he is threatening to use force against the plaintiff and the tenants under her; the necessity for the suit arose.

9. The defendant filed a written statement that the suit is only a counter blast to his suit namely C. S. No. 6 of 1973. The defendant has always been in possession and enjoyment of the first floor and there is no question of his interfering either with the plaintiff's enjoyment or the enjoyment of the tenants thereof.

10. On these pleadings, the following Issues were set out for trial:

1. Whether the suit property was purchased in the name of the plaintiff benami for the benefit of the defendant?
2. Has not the defendant been in possession of the first floor of the suit property even prior to the filing of the suit?

3. Whether the suit as framed is not maintainable?

4. Whether the plaintiff is entitled to the injunction prayed for? and

5. To what reliefs are the parties entitled?

11. Both the suits have been tried together as the parties are the same and evidence has been let in, which is common to both the suits.

12. Documentary evidence on the side of the plaintiff consists of Exs. P-1 to P-6 while that of the defendant is Exs. D-1 to D-9.

13. The parties will be referred to in the manner in which they were arrayed in C. S. No. 6 of 1973.

14. ISSUE NO. 1. In C. S. No. 6 of 1973 and C. S. No. 157 of 1973 is the main issue in both the suits. The oral evidence of the plaintiff as P.W. 1 is to the following effect: The father of the first defendant became an insolvent and he was so adjudicated in I. P. No. 177 of 1940. His mother was owning some lands in Tambaram which were disposed of for Rs. 2,600 and it was utilised for the partnership business of Padmanabha Chettiar. He was getting a salary of Rs. 150 per month and inclusive of batta he was getting a monthly income of Rs. 170. Towards the purchase of the suit land by way of instalments he was paying from his salary Rs. 88 every month and the instalments were paid in consolidated amount of Rs. 600 or Rs. 700 and in that way the land was purchased and at the time of his retirement in 1958 he was paid a sum of Rs. 4,500 which was paid to the first defendant. In order to build the superstructure, monies were borrowed by executing mortgages and all these mortgages were executed by the first defendant at his direction. In cross-examination he admits that his wife the first defendant was running a ration shop in firewood in the year 1948 for about 1½ years and after 1948 when the ration shop was closed the property was leased to tenants. In 1952 he was drawing Rs. 120 per month and by way of rental income from the suit property a sum of Rs. 70 per month was realised. It is further admitted by him that there are no documents to prove that the father of the first defendant was adjudicated insolvent. He denies the suggestion that no portion of his money was paid for the purchase of the property.

15. D.W. 1 is the first defendant. She stated in chief examination that she alone paid the various instalments for the purchase of the property by running the firewood depot and after the closing of the firewood depot the suit site was let out to tenants and by way of rental income about a sum of Rs. 50 or Rs. 60 per

month was realised. She denies that her husband used to pay the salary to her and that she was paying the instalments out of the amounts given by him. In cross-examination she stated that her younger brother was helping her in the firewood business and he was going outside and bringing large quantities of firewood and was helping her in the wholesale business also and therefore she was able to get money for the purchase of the suit site. She denies the suggestion that Rs. 1,600 was paid to her by selling lands. Likewise she denies the payment of Rs. 4,500 by the plaintiff. She further states that the plaintiff paid not even a single pie for family expenses and whatever salary he was getting he was spending for himself. To discharge the mortgage in favour of Lakshmana Chetty and to meet stamp and other incidental expenses since the sale in respect of No. 33, General Muthiah Mudali Street, could not be effected there was mortgage in favour of the second defendant.

16. The important question in this case is whether the property had been purchased benami in the name of the first defendant with the help of the monies belonging to the plaintiff. The test to determine the case of benami had been repeatedly laid down in various decisions. I will only refer to the decision in *Javadaval Peddar v. Bibi Hazra*, (1973) 2 SC WR 569 = (AIR 1974 SC 171). At page 572 their Lordships lay down the following tests:

- (1) the source from which the purchase money came;
- (2) the nature and possession of the property, after the purchase;
- (3) motive, if any, for giving the transaction a benami colour;
- (4) the position of the parties and the relationship if any, between the claimant and the alleged benamidar;
- (5) the custody of the title deeds after the sale, and
- (6) the conduct of the parties concerned in dealing with the property after the sale.

17. In the present case, as regards the first, namely the source, the plaintiff in his oral evidence would state that it was he who contributed towards the payment of instalments for the purchase of the suit site and then the entire amount of Rs. 1,292 due to the Corporation came to be paid only by him. There is absolutely no document to show this payment. But, he would have it that he had all these sources for the money while the defendant has nothing except to state that she was running a firewood depot. It is in evidence that the plaintiff was getting only a meagre salary of Rs. 150

per month and he ceased to be in employment in 1958 itself. It may be noted as seen from Ex. D-2 series that the instalment began on 6-2-1957 and the actual sale came to be completed in 1960. At this crucial period, the plaintiff was unemployed and therefore, it is very hard to believe that he could have ever contributed to the purchase of the suit site. As stated above, except his oral testimony there is no other proof to show that his monies went to the purchase of the suit site. But he would state that since it is admitted by D.W. 1 that the firewood business ceased as early as 1948, the first defendant had no money to pay towards the instalments and consequently it must be held having regard to the fact that the plaintiff was the only earning member, he alone contributed towards the instalments. I am unable to agree. Admittedly after the firewood business ceased, there was a regular rental income from the property of about Rs. 70 per month which was utilised for the payment of the various instalments. Moreover, there is the oral evidence of D.W. 1 that her husband namely the plaintiff contributed nothing towards the purchase of the suit site, and whatever salary he was earning he utilised the same for himself. I am impressed with her evidence and it appears to me that she is speaking the truth. From this, I conclude that the site was purchased not with the money of the plaintiff but only by the first defendant and with her own money.

18. As regards the superstructure it is the common case that a mortgage was executed in 1962 in favour of the Southern Roadways for Rs. 12,000 a further mortgage was executed in favour of Lakshmana Chetty and with the help of these monies the superstructure came to be constructed.

19. Additions to the superstructure were also done with the help of the monies obtained from the mortgage executed in favour of Bhodevi Ammal and the mortgage in favour of the second defendant has come to be discharged by the first defendant. There is no question of contribution by the plaintiff at all as far as the superstructure is concerned. But he would have it that all the mortgages were executed only at his directions by the first defendant. It is very important to note that there are two mortgages in which the plaintiff has attested and they are Ex. D-3 dated 30-6-1962 and Ex. D-5 dated 9-6-1966. Resting on the attestation, I think the principle laid down in the two decisions in Ramaswami Gounder v. Ananthapadmanabha Iyer, ((1971) 84 Mad LW 176) and Jagannatham Pillai v. Kunjithapadam Pillai L. B. 85 Mad LW 112 (AIR 1972 Mad 390) would clearly apply

to this case. It cannot be contended that the plaintiff was not aware of the recitals and therefore the attestation would not in any way constitute an estoppel. If really, as he himself states in his evidence that these mortgages were executed at his direction he would have been aware of the recitals in the documents and in such a case he would be estopped and the two decisions relied upon by the learned counsel for the first defendant Mr. K. Ramaswami fully support his submission relating to estoppel.

20. The learned counsel for the first defendant further contends on the allegations contained in paragraph 4 of the plaint the question of benami would not arise since it is stated "..... the superstructure was secured with the intention to benefit the first defendant." It is submitted that if there was an intention to benefit the first defendant the question of benami would not arise and on the strength of the decision in Annappoornammal v. Shanmugham Pillai (AIR 1971 Mad 370) he would be entitled to succeed and there cannot be a question of any benami. I do not agree. The statement contained in paragraph 4 of the plaint relates to the securing of superstructure in the year 1940. But from the facts of the case, it is clear that the suit site came to be purchased only in the year 1960 and the superstructure thereon was rebuilt subsequently by executing various mortgages. Whatever it may be, since I have found that no portion of the plaintiff's money has gone in for the purchase of either the suit site or the superstructure thereon, the first test laid down by their Lordships of the Supreme Court is not satisfied in this case. All the remaining tests have to be answered in favour of the first defendant, since she alone has been in possession and enjoyment of the property; no motive has been suggested for giving the transaction a benami colour; the title deeds are produced from the custody of the first defendant and the property has been dealt with by executing various mortgages by the defendant in her own capacity as the owner thereof. In this connection, it may also be noted that if really the plaintiff is the owner, there is no reason why he should choose to claim only half of the suit property instead of the entirety.

21. Thus, I answer Issue No. 1 against the plaintiff.

22. Issue No. 2 in C. S. No. 6 of 1973: Properly speaking there ought to be a declaration and I find that there is a specific prayer for declaration with regard to the half share and the suit as framed is therefore, maintainable. Issue No. 2 is answered in favour of the plaintiff.

23. Issue No. 3: No argument has been advanced on this Issue. However, I find that there is valuation with reference to half the share of the suit property and it has also been valued separately for the purpose of declaration under Section 25 (d) of the Madras Court Fees and Suits Valuation Act. Hence the Court-fee paid is correct.

24. Issues 4, 5 and 6: In view of my finding under Issue No. 1, I hold that the plaintiff is not entitled to partition and separate possession, that the plaintiff was never in enjoyment or possession of any portion of the suit property at any time and that the plaintiff is estopped from claiming any share in the suit property. All these Issues are answered against the plaintiff.

25. Issues 2 and 4 in C. S. No. 157 of 1973: From the oral evidence it is clear that the plaintiff was never in possession of the first floor of the suit property while the first defendant (Lilavathi Ammal) has always been in possession through her tenants and was collecting rents. Therefore, she would be entitled to the injunction prayed for.

26. Issue No. 3 in C. S. No. 157 of 1973: No arguments have been addressed as to why the suit as framed is not maintainable and I answer this Issue in favour of the first defendant (Lilavathi Ammal).

27-28. Issue No. 7 in C. S. No. 6 of 1973 and Issue No. 5 in C. S. No. 157 of 1973. In the result, C. S. No. 6 of 1973 shall stand dismissed while C. S. No. 157 of 1973 is decreed in favour of the first defendant (Lilavathi Ammal) in C. S. No. 6 of 1973 and plaintiff in C. S. No. 157 of 1973. Having regard to the fact that the parties are related to each other as husband and wife, I think that this is a fit case in which each of the parties must be directed to bear his or her costs.

Order accordingly.

AIR 1975 MADRAS 282

RAMANUJAM AND V. RAMASWAMI,
JJ.

Prakasam alias Padmini, Appellant
v. Rajambal and others, Respondents.

App. No. 428 of 1968, D/- 20-3-1974.*

(A) T. P. Act (1882), S. 58 (c) — Sale or mortgage by conditional sale.

The document was described as a sale deed but the stamp paper was provided by the transferor, the consideration was

*(Appeal against order of Sub-J., Tiruchirapalli, in O. S. No. 250 of 1963.)

KR/AS/E706/74/JHS

much less than the actual value of the property, patta was not got transferred in favour of the vendee and there was a specific condition that on payment of the 'principal' amount the property should be reconveyed. It was held that the transaction was a mortgage by conditional sale and not an outright sale. AIR 1966 SC 902, Followed. (Paras 4, 6, 7)

Cases Referred: Chronological Paras
AIR 1966 SC 902 = (1966) 2 SCR 915 8
AIR 1961 Mad 276 = 74 Mad LW 23 8
(1956) 2 Mad LJ 565 = 1956 Mad WN 888 8

V. RAMASWAMI, J.:— The plaintiff is the appellant. She is the daughter of one Shanmugha Mudaliar, who died in the year 1959. The first defendant is the mother of the said Shanmugha Mudaliar and the second defendant is his wife and the mother of the plaintiffs. The suit was filed by her challenging certain alienations made by Shanmugha Mudaliar on various grounds. The said Shanmugha Mudaliar had executed a document dated 5-5-1948 in favour of one Papammal, whose legal representatives are defendants 3 to 6 in the suit. In respect of this transaction, the plaintiff's case was that it was executed at a time when the said Shanmugha Mudaliar was insane, that it was therefore null and void and that no right or interest was created in favour of Papammal. Alternatively it was contended that the document is a mortgage by conditional sale or it is a sale with a right of reconveyance and that in either case the plaintiff is entitled to redeem or to get a reconveyance of the same on payment of the sale consideration of Rs. 8,500 as recited in the document itself. The next transaction which was challenged in the suit is a mortgage dated 23-8-1946 executed by Shanmugha Mudaliar in favour of the 10th defendant for a sum of Rs. 2,000. The 10th defendant has assigned the said mortgage in favour of the 9th defendant on 25-11-1952. The 9th defendant filed a suit, O. S. 785 of 1959 on the file of the court of the District Munsif, Tiruchirapalli, obtained a decree on the mortgage and in execution of that decree he himself had purchased that property. This mortgage in favour of the 10th defendant was challenged on the ground that it was executed by Shanmugha Mudaliar at a time when he was insane and that therefore the said mortgage was invalid and could not have been enforced.

2. The plaintiff also challenged certain other transactions in favour of defendants 7, 8 and 11. Since the appellant did not advance any argument relating to the transactions in respect of these defendants, we confirm the finding of the court below in regard to the same

and therefore no detailed discussion is necessary.

3. The main contention of the learned counsel for the appellant in this case is that the findings of the court below that Ex. B-2 dated 5-5-1948 in favour of Papammal is not a mortgage by conditional sale is unsustainable and that it is contrary to law. The document was executed by Shanmugha Mudaliar. It recites that he agreed to convey the property to Papammal in consideration of a sum of Rs. 8,500. Then it sets out the details of the consideration paid amounting to Rs. 8,500 and proceeds to state that since the consideration as stated above has been received, the said Papammal shall, as per the sale deed, hold and enjoy the property absolutely. There is also a recital that there are no encumbrances over the property and that if any encumbrance is to be found the said Shanmugha Mudaliar shall be liable to discharge the same. Therefore, we find the following recital in the document:

[Original in Tamil omitted.—Ed.]

The effect of the above recital is that should the said Shanmugha Mudaliar pay in cash the aforesaid sale consideration of Rs. 8,500 after a period of seven years and within a period of ten years, from the date of execution of the deed, the said Papammal should reconvey the property at the expense of the said Shanmugha Mudaliar. The document is styled as a sale deed. But the stamp papers were provided by the vendor Shanmugha Mudaliar himself.

4. The learned counsel for the appellant contended that the property conveyed under Ex. B-2 is an extent of 7 acres, 94 cents of valuable land, that even at the time of the sale, the property was worth much more than Rs. 30,000, but, the consideration shown in the document was only Rs. 8,500, and that neither a patta transfer application was filed at the time of sale, nor was patta transferred till August 1962. Though the liability of reconveyance is after a period of 7 years and within a period of 10 years from the date of sale, the consideration payable is the same sum of Rs. 8,500, recited in the document, irrespective of the market value of the land as on the date of reconveyance. Further, the document also uses the expression (original in Tamil omitted.—Ed.) The word..... means 'principal'. The document thus states that on payment of the principal amount of Rs. 8,500, the property will have to be reconveyed. These facts, according to the learned counsel, clearly establish that the document is a mortgage by conditional sale and not an absolute sale in favour of Papammal.

5. Section 58 (c) of the Transfer of Property Act defines a mortgage by conditional sale and it reads as follows:

"58 (c) Where the mortgagor ostensibly sells the mortgaged property—on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made, the sale shall become void, or on condition that on such payment being made, the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale, and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

The proviso to the section is satisfied in this case, as the condition is embodied in the document itself. The document also is ostensibly in the form of a sale deed. The learned counsel relies on that portion of the definition which states 'on condition that on such payment being made, the buyer shall transfer the property to the seller' and contends that this condition is satisfied in this case and that therefore the document in this case is a mortgage by conditional sale and not an absolute sale. We are of the view that the learned counsel is well founded in this contention.

6. It is seen from the evidence that the consideration stated in the document works out at the rate of Rs. 1,015 per acre and that actually the value of the property at the time of the transaction was much more than what is recited in the document. Even D.W. 3 the karnam of the village, who was examined on behalf of the defendants, admits in cross-examination that in 1948, nanja lands in Killiyur were sold from Rs. 700 to Rs. 1,700 per acre, though he would add that the suit lands were not worth more than Rs. 1,000 per acre then. The plaintiff has produced a sale deed, Ex. A-3, (registration copy) dated 18-3-1953, under which the property was sold at the rate of Rs. 2,586 per acre. There is no dispute that that property is adjoining the property now under discussion except that the sale under Ex. A-3 was about 5 years after the suit transaction. But there is no evidence to show that the price of properties was increasing in that area or that the increase was so much as from Rs. 1,000 to Rs. 2,500 per acre. We should also bear in mind that the suit property is an agricultural land and unlike house sites in urban area, the increase in value of agricultural lands could not have been so phenomenal. In

Ex. B-14, dated 7-8-1962, which is a lawyer's notice issued by the plaintiff prior to the filing of the suit, the plaintiff had stated that the property was worth much more than Rs. 30,000, at the time of the transaction. Of course, in the reply notice, the defendants had denied that the property was so valuable. But in spite of these assertions by the plaintiff, the defendants had not chosen to let in proper evidence to discredit the evidence of the plaintiff that the suit property was much more valuable than what was recited in the document itself. We have also got the admission of the karnam as D.W. 3 that even at the time of the registration of the document, no patta transfer application was filed. If really the transaction was intended to be a sale, one would normally expect that such a patta transfer application would be filed even at the time of the registration. We find in this case that as late as August 1962, there was no patta transfer and that after the lawyer's notice was issued by the plaintiff to the defendants, the defendants appear to have got the patta transferred just prior to the suit.

7. One other important circumstance in this case is that admittedly Mudaliar provided the stamp papers for the execution of Ex. B-2. Under the Stamp Act, in the case of sales, normally, unless there is a contract to the contrary, it is the purchaser who will have to provide the stamp papers and in the case of mortgages, it is the mortgagor who will have to provide the stamp papers. The supply of stamp papers by Shanmugha Mudaliar is in consonance with the fact that it should have been intended to be a mortgage and not a sale. It may be noted that there is neither allegation much less any evidence that there was any contract to the contrary requiring the vendor himself to provide the stamp papers for the execution of the sale deed. These circumstances, in our opinion, clearly show that the document was intended to be and was a mortgage by conditional sale and not an outright sale of immovable property.

8. We are fortified in this opinion by a decision of the Supreme Court in *P. L. Bapusami v. Pattay*, AIR 1966 SC 902. In that case also, the transaction was identically worded and the deed itself is set out at pages 903-904 of the report. After stating that the consideration was settled at Rs. 4,000, the document proceeded to state—

"As, in all, I have received the sale consideration of Rs. 4,000 as detailed above, you yourself shall, in future, hold and enjoy absolutely the undermentioned properties. In future, neither myself nor my heirs shall have any right or future

claim, whatever, in respect of these properties. There is no other encumbrance, whatever, except the encumbrance mentioned above in respect of these properties. In case anything is left out, I am bound to get the same discharged from and out of my other properties..... Should I pay in cash the aforesaid sale consideration of Rs. 4,000 after a period of five years within a period of seven years from the date of the execution of the deed, during the date of expiry of the said deed of any year (the said properties) should be reconveyed for the very same amount to me. This condition is not valid after the aforesaid period."

Except the last sentence that this condition is not valid, after the aforesaid period, the rest of the recitals in the document is almost identical with those in the document now in question. The Supreme Court held that there were a number of circumstances to indicate that the document was a transaction of mortgage by conditional sale and not a sale with a condition for retransfer. In the words of the Supreme Court—

"In the first place there is the important circumstance that the condition for re-purchase is embodied in the same document. In the second place, there is the significant fact that the consideration for Ex. B-1 was Rs. 4,000, while the real value of the property was, according to the Munsif and the Subordinate Judge Rs. 8,000..... In the third place, there is the circumstance that the patta was not transferred to the 1st defendant after the execution of Ex. B-1 by Palani Moopan..... There is also the circumstance that the kist for the land was continued to be paid by Palani Moopan and after his death, by the sons of Palani Moopan. Lastly, there is the important circumstance that the consideration for reconveyance was Rs. 4,000, the same amount as the consideration for Ex. B-1."

In those circumstances, the Supreme Court held that the document was a mortgage by conditional sale. Except that the kist was paid by the defendants in this case, all the other circumstances pointed out by the Supreme Court are present in this case. We consider that the payment of kist by the defendants does not in any way alter the situation. The Supreme Court also specifically pointed out that there need not be any debtor-creditor relationship prior to the transaction itself in order to make the transaction a mortgage by conditional sale, though if there had existed a debtor-creditor relationship even prior to that document that would be a very consideration, as pointed out by this court in *Ramachandrayya v. Lakshminarayana Rao*, (1956) 2 Mad LJ 565. In the above

decision of this court, it was held further, that the circumstance that the stamp papers were purchased in the name of the transferor is also very relevant in holding that the transaction is a mortgage by conditional sale. We may also point out that the decision relied on by the court below in *Pattay Gounder v. Babusami*, (1961) 74 Mad LW 23 = (AIR 1961 Mad 276) in support of its view that the document is not a mortgage by conditional sale is the very decision which, on appeal, was reversed by the Supreme Court in AIR 1966 SC 902, referred to already.

9. For the foregoing reasons, differing from the court below, we hold that the transaction evidenced by Ex. B-2 dated 5-5-1948 is a mortgage by conditional sale and not an outright sale of the suit properties.

10. Now that we have held that the document is a mortgage by conditional sale, no further question arises. But it should be pointed out that there is no evidence to show that Shanmugha Mudaliar was insane even at the time of the transaction in 1948, though there is evidence to show that he was not in a sound state of mind in 1955. The document is therefore not vitiated on the ground that Shanmugha Mudaliar was not in a sound disposing state of mind in 1948 when the deed was executed. It is not in dispute that if the document were to be construed as a mortgage by conditional sale, the suit is in time and that the plaintiff is entitled to a decree for redemption.

11. Accordingly we set aside the judgment and decree of the court below in so far as Ex. B-2 is concerned and there will be a preliminary decree for redemption of the mortgage Ex. B-2 dated 5-5-1948. The plaintiff will be entitled to proportionate costs in the suit.

12. Though the learned counsel challenged the finding of the court below that the mortgage executed in favour of the 10th defendant was not binding on the plaintiff, since the only ground on which that mortgage was challenged was on the basis that Shanmugha Mudaliar was insane even at the time of that mortgage in 1946 and since that plea has not been established, we have to confirm the finding of the court below that the mortgage in favour of the 10th defendant is valid and binding on the plaintiff.

13. In the result, the appeal is partly allowed in so far as Ex. B-2 dated 5-5-1948 is concerned and dismissed in other respects. The appellant will pay the court-fee due to the Government on the memorandum of appeal. The parties will bear their respective costs in this appeal.

Appeal partly allowed.

AIR 1975 MADRAS 285

NATARAJAN, J.

R. Lingaraj and others, Appellants v. Parvathi, Respondent.

Appeal Against Order No. 27 of 1973, D/- 19-7-1974.*

(A) Lunacy Act (1912), S. 3 (5) — Unsoundness of mind — Test.

The mental condition of a lunatic described under the Act as an idiot or a person of unsound mind, has reference to a deranged or dishevelled mind which is on an entirely different plane than the dull wit or weak intellect of a simpleton or booby. However low the intelligence quotient of a simpleton may be, his mental capacity is referable to an integrated and sound mind, while the mental factor of a person of unsound mind can have reference only to a mind affected by severe congenital subnormality or to a disintegrated or deranged or dishevelled mind. It is in this perspective, the ability of a person with unsound mind to take care of himself and manage his affairs has to be assessed. A person of weak intellect may not have the capacity to look after himself and his affairs in a prudent or acceptable manner, but nevertheless, the capacity of his mind to manage himself and his affairs cannot be called into question. On the other hand, a person of unsound mind is one who is totally unsuited to manage himself and his affairs and such incompetency is directly referable and attributable to the incapacity of his mind. (Para 13)

(B) Lunacy Act (1912), S. 3 (5) — Lunatic — Inability to answer questions relating to measurements — Not a sign of unsoundness of mind.

Where a person is unable to answer questions of a particular kind regarding the height and the distance of places in metres, speed of vehicles in terms of miles per hour etc. it cannot necessarily be said that he is mentally unsound.

(Para 14)

(C) Lunacy Act (1912), S. 62 — 'Capacity to manage himself and his affairs' — Meaning of.

A capacity of a person to manage himself and his affairs may vary from person to person, but the total incapacity which alone would justify a Court finding a person to be of unsound mind is wholly different from the inadequate ability of a person to look after himself and his affairs according to accepted norms and standards and by no stretch of imagination, be equated with incapacity flowing from unsoundness of mind. The

*(Against order of Dist. J., Coimbatore, in G. P. No. 169 of 1969, D/- 23-12-1972.)

degree of a mental soundness of a person brought before the Court for inquisition under the provisions of the Act has to be determined with reference to the facts and circumstances of each case and there is no infallible test which can be prescribed as of universal application in all such cases. (Para 15)

(D) Lunacy Act (1912), S. 62 — Lease of land by alleged lunatic — Does not by itself suggest incapacity arising out of unsoundness of mind.

Merely because a person who is brought up for inquisition by a Court under the provisions of the Act is proved to have found difficulty in managing his estate and leased it to another person, it can never be contended that the action of the person must only be attributed to the incapacity arising from unsoundness of mind. A person can well lease out his estate to a third party for a host of reasons including physical disability, laziness, prudent conduct etc. (Para 16)

Cases Referred: Chronological Paras
AIR 1949 All 449 = 1949 All LJ 158 13
AIR 1935 Pat 423 = 1958 Ind Cas 965 15
AIR 1930 Lah 289 = 122 Ind Cas 570 13

T. R. Rajagopalan, for Appellants;
S. Padmanabhan for M/s. R. Nadanasabapathy and R. Thamodaran, for Respondent.

ORDER:— R. Lingaraj, who has been held to be a lunatic under the Indian Lunacy Act, 1912 (hereinafter referred to as the Act) and respondents 1 to 4 in O. P. No. 169 of 1969 on the file of the Court of the District Judge of Coimbatore (West) are the appellants. The proceedings between the parties have a long and chequered history and for a full appreciation of the controversy it is necessary to refer to the course of the litigation from its inception. Parvathi alias Kundhiammal, the respondent herein, is the wife of Lingaraj. She came forward with a petition under Sections 62 and 67 of the Act for directing an inquisition for the purpose of ascertaining whether her husband, Lingaraj, is of unsound mind and incapable of managing himself and his affairs and for consequential orders and directions of Court, if the Court found on inquisition that Lingaraj is of unsound mind. Though she had given birth to three sons and a daughter through Lingaraj, the respondent's case was that, Lingaraj had been of unsound mind from the year 1967 and he was incapable of managing his affairs. It was her further case that in or about the first week of July 1969, the brothers of Lingaraj who are appellants 3 to 5 herein, decoyed Lingaraj from his house and were detaining him unlawfully in their custody. Subsequent to the decoyming of Lingaraj, one of his brothers by name

Krishnaraj, was also reported to have induced Lingaraj to execute a lease deed in respect of his tea estate, the terms of which were detrimental to the interests of Lingaraj and his family members, and had thereby taken undue advantage of the mental condition of Lingaraj. In those circumstances, the respondent wanted the Court to hold an inquisition about the mental condition of Lingaraj and if the Court found him to be a lunatic, make suitable provision for the custody of Lingaraj and the management of his properties.

2. The petition was resisted by Lingaraj as well as appellants 2 to 5 and in the counter-statements filed by them, it was contended that Lingaraj was not of unsound mind or a lunatic, that he was not incapable of managing himself and his affairs, that he was not decoyed by the appellants 2 to 5, that he was not detained unlawfully and that the lease deed entered into by him was a fair transaction and was forged, for proper and bona fide reasons. It was further contended that the petition had been filed for motivated reasons as Lingaraj had refused to convey his properties to the name of the respondent.

3. The learned District Judge of Coimbatore examined Lingaraj on 26-2-1970 by putting him some questions. On such examination, the learned Judge found that Lingaraj was able to give rational answers to the questions put by him, but nevertheless, he directed the Subordinate Judge of Ootacamund, under Section 66 (1) of the Act, to hold an enquiry regarding the lunacy of Lingaraj and submit a report. In compliance with this order the learned Subordinate Judge examined Lingaraj and submitted a report that he was not a lunatic. The learned District Judge accepted the report of the Subordinate Judge and, without any further enquiry, acted upon it by declaring that Lingaraj was not a lunatic.

4. Aggrieved by the perfunctory manner in which the matter had been dealt with, the respondent preferred Civil Miscellaneous Appeal No. 249 of 1970. Ganesan, J. sustained the contention of the respondent and held that a proper inquisition had not been done in the matter and the District Judge had failed to adopt the prescribed procedure in the matter of holding an inquisition under the Act. Consequently, the appeal was allowed and Ganesan, J. remitted the matter to the learned District Judge for fresh disposal of the case according to law.

5. In the enquiry held subsequent to the order of remand, the District Judge examined Lingaraj on 25-3-1972 and made the following order:

"Adjournment prayed for on behalf of the petitioner refused. The alleged lunatic present. I personally examined him in open Court. He answered questions, but his looks, his behaviour and the manner in which he gives the answers lead me to doubt whether he is mentally normal. Hence I desire to have medical opinion before inquisition is launched. A requisition is to go to the District Medical Officer, Nilgiris, for examination of the alleged lunatic and report as to his mental condition. The alleged lunatic is directed to appear before the District Medical Officer on 14-4-1972 and subsequent days as required by the District Medical Officer. The District Medical Officer shall be intimated of this fact. The petitioner (respondent herein) shall deposit the sum, if any, required by the District Medical Officer....."

Lingaraj was produced before P.W. 1 Dr. Mrs. P. Sarala Krishnamurthy, District Medical Officer, Nilgiris, on 14-4-72. From the evidence of P.W. 1 it is borne out that though Lingaraj submitted himself to an examination by P.W. 1, he did not agree to remain in the hospital for a period of ten days for purposes of observation. Subsequently, the District Judge proceeded with the enquiry of the petition, wherein witnesses including P.W. 1 and the respondent were examined. Contra evidence was adduced by Lingaraj himself as P.W. 1 and two others as P.Ws. 2 and 3. I shall refer to the evidence of P.Ws. 1 to 5 and P.Ws. 1 to 3 at a later stage. Suffice it to say now that the learned District Judge accepted the respondent's case and declared Lingaraj to be of unsound mind and incapable of managing himself and his affairs. He further held that the respondent was only fit and proper person to be appointed guardian of the person and property of Lingaraj and gave necessary directions to the brothers of Lingaraj to hand over Lingaraj to the respondent. It is as against this order, the first appellant Lingaraj as well as his mother and brothers, viz. appellants 2 to 5 have preferred this appeal.

6. Mr. T. R. Rajagopalan, learned counsel for the appellants, contended firstly, that the evidence on record was not adequate to warrant the conclusion that Lingaraj is of unsound mind and incapable of managing himself and his affairs and secondly, that, even if the evidence suggested that he was mentally not normal, the abnormality or subnormality of his mental faculty ought not to be confused with lunacy as envisaged under the Act. Arguing contra, Mr. S. Padmanabhan contended that the testimony of P.Ws. 1 to 5 as well as the answers given by Lingaraj (P.W. 1) himself in cross-exa-

mination left the Court with no other alternative but to hold that Lingaraj was a lunatic.

7. As is well known, no person can have direct experience of the mind of another and therefore the proper test for determining the insanity of a person will be his conduct. Such being the case, it becomes necessary to determine the conduct of R.W. 1 with reference to the testimony of P.Ws. 1 to 5 and R.W. 1 himself besides the evidence of R.Ws. 2 and 3.

8. P.W. 2, the respondent, and her son, P.W. 4 studying in the Pre-University Class, have deposed that R.W. 1 was of unsound mind, that the symptoms became more pronounced from about five years prior to their examination, that he would throw out the food served to him, that he would pick up, beedies from the road and strew them on his food, that he would take a lighted lantern even during day-time and that he would even go to the extent of answering calls of nature in the house itself. P.W. 5, a maternal uncle of P.W. 2, has deposed that for about five years prior to his giving evidence, R.W. 1 had been behaving insanely, that he would walk about the streets in broad daylight with a lighted lantern, that even on rainy days he would carry an umbrella in a folded fashion, that after buying edibles (vadai) and tea in neighbouring shops, he would hand over the cash for the edibles to the tea shopman and the cost of the tea to the hotelier and that R.W. 1 was incapable of heeding to sane advice given to him by his well-wishers. From the evidence of these three witnesses, it is rather difficult to reach a conclusion that R.W. 1 was of unsound mind and had pronounced symptoms of lunacy. Though P.Ws. 2 and 4 are none else than the wife and son of R.W. 1 it is not possible to place wholesale reliance on their testimony. It is obvious that the dispute regarding the management of the properties of R.W. 1 has an impact on the case of the respondent that R.W. 1 is of unsound mind and is incapable of managing his affairs. It is somewhat unlikely that R.W. 1, who had been married to P.W. 2 twenty-three years ago and who had normal conjugal life with her resulting in the birth of four children, would have suddenly developed symptoms of insanity. Many of the details furnished by P.Ws. 2 and 4 in their evidence regarding the insane behaviour of R.W. 1 do not find place in the petition filed by P.W. 2, P.W. 5, being the uncle of P.W. 2, is not an independent witness and as such, his evidence cannot also be given ready acceptance. If really R.W. 1 had been exhibiting symptoms of unsoundness of mind for about five years,

the entire village would have known about his lunacy and consequently, there would be no dearth of witnesses to speak about the mental condition of R.W. 1. Curiously enough, the respondent has not examined any of her neighbours or any of the shop-keepers or any independent witness of the village to speak about the mental condition of R.W. 1. The absence of testimony of any independent witness is certainly a serious infirmity in the case of the respondent.

9. The remaining witnesses to speak about R.W. 1's unsoundness of mind are P.W. 1 the District Medical Officer, Nilgiris, and P.W. 3, an Ayurvedic Vaidyar of Akathuthurai in Palghat District. P.W. 1 has, no doubt, stated that in her opinion, R.W. 1 is not in his proper senses and is incapable of managing himself. Having regard to her qualifications and her disinterested role in the controversy between the parties, her testimony is certainly entitled to weight and consideration. But nevertheless, there are certain features which stand in the way of unreserved acceptance being given to the opinion of P.W. 1. Admittedly, P.W. 1 examined R.W. 1 only for one or one and a half hours and P.W. 1 did not have the advantage of keeping R.W. 1 under observation for the usual number of days in cases of such type. No record has been produced by P.W. 1 regarding the nature and intensity of her examination of R.W. 1. Even if any such record had been produced, it is doubtful if the conclusion arrived at by P.W. 1 regarding the sanity of R.W. 1 can secure forthright acceptance in a Court of law. All that P.W. 1 has stated in her evidence is that she noted the general behaviour of R.W. 1, how he conducted himself and how he answered questions. She has further stated that R.W. 1 was adamant and refused to submit himself for examination and was always attempting to run away. She has also stated that she had to waste a lot of time over him and in all she spent about one or one and a half hours in her endeavour to assess the mental condition of R.W. 1. However capable and competent P.W. 1 might be, in view of her qualifications and her experience in the medical field, it will be neither wise nor just to accord ready recognition to the opinion of P.W. 1 about R.W. 1 being of unsound mind. The symptoms of fright exhibited by R.W. 1 at the time of his examination may be due to the strange atmosphere of the hospital and nervousness developed on seeing ailing patients, doctors, hospital staff etc., at the hospital premises. Whatever it be, the conclusion arrived at by P.W. 1 as a result of her examination of R.W. 1 lasting about one or one and a half hours, during which session, admittedly, a part of the time

was spent in preventing R.W. 1 from running away, is not an infallible one. Unless there are other circumstances and factors which lend support to the opinion of P.W. 1, it would be a hazardous venture to conclude that R.W. 1 had been medically examined by a competent person like P.W. 1 and the result of the examination established the lunacy of R.W. 1.

10. The opinion of P.W. 3, the native doctor, regarding the mental condition of R.W. 1 does not, and in fact ought not to, carry conviction. He claims to be a native physician well versed in the art of giving psychiatric treatment. But, except his own claim in that behalf, there is no other evidence to establish the professional attainments of P.W. 3. According to him, when R.W. 1 was brought to him for treatment, R.W. 1 was suffering from loss of sleep. He is also said to have exhibited abnormal symptoms such as refusing to eat, smoking beedies incessantly, answering calls of nature at all places and expressing difficulty to take bath by himself. From these symptoms, P.W. 3 has drawn his conclusion that R.W. 1 was of unsound mind. However, even according to P.W. 3, the patient viz. R.W. 1 was either partially or fully cured as a result of the treatment given by P.W. 3. R.W. 1, when he was examined by me in the course of the hearing of the appeal, admitted having received treatment from a native physician at Palghat, but according to him, the treatment was for fever and not for any other ailment. It is therefore quite likely that P.W. 3 gave treatment to R.W. 1 for some time, but from that factor alone, I do not think it safe or prudent to accept the opinion of P.W. 3 that R.W. 1 was of unsound mind when he was brought to him and that he gave treatment for such a condition.

11. Ironically, the strength of the respondent's case about R.W. 1 being a person of unsound mind lies in the answers given by R.W. 1 in cross-examination. In his examination-in-chief, R.W. 1 has given a cogent version and refuted the allegation of his wife that he was of unsound mind and that he was exhibiting abnormality of behaviour. The debacle, however, occurred when R.W. 1 was subjected to an exacting cross-examination. Since considerable reliance was placed by Mr. S. Padmanabhan on the answer given by R. W. 1 in cross-examination to sustain the order of the learned District Judge, it is necessary to extract the insensible and irrational answers given by R.W. 1 in answer to several questions put to him in cross-examination:

(After reproducing the evidence in local script the judgment proceeded.)

There is no denying the fact that the answers of R.W. 1 to the questions put to him in cross-examination, as extracted above, clearly go to show that R.W. 1, is not a man of normal or average intellect. But, the crucial question for consideration is whether the stupid and idiotic answers given by R.W. 1 can form the basis for the Court concluding that he is a person of unsound mind and therefore a lunatic within the meaning of the Act. Before proceeding to assess the soundness or otherwise of the mind of R.W. 1 with reference to his performance in the witness-box, I may conveniently dispose of the evidence of R.Ws. 2 and 3:

12. R.W. 2, a former school-teacher, has stated that R.W. 1 was his student in Standards IV and V and that apart from exhibiting a certain dullness of mind, R.W. 1 did not have any symptom of lunacy. I am unable to attach any importance to the evidence of R.W. 2 because the case of the respondent itself is that it was only from about five years prior to the filing of the petition, R.W. 1 began to exhibit symptoms of lunacy. Even the assertion of R.W. 2 that he had been seeing R.W. 1 almost daily for the past several years and that he did not find any abnormality of behaviour in him cannot merit any acceptance, because the alleged meeting of R.W. 2 with R.W. 1 seem to be casual. R.W. 3, Krishnaraj, is the younger brother of R.W. 1 and he has stated that R.W. 1 is not suffering from unsoundness of mind. Since the respondent has accused R.W. 3 and his brothers of having decoyed R.W. 1 and detaining R.W. 1 in their house against his wish, R.W. 3's testimony cannot be characterised as impartial testimony. Inasmuch as R.W. 1 himself has been examined by the trial Judge as well as by me, I do not think it necessary to dwell much upon the veracity of R.W. 3's testimony and the impact the testimony of R.Ws. 2 and 3 has on the controversy between the parties.

13. As has been held by Tek Chand, J. in *Teka Devi v. Gopal Das*, AIR 1930 Lah 289 and which proposition is, by now, well settled, "in assuming jurisdiction under the Lunacy Act, the Court must keep in view the distinction between mere weakness of intellect and 'lunacy' as understood in the Act and it is only with 'lunatics' as defined in Section 3 (5) that the Act is concerned". Dealing with the question as to what would amount to unsoundness of mind, a Bench of the Allahabad High Court held as follows in *Joshi Ram Krishnan v. Rukmini Bai*, AIR 1949 All 449:

"Unsoundness of mind implies some unusual feature of the mind as has tended to make it different from the normal

and has, in effect, impaired the man's capacity to look after his affairs in a manner in which another person without such mental irregularity would be able to do in a matter of his own. The idea suggests some derangement of the mind, whatever be its degree and it is not to be confused with, or taken as analogous to, a mere mental weakness or lack of intelligence.

A man may find it difficult to answer questions of a particular class, but if he intelligently answers questions of various other sorts concerning himself, his family and property, he cannot be classed with men of unsound mind being unable to manage their affairs. If a man is able to understand and answer questions on various matters except those relating to arithmetical calculations, he cannot be regarded as mentally unsound, although he would be held as having a weak or undeveloped mind."

While I am in agreement with the expressions contained in the above two decisions, I would like to add that unsoundness of mind has reference to a mental condition which falls outside the range of the wide spectrum of mental calibre ranging from that of a nincompoop to that of genius. It may well be that at the lower range of the spectrum there is an apparent resemblance between the mental fabric of a nincompoop or a booby, or a lubberly lout on the one hand and a lunatic on the other. But, such superficial similarity ought not to result in confusion. The spectrum of the mental calibre of unsound persons is of entirely different wave-lengths, the range varying from the wave-length of the mind of a mild and harmless lunatic at the base and going up to the top depicting the mind of a violent maniac. The stupidity or the dull-wittedness or the weakness of mind of a simpleton is the sub-terranean level of the structure of the human intellect and the apex of it will extend to the soaring height of the mind of a genius. On the other hand, the mental condition of a lunatic described under the Act as an idiot or a person of unsound mind, has reference to a deranged or dishevelled mind which is on an entirely different plane than the dull wit or weak intellect of a simpleton or booby. However low the intelligence quotient of a simpleton may be, his mental capacity is referable to an integrated and sound mind, while the mental factor of a person of unsound mind can have reference only to a mind affected by severe congenital subnormality or to a disintegrated or deranged or dishevelled mind. It is in this perspective, the ability of a person with unsound mind to take care of himself and manage his affairs has to be assessed. A person of

weak intellect may not have the capacity to look after himself and his affairs in a prudent or acceptable manner, but nevertheless, the capacity of his mind to manage himself and his affairs cannot be called into question. On the other hand, a person of unsound mind is one who is totally unsuited to manage himself and his affairs and such incompetency is directly referable and attributable to the incapacity of his mind. Having thus dealt with the law on this aspect of the matter, I shall now revert to a factual consideration of the state of the mind of R.W. 1 with reference to his examination before the learned District Judge and his examination before me.

14. It may be recalled that, before referring to the unintelligible answers given by R.W. 1 in cross-examination, I had stated that he had given cogent evidence during his examination-in-chief. Even in cross-examination he has given certain rational answers. On reading the entire evidence of R.W. 1 before the District Judge, a strong feeling is aroused that, after having exhibited the normality of his mind by giving cogent and rational answers to questions put to him in the chief-examination, R.W. 1's self-confidence and power of resistance broke down on being subjected to a trying cross-examination. He may have broken down due to nervousness or due to inadequate powers of resistance, a feature commonly found in men of weak intellect. Otherwise, it is incomprehensible that R.W. 1 would have given such irrational answers as saying that he came to Coimbatore from Ooty by plane, ship etc. It is apparent that, after a stage, P.W. 1 had simply begun to affirm whatever suggestion was put to him in cross-examination by the counsel for the petitioner and thus sought escape from further cross-examination at the hands of the counsel. Even in the midst of the taxing cross-examination R.W. 1 has given sensible and rational answers to some questions by saying that the age of his wife was 39 years, that he refused to accede to his wife's demand for handing over the properties to her, that the shirt he was wearing was his own and did not belong to his brother, that the annual lease for his estate was Rs. 3,000, that the lease was evidenced by a deed, that he knows the Co-operative Bank at Coonoor and that he has not attempted to mortgage his property and raise a loan. It is on account of these conflicting features in the evidence of R.W. 1 viz., the sensible manner of answering questions in the chief-examination, the feeble attempt made by R.W. 1 at the earlier stages of the cross-examination to hold his ground and thereafter the utter crumbling down

of R.W. 1 during cross-examination by the total lack of resistance to the onslaught made by the cross-examining counsel; that I deemed it necessary to send for R.W. 1 and examine him myself. When R.W. 1 appeared before me, I put him several questions in the presence of counsel for both sides and R.W. 1 was certainly able to give rational and sensible answers to the various questions put by me. Except exhibiting some nervousness to undergo the examination and coughing involuntarily before answering every question, R.W. 1 did not manifest any other symptom of abnormality. For a full appreciation of the matter it is necessary that the questions put by me and the answers given by R.W. 1 are reproduced here:—

"Q. How many brothers have you got?

A. I have got five brothers and three sisters.

Q. When were you married?

A. 20 years ago.

Q. How many children have you got?

A. I have three sons and a daughter.

Q. What is your occupation?

A. I am looking after my tea Estate.

Q. How many acres of tea estate do you have?

A. Ten acres.

Q. Have you borrowed money from anywhere?

A. I do not have any debts.

Q. Where are your wife and children?

A. They are in Sogathurai.

Q. For how many years are they living there?

A. They are living there for the last five years.

Q. Why are they living separately?

A. They asked me to give away my properties. I refused to concede to their request and hence they have quarrelled and gone away.

Q. Who is cooking food for you?

A. My mother cooks food for me.

Q. Are you prepared to lead life with your wife and children, if they come back to your place?

A. I am willing.

Q. Where are you now and how did you come?

A. I am now in Madras. I came here by train.

Q. Were you treated by any native doctor at Palghat and if so, what was your ailment?

A. I went to Palghat, as I was suffering from fever. I was not satisfied with the treatment given by the doctor and so I came away.

Q. Is it a fact that you picked up beedies and put them in your place of food?

A. It is not true.

Q. What is the type of food you take?

A. I take iddlies, dosai, coffee etc.

Q. Do you have workers in your tea estate?

A. Yes, I have workers and I supervise their work.

Q. How much income do you get?

A. I get Rs. 250 per month.

Q. At that rate what is your annual income?

A. At first the witness stated that it is Rs. 30,000. Later, he corrected and said that it is Rs. 2,400.

Q. Who brought you to Madras?

A. My younger brother Ramachandran brought me to Madras.

Q. Why did your wife and children ask for the estate?

A. I do not know why they made such a demand.

Q. What do you do with the income?

A. The land is leased out. After meeting my expenses, the balance of the lease amount is kept in my box.

Q. Are you willing to allow your wife and major son to look after the tea estate?

A. No. I am not willing."

The record of the answers given by R.W. 1 unmistakably go to show that he comprehends simple questions put to him and that he is able to give relevant and rational answers. At this juncture, it has to be pointed out that many of the questions put to R.W. 1 in cross-examination before the District Judge relate to things like the height and the distance of place in metres, the requirement of cloth for dress in terms of metres, the speed of vehicles in terms of miles per hour etc. The startling answers given by R.W. 1 are in answer to those questions, and the answers themselves are repetitive of the suggestions put to him by the cross-examining counsel. I do not think the stupidity of those answers can be held adequate material to reach the conclusion that R.W. 1 is a person of unsound mind. As the Allahabad High Court had stated in (AIR 1949 All 449), merely because a man may find difficulty in answering questions of a particular class such as those relating to arithmetical calculations etc., but was able to answer intelligently various questions of other sorts concerning himself, his family and property, he cannot be regarded as mentally unsound. It is interesting to note that in the case decided by the Allahabad High Court, the alleged lunatic was not able to say as to how many annas there were in a sum of Rs. 5 what the total would be of 5+10 and whether a sum of annas nine was larger than a sum of seventeen pies. In spite of such answers having been given, the court held that the person was not a lunatic because he was able to give rational and intelligent answers to other

questions put to him regarding himself, his family and family members. The instant case also must be treated as a case of that kind where a person is unable to answer questions of a particular kind regarding the height and the distance of places in metres, speed of vehicles in terms of miles per hour etc. This circumstance certainly ought not to outweigh other factors which clearly warrant the inference that R.W. 1, though a person of subnormal intellect and capacity, is certainly not a person of unsound mind.

15. Mr. S. Padmanabhan, however, placed reliance on *Sonabati Devi v. Narayan* (AIR 1935 Pat 423) where it was observed that it frequently happens that persons of unsound mind are capable of logical answers to questions and of giving a reasonably intelligent account of themselves, but that does not necessarily imply that such persons are capable of looking after themselves or that their minds are in such a condition that would enable them to look after themselves or their property. He would, therefore, contend that even though R.W. 1 has been able to give logical answers to some of the questions put to him, it ought not to be construed that he was mentally sound and capable of managing himself and his affairs. I am clearly unable to agree with the arguments of Mr. Padmanabhan. The degree of mental soundness of a person brought before the Court for inquisition under the provisions of the Act has to be determined with reference to the facts and circumstances of each case and there is no infallible test which can be prescribed as of universal application in all such cases. In the instant case, apart from the basis offered by the irrational answers given by R.W. 1 to most of the questions put to him in cross-examination, there is no other material on which the respondent can lay her hands on and invite the Court to accede to her contention that R.W. 1 is an idiot or a person of unsound mind as envisaged under the Act and consequently, a person incapable of managing himself and his affairs. As stated above, the capacity of a person to manage himself and his affairs may vary from person to person, but the total incapacity which alone would justify a Court finding a person to be of unsound mind is wholly different from the inadequate ability of a person to look after himself and his affairs according to accepted norms and standards and by no stretch of imagination, be equated with incapacity flowing from unsoundness of mind. I have already held that the evidence of P.Ws. 2, 4 and 5 regarding the abnormal behaviour of R.W. 1 is not free from doubt and blemish. Therefore, the contention of the respondent that the

order of the District Judge declaring R.W. 1 to be a person of unsound mind should not be disturbed, cannot be acceded.

16. The last contention of Mr. Padmanabhan is that inasmuch as R.W. 1 has leased out his estate to R.W. 3 soon after the respondent went away to her mother's house with her children, it is patently made out that R.W. 1 is incapable of managing his estate, and therefore, it must be held that he is incapable of managing his affairs. This is also an untenable contention. Merely because a person who is brought up for inquisition by a Court under the provisions of the Act is proved to have found difficulty in managing his estate and leased it to another person, it can never be contended that the action of the persons must only be attributed to the incapacity arising from unsoundness of mind. A person can well lease out his estate to a third-party for a host of reasons including physical disability, laziness, prudent conduct etc. Hence this contention of Mr. Padmanabhan must also fail.

17. A finding by a Court under Section 63 (2) of the Act that a person is of unsound mind and incapable of managing himself and/or incapable of managing his affairs has got far-reaching consequences and must, therefore, be given only after great care and deliberation. Apart from being stigmatised as a lunatic, a person held to be of unsound mind is bound to be deprived, either temporarily or permanently, of the right to manage his properties according to his likes and views. It is, therefore, incumbent on the Court making an inquisition under Section 62 of the Act, to bestow its consideration on each and every aspect of the matter before rendering a judicial finding that the person subjected to inquisition is of unsound mind and needs a guardian for his person and property. For reasons already stated above, the instant case is not one where the first appellant can be declared a person of unsound mind and incapable of managing himself and his affairs.

18. In the result, the appeal succeeds and the order of the learned District Judge is set aside. Once it is held that the first appellant is not a person of unsound mind, it necessarily follows that the order of the District Judge appointing the respondent the guardian of the person and property of the first appellant must also fall to the ground. Having regard to the close relationship between the parties, there will be no order as to costs.

Appeal succeeds.

AIR 1975 MADRAS 292

RAMAPRASADA RAO AND

NATARAJAN, JJ.

The State of Madras and another, Appellants v. R. Ranganatham Chettiar, Respondent.

Appeal No. 772 of 1968 and C. M. P. No. 4476 of 1974, D/- 21-6-1974.

(A) Civil P. C. (1908), O. 41, R. 27 — Production of documents for first time at stage of hearing of appeal — Permission granted by giving opportunity to other side.

Where certain documents which had material bearing on the real question in issue and which were not brought to the notice of the trial court were sought to be exhibited at the stage of hearing of the appeal,

Held that the permission to exhibit the documents should be granted after giving an opportunity to the other side at that stage, as it would result in furtherance of justice to both the parties.

(Para 5)

(B) Constitution of India, Art. 299 — Contract on behalf of Government — May be made otherwise than by formal deed provided it is entered by an officer duly authorised.

Though the words 'expressed' and 'executed' in Art. 299 (1) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorised on this behalf by the President of India or the Governor of a State. A contract whether by a formal deed or otherwise by persons not so authorised cannot be binding and is absolutely void. AIR 1972 SC 915, Followed.

(Para 6)

An auction sale of forest produce held by the District Forest Officer who is one of the officers empowered to negotiate and forge a contract on behalf of the State Government under the Madras Financial Code Vol. II cannot be said to be not in compliance with S. 299 (1) of the Constitution.

(Para 6)

(C) Contract Act (1872), Ss. 2 (h), 4 and 10 — Auction sale of forest produce — Conditions of sale laid down in sale notification — Mere acceptance of highest bid by sale officer whether concludes contract and passes property in goods to purchaser. (Sale of Goods Act (1930), S. 19).

The plaintiff was declared to be the highest bidder at an auction sale of a lease of the right to cut and remove

JR/KR/E481/74/KSB

Casuarina trees in two forest coupes held by the District Forest Officer. The terms and conditions of the sale notification as advertised were to form part and parcel of an agreement to be executed by the purchaser in the sample form attached to the notification. Cl. 13 of the Notification inter alia provided that the sale was subject to confirmation by the District Forest Officer or the Conservator of Forests who reserved his right to reject any bid including the highest bid without assigning any reason. Under Cl. 19 the successful bidder was bound to deposit in addition to the sale amount, a security deposit and had to execute an agreement in the prescribed form within 10 days of the receipt of the order confirming the sale in his favour. The plaintiff had also deposited the entire sale price together with the security deposit. The District Forest Officer, however, did not confirm the sale in favour of the plaintiff, ordered a refund of the sale amount and the security deposit and a second auction sale through Court Receiver was held and the amount was deposited in Court. The plaintiff brought suit for declaration against the State that he was entitled to the amount in Court deposit on second sale and also to a refund of the security deposit.

Held that according to the terms and conditions of auction sale a "successful bidder" would be one who was not only the highest bidder, but also one who has paid the sale amount and the security deposit and a person to whom an intimation as to confirmation of the sale has been sent and who is ready and willing to execute an agreement as provided in clause 19 within ten days of the receipt of the order of confirmation. In the absence of any evidence to show that the plaintiff had received any communication about the written acceptance of the bid or its confirmation or that he had executed any agreement as required by cl. 19 there was no concluded contract between the parties which could be legally enforced.

(Paras 8, 11)

No doubt it is accepted law that on the fall of the hammer a contract of sale is concluded invariably in an auction sale. But this is only a prima facie presumption. This can be set at naught by establishing a manifest intention on the part of the parties to the said auction which would prevent an automatic application of the rule. The passing of title on the fall of the hammer may be an accepted mercantile practice in the case of ordinary auctions. But in a peculiar auction of the kind before us one has to gather the intention of the parties by meticulously invoking each and every condition under which the auction was so held. Whether the fall of the hammer or as in

this case, the acceptance of the highest bid would amount to absolute acceptance or provisional acceptance or conditional acceptance of the offer made by the bidder is a matter which has to be adjudged with reference to the facts of each case and in particular to the conditions and stipulation under which the auction by the department of a State is undertaken. As the words and the conditions in the Forest notification are clear and unambiguous a strict interpretation is called for in the instant case. Non-compliance with any one or more of the conditions so expressed in the contract would necessarily lead to the conclusion that the contract is not concluded though the hammer has fallen in the auction. On the facts of this case there being no concluded contract the property in the goods did not pass to the plaintiff. He was, therefore, entitled to a return of the sale amount and the security deposit made by him.

(Paras 13 to 15)

Cases Referred: Chronological Paras

AIR 1972 SC 915 = (1972) 3 SCR 437 6

AIR 1957 Mad 82 = 69 Mad LW 835 11

AIR 1951 Mad 322 = 6 DLR (Mad) 5 14

AIR 1947 Mad 366 = 1 DLR (Mad) 202 14

The Addl. Govt. Pleader, A. Alagiriswami and K. J. Bhakthavatsalam, for Appellants; K. Sarvabhauman and T. R. Mani, for Respondent.

RAMAPRASADA RAO, J.:— The State of Madras represented by the Collector of Thanjavur, the 1st defendant in O. S. No. 57 of 1967 on the file of the Court of the Subordinate Judge of Mayuram, is the appellant. The plaintiff-respondent brought an action for declaration that he was entitled to the sum of Rupees 23,500.48, which was held in deposit in O. S. No. 90 of 1963 on the file of the Court of the Subordinate Judge of Mayuram, and also for the return of the sum of Rs. 1,420 together with interest which, according to the plaintiff, was payable and refundable to him and to which the defendants, namely, the State of Madras, which is the 1st defendant, and the District Forest Officer, Thanjavur, who was the 2nd defendant, had no right, title or interest. The circumstances under which the suit was filed may be stated thus.

2. Under Ex. B-1 dated 16-7-1963 a Forest notification was issued by the District Forest Officer, Thanjavur, wherein the lease of the right to cut and remove the Casuarina trees in Sodikudy, which lay in two different coupes in the village of Sodikudy, Sodiakudy Taluk, was advertised to be sold in public auction. It is common ground that there were two lots which were so advertised for sale. But the auction could not take place as notified, since there were no bidders.

Again a fresh notification, but a similar one, was issued under Ex. A-1 dated 5-11-1963. The notification itself made it clear that the said right to remove the standing growth from the coupes will be sold in public auction by the District Forest Officer, Thanjavur, or by an Officer deputed for the purpose. There were several conditions which were fully and clearly reduced to writing in the said notification and the notification also attracted an agreement, a sample form of which was admittedly exhibited at the time of sale. Under the notification it was made clear that the conditions of the sale notice or the notification would form part and parcel of the above agreement to be executed. We shall refer to the conditions of the sale in detail as and when it becomes necessary. As already stated, the sale was held in two lots and on 18-11-1963 which was the date of auction held in pursuance of Ex. A-1, the plaintiff became the highest bidder for both the lots, he having bid for the first lot at Rs. 6,850 and for the second lot at Rs. 2,575. He was also called upon to give security as per the conditions of sale, and accordingly the plaintiff paid towards lot No. 1 a sum of Rs. 1,030 and towards lot No. 2 a sum of Rs. 390, making in all a sum of Rs. 1,420 towards security after he had been declared the highest bidder. As is usual, the District Forest Officer through his Range Officer executed receipts Exs. A-2, A-3 and A-4, receipting the above amounts from the plaintiff. In fact, under Ex. B-3, which is the list showing the bids made by the bidders at the said auction, it is made clear that the sale was knocked down in the name of the plaintiff and that besides the sale amount, security deposit in respect of the sale of the coupes in two lots was also receipted by one of the officers of the Forest Department. The District Forest Officer certified that the sale was conducted by him in person and in the presence of certain witnesses and the plaintiff in turn agreed to obey by the conditions of sale as notified in the Forest notification. On the next day the Collector of the District received information about the above auction and in fact, one of the co-bidders as well as a member of the Legislative Council of the State of Tamil Nadu complained that the bid secured by the District Forest Officer was too low and that there were parties who were prepared to pay higher amounts if a re-auction is undertaken. Such complaints were received by the Collector under Exs. B-4 and B-5. The Collector of the District forwarded the said complaints under Ex. B-6 to the District Forest Officer or the Divisional Forest Officer, Thanjavur for remarks. As by then no order of confirmation of the bid was made by

the District Forest Officer and apparently because the Collector of the District also intervened on complaints made by third parties, the District Forest Officer, under Ex. B-12 equivalent to Ex. A-6, invited tenders for the removal of the Casuarina growth in the above coupes. The tender notice also contained a condition that the tender is subject to acceptance or rejection by the Divisional Forest Officer or Conservator of Forests whose decision shall be final and binding on the tenderers. Soon thereafter the District Forest Officer, under Ex. B-8, issued proceedings ordering refund of the sums paid by the plaintiff and as enumerated above. To continue the narrative, third parties tendered pursuant to Ex. A-6 in respect of the Casuarina growth in the two coupes as above. Whilst such proceedings were on, in the office of the District Forest Officer, the plaintiff, aggrieved by the action taken by the District Forest Officer, filed O. S. No. 90 of 1963 on the file of the Court of the Subordinate Judge of Mayuram, the plaint in which has been marked as Ex. B-13, seeking for an order of injunction restraining the defendants from dealing with the rights to remove the standing growth of the Casuarina on the coupes in question and for ancillary reliefs. As is seen from Ex. A-7, the Court in an elaborate order, while refusing to grant the relief as prayed for, felt that the only relief that could be given to the plaintiff would be to restrain the respondents from proceeding with the sale notified by them and in order to safeguard the trees, directed the petitioner, if he is so inclined, to apply for the appointment of a receiver to cut the trees and deposit the sale proceeds into Court so that he could ultimately withdraw the same from Court deposit if he succeeds and if he fails the State may withdraw the same after adjusting the equities. In effect, therefore, a partial interim injunction was granted as prayed for. Thereafter the plaintiff applied for appointment of a receiver in I. A. No. 104 of 1964 on the file of the Court of the Subordinate Judge of Mayuram. This was opposed by the State. In fact, the State attempted to canvass the correctness of the order of Court in granting a partial temporary injunction as above, but was unsuccessful in the said appeal ultimately filed by them. The learned District Judge who heard the appeal filed by the State as against the order of the trial Court which granted a partial temporary injunction, also agreed with the trial Court that it was conducive that a receiver be appointed to cut the trees and sell them in auction and deposit the sale proceeds into Court pending disposal of the suit. On such a direction also being given by

the appellate Court, the State agreed to the course suggested by the plaintiff for the appointment of a receiver. Accordingly a joint memo was filed to that effect by both parties in the trial Court on 11-2-1965. Thereafter the right to cut and appropriate the trees was auctioned under the supervision of Court and there were several bidders in the said auction. One S. Abdul Jabbar was the highest bidder who tendered to purchase the right for a sum of Rs. 24,001. This was accepted by the Court and after appropriating the poundage charge, a net amount of Rupees 23,500-48 was credited to the suit O. S. No. 90 of 1963 on the file of the Court of the Subordinate Judge, Mayuram. It is still remaining in Court deposit. According to the plaintiff, the amount in Court deposit is payable to him. As he was the highest bidder in the auction held by the District Forest Officer pursuant to Ex. A-1 and that he having performed his part of the contract and that his bid having been accepted and as he was called upon to pay an additional security deposit also in conclusion of the said auction, the plaintiff was solely entitled to the amount in Court deposit, as the property in the goods have already passed to him notwithstanding the absence of a formal order of confirmation by the District Forest Officer and the supervening communication of the said order of confirmation to him. On the foot of such an alleged vested right in him, the plaintiff sought for permission to withdraw O. S. No. 90 of 1963 and file a fresh suit for the purpose of establishing his right to withdraw the sum of Rs. 23,500.48 in Court deposit to the credit of O. S. No. 90 of 1963. The permission was granted. Hence the present suit after the plaintiff issued the usual notice Ex. A-9 dated 13-2-1967 under Section 80, C. P. C.

3. The 1st defendant's contention is that the District Forest Officer was only an agency to sell the Casuarina growth in the coupes in question and at no time did he act as a statutory officer to confirm the said bid even though he was the person who took a major part in the auction held on 18-11-1963, and there being no concluded contract either in the eye of law or in accordance with the conditions of sale as is seen from Ex. A-1, the plaintiff would not be entitled to claim the sum in Court deposit as he has no right or title thereto. It is said that the plaintiff might describe himself as the highest bidder, but he has not become the successful bidder in accordance with the terms and conditions of the Forest notification as the bids were not accepted by the competent officer. There is no lawful contract of sale, much less a concluded contract. Further, the plain-

tiff did not offer, nor was he called upon by the Department, to execute an agreement which is also equally imperative under one or the other of the conditions of the Forest notification and in the absence of such an agreement there is no concluded contract between the plaintiff and the State. As in law there could be no implied contract as between a citizen and the State and as such contracts by implication are ruled out by the operation of Article 299 of the Constitution of India, it is said that the plaintiff cannot lay any claim to the amount in Court deposit. It is also stated that the complainants who were responsible to move the Collector of Thanjavur and which movement ultimately resulted in a resale of the goods, did not in any way influence the Department as alleged by the plaintiff. What is stated is that fresh tenders were called for because it was felt by the Department as well as by the Collector, who was also a contemporary supervisory authority, that the bids secured at the auction held on 18-11-1963 were too low and that as public revenue was involved it was felt desirable and expedient that a fresh auction should be held. One other contention of the defendants is that in the earlier action the plaintiff did not pray for a declaration, but sought for only a bare injunction and the plaintiff himself having agreed to have the coupes sold once again in Court by consent is estopped from claiming the amount in Court deposit which belongs solely to the State Government. The 1st defendant who filed the written statement, which was adopted by the 2nd defendant, reiterates that the plaintiff is not entitled to any interest and that he was only entitled to a refund of the amounts paid by him at or about the time when he was declared the highest bidder in the auction held pursuant to Ex. A-1 and that refund orders were also made forthwith and it was the plaintiff who defaulted in withdrawing the said amounts and therefore no question of payment of interest on such amounts would arise. It is also stated that the suit was barred by time. Lastly it was contended that the suit notice under Section 80, C.P.C. was not proper.

4. On the above pleadings the following issues were framed:

1. Whether there was a concluded contract between plaintiff and defendants of the right to cut the trees in Bits Nos. 1 and 2 of the standing growth on suit properties and whether plaintiff became entitled to cut the trees and remove them?
2. If there was a concluded contract, is it not valid as contended by defendant?

3. Whether plaintiff is entitled to the sum of Rs. 23,500.48 in deposit in O. S. No. 90 of 1963 of this Court?
4. Whether plaintiff is estopped from claiming the same?
5. Whether the suit is not sustainable as the cause of action in this suit is different from that in O. S. No. 90 of 1963 of this Court?
6. Whether the suit is barred by limitation?
7. Whether the suit notice is not proper and valid?
8. To what relief is plaintiff entitled?"

On issue No. 4 the lower Court came to the conclusion that no question of estoppel would arise as in the earlier action he could only ask for an injunction and not for a declaration. On issue No. 5 it held that part of the cause of action has arisen only after the Court auctioned the coupes by consent of parties and that it was only on 11-2-1965 the parties agreed jointly to have the standing growth on the coupes to be sold and that gave the cause of action for the plaintiff to institute the action. On issue No. 6 it found that the suit was in time, that the plaintiff filed it within three years from 27-3-1965 when the properties were sold. On issue No. 7 the lower Court was of the view that the notice under Section 80, C.P.C. was in order. On issues 1, 2 and 3, the lower Court came to the conclusion that there was a concluded contract between the plaintiff and the defendants of the right to cut the trees in two lots and that the plaintiff became entitled to cut the trees and remove them and in consequence the plaintiff was entitled to withdraw the sum of Rs. 23,500.48 which was admittedly in Court deposit. It also decreed the suit for the recovery of the sum of Rs. 1,420 which was admittedly the security deposit which the plaintiff deposited at the time of the first auction. It did not, however, grant interest, but gave interest for the period subsequent to the decree. It is as against this the present appeal has been filed.

5. Mr. Kumaraswami Pillai, learned Assistant Government Pleader, contended that on a close and careful scrutiny of the conditions of sale, as also the practice prevailing in the Department in the matter of the said auction, it cannot be said that there was a concluded contract which perforce compelled the State to recognise the plaintiff as the owner of the trees and in consequence the person entitled to the amount now in Court deposit. He filed certain documents in C. M. P. No. 4476 of 1974 at the time of the hearing of this appeal and sought for permission for their reception. This was opposed. The affidavit in support of

this application was filed by the District Forest Officer who conducted the auction and who had already retired about five years before. Whilst setting forth the practice which prevailed in this district and in other districts when such auctions take place under the auspices of the Forest Department, the District Forest Officer alleged that even though auctions are conducted by the District Forest Officer himself and he had the command on the day of auction and accepted amounts from the highest bidder showing that he was so or received amounts by way of security deposit as per the other clauses in the Forest notification, yet it is customary and usual for the Department to follow up such an auction by issuing a memorandum to the effect that the sale of the right to remove the forest property has been confirmed. On the strength of this the practice prevailing in the Department is put forth to the forefront. We see no reason to reject the application of the learned Assistant Government Pleader. Certainly it would have been better if these documents were brought to the notice of the trial Court, so that it could have by itself appreciated independently the force and effect of these exhibits. But that by itself does not prompt us to reject the request of the learned Assistant Government Pleader, for, by exhibiting such documents at this stage after giving an opportunity to the other side, we feel that justice could be furthered and done to both parties. If on the sole ground of delay the application is rejected, it would result in not only hindering justice but would be to perpetrate an irregularity in that we would be avoiding the scrutiny of acceptable material which might have an impact on the real question in issue. For these reasons we allow C. M. P. No. 4476 of 1974.

6. We may at once dispel certain misgivings in the minds of the parties to this litigation regarding the notification and applicability of Article 299 of the Constitution of India. Art. 299 itself provides for contracts made on behalf of any State being executed on behalf of the Governor of the State by such person and in such manner as he may direct or authorise. The question, therefore, is whether the District Forest Officer or the Conservator of Forests, as the case may be, is one of the authorities who has been authorised to enter into such contract or enter into such negotiation leading to such contract. The Forest Manual has been produced before us, to which learned counsel for the respondent had also recourse, which suffered revision from time to time. But in so far as contracts in matters connected with the administration of forests and with the busi-

ness of the Forest Department generally were divided into two classes. The first one is those in which the Department was engaged to extract and supply certain produce to purchasers and the second class of contracts related to those in which the Department sold to purchasers the right to extract certain produce for themselves. It was made further clear in the Forest Manual of 1916, Third Edition, that the contracts under class 2 would also include contracts to remove forest produce as well. In or about 1916 contracts not exceeding Rs. 3,000 would be entered into and dealt with by approved District Forest Officers; and contracts not exceeding Rs. 1,500 by other District Forest Officers. But contracts above these limits should be entered into and dealt with by the Conservator of Forests. In 1927 the instructions remained the same. In 1941 three classes of contracts were created; but we are not, however, concerned with the third class. In so far as the suit matters are concerned, the position remained the same. Uniformly in all these instructions it was made clear that the Officer empowered to make a contract will finally decide on his own responsibility in regard to each contract. He could, however, take advice from his superiors. This would mean that even though he had the right to participate as the auction officer, if he so chooses, he had also equally the right to refuse confirmation after having received the highest bid from the highest bidder for reasons which he need not disclose. We shall presently consider this aspect with reference to the conditions of sale also. In 1954, under the Madras Financial Code, Volume I, clause 51 it was imperative on the part of every Government servant who enters into a contract on behalf of the Government to be responsible for strictly enforcing the terms of the contract and for seeing that no act is done that would tend to nullify or vitiate the contract. Again in the Madras Financial Code, Volume II, corrected upto 31-7-1953, the list of authorities empowered to execute contracts, deeds, etc., on behalf of the Governor of the State was enumerated. It runs as follows:—

(Contd. on Col. 2)

5. Contracts and other instruments relating to the Forest Department (subject to any limits and conditions) fixed by departmental order P.

By the Chief Conservator of Forests, Conservators of Forests, Collectors of Districts, Deputy Conservators of Forests; Assistant Conservators of Forests, the Forest Engineer and Rangers".

Again we have in the Madras Forest Department Code an enumeration of the duties of officers and office business. In clause 67 (1) of the Madras Forest Department Code, corrected upto October, 1941, it is said that the District Forest Officer is responsible for the general management of the forest situated in his division and possesses direct control over the forest establishment employed therein. It is also provided that the Collector as the head of the district possesses general supervision over the District Forest Officer who shall, pending any reference to higher authority, obey any orders which the Collector may issue and that the Collector may call for any paper or any information from the District Forest Officer. With the above background it is seen that the contention of the State that the contract is not in full compliance with Article 299 (1) is not acceptable. In fact, under the manual of instructions, the District Forest Officer is one of the authorities who is empowered to negotiate and forge contract, but in accordance with the prescribed conditions and it was this which was attempted by the District Forest Officer in the instant case when he auctioned the growth in the coupes pur-

bility in regard to each contract. He could, however, take advice from his superiors. This would mean that even though he had the right to participate as the auction officer, if he so chooses, he had also equally the right to refuse confirmation after having received the highest bid from the highest bidder for reasons which he need not disclose. We shall presently consider this aspect with reference to the conditions of sale also. In 1954, under the Madras Financial Code, Volume I, clause 51 it was imperative on the part of every Government servant who enters into a contract on behalf of the Government to be responsible for strictly enforcing the terms of the contract and for seeing that no act is done that would tend to nullify or vitiate the contract. Again in the Madras Financial Code, Volume II, corrected upto 31-7-1953, the list of authorities empowered to execute contracts, deeds, etc., on behalf of the Governor of the State was enumerated. It runs as follows:—

"Under Article 299 (1) of the Constitution of India, the Governor has directed the undermentioned classes of deeds, contracts and other instruments shall be executed as follows:

suant to Ex. A-1. As was pointed out by the Supreme Court in *Union of India v. N. K. (Pvt.) Ltd.*, AIR 1972 SC 915:

"Though the words 'expressed' and 'executed' in Article 299 (1) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorised on this behalf by the President of India. A contract whether by a formal deed or otherwise by persons not authorised by the President cannot be binding and is absolutely void."

No doubt the District Forest Officer is one of the authorised Officers to forge a contract. But the question is whether the acceptance of the highest bid by the District Forest Officer and the receipting of the said amount as having been accepted by the State as the bid amount of the highest bidder, and also the receipting of security deposits which could be called for under the conditions of sale by the auction officer, by themselves would create a concluded contract of sale.

7. For this purpose it is necessary to scan the various provisions of the Forest notification and ultimately find

whether by any act of omission or commission on the part of the District Forest Officer, a concluded and legally enforceable contract was entered into between the parties.

8. We shall refer to the salient clauses in the Forest notification in question. The right to remove the standing growth from the coupes was to be sold in public auction by the District Forest Officer, Thanjavur division, or by an officer deputed for the purpose. Under clause 5 a solvency certificate as prescribed has to be produced by the intending bidders. Clause 5 (d) says that if the bidders do not produce solvency certificates at the time of the sale, they will be allowed to bid at the auction provided they deposit as earnest money an amount of Rs. 1,000 before commencement of the sale. Such deposits of unsuccessful bidders would be returned after the sale is concluded. The successful bidder should, however, pay the full sale amount, and the security deposit as provided in clause 19. If the successful bidder fails to pay the full sale amount and the security deposit as prescribed after the conclusion of the sale, the earnest money will be forfeited and the coupe resold at his risk. Sub-clause (j) of clause 5 provides for an alternative in lieu of the solvency certificate. Clauses 6 and 7 refer to the production of sales tax clearance certificate and the income-tax clearance certificate in cases where the sale amount of the coupe exceeds Rs. 1,000 and if the lease amount exceeds Rs. 10,000 respectively. Discretion is given in clause 8 to the District Forest Officer or other officer authorised to conduct the sale to accept any deposit from any intending bidder. Clause 13 reads as follows:—

"The sale is subject to confirmation by the District Forest Officer, Thanjavur or the Conservator of Forests, Coimbatore, as the case may be, who reserves to himself the right to reject any bid including the highest bid without assigning any reason for so doing. Subject to the right of the District Forest Officer or the Conservator of Forests to reject any bid without assigning any reason therefor, and subject to the fact that the condition of the sale notice have been fulfilled, bidders are warned that the highest bid will be accepted. Even though the bids are absurdly high, sales will not, on this account, be refused confirmation nor will there be any scaling down of the bid nor sale by negotiation at a lower figure".

Clause 15 runs as follows:—

"The sales list shall be signed by the highest bidder and also by any other bidder, if he is asked to do so, immedi-

ately after the sale is knocked down and a certificate must be appended thereto by them to the effect that they have read and understood the conditions of the sale notice, supplemental conditions that may be prescribed at the time of sale and the conditions of the agreement and that they agree to abide by them. A sample form of the agreement will be exhibited at the time of sale. The conditions of the sale notice and any supplemental conditions that may be prescribed at the time of sale will be read out and explained and any other information required will be given at the auction time, and the intending bidders will be required to sign the sale notice in token of their having accepted the conditions mentioned above. All modifications and concessions shall be discussed and settled before the sale commences."

The conditions set out in the notification are to be deemed to form part and parcel of the agreement contemplated in clause 15. Clauses 18 and 19 refer to the method by which the successful bidder of the coupe deposits the sale amount as prescribed therein. Clause 19 is the clause whereunder the successful bidder is bound to deposit, in addition to the sale amount, a security deposit, and it compels him to execute an agreement within ten days of the receipt by him of the order confirming the sale in the prescribed form.

On a fair reading of these clauses it is clear that a distinction is made between the highest bidder and the successful bidder at such auctions. The plaintiff could only claim to be the highest bidder. Though in certain clauses the expressions "highest bidder" and "successful bidder" have been interchange, yet we are of the view that, having regard to the substance of the agreement, though not form, the notification does make out a distinction between the "highest bidder" and "successful bidder". A successful bidder should be deemed to be one to whom a communication has been sent by the appropriate officer intimating him of the order confirming the sale in the prescribed form. Clause 19 makes this very clear. Until, therefore, a confirmation of the sale is sent, persons like the plaintiff can only be pigeon-holed in the compartment of "highest bidder" whose bid may or may not be accepted (see Clause 13). A "successful bidder" would be one who was not only the highest bidder, but also one who has paid the sale amount and the security deposit and a person to whom an intimation as to confirmation of the sale has been sent and who is ready and willing to execute an agreement as provided in clause 19 with-

in ten days of the receipt of the order of confirmation.

9. Bearing the above distinction in mind the argument of Mr. M. S. Venkatarama Iyer has to be considered. Strong reliance was placed upon the text of Ex. B-3 wherein the language deployed by the auctioning officer was to the effect that the sale has been knocked down in the name of the plaintiff in respect of the two coupes and that the security deposit has also been collected as prescribed. What was urged before us was that the plaintiff signed as highest bidder in Ex. B-3 after having been apprised that the sale has been confirmed in his favour. It is singular in this case that the plaintiff did not even go into the box to say that such was the purpose and intent when he appended his signature to Ex. B-3 as highest bidder. There is intrinsic evidence in Ex. B-3 itself to show that the signature of the plaintiff was taken only as highest bidder and not as the successful bidder. The dichotomy between the two expressions 'highest' and 'successful' has been maintained and kept up from the beginning of the issue of the notification till it reached its normal end. The record made by the District Officer in Ex. B-3 is only to the effect that it was he who conducted the auction and that the plaintiff was the highest bidder and that the sale was knocked down in his name, he having paid the full sale amount as also the security deposit called for. But this does not, however, take us any further to infer unequivocally that there was a concluded contract as between the State represented by the District Forest Officer and the plaintiff. The salient feature which is given the go-by in the instant case is that it is imperative in all circumstances for the District Forest Officer or the Conservator of Forests, who are the officers named in the contract or any other officer duly authorised in that behalf to confirm the sale in a manner administratively known. As a matter of fact, clause 15 says that the sale list shall be signed by the highest bidder after the sale is knocked down and a certificate should also be appended thereto by them to the effect that they have read and understood the conditions of the sale notice, as also the supplemental conditions that may be prescribed at the time of sale and the conditions of the agreement to be executed by them as provided in this clause and clause 19. As required under clause 19, no order confirming the sale has been communicated. Therefore, it is clear to our mind that Ex. B-3 which is the main document relied upon by Mr. M. S. Venkatarama Iyer for the purpose of making out a case of a concluded contract be-

tween the plaintiff and the State in the above circumstances does not appear to be tenable or fair.

10. It is in this conspectus that the additional documents produced before us by the State at the appellate stage, which we have allowed, gain importance. Beyond reasonable doubt, it has been established before us that Ex. B-3 is only the formal form prescribed under the Forest notification which introvertically makes a record of contemporaneous events which include mentioning of the various bidders who participated in the auction, the amounts for which they bid, the price at which the lot was knocked down in favour of the highest bidder and how the sale was provisionally confirmed in the name of the highest bidder. The more important aspect which is seen from the practice prevailing in the department is that after making such a record of contemporaneous events on the date of auction, a memorandum invariably is issued by the authorised officer, may be the District Forest Officer or the Conservator of Forest, informing the highest bidder that the sale has been confirmed in his favour. We may express the view that precedents do not only have a binding force in law, but equally have such a value even in the course of administration. The fundamental rule is that even when guidelines are set for administrative action, there should invariably be uniformity unless the exigencies of circumstances requires otherwise. Of course, care has to be taken to see that uniformity does not degenerate into a line of least resistance. As in judicial doctrines, so in administrative actions; decisions taken and acts performed by the executive under similar circumstances are normally uniform. Any tinkering or deviation in the acceptance and working of the age-old practice is fraught with danger, as automatic acceptance of such a change might affect vested rights. It is a common and an equitable rule too that if anything analogous has happened before, then it is desirable to proceed on the same lines. If we bear these fundamental principles in view and particularly the rule of uniformity as of universal application unless there are compelling reasons to deviate therefrom, then we have no hesitation to find that the practice in the Forest Department is that notwithstanding the fact that the District Forest Officer himself is the auctioning officer, and he declares a particular person as the highest bidder and issues a certificate to that effect after receiving both the sale amount and the security deposit, yet by such an act of commission on the part of the District Forest Officer

it cannot be said that everything is at an end and a concluded contract of sale has been forged as between the State on the one hand and that person on the other. Under the Contract Act, all agreements which are legally enforceable are contracts. The question for consideration is whether the plaintiff at the stage when he has become the highest bidder and not the successful bidder as contemplated in the Forest notification can claim to have gained a vested right to enforce the so-called contract which, according to him, was concluded at or about the time when the sale has been knocked down in his favour by the District Officer. Mr. M. S. Venkatarama Iyer's contention is that he has secured such a right. He would go to the extent of stating that as it is an open auction and as the plaintiff has become the highest bidder, it cannot be set aside unless an order of rejection is made by the District Forest Officer. This would be begging the question. The option to reject the highest bid of the plaintiff would arise only if there is further processing before concluding the contract. When there is no concluded contract and so long as that highest bid is subject to further processing and acceptance by the District Forest Officer or the Conservator of Forests, as the case may be, and if it is also imperative as is seen from the language of clauses 15 and 19 that an order of confirmation should be sent by the auctioning officer or other authorised officer to the bidder, then something more has to be done in the instant case so as to complete the link and make it a completely forged and legally enforceable contract. Under clause 13, the sale is subject to confirmation by the District Forest Officer or the Conservator of Forests, as the case may be, who reserves himself the right to reject any bid, including the highest bid, without assigning any reason for so doing. It is also made clear that the highest bid is accepted only subject to the above features. This unambiguous language in clause 13 is also a pointer to the effect that the nomenclature "highest bid" has a meaning different from "successful bid" and that "highest bid" has to be further accepted and it is only on such acceptance it becomes a "successful bid". As long as there is no acceptance by the District Forest Officer and so long as such a communication was not sent and received by the plaintiff as stipulated in clause 19, we are of the view that there is no scope for holding that there was a concluded contract of sale of goods by the State through its authorised officer to the plaintiff on the date when the auction was held and when the plaintiff was declared as the highest bidder. From the trend of events that happened it is seen

that we would be encouraging unjust enrichment if the plaintiff were to be allowed to take the amount in Court deposit pursuant to a contract which obviously did not give him any right which could be enforced in a Court of law.

11. It is also necessary at this stage to refer to the various instructions given to the Forest Department by the Government of Madras under the Forest Codes already referred to. Suffice it for our purpose to refer to the instructions given in page 31 of the Madras Forest Department Code (corrected upto October, 1941) which refer to the duties of officers and office business. Under Section 67 therein, the District Forest Officer is made responsible for the general management of the forest situated in his division and the Collector as the head of the district, possesses general supervision over the District Forest Officer who shall, pending any reference to higher authority, obey any orders which the Collector may issue. We have already referred to the fact that the Collector on receipt of some intelligence about the low bid for the coupes in question passed on the said information to the District Forest Officer under Ex. B-6 for urgent remarks. Obviously, therefore, the auction in question was not a normal one, but which provoked a further investigation or probe due to the supervening complaints by third parties including public men. The Collector, therefore, in exercise of his prerogative, desired that matters should be set right. It was in those circumstances that the District Forest Officer positively acted and never communicated to the plaintiff about the acceptance of the bid. We have already made it clear that until such a letter of acceptance was sent, the subject-matter could only be dealt with as being in the region of an offer which has to be accepted by the appropriate authority to result in a concluded enforceable contract. We are unable, therefore, to accept the argument of Mr. M. S. Venkatarama Iyer that in the instant case there was a concluded contract. The learned trial Judge fell into an error when he expressed the view that later events were taken into consideration by the officers which resulted in the non-acceptance of the highest bid. It is common ground that under Ex. B-7 which is an office note made by the Divisional Forest Officer, he categorically noted that he was not accepting the bid and that he was arranging for a re-auction. The learned trial Judge was of the view that it was mandatory on the part of the Divisional Forest Officer to intimate the essence of the above office note to the plaintiff and put him on notice that his bid was rejected. We

searched in vain the various clauses in the Forest notification in support of the conclusion of the trial Judge that it was obligatory on the part of the Divisional Forest Officer to intimate to the plaintiff that his bid was rejected. The only obligation, contractual as well as legal, appears to be that he should send a communication when he accepts the highest bid and call upon the highest bidder to become the successful bidder by executing an agreement in the prescribed form. It is common ground that no such agreement has been entered into either. This is a notable lacuna in the case of the plaintiff. One other reason why the learned trial Judge came to the conclusion that the contract was concluded between the plaintiff and the defendants is that the Divisional Forest Officer retained the bid amount and the security deposit amount without immediately causing a refund of the same to the plaintiff if his bid was not accepted. The auction was on 18th November, 1963. The Collector communicates about the complaint received by him from Sri C. Muthiah, M.L.C. and another competitor, by his letter dated 23-11-1963. The Divisional Forest Officer, on 23-11-1963, acts on the said information and was satisfied that the highest bid ought not to be accepted by him and on 29-11-1963 he calls for fresh tenders from the public in the matter of the sale of the forest growth in question and soon thereafter on 9-12-1963, under Ex. B-8, intimates the plaintiff that he could come and take back his sale amount and the security deposit amount. In actions concerning Government Officials, more precision cannot be expected. In fact, within a month from the date of auction the officer has made it clear to the plaintiff that he could take back the amounts deposited by him, which obviously means that he was not prepared to accept his highest bid for which the sale was knocked down on the relevant date of auction. We are therefore unable to agree with the learned trial Judge that the District Forest Officer made a belated offer of refund and that itself is another indication to confirm the plaintiff's view that the contract is concluded. In the case reported in *Maddala Thathiah v. Union of India*, 69 Mad LW 835 = (AIR 1957 Mad 82) the facts were entirely different. After calling for tenders and accepting the same the railway authorities placed a definite order for supply of goods pursuant to such acceptance of tender. In those circumstances *Rajamannar, C. J.* and *Panchapakesa Iyer, J.*, held that the railway has committed a breach of contract when they cancelled the balance of quantity outstanding under the contract and de-

sired that the plaintiff should treat the contract as cancelled. In the instant case we have not reached that stage at all. The salient features in this case are that the plaintiff was the highest bidder and he was one who paid both the sale amount and the security deposit. But he did not receive any communication in writing about the acceptance of the bid, nor is it his case that he executed any agreement as specifically called for under the Forest notification; if these are the admitted facts in the instant case, we are of the view that the District Forest Officer still had the right not to accept the bid. He may have myriad reasons for not accepting. But once the bid is not accepted as the facts and circumstances of the case prove, the plaintiff can have no cause of action at all.

12. Mr. M. S. Venkatarama Iyer thereafter relied upon Ex. A-7 to sustain his case. Ex. A-7 is the certified copy of the order in I. A. No. 787 of 1963 in O. S. No. 90 of 1963. The learned Judge was constrained to grant an injunction restraining the State from proceeding with the sale as notified by the officer and contemporaneously gave an advice to the plaintiff to apply for the appointment of a receiver to sell the forest growth obtained from the coupes. What was urged before us is that at that stage if the Government was a party to the appointment of a receiver for the sale of the Casuarina, then it should be understood that the Government accepted that there was a contract and that the property in the goods passed to the plaintiff, and that therefore they had no right in the goods. With respect to the learned counsel, we are of the view that this is a far-fetched contention. The joint memo filed by both the State and the plaintiff for a sale of the coupe property projected a bilateral interest of both the parties over the situation and which did not have the effect of creating any right in either of them. It was only a measure adopted by the parties under directions of Court so as to safeguard the interests of all concerned. The fact that an injunction was granted restraining the State from proceeding with the tenders by then called for, for which purpose alone O. S. No. 90 of 1963 was filed, does not by itself create any vested right in the parties. It is in this way we are of the view that the order Ex. A-7 relied upon by Mr. M. S. Venkatarama Iyer cannot be availed of by the plaintiff to pursue the present action which is essentially one for a declaration that he is the owner of the property which was the subject-matter of the auction and that he is entitled to follow up his rights by laying his hands on the proceeds of such a sale.

13. Incidentally Mr. M. S. Venkatarama Iyer raised the question that the facts and circumstances of this case raises a presumption that the property in the goods has passed to the plaintiff when he was declared as the highest bidder. No doubt it is accepted law that on the fall of the hammer a contract of sale is concluded invariably in an auction sale. But this is only a prima facie presumption. This can be set at naught by establishing a manifest intention on the part of the parties to the said auction which would prevent an automatic application of the rule. The passing of title on the fall of the hammer may be an accepted mercantile practice in the case of ordinary auctions. But in a peculiar auction of the kind before us one has to gather the intention of the parties by meticulously invoking each and every condition under which the auction was so held. Whether the fall of the hammer or as in this case the acceptance of the highest bid would amount to absolute acceptance or provisional acceptance or conditional acceptance of the offer made by the bidder is a matter which has to be adjudged with reference to the facts of each case and in particular to the conditions and stipulation under which the auction by the department of a State is undertaken. It is by now the accepted principle that the guiding or the controlling factor to determine whether a sale is concluded in all its aspects and particularly whether an auction sale which is subject to certain specified conditions has projected a concluded contract of sale depends upon the intention of the parties which has to be gathered from the circumstances and in an auction sale from the conditions under which the auction is held. The ordinary and well accepted rule of construction in all contracts which are reduced to writing is that such writing should be the primary guide for interpreting the contract and the intention of the parties has to be gathered from the letter as well as the spirit of such a written contract. It is also well established that in all such contracts reduced to writing, effect has to be given, unless there are compelling circumstances otherwise, to each and every word used in the said contract, and thus harmoniously and grammatically interpret the entirety of the contract according to the natural and ordinary meaning of the words deployed therein. The only exception in such cases is when there is a clear, unambiguous and manifest intention on the part of the parties to depart from such a natural and ordinary meaning of such words. No doubt, when the terms and words used in a contract are incomplete by themselves or ambiguous in their scope and understanding, then it is possible for

Courts to find the sense and spirit of the contract and thereafter liberally interpret them so as to avoid any absurdity or uncertainty in analysing such a contract. We are not in the instant case confronted with any such ambiguity or uncertainty. The words and the conditions in the Forest notification are clear. A strict interpretation therefore is called for in the instant case. Non-compliance with any one or more of the conditions so expressed in the contract would necessarily lead to the conclusion that the contract is not concluded though the hammer has fallen in the auction.

14. The other aspect which is connected with this argument is whether there has been an absolute acceptance of the contract. Strong reliance was placed by Mr. M. S. Venkatarama Iyer on the judgment of Satyanarayana Rao, J., in the Rajanagarani Village Co-operative Society v. P. Veerasami Mudaly, (1951) 6 DLR (Mad) 5 = (AIR 1951 Mad 322). There the learned Judge dealt with ordinary auctions and in the course of the discussion quoted the observations of the learned Chief Justice in Somasundaram Pillai v. Provincial Government of Madras, 1 DLR (Mad) 202 = (AIR 1947 Mad 366). The observations are to the following effect:

"An absolute acceptance is where the sale officer, or the auctioneer, as the case may be is given full authority to accept a bid unconditionally. A provisional acceptance means that the auctioneer had only a right to receive the bid and pass them on to his superior who is the final authority to confirm and conclude the contract. In that case, the auctioneer acts merely as a sort of conduit pipe to convey the highest bid to the superior. Conditional acceptance has the effect of binding the highest bidder to the contract if finally there is the approval or confirmation by the superior person indicated in the terms of sale. He cannot resile from the contract. It is not open to him to withdraw the offer as in the case of a provisional acceptance and if there is approval the contract becomes concluded and becomes enforceable. No further communication of the approval is needed as there is already a conditional acceptance when the bid was accepted."

Based on the above observations it was said that in the instant case there had been a conditional acceptance and therefore there was no need for any further communication of the approval. This general principle is not of universal application when the parties bid at an auction which is subject to certain specified conditions. When the District Forest Officer did was only ministerial in that he knocked down in the bid in favour of the

plaintiff and accepted him as the highest bidder. The receipt of the security deposit is one further step in the same direction and does not throw any conspicuous light on the situation, as neither expressly or by necessary implication the District Forest Officer announced his acceptance of the highest bid. He reserved for himself his right to approve of the bid as this enabling power was available to him under the conditions of the notification. This power could be exercised by him after striking the hammer as well. He did not communicate his acceptance and take a contract in writing as required in the notification. In the instant case, therefore, the facts project only an inchoate contract towards which something more had to be done so as to make it a binding enforceable and concluded contract.

15. In the above circumstances we are unable to hold that the property in the goods in question did pass to the plaintiff on the fall of the hammer. The property therefore remained as the property of the Government. The subsequent treatment of the property in the auction held by the receiver appointed by Court in O. S. No. 90 of 1963, is, therefore, to be understood as a treatment of the property of the Government and not that of the plaintiff. The parties agreed mechanically for the appointment of a receiver and the sale of the property in a Court auction. But that was obviously without prejudice to the rights of either party. That does not throw any light upon the Court order, or on the right each party held towards the forest growth in the coupes in question.

16. We are therefore unable to agree with the learned trial Judge when he found on issues 1 to 3 and held that the plaintiff is entitled to the sum of Rs. 23,500.48 in deposit in O. S. No. 90 of 1963 on the file of the Court of the Subordinate Judge, Mayuram. Regarding the claim for a refund of the sum of Rs. 1,420 being the security deposit made by the plaintiff under Exs. A-4 and A-5 on 18-11-1963 the plaintiff is certainly entitled to it. As a matter of fact, the District Forest Officer made it clear in his proceedings under Ex. B-8 that the unsuccessful bidder might take back the sale amounts as well as the security deposits. The State of Madras in the written statement have admitted that the plaintiff is entitled to a refund of the sum of Rs. 1,420 deposited by him as security along with the amount of Rs. 9,425 which he has deposited as sale price. The claim made by him is this suit as if the plaintiff was denied such a right and that he was forced to institute an action for its recovery obviously is misconceived. We, however,

make it clear that the plaintiff would be entitled to a refund of the sale price and the security deposit and it is expected that the State would as expeditiously as possible refund the same. The plaintiff, however, would not be entitled to any interest on those amounts as the orders for refund of the amount, as was pointed out even by the learned trial Judge, was made as early as December, 1963.

17. The appeal is therefore allowed with costs in this Court only.

Appeal allowed.

AIR 1975 MADRAS 303

ISMAIL, J.

The State of Tamil Nadu and another, Petitioners v. P. Kanagamani and others, Respondents.

Writ Petns. Nos. 489 and 490 of 1971 etc., D/- 20-6-1974.

(A) Land Acquisition Act (1894), S. 23 (1) — Market value — Determination of — Tenure of land is relevant consideration. (Para 6)

(B) Land Acquisition Act (1894), S. 11 — Award — Nature of — It is only an offer — No certiorari lies against it. (Constitution of India, Art. 226).

An award made by the Collector is only an offer made by him on behalf of the Government to the owner of the land. The Collector acts only administratively in ascertaining the compensation. The award does not constitute a decision or a determination by a judicial or a quasi-judicial officer so as to bring it within the certiorari jurisdiction of the High Court under Art. 226 of the Constitution. AIR 1961 SC 1500, Relied on. Case law discussed. (Paras 11, 18)

Cases Referred: Chronological Paras

AIR 1970 SC 1771 = (1971) 1 SCR 719 17
AIR 1962 All 61 15
AIR 1961 SC 1500 = (1962) 1 SCR 676 11, 18
AIR 1955 Pat 63 = 1954 BLJR 506 14
AIR 1946 PC 75 = 73 Ind App 44 14
ATR 1922 Bom 161 = ILR 46 Bom 366 10
(1909) 4 Ind Cas 914 = 1908 Pun Re 123 9, 11
(1905) ILR 32 Cal 605 = 9 Cal WN 454 (PC) 9, 11, 12
(1903) ILR 30 Cal 36 = 7 Cal WN 249 9, 11

S. Ramalingam, Asst. Govt. Pleader, for Petitioners; M. K. Nambiar for K. K. Venugopal, G. Narayanan, R. Krishnamachari, G. Desappan, R. Ganesan and P. Venkatachalapathi, for Respondents.

LR/BS/F521/74/JHS

ORDER :— These Writ Petitions raise a common question. Having regard to the nature of the question raised, it is not necessary to refer to the facts in detail and it is enough, if the broad facts are stated for the purpose of appreciating the question raised. Manali village in Chingleput Taluk, Chingleput District, was an inam village which became an estate under the Tamil Nadu Estates Land Act, 1908 by virtue of the Tamil Nadu Estates Land (Third Amendment) Act, 1936 (Tamil Nadu Act XVIII of 1936). For the purposes of the Madras Refineries Ltd., a major portion of the lands in the said village was notified to be acquired under the provisions of the Land Acquisition Act, 1894, hereinafter referred to as the Act. The notification under Section 4 (1) of the Act was published in all these cases in the Tamil Nadu Government Gazette on 3-2-1965. The declaration under Section 6 of the Act was published in the Gazette on 9-6-1965. Under the provisions of Section 17 (1) of the Act, possession was taken on different dates even before the passing of the award.

2. The Tamil Nadu Legislature had enacted the Tamil Nadu Inam Estates (Abolition and Conversion into Ryotwari) Act, 1963 (Tamil Nadu Act XXVI of 1963) hereinafter referred to as the Abolition Act. The Government by G. O. Ms. No. 3265, Revenue, dated 21st November, 1966 issued a notification under the Abolition Act for the purpose of taking over the village on 15th December, 1966. The second respondent in W. P. No. 489 of 1971 filed W. P. No. 2816 of 1966 on the file of this Court against the notification of the village under the Abolition Act and obtained an interim order of stay from this Court on 14-12-1966 preventing the Government from proceeding further pursuant to the notification issued under the Abolition Act. As pointed out already, under Section 17 (1) of the Act, possession was taken on different dates even before the passing of the award, of different parcels of land notified under Section 4 (1) of the Act. Some of those lands had been taken possession of even before the issue of notification under the Abolition Act. Under those circumstances, the Government had to make up its mind whether it will proceed with the acquisition of the lands under the provisions of the Act or not. It appears that as a result of a conference the inamdars had with the Government officials and Ministers concerned, G. O. Ms. No. 1111, Revenue, dated 3rd June, 1969 was issued. This Government order referred to the steps that had been already taken under the Act as well as the Abolition Act and the pendency of the writ petition, W. P. No. 2816 of 1966 on the file of this Court as

well as the interim order passed by this court. The Government order stated:

"The question whether proceedings under the Land Acquisition Act can be pushed through in view of the stay orders of the High Court, has been examined by the Government. According to Section 2 (10) of Madras Act 26/63 where the operation of any notification issued under Section 1 (4) of the Act, has been stayed or interrupted by an order of Court or Tribunal or other authority constituted under any law for the time being in force, the notified date shall be the date from which the Government have been in uninterrupted possession of the Inam Estate. In this particular case, the Section 4 (1) notification has been stayed by the High Court. The effect of this is, that the Inam Estate of Manali has not vested in the Government so far. Consequently, the date of vesting will stand postponed due to the operation of the proviso to Section 1 (4) and Section 2 (10) of the Madras Act 26 of 1963. It is learnt that there is some likelihood of delay in the disposal of the Writ Petition filed by Thiru Ramakrishna Mudaliar. In these circumstances, the Government are advised that there is no need to delay the passing of the award in respect of the lands required by the Madras Refineries Ltd. The Government accordingly direct that the award under the Land Acquisition Act be passed for all the lands required for the Madras Refineries Limited without waiting for the decision of the High Court in Writ Petition No. 2816 of 1966. The District Revenue Officer, Chingleput, is requested to take immediate action in the matter."

Subsequently, on 1-12-1969, W. P. No. 2816 of 1966 was dismissed by this Court as having become infructuous.

3. Pursuant to G. O. Ms. No. 11, Revenue, dated 3-6-1969 referred to above, the Land Acquisition Officer, who happens to be the first respondent in all these writ petitions, passed awards in respect of the lands covered by these writ petitions on different dates commencing from 18-8-1969 to 1-7-1970. These writ petitions have been filed by the State of Tamil Nadu for quashing these awards made by the first respondent under the provisions of the Act.

4. Though in the affidavits filed in support of these writ petitions, it was contended that the first respondent acted mala fide in passing these awards, that he had colluded with the inamdars of the village in question and that consequently his act was fraudulent, the only point that was urged before me in the course of the hearing of the writ petitions by the learned Advocate-General, who ap-

"The distinction to be borne in mind is between the grant of an office to be remunerated by the use of land and the grant of land burdened with service. In the former case the land will prima facie be resumable in the latter case prima facie it will not but the terms of the grant or the circumstances in which it was made may establish a condition of the grant that it was resumable. The onus will be upon the grantor to make out such a condition."

Reliance was placed by Mr. Das on ILR (1963) Andh Pra 1085 (Lakshmi Reddy v. Subba Reddy) and (1969) 1 SCR 869 (Begum Suriya Rashid v. State of Madhya Pradesh). These decisions do not take a view contrary to what has been said in the aforesaid Orissa decisions. In the Andhra Pradesh case it was said the effect of enfranchisement of service inams is to disannex the inam from the office by imposing a quit rent and convert it into ordinary property and does not operate as a resumption and a regrant. This proposition is in line with the second dictum indicated above, that is to say, where rent has been quitted in lieu of service and the land is burdened with service, then on the extinction of the service tenure the rent is to be re-assessed. Enfranchisement means nothing else than freeing the service tenure from the obligation of the service.

The Supreme Court decision does not lay down any proposition to the contrary. Their Lordships observed thus—

"There is a distinction between a muafi and a jagir. The former is a remission of land revenue whereas the latter is an assignment of land revenue to the grantee."

On an examination of the facts and circumstances of that case their Lordships held that in Bhopal State the expressions "naslan-bad-naslan" and "Batnan-bad-batnan" in the muafi grant had the same meaning as in a jagir grant.

We would now examine Exts. L and 5/a and see how far they advance the case of the plaintiff. Ext. L is the khatian showing that the suit lands are Nariha Jagir lands. The Hakiyat (status) in column No. 4 is mentioned as Nariha Jagir. The remarks column shows that in 1956 the lands were taken from khata No. 122 and were allotted to khata No. 195. It appears from column No. 13 that the land was assessed to rent of Rs. 5/14/2 out of which Rs. 1/8/- was quitted (Nariha Jagir Mafi). In recording the finding of fact the trial court took into consideration Ext. L and the reasons which influenced it need not be repeated as the finding was not assailed before the lower appellate court.

1975 Orissa/10 IX G—30

Ext. 5/a dated 14-10-60 is the certificate of mutation of rayati lands. After the death of Jamuna the disputed lands were mutated in the name of the defendant as if the lands were rayati. This document is not of much significance. It is of recent origin. Despite the admitted position that the suit lands are Nariha Jagir lands the mutation officer allowed mutation on the footing of its being rayati without understanding the legal import of his own act in determining the nature and character of the tenure. We do not find sufficient justification to take a different view from the concurrent finding of fact on the basis of Ext. 5/a.

17. The significant feature in this case is that Nariha Jagir service tenure was created for the purpose of supplying water to public servants coming to the village. This is a very onerous task. It is a matter of common knowledge that in ex-State areas various classes of public officers used to frequent villages. The Nariha is to supply water to all of them. The annual rent of the disputed land assessed in the khatian is Rs. 5/- and odd. It is difficult, may impossible to imagine that for a remuneration of about Rs. 6/- a Nariha would agree to supply water to the public servants throughout the year. This is a decisive test that the land itself was assigned by the ex-State of Bamra as a remuneration for the services to be performed by the Nariha in the village. The decision taken by the State of Orissa for re-settlement as indicated in Exts. E, F/1 and G is consistent with this conclusion.

Defendant has thus successfully established that land was granted towards remuneration of services and the Nariha Jagir lands were not originally rayati. Both the courts below failed to keep the correct law in view and consequently this aspect of the matter was not clearly analysed by them.

18. Thus, though we agree that the plaintiff is the successor-in-interest, on resumption the lands reverted to the State and the service tenure came to an end. It was open to the State to settle it in the manner indicated in Exts. E, F/1 and G. Defendant made the application and land has been settled on him on rayati basis. Plaintiff was not vigilant and did not take any steps to get her claims, if any, recognised. Defendant has got title to the suit lands which have been settled on him on rayati basis. Plaintiffs' suit is bound to fail.

19. In the result, we set aside the judgment of the lower appellate court and restore that of the trial court though for different reasons. The second appeal

is allowed but in the circumstances, without costs.

B. K. RAY, J.:— I agree.

Appeal allowed.

AIR 1975 ORISSA 146

FULL BENCH

G. K. MISRA, C. J., P. K. MOHANTY AND N. K. DAS, JJ.

Gopaleswar Dharua, Petitioner v. State of Orissa and others, Opposite Parties.

O. J. C. No. 203 of 1974. D/- 14-3-1975.

(A) Patna State Land Revenue Act (3 of 1940), Ss. 3 (xviii) and 101 to 106 — Thekadar — Rights and duties of — Nature and incidents of Thekadari tenure — Bhogra lands in Ex-State of Bolangir — Nature of right of Thekadar in such lands.

A Thekadar in the ex-State of Bolangir was not a tenant and was a mere tenure-holder. He had rights and obligations as mentioned in the Patta and the Kabuliyaat during the currency of the settlement. He had no title in Bhogra lands. He had no right of alienation. There was no right of possession except during the currency of the settlement. He was liable to eviction on various grounds during the currency of the settlement. During the period for which the settlement was valid the Thekadar had a precarious right. At the close of the settlement he had no right. All that was prescribed was that until the next settlement he would continue to collect the land revenue and discharge the duties. The legal position that existed in the ex-State of Bolangir prior to the coming into force of the Orissa Merged States (Laws) Act (1950) on 3-3-1950 was that the Thekadar had no right, title and interest in the Bhogra lands except that he was in possession thereof towards the remuneration for management of the village.

(Para 8)

(B) Orissa Merged States (Laws) Act (4 of 1950), S. 7 (g) — Bhogra lands attached to thekadari tenure in ex-State of Bolangir — Section 7 (g) does not apply — Thekadar does not acquire occupancy rights under S. 7 (g) — (1960) 26 Cut LT 187 and AIR 1961 Orissa 15, Overruled. (Patna State Land Revenue Act (3 of 1940), S. 3 (v)).

Section 7 (g) of the Act has no application to Bhogra lands attached to the Thekadari tenure of the petitioner in the ex-State of Bolangir. Those lands belonged to the State and not to the Ruler in his private capacity. They were attached to the tenure as remuneration towards the work of management of the village by the Thekadar.

(Para 14)

The expression 'land held as service-tenure' in Section 7 (g) cannot refer to any land held under the State. It must be confined to the private lands held by the Ruler

or any member of his family. Section 7 (g) purported to abolish various classes of service-tenures doing private service either to the Ruler or members of his family. In S. 3 (v) of the Land Revenue Act 'Govt.' means the Govt. or administration of the Maharaja and Ruler of the Patna State. Merely because the ex-Maharaja of Patna was the Ruler of the State it does not mean that distinction was not maintained in respect of service tenures under the Government and those under the Ruler in his private capacity. AIR 1975 Orissa 139, Rel. on. Contrary observations in (1960) 26 Cut LT 187 and AIR 1961 Orissa 15, Overruled. (Para 10)

(C) Constitution of India, Art. 226 — Bar to writ by principle of estoppel and waiver — Effect of laches and delay — Discretion of High Court to exercise jurisdiction. (Limitation Act (1963), Arts. 64, 65). (Orissa Merged States (Laws) Act (4 of 1950), S. 7 (g)).

The writ petitioner who was a party to the Bhogra conversion proceedings assisted the Revenue authorities in ascertaining the persons in possession of bhogra lands, signed allotment sheets and executed agreements surrendering the thekadari tenure and the apurtenant bhogra lands. Ever since the finalisation of the settlement in 1953, the reserved lands were all through in the possession of the Government till the date of filing the writ petition in 1973.

Held (i) that even assuming that Section 7 (g) of the Orissa Merged States (Laws) Act was applicable the petitioner was precluded from raising the validity of the settlements and reservation of fifteen acres of land after a long lapse of more than twenty years. The writ application was therefore barred by the principle of estoppel and waiver.

(Paras 21, 23)

(ii) that as the delay of 20 years in filing the petition has not been satisfactorily explained, the petition was also liable to be dismissed on the ground of laches and delay. AIR 1973 Orissa 199, Applied.

(Paras 22, 23)

(iii) that even assuming that Section 7 (g) of the above Act was applicable the petitioner had lost title to the reserved land by adverse possession for the statutory period.

(Paras 20, 23)

Cases Referred: Chronological Paras
AIR 1975 Orissa 139 = ILR (1974) Cut 909

AIR 1973 Orissa 199 = ILR (1973) Cut 339

(1972) 1 Cut WR 178 12

(1968) 34 Cut LT 1360 12

AIR 1961 Orissa 15 = 26 Cut LT 216 12

(1960) 26 Cut LT 187 = (1960) 2 Orissa JD 56

AIR 1959 SC 909 13

M. N. Das, for Petitioner; B. B. Mohanty (Addl. Govt. Advocate), for Opposite Parties.

G. K. MISRA, C. J.:— The writ application was filed on 1-2-1974. The petitioner

filed several affidavits on 15-7-1974, 16-10-1974 and 8-11-1974 making statements of further facts. His case may be stated in short.

2. The petnr. was the Thekadar of the three villages of Budhamunda, Tara and Chuinara in the ex-State of Bolangir, Three Pattas, one for each village, had been issued to him in 1936 for a period of fifteen years from 1-4-1936 to 31-3-1950.

As Thekadar the petnr. was in possession of Bhogra lands along with his co-sharers. The Bhogra lands in villages Budhamunda, Tara and Chuinara were respectively 41.79 acres, 93.82 acres and 40.87 acres, in all 176.48 acres. The ex-State of Bolangir merged in the State of Orissa on 1-1-1948. The Government of Orissa took a decision in 1949 for abolition of Thekadari system with effect from 1-4-1950 after the expiry of the Thekadari Pattas. Accordingly Bhogra conversion proceedings were initiated. The principles to be followed were that five acres of Bhogra lands to be selected by the revenue authorities would be reserved for settlement as service inam jagirs for village officers and those lands which were treated as Bhogra on account of surrender or abandonment by tenants would be settled with those tenants. The other Bhogra lands were to be settled with the Thekaders or their co-sharers according as they were found to be in possession. Subsequently it was decided that those reserved five acres would be temporarily given to the Grama Panchayats to be leased out on annual auction. In the year 1973 a decision was taken that those reserved five acres would be distributed amongst landless persons. Bhogra conversion proceedings were started in April, 50 and concluded on 10-3-1953. Bhogra lands were settled in the three villages as indicated hereunder :

Village Budhamunda

1. Gopaleswar Dharua	Ac. 5.55
s/o. Chaitan Dharua	
2. Raicharan Dharua	Ac. 15.36
s/o. Chandala Dharua	
3. Jani Dharua	Ac. 5.89
s/o. Chandala	
4. Khaman Dharua	Ac. 2.96
s/o. Judhesthi	
5. Rana Gauda	Ac. 7.03
s/o. Sankirtan	
6. Jagir (reserved)	Ac. 5.00
	Ac. 41.79

Village Tara

1. Gopaleswar Dharua	Ac. 32.32
s/o. Chaitan Dharua	
2. Dingar Dharua	Ac. 37.34
s/o. Chaitan Dharua	
3. Gopi Dharua	Ac. 10.55
s/o. Chaitan Dharua	
4. Madhab Dharua	Ac. 8.61
s/o. Sadhu Dharua	
5. Jagir (reserved)	Ac. 5.00
	Ac. 93.82

Village Chuinara

1. Laxman Dharua	Ac. 29.59
s/o. Padamona Dharua	
2. Madhab Dharua	Ac. 6.28
s/o. Sadhu Dharua	
3. Jagir (reserved)	Ac. 5.00
	Ac. 40.87

The petitioner does not challenge the legality of the settlement of some of the Bhogra lands with his co-sharers who were found to be in possession of those lands and on some of the tenants whose lands had been treated as Bhogra in 1936 on account of their surrender or abandonment. The challenge is confined only to the reserved five acres in each of the three villages. Thus the subject-matter of the writ application is confined to 15 acres of Bhogra lands out of 179.48 acres of Bhogra lands in all the three villages. The legality of the settlement in respect of the residual 161.48 acres is not challenged.

Petnr.'s stand is that he is still in possession of these 15 acres of reserved Bhogra lands in the three villages and that he had acquired occupancy right in those lands by virtue of Section 7 (g) of the Orissa Merged States (Laws) Act, 1950 (Orissa Act IV of 1950) (hereinafter to be referred to as the Act) which came into force on 3-3-1950 and that a writ of mandamus and an injunction should be issued against the opposite parties not to interfere with his possession.

Petnr. does not dispute that there were Bhogra conversion proceedings in which his signatures were taken as evidence of his assent to settlement of Bhogra lands in the three villages as indicated above and that he executed agreements on 13th June, 1951 whereby he surrendered his Thekadari right and the Bhogra lands to the State. He, however, takes the stand that he did not know his legal rights and his signatures in the Bhogra conversion proceedings and the agreements were taken by threat and coercion.

3. The case of the opposite parties may be stated in brief. After the Government took a decision in 1949 for abolition of Thekadari system and for conversion of Bhogra lands into raivati lands, Bhogra conversion proceedings were initiated in presence of the petnr. He was a signatory to the settlement made after verification of possession. He executed agreements surrendering his Thekadari rights and the Bhogra lands in the three villages. Section 7 (g) of the Act has no application to Bhogra lands held by the Thekaders in the ex-State of Bolangir. The settlement was finalised in 58. Parchas were distributed and the reserved 15 acres of land remained in the Khas possession of the Government which were leased out on annual auction. Subsequently the lands were given to Grama Panchayats temporarily. The lands have been taken back and distributed amongst the landless persons in 1973. Bhogra lands belong to the State. The Gountia had no

right in them. After the abolition the petnr. acquired raiyati right only in those lands which were settled with him. He has no right in the lands settled with the co-sharers and the tenants and reserved by the Government. He ceased to be in possession of the lands from 1953 onwards. Both before and after the petnr. surrendered the Bhogra lands and the Thekadari right he has no title or possession in the reserved five acres of land in each of the villages. He is estopped from questioning the settlement and the agreements. The writ application is liable to be dismissed both on merits and as having been filed 21 years after the final settlement of the Bhogra lands in Bhogra conversion proceedings.

4. The following questions arise for consideration in this writ application :

- (i) What was the nature of right the Thekadar had in the Bhogra lands during the tenure of the settlements from 1-4-1936 till 31-3-1950?
- (ii) Has Section 7 (g) of the Act any application to Bhogra lands of the Thekadars in the ex-State of Bolangir?
- (iii) Were the Bhogra conversion proceedings conducted in presence of the petnr.? Was he voluntarily a signatory to the ultimate settlement made in the year 53?
- (iv) Did the petnr. voluntarily execute agreements in 51 surrendering his Thekadari rights and the appurtenant Bhogra lands?
- (v) Is the writ application barred by the principles of estoppel and waiver?
- (vi) Is the writ application liable to be dismissed on the ground of laches and delay?

5. Before examining the aforesaid questions it would be appropriate to notice the relevant provisions of the Patna State Land Revenue Act, 1940 (Act III, of 1940) (hereinafter to be referred to as the Land Revenue Act). Section 3 is the Interpretation clause. So far as relevant it runs thus :

"3. In this Act unless there is anything repugnant in the subject or context :

(ii) "Bhogra land" means the land allotted by the Government of the State to a Thekadar in a village in lieu of remuneration for the management of such village and includes all lands recorded as Bhogra under Section 53 of the Act.

(v) "Government" means the Government or administration of the Maharaja and Ruler of the Patna State.

(xiii) "Rent" means whatever is paid, delivered or rendered, in cash or kind by a tenant on account of the use or occupation of land let to him and also includes any service rendered by him.

(xvi) "Tenant" (raiyyat) means primarily a person who holds land for the purpose of cultivating it by himself or by member of his family or by hired servant and is, or, but

for a special contract, would be liable to pay rent or cesses or both for such land and includes also the successors in interest of such persons but not a farmer or Thekadar.

(This definition was introduced in the Patna State Land Revenue (Amendment) Act, 1942 (Act VIII of 1942)).

(xvii) "Tenure-holder" means and includes a Zamindar, Khorakposhakdar, Umrao, an Asli or Shikmi Thekadar and a Muafidar holding a Sanad or Patta from the Government.

(xviii) "Thekadar" means a person who under the provisions of this Act has accepted, or is deemed to have accepted, the assessment of a village and includes his successors as recognised in accordance with the provisions whom a settlement has been made before this Act comes into force, and his successor as recognised in accordance with the provisions of this Act; the term includes both "Asli" and "Shikmi" Thekadars."

6. Chapter XI of the Land Revenue Act deals with village servants. Section 100 gives the various categories of village officers. It runs thus :

"100. There may be the following village servants in respect of each inhabited village—

- (a) The Thekadar (Asli or Shikmi).
- (b) The Thekadar's village Agent, if any.
- (c) The Village Watchman (Chowkidar or Jhanker).
- (d) The Waterman (Nariha)."

Section 101 prescribes the incidents of tenure of a Thekadar which may be extracted.

"101. The incidents of the tenure of a Thekadar shall be as follows—

- (a) the tenure shall be heritable during the currency of a settlement;

It shall not be saleable in execution of any decree, nor shall any decree be passed for the sale thereof;

It shall not be partitioned and shall devolve on one member only of the Thekadar's family unless the Government directs otherwise.

Explanation— Private arrangements may be made by the Thekadar with his co-sharers for the enjoyment of Bhogra lands but these will not be recognised or enforced by the Revenue Courts.

- (b) x x x x
- (c) the tenure shall not be transferable by sale, gift, mortgage, dower, lease or in any other way in whole or part provided that the Thekadar may lease out the Bhogra lands in the village to bona fide cultivators on annual leases during the currency of a settlement but no title can be acquired by such a lessee over such Bhogra lands even though the same were leased out to him for more than a year.

- (d) A Thekadar may surrender his tenure in writing before a Revenue Officer not below the rank of an Officer of the

first grade and similarly a Thekadar within a Zamindari, Khorakposhakdari or Umrai area may also surrender his tenure to his respective Zamindar, Khorakposhakdar or Umrao."

Section 102 deals with rights and privileges of Thekaders. Section 102 is as follows:

"102. (a) No Thekadar shall be ejected otherwise than by an order of a competent Revenue Court passed in accordance with the provisions of Section 103.

(b) x x x x

(c) x x x x

(d) The Thekadar may exercise and enjoy the rights and privileges conferred on him by his Patta and the Wajib-ul-arz of his village."

By Section 103 a Revenue Officer of the first grade may eject any Thekadar on the ground that he has failed to pay the village demand legally payable by him.

Section 104 prescribes the other grounds on which a Thekadar may be ejected.

Section 106 lays down the duties of a Thekadar.

7. During the currency of the settlement a Patta is to be granted to the Thekadar and he is to execute a Kabuliyat. A sample copy of the Thekadari Kabuliyat is to be found in Appendix J (I) of the Final Report on the Land Revenue Settlement of the Patna State, 1937. Whatever has been prescribed in the Land Revenue Act in the various sections has been incorporated in the Kabuliyat. A Patta is granted to him on similar terms. A sample copy of the Patta is to be found in the Wajib-ul-arz in Appendix I of the Final Report.

8. From the aforesaid provisions it would be clear that a Thekadar in the ex-State of Bolangir was not a tenant and was a mere tenure-holder. He had rights and obligations as mentioned in the Patta and the Kabuliyat during the currency of the settlement. He had no title in Bhogra lands. He had no right of alienation. There was no right of possession except during the currency of the settlement. He was liable to eviction on various grounds during the currency of the settlement. During the period for which the settlement was valid the Thekadar had a precarious right. At the close of the settlement he had no right. All that was prescribed was that until the next settlement he would continue to collect the land revenue and discharge the duties. The legal position that existed in the ex-State of Bolangir prior to the coming into force of the Act on 3-3-1950 was that the Thekadar had no right, title and interest in the Bhogra lands except that he was in possession thereof towards the remuneration for management of the village.

9. The next question for consideration is whether the petnr. acquired occupancy right in the Bhogra lands under Section 7 (g) of the Act. Clauses (g) and (h) of Section 7 of the Act as they stood before the amend-

ment by Orissa Act 22 of 1962 may be extracted.

"7. (g) when land is held as service-tenure, either under the Ruler or any member of his family the liability of the holder of such tenure to render service for the use and occupation thereof shall cease, and he shall, on payment of such rent as may be assessed by the State Government as fair and equitable, acquire occupancy right therein;

(h) when a person holds Khamar, Nijjote or any other private land of a Ruler, which has been recognised as such by the State Government, he shall not be liable to ejectment but shall be liable to pay such fair and equitable rent as may be fixed by any competent authority appointed in this behalf by the Revenue Commissioner, Northern Division, as the case may be and thereupon he shall acquire right of occupancy in respect of such lands."

10. It is contended for the petitioner. that he held the Bhogra lands as service-tenure under the Ruler and as the Thekadari system had been abolished he had on payment of such rent as might be assessed by the State Government as fair and equitable acquired occupancy right therein.

The question for consideration is whether the Bhogra lands were held as service-tenure under the Ruler. The expression "Ruler" has been used in collocation with the words "any member of his family". The construction to be given to the word "Ruler" must, therefore, take its colour from the disjunctive words "any member of his family". The Bhogra lands attached to the Thekadari right are not the private properties of the Ruler. They belong to the State; towards remuneration for the management of the village the Bhogra lands are given during the period of settlement to the Thekadar. There was no, nor can there be any, service-tenure in respect of lands belonging to the State under any member of the Ruler's family. Consequently the expression 'land held as service-tenure' cannot refer to any land held under the State. It must be confined to the private lands held by the Ruler or any member of his family.

It is to be noted that under Section 100 of the Land Revenue Act there were four classes of village servants. They were the Thekadar (Asfi or Shikmi), the Thekadar's Village Agent, the village watchman (Chowkidar or Jhankar) and the waterman (Nariha). They were all public servants doing service to the community being appointed by the State and they cannot be put in the same category as persons doing private service and getting remuneration by way of grant of land.

A Ruler or a member of his family had several classes of persons doing private service. They were barbers, washermen, Choukidars to watch their lands, persons who fan the Ruler or member of his family, and persons who prepare sandal paste. The aforesaid instances are merely illustrative but not

exhaustive. Section 7 (g) purported to abolish these classes of service-tenures doing private service either to the Ruler or members of his family. In Section 3 (v) of the Land Revenue Act 'Government' means the Government or administration of the Maharaja and Ruler of the Patna State. Merely because the ex-Maharaja of Patna was the Ruler of the State it does not mean that distinction was not maintained in respect of service tenures under the Government and those under the Ruler in his private capacity.

11. Reliance was placed on Section 7 (h) of the Act to show that therein clearly it was mentioned that a person holding Khamar, Nij-jote or any other private lands of the Ruler would acquire occupancy right in certain circumstances. Section 7 (h) would throw no light on the construction of Section 7 (g). It was well known that there were many tenants having no occupancy right in respect of Khamar, Nij-jote or any other private lands of the Ruler. In respect of lands held directly under the State persons had occupancy right, so clear provision had to be made in respect of Khamar, Nij-jote or private lands of the Ruler. Merely because in Section 7 (h) the classes of land were specifically expressed, it does not follow that in the absence of similar expression in Section 7 (g) the service tenures would be extended to the lands belonging to the State and not to be restricted to lands held by the Ruler in his private capacity. The Legislature made the position clear that the expression 'any member of his family' in collocation with the word "Ruler" would carry the meaning that the abolition of service tenures dealt with in that clause related to the private lands of the Ruler. This is so because no member of the Ruler's family had any other land excepting Khamar, Nij-jote or any other private land. They could not have any service tenure in respect of the lands belonging to the State.

This view had been taken by a Bench of this Court in ILR (1974) Cut 909 = (AIR 1975 Orissa 139), (Bhagaban Gouda v. Ukla Dei) with reference to Nariha Jagir lands in the ex-State of Bamra State. In paragraph 9 thereof the following observation was made:

"Thus, Section 7 (g) does not apply to all lands held on service tenure. It has application to service tenure held either under the Ruler or any member of his family."

12. Mr. Das, however, placed reliance on a Bench decision of this Court consisting of Narasimham, C. J. and J. K. Misra, J. in (1960) 26 Cut LT 187, (Krushna Ch. Meher v. Hrushikesh Meher). In paragraph 26 their Lordships observed as follows:

"Statutory recognition to the conversion of Bhogra lands into ryoti lands in Bolangir district is given in clause (g) of Section 7 of the Orissa Merged States (Laws) Act, 1950." To that case the State of Orissa, was not a party, the contest was between the ex-Theka-

dar and his co-sharers in a suit for partition. The co-sharers claimed a share which was challenged by the ex-Thekadar. It was to the benefit of both the parties in that case to contend that they had acquired occupancy right on the strength of Section 7 (g). The point raised before us was not canvassed therein and it was assumed that Section 7 (g) applies to Bhogra lands attached to the Thekadari tenure which was abolished. The aforesaid observation made by their Lordships is contrary to law and to that limited extent the decision is hereby overruled.

In 26 Cut LT 216 = (AIR 1961 Orissa 15), (Diriu Patra v. Minaketan Patel) J. K. Misra, J. sitting single also held: that the plaintiff in that case acquired occupancy right under Section 7 (g). The plaintiff was an ex-Thekadar and lands were settled with him by the State of Orissa during Bhogra conversion proceedings. His Lordship held:

"So, both under this law and by the re-settlement proceeding the plaintiff acquired a new title to the Bhogra holding as a tenant." The observation that the plaintiff acquired occupancy right under Section 7 (g) was not based on any discussion. The State was not a party to that case. That part of the observation does not lay down good law.

In (1968) 34 Cut LT 1360, (Mahadeb Patnaik v. Dula Dei) the applicability of Section 7 (g) was also incidentally raised. There also the State was not a party. The nature of the service tenure whether it was held under the State or under the Ruler is not clear from the judgment. That case, therefore, furnishes no useful guide for determination of the question in issue.

In 1972 (1) Cut WR 178, (Bhatri Kisan v. Antaryami Mahakud) A. Misra, J. dealt with a case of Chakran Mauafi or service tenure in the ex-State of Benai. The judgment does not make clear whether Chakran jagir land was held under the Ruler or any member of his family or under the State. It was assumed that Section 7 (g) applies to Chakran jagir. The distinction pointed out by us was not raised or examined in that case.

13. The same conclusion would be reached if we notice the genesis and history of Section 7 (g) of the Act.

In the Orissa Merged States (Laws) Ordinance, 1949 (Orissa Ordinance No. IV of 1949) which came into force on the 30th December, 1949, sub-clauses (h) and (i) of clause 7 were inserted as follows:

"7. Notwithstanding anything contained in the tenancy laws of the merged States as continued in force by virtue of Article 4 of the States Merger (Governor's Provisions) Order, 1949—

X X X X X
(h) when land is held as service tenure, either under the Ruler or any member of his family the liability of the holder of such tenure to render service for the use and occupation thereof shall cease, and he shall, on

payment of such rent as may be assessed by the Provincial Government as fair and equitable, acquire occupancy right therein;

(i) when a person holds khamar, nij-jote or any other private lands of a Ruler, which has been recognised as such by the Provincial Government, he shall not be liable to ejectment but shall be liable to pay such fair and equitable rent as may be fixed by any competent authority appointed in this behalf by the Revenue Commissioner or the Commissioner Northern Division, as the case may be and thereupon he shall acquire right of occupancy in respect of such lands :

Provided that such liability of the holder of any service tenure shall not cease and no occupancy right shall acquire to him therein if, on the application of the Ruler the Provincial Government direct that the holder shall continue to render such service."

Though the proviso was placed under sub-clause (i) it was really a proviso to sub-clause (h). The proviso prescribed that the liability of the holder of any service tenure shall not cease and no occupancy right shall accrue to him therein that the holder should continue to render such service. This proviso in unmistakable term indicates that the service tenure referred to in sub-clause (h) was in respect of the private lands of the Ruler and not in respect of the lands belonging to the State in which there was service tenure for public purposes. All the ex-States in Orissa excepting Mayurbhanj merged in the State of Orissa on 1-1-48. By December, 1949 when the Ordinance came into force the Rulers had lost their sovereignty and they had no voice or say as to service tenures in respect of lands vesting in the State of Orissa. The proviso conferred certain privilege on the Rulers and not even on the members of their family. If the Rulers so liked they could retain the service tenures and in such a case the holders of the service tenures would not be entitled to occupancy right and the services would continue.

In the Orissa Merged States (Laws) Act, 1950 sub-clauses (h) and (i) of the Ordinance were retained as Section 7 (g) and (h) word for word without any alteration and the proviso continued as before under clause (h) though really it was a proviso to Section 7 (g).

In the Orissa Merged States (Laws) (Amendment) Act, 1951 (Orissa Act XXXI of 1951) the proviso in clause (h) of Section 7 of the Act was omitted.

Thus the history of the legislation regarding insertion of the proviso and its subsequent deletion clearly indicates that initially a privilege had been conferred on the Rulers to retain service tenures in respect of their private lands. This privilege was taken away by the Orissa Act XXXI of 1951.

Reliance was placed by Mr. Das on AIR, 1959 SC 909, (Raghubar Sarup v. State of U. P.). We are unable to understand why

the decision was cited. Therein Thekadari tenures were abolished by legislation. Certain leases had been granted to the Thekadars by the ex-Ruler of Ranpur. Their Lordships held that the Thekadars could not claim any right in those leases which were terminated by the Thekadari Act.

14. We would sum up our conclusion by saying that Section 7 (g) of the Act has no application to Bhogra lands attached to the Thekadari tenure of the petitioner. Those lands belonged to the State and not to the Ruler in his private capacity. They were attached to the tenure as remuneration towards the work of management of the village by the Thekadar.

15. We now proceed to examine the course of events relating to Bhogra conversion. Annexure 1 is the copy of letter No. 1548 dated 5th February, 1949 from the Secretary to the Government of Orissa, Revenue Department, to the Secretary to the Chief Administrator and Commissioner. The subject was conversion of Bhogra lands into rayati in Patna State. Detailed reference need not be made to this letter as in partial modification thereof Annexure C, a copy of letter No. 14340/S-SL-Ten. 114/49 dated the 19-12-1949, from the Secretary to Government, Revenue Department, to the Commissioner, Northern Division, Sambalpur, was issued. The entire Annex-C is extracted hereunder :

'Copy of letter No. 14340/R-SL-Ten. 114/49, D/- 19-12-1949 from the Secretary to Government, Revenue Department to the Commissioner, Northern-Division, Sambalpur.

Ref. :— Your letter No. 5721 Rev. DI-29-8-1949.

Sub :— Conversion of Bhogra lands into rayati in Patna State.

In partial modification of the Government Order No. 1458/R dated 5-2-1949 on the subject noted above I am directed to convey the following decision of Government.

The Thikadari system in Bolangir Patna should be abolished as soon as the present pattas lapse i.e., on 1-4-1950.

2. All lands recorded as Bhogra in the 1936 settlement excepting items mentioned hereunder will be settled in rayati tenancy with the Thikadar and his co-sharers according to their present possession. The possession will be determined entirely by Revenue authorities and the decision of the Commissioner, Northern Division shall be final in this regard :

Items to be omitted from Bhogra are :—

- (a) Lands recorded as Bhogra in the 1936 settlement from the abandoned holdings of tenants and the surrendered holdings, and
- (b) Five acres of Bhogra lands to be selected by the Revenue Authorities subject to confirmation reserved for settlement as service Inam (Jagirs) for village Officers.

3. Such of the Thikadars as are required to continue collection till 1951 should do so on the usual terms of collection.

4. Abandoned holdings and surrendered holdings recorded as Bhogra in the settlement of 1936 as mentioned in clause 2 (a) above shall be settled preferably with the tenants who originally surrendered or abandoned the holdings or their heirs on suitable terms. Government desire that proposals in this respect should be sent to Government for approval before final orders are passed.

5. The five acres of reserved land mentioned in clause 2 (b) above shall be assigned as service jagir to a village officer who is expected to discharge all the miscellaneous duties mentioned in Section 106 of the Patna State Land Revenue Act banning the duty of collection of rent and cess. The office will preferably be given to the Thikadar or one of his co-sharers to be selected by the Revenue Authorities.

6. In order to avoid all legal complications the Thikadars should be persuaded to surrender the Thikadari on the broad conditions that have been accepted by Government. A deed of agreement will be taken from each Thikadar on that basis after the forms have been duly approved by the Law Department. A draft deed of agreement may please be furnished to Government as early as possible.

7. Government have also been pleased to order that in case Government cannot set up an alternative machinery for revenue collection work and such other work of preparing list of lands held by Thikadars and cosharers as well as preparing upto date accounts of the assessment of village; the Thikadars have to continue till 1-4-1951 on the usual terms of collection.

Steps may please be taken as early as possible to implement the decision of Government mentioned above."

16. The Bhogra conversion proceedings in respect of the three villages were separately started on 4-4-1950. We would refer to the order sheets relating to village Budamunda only and not to the order sheets of the proceedings relating to the other two villages as they were similar. On 4-4-1950 notice was issued to the Thekadar of Budamunda by the Superintendent of Land Records (S. L. R.) giving out the details of instruction of the Revenue Department and inviting objections, if any, within fifteen days from the date of service of notice. The Thekadar was required to submit papers such as Village Akapadia, Bhogra settlement and List of encroachment within one month from the date of service of the notice. Notice was served on 29-4-1950. The order sheet dated 9-6-1950 shows that no objections were filed and no settlement papers as required under the notice were submitted. On 16-5-1950 correction list of persons then possessing the Bhogra land and list of alienation were pre-

pared in presence of Gopaleswar Dharua (petnr.), Thekadar, which were read over to him. He signed the list with an endorsement that he had understood the contents thereof. On 8-2-1951 notice was issued and duly served on the villagers. The Bhogra lands were verified regarding possession by the Patwari and had been checked by the Revenue Inspector (R. I.) on 3-2-1951. The Tahsildar submitted separate settlement forms to the S. L. R. for confirmation. The order-sheet dated 4-2-1951 shows that Gopaleswar Dharua (petnr.) and his co-sharers signed the resettlement statement of the Bhogra lands on the abolition of the Thekadari system with the endorsement to the effect that the aforesaid settlement of Bhogra land was read over to them and they agreed to the settlement of Bhogra land and put their signatures in token of their assent. The settlement as was made in favour of the petnr., his co-sharers and the tenants and the five acres of reserved land has already been extracted. Thus the petnr. was a party to the reservation of five acres of land out of the total Bhogra lands. On 15-3-1951 the petnr. filed an objection before the S. L. R. not to settle the Bhogra lands with his co-sharers on raiyati basis. This objection was rejected by the S. L. R. by his order dated 7-4-1951 passed on the back of the objection petition. The petnr. signed the agreement on 13-6-1951, the contracting parties being himself and the Governor of Orissa whereby he surrendered the Bhogra lands settled on him in the year 1936 as appurtenant to the office of the Thekadar. The terms of the agreement would be referred to at a later stage. On 30-10-1951 the proposed settlement was submitted to the Collector. On 22-11-1951 notice was issued to the petnr. and others wherein it was recited that they had executed an agreement on 13-6-1951 to surrender the Thekadari right and the Bhogra lands and that they had agreed on 8-2-1951 to possess the Bhogra lands as mentioned therein. They were intimated that settlement statement was being sent to the Member, Board of Revenue, Sambalpur, for final confirmation and it was open to them to file objection, if any, within fifteen days of the date of receipt of the notice, before the Member, Board of Revenue. On 25-3-1952 the Member, Board of Revenue confirmed the same and passed the following order:

"The Thikadar and the co-sharers in possession have agreed to the distribution of the old bhogra and the new bhogra as finalised in this regard by the Collector. By notice they were given an opportunity to bring to my notice errors if any in the arrangement. The time-limit has expired and no objection has been filed within the time. Arrangement proposed is reasonable and is hereby confirmed. Collector will arrange issue of patta and taking of cabuliyat accordingly. The jagir reserved will be in khas possession of the State and will be leased out temporarily on auction and for one year only for culti-

vation. Khas collection of rent in the village has already started on 1st January, 1952." After receipt of the order of the Member, Board of Revenue, the Collector passed the following order on 5-4-1952:

"Informed the S. D. Os. about the jagir land which required to be auctioned before agricultural season. Immediate auction. Put up Parcha for signature and enter the details in the Maintenance Register."

On 10-3-1953 there was distribution of Parchas and all other work was finished and the proceeding was completed.

17. It would thus appear that the petnr. was a party to the Bhogra conversion proceeding. With his full knowledge settlement of some Bhogra lands was made on co-sharers and tenants and five acres were reserved. He raised no objection and signed the statement. There was no evidence of any threat or coercion in the case, and the entire proceeding was closed in 1953. The five acres of reserved land were directed by the Member, Board of Revenue to be in Khas possession of the State and were to be leased out temporarily on annual auction. The collection of rent by the Thekadar also came to an end by the first January, 1952. The Collector also directed the S. D. Os. to auction the five acres of reserved jagir land before the agricultural year.

As has already been stated, the State had title in the Bhogra lands and the petnr. had none. Only during the currency of the settlement he was to enjoy the lands towards his remuneration for the management of the village. The settlement came to an end on 1-4-1950. All through he had a precarious right and he had no right after 1-4-1950. Lest any legal complication may arise, an agreement was taken from the Thekadar who surrendered the Thekadari right and the apurtenant Bhogra lands to the State. This was merely by way of abundant caution and was not necessary in law after the expiry of the period of settlement on 1-4-1950. The decision of the State Government under Annex-C to abolish Bhogra lands was an executive act. The petnr. was fortunate that the State Government decided to confer occupancy right on him in respect of Bhogra lands which were in his possession. This was done on just and equitable ground as since long the Thekaders and their co-sharers were in possession of the Bhogra lands towards their remuneration. They had, however, no right to claim. If the State Government had decided otherwise, the entire Bhogra lands could have been disposed of by the State Government in any manner they chose.

18. The agreement between the petnr. on the one hand and the Commissioner, Northern Division acting on behalf of the Governor of Orissa on the other runs thus:—

"An agreement made this the 13th day of June, 1951 between the Governor of Orissa (hereinafter called 'the Governor' which expression unless repugnant to the context shall include his successors and assigns) on the one part and GUPALESWARDHARUA son of late CHAITAN DHARUA of CHHUNARA P. S. BELAPARA District Bolangir (hereinafter called 'the Thikadar' which expression unless repugnant to the context shall include his heirs, administrators, executors and assigns) of the other part;

Whereas the abolition of the Bhogra system of land tenure and the conversion of the same into Raiyati holdings will be to the best interest of the Thikadar;

And whereas the abolition of the said Bhogra system of land tenure shall confer permanent rights on the Thikadar and his heirs;

And whereas the Governor has decided to abolish the said Bhogra system of land tenure and the Thikadar has agreed to surrender his Thikadari interest to the Governor;

Now these presents witness and the parties hereto hereby agree as follows:—

- (1) That the lands recorded as Bhogra in the settlement operation of 1936 (hereinafter called 'the said lands') which are in the possession and enjoyment of the Thikadar and his Co-sharers by virtue of his holding the office of the Thikadar shall be surrendered to the Governor along with the said office of the Thikadar.
- (2) The said lands shall be re-settled with the Thikadar and his co-sharers or any other tenant on Raiyati basis or otherwise on such terms and conditions as the Governor may consider expedient or proper.
- (3) That the holdings abandoned or surrendered by tenants prior to 1936 and recorded as Bhogra land in the settlement of 1936 shall not be treated as part of the Bhogra tenure and may be resettled with the original tenants who abandoned or surrendered the holdings on Raiyati basis or with any other person or tenant in any manner as the Governor may decide.
- (4) That the Thikadar shall continue to hold temporarily the office of the Thikdar, if required to do so, under a temporary patta for such period as the Governor may determine;

It is hereby expressly agreed by and between the parties hereto that if in the matter of this agreement any dispute or difference arises, the same shall be referred to the Revenue Commissioner, Orissa whose decision shall be final and binding on the parties.

In witness whereof the parties hereto have put their hands and seals the day and

year first above written.
Sd/- Gupalswar Dharla
Signature of the Thikadar.

In the presence of
Seal.

Witnesses (1) Sd/- Sobnath Thikadar
Rajibhata
(2) Sd/- Narasingha Sahu
vill. Laherjuri.
Seal Sd/- Illegible
signature of the
Commissioner, Northern
Division, Orissa acting in
the permises for and on be-
half of the Governor of
Orissa.

In the presence of
Witnesses (1) Sd/- Illegible
Dy. Collr.
(2) Sd/- Somanath Pani
Tahasildar."

The preamble to the agreement itself shows that the abolition of the Bhogra system of land tenure and the conversion of the same into raiyati holdings would be to the best interest of the Thekadar and the abolition confers permanent rights on the Thekadar and his heirs. It is on this consideration that the Thekadar agreed to surrender his Thekadari interest to the Governor. In the body of the agreement there is no term regarding reservation of five acres of land as was directed in Annex-C. It was accordingly contended that five acres of land could not have been reserved. The contention is without any substance. Para 6 of Annex-C itself made provision for such agreement to avoid legal complications. The source of the authority was Annex-C notice of which was given to the petnr. It was not necessary in the agreement to make any provision for reservation of five acres of land.

19. The position, therefore, is that the petnr. cannot have any title in any Bhogra lands other than those which were settled with him on raiyati basis. The State could reserve five acres of land for disposal in any manner it liked.

20. These five acres of land, were at first regained in the Khas possession of the State. Subsequently they were given to the Gram Panchayats and in 1973 they have been distributed amongst landless persons. In 1963 the Government of Orissa in the Revenue Department in their letter (substituted for that Department letter No. 24214/R dated 12-4-1963) gave the following direction regarding settlement of reserved Bhogra lands in the ex-State of Bolangir. The relevant portion runs thus :—

"I am directed to say that after the abolition of Thikadary system in the ex-State of Patna in the district of Bolangir, 5 acres or 25 per cent. of Bhogra land whichever was less was reserved for Gram Panchayats. Though in the meantime the Gram Panchayats have started functioning these lands continu-

ed to be under the management of Government and were being settled by annual auction with the highest bidders. It is the settled policy of Government to make over these reserved Bhogra lands to the Gram Panchayats. In conformity with this policy Government have now been pleased to transfer the reserved Bhogra lands in the ex-State of Patna to the control and management of the Gram Panchayats on the following condition viz.

x x x x"

These reserved lands were directed to be brought back to the control of the Revenue Department and distributed amongst landless persons in accordance with the existing lease principles. The letter is extracted hereunder :

"Copy of letter No. EA-I-No.- 6/73-19492/R dated 17-3-1973 from Sri P. R. Chandra, Deputy Secretary to Government, Revenue Department, Orissa, Bhubaneswar addressed to the Land Reforms Commissioner, Orissa, Cuttack.

Sub :— Leasing out of reserved Bhogra lands of the ex-State of Patna in the district of Bolangir brought back to the control of Revenue Department from Gram Panchayats.

Ref :— This Department letter No. 36415-R dated 3-7-1970.

I am directed to say that Government have been pleased to decide that the reserved Bhogra lands which after abolition of thikadari system in the ex-Patna State had been given to the Gram Panchayats, and were subsequently brought back to the control of the Revenue Department by the above mentioned Government order, should be settled with the landless persons in accordance with the existing lease principles. It appears that these lands have not been leased out for the year 1972-73. Necessary instructions may, therefore, be issued to the Collector, Bolangir for implementing the above decision with immediate effect."

It would thus appear that five acres of reserved land are all through in the possession of the State from 1952 to the date of the filing of the writ application and the petnr. has not been able to produce an iota of evidence in support of his case of continuance in possession. The petnr. is not entitled to any injunction. Moreover, the State Government are in possession of the reserved five acres of land for more than the statutory period of 12 years in their own right, title and interest and the petnr. has no subsisting title even assuming that originally he had acquired occupancy right under Section 7 (g) of the Act which we have negatived.

21. The petnr. was a party to the Bhogra conversion proceedings. When Bhogra lands in possession of different persons were ascertained he assisted the revenue authorities. He signed the allotment sheets. He executed agreements surrendering the Thekadari tenure

and the appurtenant Bhogra lands. Even assuming that Section 7 (g) of the Act applies, he is precluded from raising the validity of the settlements and reservation of the fifteen acres of land after a long lapse of more than twenty years. The principle of estoppel and waiver fully applies to this case.

22. The writ application has been filed about twenty years after the finalisation of the Bhogra conversion proceedings and the consequential settlement on co-sharers and tenants on raiyati basis and reservation of five acres of land in each of the villages. In ILR (1973) Cut 339 = (AIR 1973 Orissa 199), (Bishnu Charan Mohanty v. State of Orissa), the following principles were laid down after examining all the relevant Supreme Court decisions. In paragraph 14 thereof their Lordships observed thus:

"14. The various considerations to be kept in mind while determining whether a writ application is liable to be dismissed on account of laches and delay may be summed up, on an analysis of the principles enunciated in the aforesaid decisions, as follows:

- (i) The limitation Act has no application to writ petitions. Where, however, a suit for identical relief would be barred by the law of limitation, the Court would ordinarily refuse to exercise discretion to grant relief under Article 226.
- (ii) Even if a suit for the same relief is not barred by limitation under the Limitation Act, yet the High Court may refuse to issue a writ, if otherwise the delay is not explainable by satisfactory reasons.
- (iii) The important circumstances to be borne in mind in all such cases are: The length of the delay, and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as it relates to the remedy.
- (iv) Where by the conduct of the party, the delay might fairly be regarded as equivalent to a waiver of the remedy, the relief under Article 226 would be refused.
- (v) Even if the conduct or act is not equivalent to a waiver, if the neglect of the petitioner put the opposite party in a situation in which it would not be reasonable to place him if the remedy is afterwards granted, the relief under Article 226 should be refused on account of delay and laches.
- (vi) Utmost expedition is the essence for a claim under Art. 226, and
- (vii) No hard and fast rule can be laid down. Each case is to be determined on its own facts and circumstances."

We endorse the aforesaid principles as representing the correct law. Most of these principles apply to the facts of this case. The writ application has been filed about twenty years after the finalisation of the Bhogra conversion proceedings. The delay in filing the writ application has not been explained by any satisfactory reason. The delay in this case is equivalent to a waiver of the remedy. We do not find any sufficient reason to interfere in this case in exercise of our jurisdiction under Article 226 of the Constitution.

23. Our conclusions may now be summed up:

- (i) The Thekadars in the ex-State of Bolangir had a precarious right in the Bhogra lands. They were in enjoyment thereof during the currency of the settlement having no right, title and interest therein and were evictable under certain conditions. After the expiry of the tenure they had no rights to continue in the lands.
- (ii) Section 7 (g) of the Act has no application to such Bhogra lands.
- (iii) The petnr. was a party to the Bhogra conversion proceedings and voluntarily accepted the settlement after surrendering the Thekadari tenure and appurtenant Bhogra lands on execution of agreements with the Governor of Orissa.
- (iv) Ever since the finalisation of the settlement the reserved lands are in the possession of the Government. Even if Section 7 (g) of the Act was applicable to Bhogra lands the petnr. has lost title to the lands by adverse possession.
- (v) The writ application is barred by the principle of estoppel and waiver.
- (vi) The writ application is liable to be dismissed on the ground of laches and delay.

24. On the aforesaid analysis, the writ application is dismissed; but in the circumstances, parties to bear their own costs.

MOHANTI, J.:— I agree.

DAS, J.:— I agree.

Application dismissed.

AIR 1975 ORISSA 155

R. N. MISRA AND P. K. MOHANTI, JJ.
Pratima Das, Petitioner v. State of Orissa and others, Opposite Parties.

O. J. C. No. 1060 of 1974, D/- 15-11-1974.

(A) Evidence Act (1872), S. 115 — Estoppel — Reversal of examination result — Illustrative case.

The petitioner studying in the B.Sc. class was selected for admission to the M. B. B. S.

AS/DS/A114/75/JHS

course on the basis of marks obtained in the competitive entrance examination for the M. B. B. S. course. The petitioner left her B.Sc. course and was admitted to the Medical College. Sometime thereafter her admission was cancelled as it was found that in the entrance examination she had, in fact, secured lesser marks than some other candidates who were not selected. The petitioner had all the qualifications prescribed for selection. Apart from heavy financial loss which the petitioner had suffered through the negligence of the authorities it was not possible for the petitioner to go back to her former college and pursue her studies there. It was held that the plea of estoppel was attracted and the order cancelling her admission was liable to be quashed. AIR 1971 Ori 276 and AIR 1956 Mad 309 and AIR 1972 Mys 135, Followed. (Paras 5, 6)

Cases Referred : **Chronological Paras**
 AIR 1972 Mys 135 = (1972) 1 Mys LJ 5 4
 AIR 1971 Orissa 276 = ILR (1971) Cut 242 4
 AIR 1965 SC 1812 = (1965) 3 SCR 283 4
 AIR 1956 Mad 309 = (1956) 1 Mad LJ 25 4
 (1892) 19 Ind App 203 = ILR 20 Cal 296 4
 (PC)

S. C. Mahapatra, for Petitioner; Addl. Govt. Advocate, for Opposite Parties.

R. N. MISRA, J.:— This is an application for a writ of certiorari to quash the order dated 7-10-1974 (Annexure 7) issued by the Principal of the M. K. C. G. Medical College at Berhampur (opposite party No. 5) cancelling the admission of the petitioner into the 1st Year M. B. B. S. Class and for a writ of mandamus to allow the petitioner to continue as student of the 1st year M. B. B. S. Class of the said College on the footing that she has been validly selected as per the intimation given to her on 21st of September, 1974 under Annexure 5.

2. The petitioner passed the 1st year Degree (Science) Examination of the Utkal University with Physics, Chemistry and Biology as group subjects and during the 1974-75 session was studying in the 4th year B.Sc. Honours Class of the S. B. Women's College at Cuttack. In July, 1974, a notice was published calling upon eligible candidates to submit applications in the prescribed form for admission into the 1st year M. B. B. S. Class of any of the three Medical Colleges of Orissa during the 1974-75 session. The petitioner made an application and was assigned Index No. 1448. She appeared at the entrance examination. On 21st of September, 1974, a list of successful candidates was published in the local newspapers. She was communicated in writing on 21st of September, 1974 (Vide Annexure 5), that she had been selected and was required to take admission in M. K. C. G. Medical College at Berhampur by 30th of September, 1974, failing which her name would be expunged from the selection list and she would not be entitled to take admission. On receipt of the com-

munication, she procured the necessary documents as indicated in Annexure 5, obtained transfer from the Women's College at the Utkal University to which that college was affiliated as she was now to join in the M. K. C. G. Medical College under the Berhampur University and finally took admission on 27-9-1974 and became a student of the 1st year M. B. B. S. Class of that College. She was obliged to make payments on obtaining transfer from the College at Cuttack and in obtaining admission into the Medical College at Berhampur. She also became a boarder in the hostel attached to the Medical College. Lectures started from 7th October, 1974 and she duly attended the same. On the 8th of October, 1974, in the afternoon, she came to learn that her admission had been cancelled and on the following day she received the communication to that effect under Annexure 7, which was to the following effect:

"The name of Smt. Pratima Das, Roll No. 39, 1st year M. B. B. S. class who took admission on 27-9-1974 is hereby removed from the College Rolls from the date of issue of this notice as she was selected by mistake due to error in decoding. Her admission was cancelled as per proceedings of the Selection Board meeting held on 2-10-1974."

She challenges this cancellation as opposed to rules of natural justice, being an act without authority and raises the plea of estoppel so far as the opposite parties are concerned.

3. The selection for admission into the three Medical Colleges of the State, namely, the S. C. N. Medical College at Cuttack, the V. S. S. Medical College at Burla and the M. K. C. G. Medical College at Berhampur, is done by one Selection Board consisting of the Principals of the three Colleges being opposite parties 3, 4 and 5. The Principal of the Medical College at Burla was the Convenor of the Selection Board for the year 1974-75. A counter affidavit on behalf of the opposite parties has been given by the said Principal. The procedure of holding the entrance examination has been described thus:—

"That after the applications were received and necessary scrutiny was made every applicant was given an Index Number and the said Index Number was communicated to the candidates. Thereafter, the applicants sat at the entrance examination in three different colleges. After the examination was over all the answer papers from the three different colleges were brought to the office of the Director of Health Services at Bhubaneswar. In the office of the Director of Health Services a code number was given to each of the papers and the portion containing the Index Number was torn away and kept in the office. The answer papers with the Code number and without the Index Number were sent to the office of the Convenor at Burla. The papers were examined at Burla and marks were awarded and all

the answer papers were again sent back to the office of the Director of Health Services. The Director of Health Services, Orissa, decoded the list and sent the list consisting of marks to the Selection Board. The Selection Board in accordance with the mark list made the selection. The deponent respectfully submits that while decoding there was an error in case of the petitioner as a result of which the selection Board selected her for admission and she was provisionally admitted into the M. K. C. G. Medical College, Berhampur.

That soon after the torn piece of Index Number which was preserved in the office of the Director of Health was also sent to the Convener and while affixing these torn pieces to the answer papers it was found that the petitioner having Index Number 1448 has actually obtained 25 marks. The last student who has been selected by the Selection Board has got 33.5. Therefore, by no stretch of imagination the petitioner could be selected for admission. Having found out the mistake in question, the selection board advised to cancel the admission which was provisionally given to the petitioner."

4. Mr. Mohapatra for the petitioner contends that even if the plea of mistake as raised in the counter affidavit is correct, the mistake was confined to one side and was not mutual. The petitioner had the requisite qualification for admission into the Medical College as she satisfies the requirements of the Statutes prescribing the minimum requisite qualification for admission into the Medical Course. As the seats in the Medical College are limited and there are more applications than seats, the entrance examination has been prescribed to make the selection. The petitioner had taken the examination and was expecting to be selected. When the order of selection was duly communicated to her, she discontinued her studies in the 4th year Honours Class of the S. B. Women's College at Cuttack and took transfer from that college as also migration from the Utkal University and rushed to Berhampur for taking admission. She made all the payments prescribed, produced all the papers required and was admitted into the College and thus duly became a student of the Berhampur University. In this process about two months have been lost. A huge amount of money has been spent. There is no possibility for the petitioner to go back as a student of the Women's College at this point of time and even if she is re-admitted after spending all the money necessary, she runs the chance of falling short of prescribed attendance and on account of the dislocation of studies, she apprehends that she might fare badly in her Honours papers. According to Mr. Mohapatra, on the representation of the opposite parties, the petitioner has changed her position to her prejudice in such a way that it is difficult for her to be restored to the status quo ante. In that view of the

matter, the opposite parties must be taken as estopped from disputing the petitioner's selection.

Reliance is placed by Mr. Mohapatra on a number of decisions in support of the plea of estoppel. In the case of Smt. Gita Mishra v. Utkal University, ILR (1971) Cut 242 = (AIR 1971 Ori 276) the Utkal University had declared the petitioner to have passed the Final Examination of the 1st year Degree (Arts) held in April 1970 and a provisional certificate was also issued to her. She applied for admission into 2nd Year Degree Class and was duly communicated by the Principal of the Women's College that she should take admission by 21st of July, 1970. In the meantime, the petitioner received an intimation that no seat was available to her in the 2nd Year Degree Class as the result of her 1st Year Degree Examination having been cancelled by the University. Dealing with the plea of estoppel, this court stated:—

"The next question for consideration is whether opposite parties Nos. 1 to 3 are estopped from questioning the success of the petitioner in English even assuming that the reference to the Board was contrary to the rules and the Board had no power to award the pass marks. The principle of estoppel is a rule of evidence and is embodied in Section 115 of the Indian Evidence Act. It runs thus:—

'When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.'

There can be no dispute that opposite parties Nos. 1 to 3 by their declaration in the mark-sheet that the petitioner secured 30 marks in English caused or permitted the petitioner to believe that she has passed in English. The last date for filling up the form for the supplementary Examination was the 6th July, 1970. By that date she knew that she had passed in English and accordingly did not fill up the form for English. Thus, she acted upon the belief based upon the Mark-sheet that she had passed in English. In terms of the section, opposite parties Nos. 1 to 3 cannot be allowed to deny the truth of the fact that the petitioner secured pass marks in English provided the representation was intentionally caused. Mr. Rath contended that what was done by the University was purely by mistake and not by fraud or any other animus to establish that it was intentional. The meaning of the word 'intentionally' as used in the section is no longer *res integra*. In the leading authority on the point is *Sarat Chunder Dey v. Gopal Chunder Laha*, (19 IA 203) it was observed thus:

"A person who, by his declaration, act, or omission, had caused another to believe

a thing to be true and to act upon that belief, must be held to have done so 'intentionally' within the meaning of the statute, if a reasonable man would take the representation to be true, and believe it was meant that he should act upon it.'

This decision has been accepted as laying down good law in *R. S. Maddanappa v. Chandramma*, (AIR 1965 SC 1812). The mark list given to the petitioner showed that she had secured pass marks in English. Any reasonable man would take this representation to be true and believe it was meant that he should act upon it. The representation was, therefore, intentionally made. All the ingredients of the section have, thus been fulfilled and opposite parties Nos. 1 to 3 are estopped from challenging the petitioner's marks in English being 30.

The estoppel arose not only from the active representation made on the basis of mark list but also out of negligence on the part of the University."

It is true that the facts of the above case are somewhat different, but the principle indicated therein, in our view, has application.

In the case of Registrar v. Sundara, AIR 1956 Mad 309, a bench of the Madras High Court was examining a plea of estoppel. The petitioner in that case had taken the Secondary School Leaving Certificate Examination held by the Board of Secondary Education, Government of Madras, in March, 1952. In due course, the S. S. L. C. Book was despatched to him with the marks obtained by him at the public examination entered in it with a rubber stamp certificate running to the following effect:

"Certificate completed.

Eligible for admission to University course of studies, Andhra, Madras or Annamalai Universities."

On the strength of the certificate, the petitioner sought and obtained admission to the Intermediate class of the college course of the Madras University in a college at Madurai. In March, 1953, he sat for the examination held by the College at the end of the 1st year of the Intermediate course and on 7th of April, 1953, he was promoted to the Senior Intermediate Class. While he was studying in that class, some time in December, 1953, he was served with a letter from the principal of the college to the effect that in the list of S. S. L. C. holders of Madras, 1952, published in the State Gazette, the name of the petitioner was not found and on further verification it transpired that the Board of Secondary Education had cancelled the certificate of eligibility. Therefore, the petitioner's name was struck off the rolls of the college. The court accepted the plea of estoppel and held that the University did hold out that the endorsement on the certificate was prima facie proof of declaration of eligibility of the candidate concerned. It is on the strength of the endorsement that the

Principal could proceed to make admissions. The case was one of legal or equitable estoppel which satisfied practically almost all the conditions embodied in Section 115 of the Evidence Act. A mandamus was, therefore, ordered to issue to the University of Madras and to the Principal of the College to forbear from preventing the petitioner to complete his Intermediate course and appear for the Intermediate examination in due course.

In the case of K. R. Shivadatta v. Government Medical College, AIR 1972 Mys 135 the court was required to examine almost a case of this type. The petitioner there after passing the Pre-University Examination of the Mysore University held in March-April, 1971, asked for admission into the Pre-Professional Course leading to M. B. B. S. in one of the Medical colleges in the State. He claimed one of the seats reserved for political sufferers under the appropriate rules. His claim for the reserved seat was admitted by the Selection Committee and the petitioner was duly intimated that he had been provisionally selected for admission. The petitioner was directed to join the college on or before a prescribed date. The petitioner had then joined the 1st Year B.Sc. Degree course in a College of Mysore. On receipt of the intimation, he obtained his discharge from the College after paying the full-term fee and on the same day he paid the requisite fee and obtained admission in the Medical College. Three days thereafter he was communicated cancellation of admission by the selection Committee on the ground that the marks obtained by the petitioner in the qualifying subjects were less than of one who had been left out of consideration. Accordingly the other candidate was given the seat and the petitioner's name was transferred to the waiting list for the political sufferers category. Thereupon, he approached the High Court. The Court repelled the contention that the provision of the General Clauses Act that one who makes a selection can unmake it did apply and held that the Selection Committee after having made the selection became functus officio. It had no power to cancel a selection. We are of the view that this principle has also equal application to the case in hand. We have not been shown any rules or instructions which authorise cancellation of a selection.

5. Undoubtedly the petitioner has changed her position substantially to her prejudice on the representation of the Selection Board and it would now be impossible to restore the status quo. Even if the heavy financial burden which has come to her on account of sheer negligence of the selection Board is kept out of consideration, it is not possible for the petitioner to go back to her old college and pursue the course of studies from which she had withdrawn half-way. We would agree with learned Additional Government Advocate that if there had been a statutory prescription in regard to admission

into the Medical College and the petitioner was wanting any of these requirements, there might have been some force in his submission that estoppel may not operate. Admittedly, petitioner has all the qualifications as laid down by the University. Examination has been prescribed for making a selection because there are more candidates than seats. In such a situation, there is no bar to attract the plea of estoppel. We are satisfied that the principle of estoppel directly applies and the defence raised by the opposite parties in support of the order of cancellation cannot be permitted to stand as a bar against the petitioner continuing in the Medical college. It is surprising that due care and attention were not bestowed in the matter of selection and such a mistake crept in. We have to hold that it is an act of sheer negligence which has led to such an unfortunate situation. The scheme evolved for the process of selection has been frustrated, yet we cannot in the facts of the case refuse relief to the petitioner.

6. We would accordingly allow the application, quash the impugned order of cancellation by issue of a writ of certiorari and direct issue of a writ of mandamus to the opposite parties to refrain from interfering with the petitioner's continuing as a student in the 1st Year M. B. B. S. Class of the M. K. C. G. Medical College at Berhampur. The opposite parties shall not act upon the order of cancellation and are directed to give effect to the order of the Selection Board on the basis of which the petitioner has been admitted into the college. The petitioner must have her costs of the proceeding. Hearing fee is assessed at rupees one hundred.

MOHANTI, J.:— I agree.

Application allowed.

AIR 1975 ORISSA 159

S. K. RAY, J.

Binod Jena and another, Appellants v. Abdul Hamid Khan and others, Respondents.

Second Appeal No. 261 of 1970, D/-11-3-1974.*

(A) Hindu Law — Joint family — Presumption — Acquisitions made by brothers with joint labour whether joint family property — Presumption and burden of proof.

The leading principle in Hindu law is that in absence of proof of division the presumption is that every Hindu family is joint in food, worship and estate. This presumption is stronger in the case of brothers than in the case of cousins and the farther one goes from the founder of the family the presumption becomes weaker and weaker.

(Para 7)

*(From decision of M. J. Rao, Addl. Dist. J., Cuttack in T. A. No. 34 of 1968, D/-27-2-1970.)

Similarly, another principle of Hindu Law is that the properties jointly acquired by the members of the joint family without the aid of joint family nucleus are presumed to be the joint family properties. Thus, where two brothers of a joint family acquire properties by their joint labour such properties, in absence of clear indication to the contrary, would also be presumed to be owned by them as joint family properties and their male issues would necessarily acquire a right by birth in such properties. (Para 7)

The burden to prove that the two brothers were separate at the time of acquisition would therefore lie on the plaintiffs who claim the property not to be joint. If the above presumptions arising under Hindu Law are not rebutted by the plaintiffs and the parties were treating the acquisitions as joint family property, the properties acquired by the two brothers must be held to be joint family property. (Para 7)

Cases Referred: Chronological Paras
ILR (1959) Cut 526 7

P. K. Dhal, S. C. Sahu and H. K. Jena, for Appellants; D. S. Nanda and M. Hazara, for Respondents.

JUDGMENT:— This is a plaintiff's second appeal from the confirming decision of the lower appellate court.

2. They filed the suit for declaration of title in respect of the suit property comprising of 37 decimals 8 karis and 2 gandas and that the sale deeds dated 10-11-1965 (Exs. A and B) executed by defendant No. 3 for self and as guardian of minor defendants 4 and 5 in favour of defendants 1 and 2 are invalid in law and not binding upon the plaintiffs. They also prayed for confirmation of possession or in alternative, if found disposed, for recovery of the same.

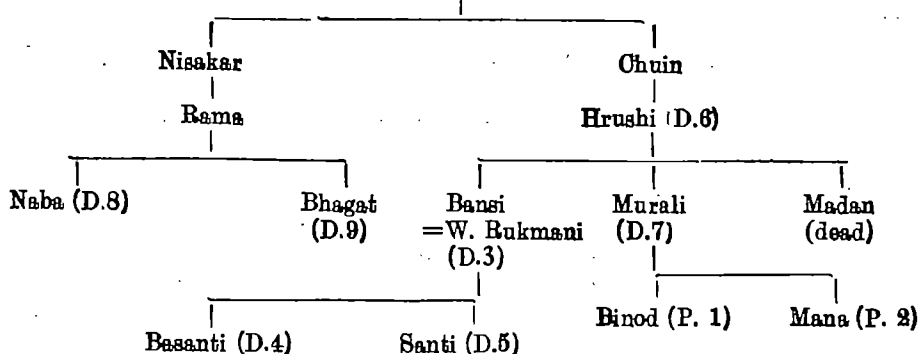
3. Before setting out the plaintiff's case in detail it is necessary to set out the genealogy of the family to indicate the relationship between the plaintiff and defendants Nos. 3 to 9.

[See Genealogy on Page 160]

4. According to the plaintiffs, the suit properties were the self-acquisition of Nisakar and Chuin and each of them were in separate possession of moiety interest therein as owners. Chuin adopted defendant No. 6 and gifted away his entire -8/- annas to him on 3-3-1922 under the deed of gift Ex. 7. Defendant No. 6 became absolute owner thereof. Defendants 1 and 2 purchased -8/- share of Nisakar from defendants 8 and 9 and are in possession thereof. This transfer has not been challenged in this suit. Of the three sons of defendant No. 6, Bansi died first and thereafter Madan. Defendant No. 6 executed the deed of gift on 20-1-1966 (Ex. 8) in respect of his -8/- properties acquired under Ex. 7 in favour of the plaintiffs, who became absolute owners thereof. On 10-11-1965, defendant No. 3 for self and mother guardian of defendants 4, and 5 transferred

GENEALOGY.

Bidei Jena



the interest under Exs. A and B to defendants 1 and 2 respectively as heirs of late Bansi. It is alleged that since Bansi had no interest in the suit properties, defendants 3, 4 and 5 did convey nothing to defendants 1 and 2.

5. The defence case is that the suit lands were ancestral properties of Bidei and not self-acquired properties of Chuin and Nisakar. The gift deed of Chuin in favour of defendant No. 6 in respect of -8/- interest in the joint family properties was invalid in law. Accordingly, Ex. 8, the deed of gift executed by defendant No. 6 conveying the entire -8/- interest to the plaintiffs was also invalid in law. Bansi had 1/3rd interest in the same and the transfer by his heirs, namely, defendants 3, 4 and 5 to defendants 1 and 2 is valid in law and good title had passed to the said transferees.

6. The trial court found that the suit properties were joint family properties of Chuin and Nisakar having been acquired from out of the joint family nucleus. It retained the character of joint family properties in the hands of defendant No. 6. But Bansi, who pre-deceased Madan had a share in the same. Defendant No. 6 had, therefore, no right to transfer the entire land to the plaintiffs by way of gift. The defendants 3, 4 and 5 had 1/4th interest in the half share belonging to Chuin's branch and not 1/3rd as claimed by defendants 1 and 2. Accordingly, the sale deeds Exs. A and B are valid only to the extent of 1/4th and invalid as to the interest in excess of 1/4th conveyed thereunder. The defendants 1 and 2 will recover possession of the same only in a separate partition suit.

This decree of the trial court was confirmed by the lower appellate court. It has not rendered any finding about the manner of acquisition of the suit properties and whether the family had sufficient nucleus from out of which the suit properties could have been acquired. It held these properties to be joint family properties on the ground that Chuin and after him defendant No. 6 treated the suit properties as joint family properties and defendant No. 6 was enjoying it with his sons and their wives.

7. The sole question for consideration in this case is whether the suit properties were the joint family properties or joint acquisition of the two brothers Nisakar and Chuin. There is absolutely no evidence in this case that the properties belonged to Bidei Jena or that there was sufficient joint family nucleus from out of which the suit properties could have been acquired so as to give rise to the presumption that the suit properties are joint family properties. The averments of para 9 of the written statement, therefore, have not been established. The defendants, however, alleged in para 10 of the written statement that Chuin and his descendants were treating the suit properties as joint family properties. There is evidence that some of the suit properties were jointly acquired by the parties and there is no positive evidence as to the manner or source of acquisition. Defendant No. 6, who has been examined as P. W. 2 has stated that his father and Nisakar used to go to Calcutta and with their income these two brothers began purchasing lands, some jointly and some separately, and at the time of acquisition these two brothers were joint. In the context of the aforesaid facts the presumption that the properties are joint family properties prevail. The leading principle in Hindu law is that in absence of proof of division the presumption is that every Hindu family is joint in food, worship and estate. This presumption is stronger in the case of brothers than in the case of cousins and the farther you go from the founder of the family the presumption becomes weaker and weaker. The reason is that the brothers are for the most part undivided while the second cousins are generally separated and third cousins are for the most part separated vide Art. 233 of Mulla's Hindu Law, 13th Edition. The burden of proof that the two brothers were separate at the time of acquisition is, therefore, squarely on the plaintiffs. Similarly, another principle of Hindu Law is that the properties jointly acquired by the members of the joint family without the aid of joint family nucleus are presumed to be the joint family properties. As an extension of this principle, when the members of the joint family acquire proper-

the case of Bank of Bihar Ltd. v. Dr. Damodar Prasad, AIR 1969 SC 297, where on a reference to Sections 128 and 140 of the Contract Act, it was held that the liability of the surety is co-extensive with that of the principal debtor and the surety is liable to pay the entire amount, his liability being immediate. On payment, he is only to be subrogated to the rights of the creditors under Section 140. The contention raised on behalf of the appellant has, therefore, got no substance, and, as such the plaintiffs' suit was not barred by the principles of constructive res judicata. The Courts below, therefore, have committed no error of law in answering this question against the appellant, as the Court in the earlier suit was not at all called upon or required to decide the present question in order to decide that suit.

6. It is not disputed that the plaintiffs did pay a sum of Rs. 1,500/- under the decree. In view of the finding that the plaintiffs father Tula Singh was merely a Surety in the handnote in question which finding is not open to challenge in the second appeal, the plaintiffs must be held to be entitled to recover the amount that they have had to pay in the execution proceeding. This right is well recognised under the provision of Section 140 of the Contract Act itself, according to which a surety upon payment of the liability of the principal debtor, is invested with all the rights which the creditor had against the principal debtor. Chakradhar Pd. Singh, the principal debtor, had the right to recover Rs. 1,500/- under the decree from the defendant, which amount has been paid by the plaintiffs. The plaintiffs, therefore, having been subrogated to the right of the decree-holder, have been rightly held to be entitled to get a decree for the amount paid by them.

7. This appeal, therefore, has got no merit and is dismissed with costs.

Appeal dismissed.

AIR 1975 PATNA 241

B. D. SINGH AND
BIRENDRA PRASAD SINHA, JJ.

Ram Bahal Singh and others, Petitioners v. Chhote Narain Singh and others, Respondents.

Civil Writ Jurisdiction Case No. 1252 of 1974, D/- 15-1-1975.

(A) Constitution of India, Art. 226 — Application under — Who can apply — Right to purchase neighbouring land — Person against whom order is passed is an aggrieved party — Such person can apply

under Art. 226 — Personal or individual rights in subject-matter can also be enforced under the Article. AIR 1966 SC 828 and AIR 1962 SC 1044, Followed; 1961-2 All ER 504; 1964-1 All ER 779 and AIR 1969 Ker 154 (FB), Applied.

(Para 10)

(B) Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), Ss. 16 (3), 17, 43 — Application under Section 16 (3) — When can be filed — In such an application Court has power to decide disputed questions of fact as to nature of transaction.

A Tribunal or an authority acting under a special statute derived its power to so act within the four corners of that statute. If the provisions of the statute are violated, and specially in regard to the condition which conferred jurisdiction and power on the Tribunal or Authority to exercise it, then the order of the Tribunal or Authority is without jurisdiction. A person claiming to pre-empt has got a right to file an application only when the registration of a document of transfer was complete. If, therefore, a proceeding was commenced by taking action on an application filed before the registration of the sale deed, then cognizance of such a proceeding was without jurisdiction and void. That being so, the final order made in such a proceeding was also without jurisdiction. AIR 1972 Pat 407, Followed.

(Para 8)

The language of sub-section (2) of Section 17 indicates that the real owner in occupation of the land was also liable to be ejected by the Collector if action was taken under Section 17. If this procedure is comprehensive enough to go into disputed questions of fact as to who was the co-sharer and who was the adjacent raiyat, it is wide enough to take within its sweep the question of benami or sham transaction if the same is raised before the Collector. On such evidence as might be produced before him or as might be permitted by him to be produced, the Collector is competent to decide the question raised. In this view of the matter Section 43 bars the jurisdiction of the Civil Court. In fact, the question whether it is a sham transaction or not should be decided by the authority under the Act under Section 17 (2). It is thus obvious that the order of the Additional Collector was bad because he failed to exercise his jurisdiction in deciding that issue himself or remanding the case back to the Sub-Divisional Officer for that purpose. AIR 1972 Pat 1, Applied.

(Para 11)

(C) Constitution of India, Art. 227 — Ambit of jurisdiction.

In the supervisory jurisdiction under Article 227, if the Court comes across any

order, which is contrary to law, the Court has ample jurisdiction to quash the same suo motu. (Para 13)

Cases Referred: Chronological Paras

AIR 1972 Pat 1 = 1971 BLJR 528 11

AIR 1972 Pat 407 = 1972 Pat LJ 321

8, 11, 13

AIR 1969 Ker 154 = 1968 Ker LJ 772 (FB) 10

AIR 1966 SC 828 = (1966) 2 SCR 172 10

(1964) 1 All ER 779 = (1964) 2 QB 362 10

AIR 1962 SC 1044 = (1962) Supp 3 SCR 1

10

(1961) 2 All ER 504 = 1961 AC 617 10

Lala Deokinandan Prasad and Jagdish Kumar Sinha, for Petitioners; Thakur Prasad and Harendra Prasad (for Nos. 1 to 7) and S. B. N. Singh (Govt. Pleader III) and Prabhu Nath Roy. (for Nos. 11 to 15), for Respondents.

B. D. SINGH, J.:— This application under Articles 226 and 227 of the Constitution of India by Ram Bahal Singh alias Bahal Singh and five others is directed against an order dated 14-3-1966 (Annexure 2) passed by the Sub-Divisional Officer, Jahanabad (respondent No. 12), order dated 16-8-1967 (Annexure 3) passed by the Additional Collector (respondent No. 13), order dated 3-2-1972 (Annexure 4) passed by the Commissioner, Patna Division (respondent No. 14) and the resolution dated 18-8-1972 (Annexure 5) of the Additional Member, Board of Revenue (respondent No. 15) In the application the petitioners have prayed for quashing of the orders and resolution as contained in those Annexures.

2. In order to appreciate the point involved in this application it will be necessary to state briefly the facts. Radhe Shekhar Singh (respondent No. 10) sold 5.53 acres of land, inclusive of a house, standing on plot No. 916 measuring an area of 0.4 decimal to respondent No. 8, (Dineshwar Singh) and respondent No. 9 (Muneshwar Singh) by a sale deed dated 11-9-1965, registration whereof was completed under Section 61 of the Indian Registration Act on 19-3-1966 for a consideration of Rs. 24, 000/-. The aforesaid land comprised of as many as 27 plots and, according to the petitioners they are raivats and holders of adjoining land in respect of at least 16 plots as it would be evident from the sale deed itself. The name of petitioner No. 1 is mentioned in one or the other boundary of 16 plots out of 27 plots, which were the subject-matter of the said sale deed. Petitioner No. 1 is father of other petitioners. All the petitioners, as stated by them, are members of a joint Hindu Mitakshara family. Subsequently, the petitioners by a registered sale deed dated 14-10-1965 purchased a house appertaining to plot No. 916 from respondents 8 and 9 in the names of peti-

tioners 2 to 6 for a consideration of Rs. 2,000/- and amalgamated the said house with their own ancestral house over plots Nos. 913, 917 and 918, which lie, according to the petitioners, partly adjacent, south of plot No. 916 and partly adjacent, east of plot No. 916. By another registered sale deed of the same date, the petitioners purchased 1½ annas interest out of the remaining properties covered by the sale deed dated 11-9-1965 from respondents 8 and 9 in the name of petitioner No. 1 for a consideration of Rs. 1,719/-. The petitioners thereafter entered into possession of the subject-matter of the two sale deeds, which were executed in their favour. On 23-10-1965 there was a partition between the petitioners on the one hand and respondents 8 and 9 on the other regarding 1½ annas interest in the properties and the lands comprised in various plots, mentioned in Schedule I of the report of the Circle Inspector dated 30-11-1965 (Annexure 1) fell into the exclusive share of petitioner No. 1, Bahal Singh.

3. On 28-10-1965 respondents 4 to 7 and Ramnandan Singh (since deceased), father of respondents 1 to 3, filed an application under Section 16 (3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, (hereinafter referred to as 'the Act') before the Sub-Divisional Officer, (respondent No. 12) and impleaded the petitioners as parties along with respondents 8 and 9 in exercise of right of pre-emption on account of the sale deed executed by respondent No. 10 in favour of respondents 8 and 9. Respondent No. 12 took cognizance on the same date, that is, 28-10-1965, issued notice and called for a report from Anchal Adhikari, Jahanabad, who, in his turn, called for a report from the Circle Inspector and after receiving the report from him the Anchal Adhikari forwarded the report dated 30-11-1965 (Annexure 1) to respondent No. 12, who after hearing the parties, allowed the application filed by respondents 4 to 7 and father of respondents 1 to 3, under Section 16 (3) of the Act by his order dated 14-3-1966 (Annexure 2).

4. Aggrieved by the said order the petitioners and respondents 8 and 9 filed an appeal before the Additional Collector (respondent No. 13). During the pendency of the appeal respondents 8 and 9 filed a petition dated 4-4-1967 before respondent No. 13 seeking permission to withdraw the appeal. In the application respondents 8 and 9 alleged, inter alia, that the two sale deeds dated 14-10-1965, executed in favour of the petitioners, were sham and fictitious documents and no consideration had passed. According to respondents 8 and 9, they had created

those documents in order to deprive respondents 1 to 7 of their right to pre-empt, which had accrued to them according to the Act. Respondents 8 and 9 also took the entire money deposited by respondents 1 to 7 under the Act and as an abundant precaution respondents 1 to 7 requested respondents 8 and 9 to execute also a sale deed in favour of respondents 1 to 7 regarding the entire land, which respondents 8 and 9 had got under the sale deed executed by respondent No. 10. Respondents 8 and 9, accordingly, executed the sale deed dated 5-10-1967 in favour of respondents 1 to 7, a copy of which is marked as Annexure 'A' to the counter affidavit filed by those respondents. The petitioners then and there on the same date (4-4-1967) filed an application before respondent No. 13 objecting to the withdrawal of the appeal and they, inter alia, controverted the allegations made by respondents 8 and 9 in their application and had stated therein that the consideration had passed and they were genuine and valid documents. The petitioners also alleged therein that respondents 1 to 7 had won over respondents 8 and 9 during the pendency of the appeal. A copy of the said application is marked Annexure 'B' to the counter affidavit filed by respondents 1 to 7. Respondent No. 13, however, by his order dated 16-8-1967 (Annexure 3) dismissed the said appeal filed by the petitioners.

5. Against the said order of dismissal of appeal the petitioners filed a revision, as contemplated under the Act, before the Commissioner, Patna Division (respondent No. 14), who also by his order dated 3-2-1972 (Annexure 4) rejected the revision application. Aggrieved by the said order the petitioners filed an application under Section 32 of the Act before the Member, Board of Revenue, who also by his resolution dated 18-8-1972 was pleased to dismiss the application (vide Annexure 5).

6. Supporting the impugned orders and resolution respondents 1 to 7 have filed a counter affidavit on 4-9-1974 inter alia denying the allegations made by the petitioners in the writ application, and contended that they had right to pre-empt and that the two sale deeds dated 14-10-1965, executed by respondents 8 and 9, were fake and created in order to defeat the right of pre-emption of respondents 1 to 7, as stated by respondents 8 and 9 themselves.

7. None has appeared on behalf of respondents 8 and 9 nor any counter affidavit has been filed on their behalf.

8. Learned counsel appearing on behalf of the petitioners has assailed the impugned orders and the resolution chief-

ly on the ground that the application under Section 16 (3) of the Act filed on behalf of respondents 1 to 7 was premature, since the application, was filed by them on 28-10-1965, whereas registration of the sale deed, executed by respondent No. 10 on 11-9-1965 in favour of respondents 8 and 9 was completed on 19-3-1966 under Section 61 of the Registration Act. On the basis of the application respondent No. 12 had taken cognizance of the application filed by those respondents on the same date, namely, 28-10-1965. According to learned counsel for the petitioners he had acted without jurisdiction. Therefore, his entire order is vitiated due to want of jurisdiction. In order to find support to his contention he has relied on a Bench decision of this Court in the case of Kauleshwar Singh v. Parmanand, 1972 Pat LJR 321 = (AIR 1972 Pat 407) where Untwalia J. (now Hon'ble Judge of the Supreme Court) and Akbar Hussain, J. were dealing with the provisions contained in Section 16 (3) of the Act. In that case the respondents had transferred the land by means of a registered sale deed executed on 16-11-1967, and the registration was completed on 11-12-1967. The petitioner in that case claiming to be the co-sharer, and an adjoining raiyat filed an application under Section 16 (3) of the Act. Their Lordships held that a person claiming to pre-empt got a right to file an application only when the registration of a document of transfer was complete. It was repeatedly held that a Tribunal or an authority acting under a special statute derived his power to so act within the four corners of that statute. If the provisions of the statute were violated and specially in regard to the condition which conferred jurisdiction and power on the Tribunal or Authority to exercise it, then the order was without jurisdiction. If a proceeding was commenced by taking action on an application of registration of the sale deed, then cognizance of such a proceeding was without jurisdiction and void. That being so, the final order made in such a proceeding was also without jurisdiction. The point could be taken at any stage if it did not involve investigation of new and fresh facts. On the basis of the aforesaid decision of this Court learned counsel for the petitioners contended that since the order of the Sub-Divisional Officer was without jurisdiction void, other orders and the resolution contained in Annexures 3 to 5 are vitiated and they were obviously without any jurisdiction.

9. The second point urged by learned counsel for the petitioners was with regard to the merit of the application. He submitted that the petitioners being raiyats of the adjoining lands in

respect of at least 16 plots, as detailed under Annexure '1' and since they had purchased the same by the two sale deeds dated 14-10-1965 and they had partitioned the properties, the petitioners having purchased 14 annas share from respondents and amalgamated the same with their undisputed plots prior to the application filed by respondents 1 to 7 on 28-10-1965, the right of pre-emption of respondents 1 to 7 was defeated.

10. It will be convenient to deal with the contention of learned counsel for the petitioners under point No. 2 first. Mr. Thakur Prasad, learned counsel for respondents 1 to 7, contended that those respondents had not sought the right of pre-emption against the petitioners in their application dated 28-10-1965. It is true that the petitioners were made parties to the application as opposite party Nos. 1, 2, 3, 4 and 6, but in the prayer portion the right of pre-emption was claimed by respondents 1 to 7 only against respondents 8 and 9, who had subsequently withdrawn the money deposited by respondents 1 to 7, and not only accepted the right of pre-emption but also executed a sale deed of their entire properties in favour of respondents 1 to 7, referred to above. Mr. Thakur Prasad submitted that, if at all, the interest of only respondents 8 and 9 was affected by the impugned order (Annexure 2), therefore the application at the instance of the petitioners under Article 226 in this Court is not maintainable. In my opinion this submission of Mr. Prasad is not tenable. Reference may be made to the concluding portion of Annexure '2', which reads as:

"..... In view of the facts enumerated above, I am satisfied that the applicants are the Raiyats of the adjoining lands and it is, therefore, ordered that the applicants be put in possession of the disputed lands".

Therefore, by the said order the petitioners also are affected and are prejudiced. They can very well be said to be the aggrieved persons. According to the petitioners, they had purchased one house, and 14 annas interest in 16 out of 27 plots. To that extent, their interest is affected. It is true that at the appellate stage respondents 8 and 9 had stated that the two sale deeds, under which the petitioners are alleged to have acquired title and interest, were sham transactions and no consideration had passed, which fact, however, was disputed by the petitioners at the earliest opportunity. The matter is a disputed question of fact which cannot be investigated here. Nonetheless, the petitioners became aggrieved persons because of the order quoted above. Reference may be made to Venkateswara Rao

v. Govt. of Andhra Pradesh, (AIR 1966 SC 828) where their Lordships have quoted with approval the following extract from the earlier decision in Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal, (AIR 1962 SC 1044 at p. 1047), dealing with the question of locus standi of the appellant in that case, to file a petition under Article 226 of the Constitution in the High Court:

"Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose.

It is, therefore, clear that persons other than those claiming fundamental rights can also approach the Court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitled to apply thereunder, but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified."

Thereafter, their Lordships further held:

"Has the appellant a right to file the petition out of which the present appeal has arisen? The appellant is the President of the Panchayat Samithi of Dharmajigudem. The villagers of Dharmajigudem formed a committee with the appellant as President for the purpose of collecting contributions from the villagers for setting up the Primary Health Centre. The said committee collected Rs. 10,000/- and deposited the same with the Block Development Officer. The appellant represented the village in all its dealings with the Block Development Committee and the Panchayat Samithi in the matter of location of the Primary Health Centre at Dharmajigudem. His conduct, the acquiescence on the part of the other members of the committee, and the treatment meted out to him by the authorities concerned support the inference that he was authorised to act on behalf of the committee. The appellant was, therefore, a representative of the committee which was in law the trustees of the amounts collected by it from the villagers for a public purpose. We have, therefore no hesitation to hold that the appellant had the right to maintain the application under Article 226 of the Constitution. This Court held in the decision cited supra that 'ordinarily' the petitioner who seeks to file an application under Article 226 of the Constitution should be one

who has personal or individual right in the subject-matter of the petition. A personal right need not be in respect of a proprietary interest, it can also relate to an interest of a trustee. That apart, in exceptional cases as the expression 'ordinarily' indicates, a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof. The appellant has certainly been prejudiced by the said order. The petition under Article 226 of the Constitution at his instance is, therefore, maintainable."

In this connection it will be useful to extract a passage from the judgment of the Privy Council in Attorney-General of the Gambia v. N'Jie, 1961-2 All ER 504 at p. 511 as follows:—

"The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busy-body who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

The Court of Appeal in *Maurica v. London County Council*, 1964-1 All ER 779 at p. 782 quoted with approval the observations of the Privy Council, quoted above. In *K. C. Pazhanimala v. State of Kerala*, (AIR 1969 Ker 154) (FB) after surveying various decisions including that of the Supreme Court and the Privy Council, referred to above, their Lordships observed in paragraph 6 at page 159 as follows:—

"In our view the meaning given to the words 'person aggrieved' has to be applied to the expression 'person prejudicially affected'. We have therefore no doubt to hold that the several appellants are persons who are aggrieved because of the enforcement of the impugned order. The objection of the maintainability of the petition filed under Article 226 of the Constitution has only to be overruled."

Applying the above principle to the instant case, I have no doubt in my mind that the petitioners were aggrieved and were prejudicially affected by the order contained in Annexure '2' and the subsequent orders and resolution contained in Annexures 3 to 5. It is obvious that if the petitioners were not aggrieved they would not have filed an appeal, revision and application before the Member Board of Revenue.

11. Mr. Thakur Prasad in this regard submitted that the observation of their Lordships in 1972 Pat LJR 321 = (AIR 1972 Pat 407) is not applicable to

the instant case, because it involved investigation of new and fresh facts. He drew our attention to the observation of their Lordships in that case in which it was held that the point could be taken at any stage, if it did not involve investigation of new and fresh facts. On the basis of the said observation he contended that in the present case the two sale deeds, as stated by respondents 8 and 9, were fake and, therefore, the petitioners did not derive any title therefrom, and as such whether those sale deeds were sham transactions or not, could have been decided only by a competent Civil Court. He drew our attention to the order passed by the Additional Collector (Annexure 3), the relevant portion of which is to the following effect:—

"Appellant First set, Dineshwar Singh and Muneshwar Singh (respondents 8 and 9) having withdrawn from the appeal on a disclaimer of title, over the land and on further describing the transfer in favour of appellants second set Ram Bahal Singh and others by them as 'sham' affair, the claim preferred by the appellant second set becomes a question of title, which is beyond the purview of the Land Ceiling Act and such a question is not to be entertained by me....."

In my opinion, this contention of Mr. Prasad is also not acceptable. Reference may be made to *Narendra Kumar v. Sheodeni Ram*, 1971 BLJR 528 = (AIR 1972 Pat 1) where Untwallia, J. (now Hon'ble Judge of Supreme Court) and S. Sarwar Ali, J., while dealing with Sections 16 17 and 43 of the Act held that if an application under Section 16 (3) of the Act was allowed under clause (iii), it would be binding on the real owner, if the question of benami was not raised by the ostensible owner, or if raised, it was decided against him or the real owner. Such a decision being binding on the real owner, it appeared that if the question was raised, then it was a question which was, by or under the Act, required to be settled, decided and dealt with by the Board of Revenue, the appellate authority or the Collector within the meaning of Section 43 of the Act, which barred the jurisdiction of the Civil Court in regard to a question, which fell to be decided by the Revenue authorities. The language of sub-section (2) of Section 17 would also indicate that the real owner in occupation of the land was also liable to be ejected by the Collector if action was taken under Section 17 of the Act. If this procedure was comprehensive enough, as undoubtedly it was, to go into disputed questions of fact as to who was the co-sharer and who was the adjacent raiyat, it was wide enough to take within its sweep the question of benami if it was

raised before the Collector. On such evidence as might be produced before him or as might be permitted by him to be produced, he was competent to decide that question. In that view of the matter in my opinion Section 43 of the Act bars the jurisdiction of the Civil Court. In fact, the question whether it was sham transaction or not ought to have been decided by the authority under the Act under Section 17 (2). On that account also it is obvious that the order of the Additional Collector (Annexure 3) was bad because he failed to exercise his jurisdiction in deciding that issue himself or remanding the case back to the Sub-Divisional Officer for that purpose.

12. Mr. Thakur Prasad, however, tried to persuade us to hold that the observation of their Lordships in the case of Narendra Kumar Ghose, just referred to above, is not applicable in the instant case, as their Lordships were considering matter relating to 'benami transaction' whereas in the present case there is the question of 'sham transaction', in which no consideration had passed. In my opinion, that would not make any difference, and would not take out of the purview of Sections 17 (2) and 43 of the Act. Mr. Prasad has not been able to substantiate his contention by any authoritative decision on the point.

13. The next question, which arises for consideration, is as to whether the entire orders and the resolution contained in Annexures 2 to 5 have to be quashed or only that portion which affects the right and interest of the petitioners. As already mentioned the petitioners had purchased only a fractional share in 16 out of 27 plots of land and a house; whereas the right to pre-empt was granted to respondents 1 to 7 with respect to the entire lands, which respondents 8 and 9 had purchased from respondent No. 10. In my opinion, the entire impugned orders (Annexures 2 to 5) have to be quashed. As mentioned earlier, respondent No. 12 had taken cognizance and had assumed jurisdiction on 28-10-1965 much before registration was completed on 19-3-1966, which is contrary to the decision of this Court in 1972 Pat LJR 321 = (AIR 1972 Pat 407) quoted above. The application by the petitioners is also under Art. 227 of the Constitution. In our supervisory jurisdiction under that Article, if we come across any order, which is contrary to law, we have ample jurisdiction to quash the same suo motu. If the order passed by respondent No. 12 was void and without jurisdiction, the subsequent orders and the resolution, which arise out of the order of respondent No. 12 are also bad and without jurisdiction.

14. Lastly, Mr. Prasad submitted that in the instant case since respondents 1 to 7 have also acquired a sale deed from respondents 8 and 9, it has gone beyond the purview of the Act. According to him, respondents 1 to 7 have now acquired title not only because of the impugned orders but also because of the sale deed dated 5-10-1967. If that is so, respondents 1 to 7 should have no grievance in case the impugned orders and the resolution (Annexures 2 to 5) are quashed.

15. Since the contention of the learned counsel for the petitioners under point No. 1 succeeds, it is not necessary to deal with his contention under point No. 2.

16. After careful consideration, I allow this application and quash the impugned orders, and the resolution contained in Annexures 2 to 5. In the circumstances there will be no order as to costs.

BIRENDRA PRASAD SINHA, J. :—

I agree.

Petition allowed.

AIR 1975 PATNA 246

SUSHIL KUMAR JHA, J.

Sunderlal Goswami and another, Appellants v. Jogeshwar Prasad Singh and others, Respondents

Appeal From Appellate Decree No. 44 of 1971, D/- 20-8-1974.*

(A) Civil P. C. (1908), Section 100 — Second Appeal — Inferences drawn from statements in Khatians whether binding in second appeal.

Inference drawn from statements in khatians are inferences of fact with which the High Court cannot interfere in a second appeal. However erroneous the inference may be, unless it is vitiated by some error of law, the finality and binding nature of the findings of fact recorded by the final Court of fact remains even though based on an inference drawn from documents, which are not instruments of title or otherwise the direct foundations of rights; and such findings cannot be interfered with. AIR 1934 PC 5; AIR 1963 SC 884 and AIR 1934 PC 112. Relied on. (Para 6)

(B) Hindu Law — Religious endowment — Dedication — What constitutes valid dedication to God.

Where there is no document or where in a document there is nothing to show that there was a dedication, except the

* (Against decision of Harihar Charan Choudhary Sub. J., Purnea, D/- 20-11-1970).

CS/CS/A850/75/SVM

use of the word 'debutter' or 'Vishnuprit' or 'Sheoprit' etc. and the usufructs were apparently in the personal enjoyment of the grantee and the grantor might have contemplated that the profits of the property, after satisfying the personal wants of the grantee, would be devoted to the service of the God whom the grantee attended, such an expectation or anticipation may explain the use of the words 'debutter', 'Sheoprit' etc. but does not suffice to constitute a valid dedication to the God. (Case law discussed.) (Para 7)

Cases Referred: Chronological Paras

AIR 1963 SC 884 = (1963) 2 SCR 208	6
AIR 1963 SC 890 = (1963) Supp 2 SCR 417	6, 8
AIR 1954 Pat 586 = 1954 BLJR 381	5, 8
(4952) Civil Appl. Nos. 4 and 5 of 1951, D/- 19-11-1952 (SC)	7
AIR 1951 Pat 340 = ILR 28 Pat 890	7, 8
AIR 1934 PC 5 = 61 Ind App 93	6
AIR 1934 PC 112 = (1935) 16 Pat LT 7	6
AIR 1915 Cal 789 = 21 Cal LJ 42	7
(1906) 3 Cal LJ 306 = 10 Cal WN 738	7
(1905) 2 Cal LJ 546	7

Kaushal Kishore Sinha and Naravan Singh, for Appellants; Ramakant Verma and Hare Ram Sharma, for No. 1 and Naresh Kumar Sinha, D. R. Guardian Advocate for Respondents 4 and 5 (minor).

JUDGMENT:— The plaintiffs are the appellants against a judgment of reversal. The plaintiffs' suit for a declaration that a sale deed, dated the 14th October, 1958, executed by defendant No. 2 (respondent No. 2 here) in favour of defendant No. 1 (respondent No. 1 here) was void and illegal, and for a further declaration that the same was not binding on the plaintiffs, with a further relief for recovery of possession, having been decreed by the trial Court, the Court of appeal below has reversed that decree and dismissed the suit.

2. The appellants' case, in short, was that cadastral survey plot Nos. 6066, 6067, 6068 and 6069, appertaining to cadastral survey khata No 401 of village Bithauli Khemchand, had been dedicated to Lord Shiva by the Darbhanga Rai long long ago. It was averred that the common ancestor of the plaintiffs and the defendants second party (respondents second party here) was a great devotee of Lord Shiva and so a rent-free grant of the lands aforementioned was given to him for maintenance and worship of Lord Shiva. The case of dedication was thus founded upon a lost grant, and it was further alleged that, after the death of the common ancestor of the parties concerned, the properties devolved upon his heirs, qua-sebais, and all of them were jointly managing the properties for the benefit of Lord Shiva so that the properties so dedicated came to be

called Shivottar properties. A further assertion in the plaint was that, in due course, the ancestors of the plaintiff-appellants and defendant second party-respondents came to be recorded in the survey papers with regard to the dedicated properties, and, finally, that, under the impugned sale deed, defendant No. 2 had illegally sold away cadastral survey plot Nos. 6066 and 6069, measuring 1.83 acres. The challenge to the validity of the sale deed was thus grounded upon the fact of inalienability in law of the properties so dedicated completely to Lord Shiva.

3. The defence of defendant No. 1-respondent No. 1 was a denial of any such dedication, and it was asserted by him that the usufructs of the lands in question were never utilised for the Seva-Puja of any deity; and that the lands always remained the personal properties of the ancestors of the plaintiffs and the defendants second party, and, in due course, these parties came in separate exclusive possession of different portions of the above mentioned lands in their personal capacity, after due partition by metes and bounds.

4. The crucial question for determination in the suit, therefore, was as to whether there was any dedication to Lord Shiva, or were the properties personal properties of the common ancestor of the appellants and the respondents second party. There was also an alternative claim put forward by the respondent to the effect that, at best, the properties could be said to have been only partially dedicated, in so far as it might have been expected that, after the fulfilment of their personal necessities and requirements, expenses over the maintenance of Lord Shiva might also be made. In such an event, it was contended, all that could follow in law was that the properties would stand charged with the maintenance of the aforesaid deity, without detracting from their character of partibility or alienability. The plaintiffs' suit was decreed by the trial Court on a finding that there had been a dedication of the properties in suit to Lord Shiva. The defence case, however, found favour with the lower appellate Court, which did not agree with the finding recorded by the trial Court and held, in its turn, that there was no complete dedication, but only a partial or qualified dedication, and that, in such a case, the properties descended and were alienable and partible in the ordinary way.

5. Mr. K. K. Sinha, learned counsel for the appellants, contended that the finding of the lower appellate Court with regard to the partial or qualified nature of the dedication was not binding on this

Court, as the proper inference from the term 'Shivottar' in the relevant entries in the cadastral survey papers had not been deduced by the Court of appeal below, and, in support of this contention, learned counsel placed reliance on a decision of the Supreme Court in *Ramkishorelal v. Kamalnarayan*, (AIR 1963 SC 890) and a Bench decision of this Court in *Somar Puri v. Shyam Narain Gir*, (AIR 1954 Pat 586).

6. Before referring to the cases relied upon by the learned counsel, I may at once indicate two insurmountable difficulties in the way of the appellants in succeeding in this appeal. Firstly, inferences drawn from statements in khatians are inferences of fact with which the High Court cannot interfere in a second appeal. And, however erroneous the inference may be, unless it is vitiated by some error of law, the finality and binding nature of the findings of fact recorded by the final Court of fact remains even though based on an inference drawn from documents, which are not instruments of title or otherwise the direct foundations of rights; and such findings cannot be interfered with. Decisions on this point are legion; but, to mention only a few, reference may be made to the cases of *Anup Mahto v. Mita Dusadh*, (AIR 1934 PC 5); *Secretary of State for India in Council v. Rameshwaram Devasthanam*, (16 Pat LT 7 = (AIR 1934 PC 112)) and *Nedunuri Kameswaramma v. Sampati Subba Rao*, (AIR 1963 SC 884). In the last mentioned case, their Lordships of the Supreme Court deprecated the painstaking examination of the documents filed by the parties by a learned single Judge of the High Court in reversing the findings of the final Court of fact, and the judgment of the learned single Judge was, accordingly, reversed by the Supreme Court on this main ground.

7. But, that technicality apart, coming to the merits of the case, as already stated, it is a case of dedication based on lost grant. There is no document of title to be construed; no terms of the grant to be interpreted; nor any inference to be drawn from any Sanad. But, as stated by Dr. Bijan Kumar Mukherjee in his *Hindu Law of Religious and Charitable Trust*, at page 172 (1952 Edition), the existence of any document is not necessary to prove a Debutter, "but the absence of a document throws a heavy onus upon the party who sets up dedication to prove that a property has been inalienably conferred upon an idol". In the absence of any grant, then, can it be justifiably said that the mere use of the term 'Shivottar' at some places in the survey papers would change the character of a secular property into that of a

property dedicated absolutely to a deity? The fact that a property ordinarily described as 'Shivottar' is a piece of evidence in favour of dedication no doubt, but it has been repeatedly held that the mere use of such a term is not of a conclusive nature for a determination of the question whether a property has lost its secular character by complete dedication to God. To refer to a small passage from Dr. Mukherjee's book aforesaid, at p. 173. "The fact that the property is called Debutter is doubtless evidence in the plaintiffs' favour but it does not relieve them of the whole burden of proving that the land was dedicated and is inalienable"; and this statement of the law has been quoted from a decision of the Calcutta High Court in *Binod Behari v. Manmatha*, 21 Cal LJ 42 = (AIR 1915 Cal 789). Reference in this connection and for the same proposition may also be made to a judgment of Mookerjee, J. in *Ram Kanai Ghosh v. Raja Sri Sri Hari Narayan Singh Deo Bahadur*, ((1905) 2 Cal LJ 546 at p. 552) where the great Judge has laid down that mere description of a property as debutter is not conclusive, because, whether the property be absolutely dedicated to a deity or be secular subject to a religious charge, it would in popular language be fittingly described as debutter. It is too late in the day now to contest the proposition that where there is no document, or where in a document there is nothing to show that there was a dedication, except the use of the word 'debutter' or 'Vishnuprit' or 'Sheoprit' etc. and the usufructs were apparently in the personal enjoyment of the grantee and the grantor might have contemplated that the profits of the property, after satisfying the personal wants of the grantee, would be devoted to the service of the God whom the grantee attended, such an expectation or anticipation may explain the use of the words 'debutter', 'Sheoprit' etc., but does not suffice to constitute a valid dedication to the God (cf *Shama Charan Nundv v. Abhiram Goswami*, (1906) 3 Cal LJ 306)). A Bench of this Court reviewing the whole mass of case law, reiterated the same principle in *Khub Narain Missir v. Ramchandra Narain Dass*, (AIR 1951 Pat 340), and it is worthwhile to mention here that the aforesaid decision of this Court in *Khub Narain's case* AIR 1951 Pat 340 was upheld by the Supreme Court in *Rambehari Thakur v. Ramchandra Narain Das*, (Civil Appeals Nos. 4 and 5 of 1951, decided on the 19-11-1952 (SC)). In that judgment, their Lordships of the Supreme Court held as follows:—

"We find ourselves in agreement with the Courts below that the mere use of the word 'Vishnuprit' or 'Sripit' in the documents does not at all indicate that the gifts were made to the institution as dis-

ting from the Mahanth personally". Thus, apart from the fact that the Court of appeal below, on an appraisal of facts, did not find sufficient evidence to record a finding to the effect that there was a complete dedication to the deity, the inference drawn from the entries in the survey papers, even if susceptible to attack, cannot be said to be in any way vitiated by any error of law.

8. Adverting now to the two decisions relied upon by learned counsel for the appellants, as a matter of fact, the case of Somar Puri, AIR 1954 Pat 586 (supra), instead of supporting the contention of the learned counsel, in my view, is a decision against him on the question of law, for, the decision of this Court in that first appeal was based upon an appraisal of the grant and other pieces of evidence, both documentary and oral, which had induced the Bench of this Court to record a finding agreeing with the trial Court that there was evidence of complete dedication; and, even while other pieces of evidence aliunde were being considered in Somar Puri's case, Das, J. (as he then was), referring with approval to the decision of this Court in Khub Narain's case (AIR 1951 Pat 340), held, at page 590, that the words 'Vishnu-priit' and 'Sheoprit' etymologically meant 'love of Vishnu' or 'love of Shiva' and they did not necessarily lead to the inference that the donor intended that the properties would be gifts not to the Mahanth but that the properties would be used by the public and would be treated as a public trust. It was further held that "the construction of a document cannot depend on one isolated word taken from its context". Narayan, J. who was a party to the Bench decision in Somar Puri's case, had also decided the earlier case of Khub Narain Missir, and, while recording a separate corroborative judgment, the learned Judge held that it was on the special facts of the case of Somar Puri and on the basis of the evidence adduced in the case, apart from the use of the words 'debutter' 'Chivottar', that it was being held that there was a complete dedication. The decision of the Supreme Court in Ram Kishorelal's case (AIR 1963 SC 890) does not help the appellants either, for, it merely lays down the rules of construction of deeds. In the present case, as I have already stated, there is no deed to be construed.

9. The lower appellate Court, having, on an appraisal of the entire evidence, albeit entries in the survey papers (Ext. 1) and two petitions purported to have been filed by the plaintiffs before the survey authorities (Exts. C and C/D), held that the case of complete dedication to Lord Shiva had not been made out. I do not

see any justification for interfering with such a finding both on the ground that the inference is not vitiated by any error of law and is, therefore, beyond the competence of this Court to interfere under Section 100 of the Code of Civil Procedure, and also for the reason that even on merits I do not feel persuaded to differ from the view taken by the final Court of fact; nor can the conclusion of the lower appellate Court, as a proposition of law, be said to be in any way erroneous, for, to quote Mulla from his Hindu Law (Thirteenth Edition), Section 408 at page 440. "If the dedication is partial, a trust in favour of the charity is not created but a charge in favour of the charity is attached to, and follows, the property which retains its original private and secular character". The secular character and that of alienability, therefore, still attach to the properties in suit, and the lower appellate Court has rightly dismissed the plaintiffs' suit.

10. In the result, therefore, this appeal must fail and is hereby dismissed with costs.

Appeal dismissed.

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B. D. SINGH AND BIRENDRA PRASAD SINHA, JJ.

Narmadeshwar Prasad Singh, Petitioner v. The State of Bihar and others, Respondents.

Civil Writ Jurisdiction Case No. 189 of 1975, D/- 6-3-1975.

(A) Bihar and Orissa Municipal Act (7 of 1922), Section 385 — Power to supersede municipal Commissioners — 'Satisfaction' of authority to issue notice, if can be challenged by writ application. (Constitution of India, Article 226).

The conditions for the exercise of power under Section 385 of the Act are clearly stated in the Section. If it appears to the State Government that the Municipality is incompetent or is persistently making default in performance of the duties imposed on it by or under the Act or exceeds or abuses its power, the State Government must give to the Municipality an opportunity to show cause why it should not be superseded. Upon a consideration of the show cause, if the State Government consider that there is no ground for making the order, the State Government may drop the proceeding. On the other hand, if in the opinion of the State Government, there are good grounds, it may, by an order, declare that the Municipality should be superseded. The order has to be a reasoned order. In

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a writ application, the High Court will not review the facts as an appellate body. That order can be set aside only in a case where no reasonable person on a proper consideration of materials before the State Government could form the opinion that the Municipality was not competent to perform or persistently makes default in the performance of duties imposed on it by or under this Act. The order can also be set aside if it was passed mala fide or in violation of principles of natural justice. (Para 25)

The power which has to be exercised by the Government under Section 385 is quasi-judicial in nature. At the time of giving the notice it is enough if the authority is *prima facie* satisfied and is of the opinion that a show cause notice is required to be given to the Municipality under Section 385 of the Act. In doing so, the selective application of law under Section 385 of the Act is left to the opinion of the Government. That, however, cannot be challenged in a writ application. AIR 1964 Cal 265; AIR 1966 Orissa 173 and AIR 1964 SC 1573. Distinguished; AIR 1959 SC 107; 1942 AC 206 and (1948) 1 KB 223, Rel. on. (Para 10)

Held: That the show cause notice in the instant case was not based on any extraneous consideration and satisfied the principles of natural justice. The High Court could not interfere with the show cause notice at that stage. (Para 26)

(B) Bihar and Orissa Municipal Act (7 of 1922), Section 385 — Show cause notice giving several grounds for superseding municipality — One ground irrelevant — Whole order not vitiated.

Held that even if one of the several grounds serious enough for superseding Municipality was vague, irrelevant or non est, the whole order was not vitiated, more so when the authority was yet to form its opinion. AIR 1967 SC 1353, Rel. on; AIR 1972 SC 1975, Distinguished.

(Paras 23, 24)

Cases Referred: Chronological Paras

(1975) C. W. J. C. No. 30 of 1975 (Pat)	16
AIR 1972 SC 1975 = 1972 Lab IC 1141	21
AIR 1968 SC 1050 = 1968 Cri LJ 1234	13
AIR 1968 SC 1513 = 1968 Cri LJ 1661	12
AIR 1967 SC 1353 = (1967) 2 SCR 583	23
AIR 1966 Orissa 173 = (1966) 8 OJD	211
	5
AIR 1964 SC 1573 = (1964) 7 SCR 1	5
AIR 1964 Cal 265 = 15 Fac LR 294	5
AIR 1962 SC 1172 = 1962 (2) Cri LJ	262
	12
AIR 1961 SC 633 = 1961 (1) Cri LJ 749	14
AIR 1959 SC 107 = 1959 SCR 1440	6
(1948) 1 KB 223 = (1947) 2 All ER 680	6
1942 AC 206 = (1941) 3 All ER 338	6

Basudeva Prasad, Radha Mohan Prasad and Mrs. Renuka Sharma, for Petitioner; Balbhadra Prasad Singh, Advoca-

te General and Surya Bhushan Prasad Singh, for Respondents.

BIRENDRA PRASAD SINHA, J.:

This is an application under Articles 226 and 227 of the Constitution of India by Sri Narmadeshwar Prasad Singh, one of the Commissioners of Gaya Municipality who is also its Chairman. The petitioner has challenged Annexure '6' which is a show cause notice under Section 385 of the Bihar and Orissa Municipal Act, 1922 (hereinafter to be referred to as the 'Act') from respondent No. 1 the State of Bihar, asking the petitioner and the other Municipal Commissioners to show cause as to why the Gaya Municipality should not be superseded for the reason stated in the said notice at Annexure '6' dated 8th January, 1975.

2. The petitioner's case, inter alia, is that after a long period of supersession the election of the Commissioners of Gaya Municipality was held in July, 1972 at which 32 ward commissioners including the petitioner and one Kanhaiya Lal Chaurasia were elected and two more were later co-opted by the elected ward commissioners. Kanhaiya Lal Chaurasia was elected as the President and the petitioner as the Chairman of the Municipality. By a letter dated 26th August, 1974, addressed to the petitioner, the said Kanhaiya Lal Chaurasia sent his resignation from the office of the ward commissioner. However, by another letter dated the 30th August, 1974, Chaurasia wanted to withdraw the aforesaid resignation. The said resignation letter of Sri Chaurasia was put up for consideration of the commissioners in accordance with Section 33 (3) of the Act on 25th November, 1974 and was accepted by a resolution passed at the meeting of the commissioners. According to the petitioner, the resignation was unconditional. Thereafter, Sri Chaurasia filed two petitions dated 5th December, 1974 and 13th December, 1974 before the District Magistrate, Gaya, Praying for stay of the operation of the aforesaid resolution which according to the petitioner, was still pending before the District Magistrate. On 19th December, 1974, the petitioner and some other commissioners filed a rejoinder to the aforesaid petitions of Sri Chaurasia before the District Magistrate. During the pendency of the aforesaid petitions, Sri Chaurasia personally approached Sri Rama Ashray Prasad Singh, respondent No. 3, who is Minister, Urban Development, Government of Bihar and filed a petition before him to stay the operation of the resolution dated 25th November, 1974, whereby the resignation of Sri Chaurasia had been accepted. It is alleged that respondent No. 3, Sri Ram Ashray Prasad Singh illegally and arbitrarily passed an

order on the said petition of Sri Chaurasiya Staying the execution of the above-mentioned resolution dated 25th November, 1974 and the said order was communicated vide memo No. 7357/U.D.D. dated the 18th December, 1974 of the Under Secretary to the Government of Bihar, respondent No. 4 to the District Magistrate, Gaya — vide Annexure '5'. It has further been alleged that respondent No. 3 acted mala fide in passing the aforesaid order at Annexure '5' mainly because he was displeased with and biased against the petitioner for the following amongst other reasons, namely, that

1. the petitioner had worked against Sri Ram Ashray Prasad Singh in his election to the Bihar Legislative Assembly from Kurtha Assembly Constituency;

2. the petitioner had participated in a meeting to condole the death of one Sri Jagdeo Prasad, who had been killed in a police firing in 1974 and had strongly pleaded for an impartial probe into the facts and circumstances leading to the firing and killing of Sri Jagdeo Prasad; and

3. the younger brother of the petitioner, Sri Mahesh Prasad Singh had worked hard against Sri Ram Ashray Prasad Singh in his election to the All India Congress Committee and the petitioner refused to persuade his brother not to work against him.

The petitioner had challenged the aforesaid order dated the 18th December, 1974, contained in Annexure '5' in C.W.J.C. No. 30 of 1975 of this Court. The said petition was admitted on 17th January, 1975, and a rule was made returnable by 6th February 1975. In the meanwhile, according to the petitioner, respondent No. 3 mala fide and illegally got a notice for supersession of the Municipality issued and served by the State Government on the Commissioner of the Municipality, which notice is contained in Annexure '6' and it has been challenged in this application, as stated above.

3. When this application was taken up for hearing, learned counsel appearing for the parties wanted that C.W.J.C. No. 30 of 1975 may also be heard along with this petition. Accordingly, both the applications were heard one after the other, as some of the questions involved were common.

4. A common counter-affidavit was filed by respondent No. 3, Sri Ram Ashray Prasad Singh on 7-2-1975 in both these applications, wherein he has specifically denied the allegation of mala fide and has asserted that all the steps which were taken by him in regard to the affairs of the Municipality, were taken after consideration of the report placed before him

and he had acted objectively in the best interest of administration of the Municipality without showing any favour to anybody. Another counter-affidavit has been filed on behalf of respondent No. 1 supporting the action of the Government in issuing the show cause notice — vide Annexure '6'.

5. Mr. Basudeva Prasad, learned counsel appearing for the petitioner, has submitted the following points for our consideration in this case:—

1. Sri Ram Ashray Prasad Singh, respondent No. 3 did not apply his mind to the question concerned for the purpose of issuing a notice under Section 385 of the Act;

2. Sri Ram Ashray Prasad Singh, Respondent No. 3, acted mala fide in issuing the said notice for the reasons stated in the application; and,

3. Since the decision to issue a show cause notice at Annexure '6' was the cumulative effect of a number of reasons stated therein, it is vitiated on the ground that some of the reasons are either non est or irrelevant.

5-A. I will take up point No. 1 first. Mr. Basudeva Prasad has referred us to Section 385 of the Act which reads as follows:—

"385. Power to supersede Commissioners in case of incompetency, default or abuse of powers.—If, in the opinion of the State Government, the commissioners of any municipality are not competent to perform, or persistently make default in the performance of, the duties imposed on them by or under this Act or otherwise by law or exceed or abuse their powers, the State Government may, by an order published, with the reasons for making it in the office gazette declare such Commissioners to be incompetent or in default, or to have exceeded or abused their powers, as the case may be, and supersede them for a period to be specified in the order or may, after giving notice to the Commissioners of its intention, by a like order, direct that the offices of the Commissioners shall be deemed to be vacant as from a date to be specified in the order and that a fresh election shall be held on or before that date".

He has submitted that the power under Section 385 of the Act is quasi-judicial. According to him, before issuing a show cause notice under Section 385 of the Act, the authority concerned must apply his mind to the facts and circumstances of the case and come to his own conclusion. He has submitted that respondent No. 3 did not apply his mind at all as the notice is based only on falsehood and irrelevant grounds. He has referred us to a decision of the Calcutta High Court in *Ram Chandra v. Secy. to Govt. of West Bengal*,

AIR 1964 Cal 265. In that case Durgadas Basu, J. held that although the plea of mala fide rarely succeeds, it was enough if the aggrieved party established "that the authority making the impugned order did not apply its mind at all to the matter in question" or "that the impugned order was made for a purpose or upon a ground other than what was mentioned on the face of the order." "When an authority was vested with a power but he was required to consult an advisory body before taking its decision, the responsibility for the decision or the final action that emerged was that of the authority who was entrusted with the power." The said authority "cannot simply act on the advice tendered by somebody without applying his own mind." If the authority failed to apply its mind and to exercise its discretion the order would be vitiated by mala fides.

He has also referred to a decision in Ishwar Chandra v. State of Orissa, AIR 1966 Orissa 173. In the said case a Government servant had been reverted on the advice of the Public Service Commission. It was held that the power to revert a gazetted Government servant vested exclusively in the Government and not in the Public Service Commission though the Public Service Commission had to aid and advise the Government in their opinion. Therefore, where the Government passed its order of reversion exclusively on the basis of the opinion to that effect by the Public Service Commission without applying its own independent mind to the merit of the case, the order could be successfully challenged and was vitiated by mala fide.

Reference has been made to a decision of the Supreme Court in B. Rajagopala v. S. T. A. Tribunal, AIR 1964 SC 1573. In this case, their Lordships were considering the scope and ambit of Section 43-A of the Motor Vehicles Act, 1939 inserted by Madras Amending Act 20 of 1948. Section 43-A of the Motor Vehicles Act reads thus:—

"The State Government may issue such orders and direction of general character only in respect of administrative matters relating to the State Transport Authority or Regional Transport Authority and such transport authority shall give effect to all such orders or directions."

It was held by their Lordships that Section 43-A authorises the State Government to issue orders and directions of a general character only in respect of administrative matters which fell to be dealt with by the State Transport Authority or Regional Transport Authority in their administrative capacity. The following

observations was made by their Lordships:—

"In interpreting Section 43-A, it would be legitimate to assume that the legislature intended to respect the basic and elementary postulate of the rule of law, that in exercising their authority and in discharging their quasi-judicial function the Tribunals constituted under the Act must be left absolutely free to deal with the matter according to their best judgment. It is of the essence of fair and objective administration of law that the decision of the Judge or the Tribunal must be absolutely unfettered by any extraneous guidance by the executive or administrative wing of the State. If the exercise of discretion conferred on a quasi-judicial tribunal is controlled by any such direction, that forges fetters on the exercise of such authority completely inconsistent with the well-accepted notion of judicial process....."

The principles enunciated in the decisions noted above are not applicable to the facts of the present case. In this case the decision of the authority directing to issue a show cause notice is not prompted by any extraneous consideration as consideration as may be found hereinafter. On the facts and circumstances of the instant case, the above cases are of no help.

6. On the other hand, the learned Advocate General appearing for the respondent has contended that at the stage of forming opinion for the issuance of notice under Section 385 of the Act, the power of the State Government is purely administrative but when it proceeds to give finding and record reasons, it becomes quasi-judicial. He has referred to the words "it appears" occurring in Section 384 and the word "opinion" occurring in Section 385 of the Act and has submitted that in the case of any action under Section 384 of the Act, the State Government must come to the conclusion before passing any order. In case of any proposed action under Section 385 of the Act, it is sufficient if the State Government is prima facie satisfied before show cause notice is issued. According to him, the very purpose of issuing show cause notice is to come to a definite conclusion after considering the show cause and other materials. Thus, according to him, the power that was exercised at the time of issuing a show cause notice, is purely administrative and not quasi-judicial. He has relied on a decision of the Supreme Court in Shri Radeshyam Khare v. State of Madhya Pradesh, AIR 1959 SC 107.

In this case the Madhya Pradesh Government in exercise of its power under Section 53-A of the C. P. and Berar Municipalities Act, 1922 has appointed an Executive Officer of the Municipal Com-

mittee of Dhamtari for a period of 18 months to exercise and perform certain powers and duties of the Committee to the exclusion of the Committee, President and others of the said Municipality. It may be relevant to set out S. 53-A of the C. P. and Berar Municipalities Act, 1922 in extenso, because it has been argued that the said provision is very much similar to Section 385 of the Act:—

"(1) If a committee is not competent to perform the duties imposed on it or undertaken by it by or under this Act, or any other enactment for the time being in force and the State Government considers that a general improvement in the administration of the municipality is likely to be secured by the appointment of a servant of the Government as the executive officer of the committee, the State Government may, by an order stating the reasons therefor published in the Gazette, appoint such servant as the executive officer of the committee for such period not exceeding eighteen months as may be specified in such order.

(2) Any executive officer appointed under sub-section (1) shall be deemed to be an officer lent to the committee by Government under sub-section (3) of Section 25.

(3) When under sub-section (1) an executive officer is appointed for any committee, the State Government shall determine from time to time which powers, duties and functions of the committee, president, vice-president or secretary under this Act or any rule or bye-law made thereunder shall be exercised and performed by such officer, in addition to, or to the exclusion of, their exercise and performance by the said committee, president, vice-president or secretary.

(4) The secretary of the committee shall be subordinate to the executive officer.

(5) The executive officer shall have the right to attend all meetings of the committee and any joint committee or sub-committee and to take part in the discussion so as to make an explanation in regard to the subject under discussion, but shall not move, second, or vote on any resolution or other motion". After considering various decisions, their Lordships observed as follows:—

....."The decision in the last mentioned case clearly establishes that in some cases it may be necessary to give an opportunity to a party to have his say before an administrative action is taken against him. But that is quite different from the well-ordered procedure involving notice and opportunity of hearing necessary to be followed before a quasi-judicial action, open to correction by a superior Court by means of a writ of

certiorari, can be taken. The difference lies in the manner and mode of the two procedures. For the breach of the rules of fair play in taking administrative action a writ of certiorari will not lie".

In *Liversidge v. Sir John Anderson*, 1942 AC 206 it was held that if the matter was one for executive discretion in the exercise of which the discretion of the authority was final, the Court of law cannot inquire whether in fact the authority had reasonable grounds for his belief. It has been contended that in the instant case if respondent No. 3 was of the opinion that it was necessary to exercise his discretion under Section 385 of the Act and has directed for issuance of a show cause notice, this Court will not act as a Court of appeal and consider and examine the facts for itself to import its own wisdom pursuant to whose judgment the matter in question is entrusted by law.

In *Associated Provincial Picture House, Limited v. Wednesbury Corporation*, 1948-1 KB 223 when a local authority had granted leave for Sunday performances subject to the condition that no children under fifteen years of age should be admitted to Sunday performance either without an adult, it was held that the local authority had not acted unreasonably or ultra vires in imposing the condition. Their Lordships observed as follows:—

"In considering whether an authority having so unlimited a power has acted unreasonably, the Court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matter that ought not to be or disregarded matters that ought to be taken into account. The Court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power".

7. In the instant case a copy of the order of respondent No. 3 has been given at Annexure 'D (2)', which is in Hindi. The English version of Annexure 'D (2)' will read as follows:—

"From the letter of the District Magistrate, it appears that the condition of Gava Municipality has become very serious. Therefore, show cause notice may be given.

Sd. Ramashray Singh
28-12-1974."

It has been stated in paragraph 7 of the counter-affidavit filed on behalf of respondent No. 1 that the show cause notice was issued on the recommendation of the District Magistrate (Annexure 'B'). The said report of the District Magistrate was examined by the Under Secretary on 24th

December, 1974 and by the Secretary on 27th Dec., 1974 vide Annexures 'D' and 'D (1)', respectively, whereupon the Minister incharge Urban Development Department passed his orders on 28th December, 1974. On 7th December, 1974, the District Magistrate of Gava had sent this report to the Government drawing Government's attention to the various irregularities of the Gava Municipality and recommended for supersession.

8. In his separate counter-affidavit, respondent No. 3 has stated in paragraph 2 that the steps were taken by him in regard to the affairs of the said Municipality on consideration of the report placed and facts represented before him and that he had acted objectively in the best interest of administration without any bias, prejudice or malice against the petitioner or anybody else.

9. It is manifest that respondent No. 3 on receipt of the report from the District Magistrate, Gava had applied his mind and had ordered for the issue of a show cause notice. In his order dated 28th December, 1974, respondent No. 3 has stated that "it appeared" to him that condition of the Municipality had become very serious. While saying so, he was exercising his discretion after being satisfied for taking action under Section 385 of the Act. The question of his final opinion will come only after the show cause has been filed in response to the notice and the matter has been considered by him. The final opinion for the exercise of powers under Section 385 of the Act has yet to be formed and that stage has not come.

10. In my opinion, the power which has to be exercised by the Government under S. 385 of the Act is quasi-judicial in nature. Any action under Section 385 of the Act is bound to prejudicially affect the Municipality. Sec. 385 of the Act provides for giving a notice to the Commissioners of the Government's intention to take an action under Sec. 385 of the Act but at the time of giving the notice it is enough if the authority is prima facie satisfied and is of the opinion that a show cause notice is required to be given to the Municipality under Section 385 of the Act. In doing so, the selective application of law under Section 385 of the Act is left to the opinion of the Government. It is the Government which has to take its decision on the materials available to it and the opinion it forms thereon. That, however, cannot be challenged in a writ application.

11. Having considered this aspect of the case, I am not inclined to hold that respondent No. 3 has not applied his mind to the question concerned or the purpose

of issuing notice under Section 385 of the Act, as submitted by Mr. Basudeva Prasad.

12. As regards point No. 2, learned counsel appearing on behalf of the petitioner has submitted that action of respondent No. 3 in issuing the show cause notice (Annexure '6') is mala fide and has been prompted by extraneous considerations. He has further submitted that Annexure '6' is for a collateral purpose and this action was taken because the petitioner and some others had filed C. W. J. C. No. 30 of 1975 in this Court challenging a previous order of respondent No. 3 contained in Annexure '5'. According to him, it is due to political ill-will and personal considerations. Learned counsel says that reference of certain litigations pending before the subordinate Courts as also the fact regarding resignation of Shri Chaurasia, which is the subject-matter of litigation in the High Court, amount to a contempt of Court and is, therefore, mala fide. To support this contention, learned counsel has relied upon a case of the Supreme Court in Govind Sahai v. State of U. P., AIR 1968 SC 1513. In that case one V. P. Singh had filed an election case against one Badri Singh in the Court of a Munsif at Azamgarh for declaring the election of Badri Singh void and inoperative. Learned Munsif had granted ad interim injunction and a prayer had been made before him for vacating the order of ad interim injunction. The election was in respect of membership of the Prarambhik Congress Committee. A resolution had been passed by the Working Committee of the Congress to the effect that any Congress member having any grievance, in respect of any action taken, should take advantage of the tribunal provided to seek redress by way of appeal or reference and that such matters should not be taken to law Courts. The resolution further provides that initiating of such litigation and securing of ex parte order from the Courts against the Congress Committee was highly detrimental to the discipline of the organisation and its smooth working and that any member who did so, did at his own risk being considered guilty of gross indiscipline and expulsion from the membership. At a time when the application for vacating the order of ad interim injunction was still pending plaintiff V. P. Singh was expelled from the Congress organisation and he moved the learned Munsif for taking action in contempt proceeding on the ground that the order of expulsion directly interfered with the normal course of justice for hampering progress of the suit. The High Court found that the action amounted to a contempt of Court. On appeal, their Lord-

ships of the Supreme Court observed as follows :—

"In the instant case, the passing of the orders of expulsion, by the two appellants, against the second respondent, and the filing of a supporting affidavit, in the suit by the second appellant, clearly indicate that it was a deliberate attempt, by the appellants, to interfere with, or prejudice the second respondent, in the conduct of the litigation, instituted by him. It is no answer that the action, by way of expulsion was taken on the basis of the Resolution of the All India Congress Working Committee, and to enforce discipline, in the Congress Organization. As emphasized by Das, J., in *Pratap Singh's case* (AIR 1962 SC 1172) any conduct, which interferes with, or prejudices parties litigant, during the litigation, is undoubtedly Contempt of Court. The High Court, in this case, was justified in holding the appellants guilty of contempt. We agree with the said conclusion."

Learned counsel has further relied on *Pratap Singh v. Gurubaksh Singh*, AIR 1962 SC 1172 in which it was held that there are many ways of obstructing the Court and any conduct by which the course of justice was perverted, either by a party or a stranger was a contempt; thus the use of threats, by letter or otherwise to a party while his suit was pending or abusing a party in letters to persons likely to be witnesses in the cause, had been held to be contempt.

13. It is urged that the notice, contained in Annexure '6' is a threat to the commissioners of the Municipality that the municipality will be superseded due to several reasons including the litigations in which the commissioners have involved themselves. On the other hand, learned Advocate General appearing for the State has submitted that the notice is only for exploring into the reports bearing upon the conduct of the Municipal Commissioners and to find whether the facts exist or do not exist. According to him, it cannot amount to a contempt inasmuch as it refers to the suit from the point of view of the Municipality. He has drawn our attention to various provisions of the Act and the Municipal Account Rules which includes law charges. His submission is that the Government is entitled to know whether the Municipal funds are properly being utilised or are being dissipated in litigation. He has referred to a case of the Supreme Court in *T. G. Gaokar v. R. N. Shukla*, AIR 1968 SC 1050. In paragraph 3 to which our attention has been drawn, it was observed that

"the customs officers are empowered to confiscate smuggled goods and to levy penalties on persons concerned with the

smuggling. They may initiate proceedings for confiscation of the goods and for imposition of the penalty though the trial of those persons in a Criminal Court for connected offences is imminent. The initiation and continuance of those proceedings in good faith cannot amount to contempt of Court, there must be involved some "act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority" or something "calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts" The power of adjudicating penalty and confiscation under those sections is vested in them alone. The Criminal Court cannot make this adjudication. The issue of the show cause notice and proceedings thereunder are authorised by the Act and are not calculated to obstruct the course of justice in any Court. We see no justification for holding that the proceedings amount to contempt of Court."

14. It may be stated here that the Municipal Act authorises the State Government to issue notice to the Commissioners under Section 385 of the Act for various reasons which also include the disposal of Municipal fund. He has also referred to another case *Saibal Kumar v. B. K. Sen*, AIR 1961 SC 633. This was a case relating to Calcutta Corporation. Certain proceedings were pending against officer of the Calcutta Corporation and an inquiry by a Special Committee was set up by the Corporation to discover malpractices on the part of Corporation Servants including the petitioners alleged to have been taking advantage of their offices in carrying on business in their own names. In the course of the enquiry the Committee sent a questionnaire to the Commissioners seeking to enquire whether he had made certain appointments of persons who were either related to the prosecution witness in the criminal case or were helping him in conducting his defence in that case. The question was whether such enquiry amounted to contempt of Court and whether the Commissioner was supporting the prosecution witnesses in the criminal case. It was held that the Committee did not tend to interfere in the course of justice and the members of the committee were not guilty of the offence of contempt of Court. Their Lordships were of the opinion that the Committee had embarked upon an enquiry on the directions of the Corporation in order to discover malpractices on the part of the Corporation's servants. The ascertainment of the motive for the appointments would be merely incidental to the main purpose of the enquiry. There was no parallel enquiry on matters pending decision by a Court of law.

15. In the instant case the notice which has been issued is merely to ascertain the truth or otherwise of the report which has reached the State Government in respect of the omission and commissions of the Municipality and the Commissioners. There is no parallel enquiry in respect of the litigations pending before the subordinate Courts of which reference has been made in Annexure '6'. As such, I do not find that Annexure '6' merely because it refers to certain litigations, amounts to a contempt of Court and, is, therefore, mala fide as submitted by learned counsel for the petitioner.

16. That it is for extraneous and collateral purpose and because of the earlier writ application (C. W. J. C. No. 30 of 1975) (Pat) filed in this Court is also not borne out from the facts of this case. C. W. J. C. No. 30 of 1975 was filed on 4-1-1975 and admitted on 7-1-1975. On 5-12-1974, Shri Chaurasia had made a representation to the District Magistrate about the affairs of the Municipality (vide Annexure '2') and on 6-12-1974 he also filed an application before respondent No. 3. On 7-12-1974 the District Magistrate had sent a report to the Government which is contained in Annexure 'B' to the counter-affidavit filed on behalf of the respondent. This report (Annexure 'B') was examined on 24-12-1974 and 27-12-1974 vide Annexures 'D' and 'D (1)' by the Under Secretary and Secretary to the Government. On 28-12-1974, respondent No. 3 passed the order contained in Annexure 'D (2)' of the State's counter-affidavit. On the basis of this order the notice (Annexure '6') was issued. Therefore, it may be seen that respondent No. 3 had passed the order much before C. W. J. C. No. 30 of 1975 had been filed in this Court, learned counsel is not correct in saying that respondent No. 3 was annoyed due to the institution of C. W. J. C. No. 30 of 1975 in this Court and, therefore, had taken this action regarding supersession of the Municipality.

17. It has also been urged that Sri Chaurasia is personal friend of respondent No. 3 and that respondent No. 3 had certain political bias and ill will against the petitioner. This has been emphatically denied by respondent No. 3 in his counter-affidavit. Respondent No. 3 has categorically stated in his counter-affidavit that the assertion made in the writ petition had worked against him and had actively supported his rival candidate in the Kurtha election is not true and he was not aware of the petitioner's having acted at any stage in the election of the representative from Kurtha Assembly constituency and was not even an elector in the said constituency. As regards the allegation in the writ application about

the petitioner's having participated in the meeting to condole the death of one Sri Jagdeo Prasad in the police firing and having pleaded for a probe, respondent No. 3 has stated that the decision to set up a commission of enquiry to enquire into the facts and circumstances that led to firing at Kurtha had been unanimously taken up by the Government in which he himself was a Minister. Respondent No. 3 has also denied any knowledge about one Sri Mahesh Prasad Singh, described to be the younger brother of the petitioner and, therefore, there was no occasion for respondent No. 3 to ask the said Mahesh Prasad Singh to work for him. About the proposal to constitute Barbigha Notified Area Committee it has been stated that idea was broached at a time when the department was in the charge of late Sri Khaderan Singh and it was later constituted under the order of Dr. Ram Rai Singh, the then Minister incharge of the department. As such, it is difficult to hold that respondent No. 3 had any bias or political ill-will against the petitioner and that he was prompted by any extraneous consideration in making the order contained in Annexure 'D (2)'. The contention of the learned counsel in this behalf is, therefore, rejected.

18. Now I advert to point No. 3. As earlier stated, it has been urged on behalf of the petitioner that Annexure '6' is the cumulative effect of the various grounds mentioned in it and if some of the grounds are found to be irrelevant or non est, the whole of it must go.

19. It will be worth while to quote Annexure '6' for a proper consideration of this point. Annexure '6' is in Hindi, a translated copy of which reads as follows:—

"Annexure 6.

Letter No. 91 U. D. D.

Government of Bihar

Urban Development Department.

From

Sri Bishram Prasad,
Secretary to the Government.

To

The Commissioner,
Patna Division, Patna.

Patna, dated the 8th Jan., 1975.

Sub.:— Proposal for supersession of Gaya Municipality.

Sir,

The Government is seriously watching the deteriorating condition of Gaya Municipality for the last several months.

The condition of the Gaya Municipality has now reached this stage that obstruction is caused in every transaction. Due to internal dispute in the Municipality this Municipality is unable to do any work for the benefit of the public. The

following are some of the examples of the mal-administration of the Municipality:—

1. After the election, the present Municipal Board was formed on 12-3-1973. Its first meeting was held on 29-3-1973. Since then all the meetings which were held, were adjourned on either in a very grim and tense situation or no tangible decision was arrived at therein.

2. Sri Kanhaiya Lal Chaurasia, the President of the Gaya Municipality had sent a confidential letter on 26-8-1974 for his resignation from the post of commissioner, stating therein that if Shri Santoshi Lal Bajaj, ward commissioner tendered his resignation, he would also tender his resignation. Later on he had given letter of withdrawal on 28-4-1974 and 30-8-1974. As the condition given in the letter of resignation was not fulfilled, the resignation of Chaurasia should have been automatically taken as rejected. The Government Pleader also clearly stated that a meeting for considering the letter of resignation will be illegal. Still the Chairman called an extraordinary meeting on 25-11-1974 and after great uproar, the Municipal Board was divided into two groups. The meeting of one group was held under the presidentship of Sri Chaurasia, in which there were only fifteen members and it was decided that the aforesaid meeting was illegal. Hence the present agenda for consideration was rejected. At the same time and on the same day and place, another meeting was also held under the presidentship of Purnanand Tarway, in which 18 members were present and the letter of resignation of Sri Kanhaiya Lal was unanimously accepted. In this way, two parallel meetings were held on 25-11-1974.

3. The adjourned meeting of September and the monthly meeting of November was to be held on 26-11-1974. Two parallel meetings were held on that day also Sri Kanhaiya Lal Chaurasia presided over one meeting and Sri Narmadeshwar Prasad Singh, Chairman, Gaya Municipality presided over the other meeting. The decision of both the meetings were contradictory. It became a problem for the Executive Officer, Gaya Municipality as to which resolution should be given effect to. In such circumstances, no work of public interest is being done properly by the Municipal Board.

4. An extraordinary meeting was held on 22-12-1973 for removal of the Chairman, in which 18 members, in all were in favour of removal. Since then the Chairman is in minority and the situation always remains tense and the Municipality has to face several cases.

5. Some members had demanded to call an extraordinary meeting in the

month of December, 1973 for removal of the president. Under Section 44 (2) of the Bihar and Orissa Municipalities Act, this extraordinary meeting was called by themselves on 18-1-1974, in which 19 ward commissioners were present and they unanimously passed the resolution for removal of the President, as a result of which a stalemate situation has arisen. An extraordinary meeting for removal of the Executive Officer was held on 20-9-1974 and only 12 votes were secured in favour of removal when it must be at least 23 votes.

6. The Municipality has been unnecessarily spending its resources and money in litigation.

(a) Some employees of the Municipality instituted case against Sri Birendra, the ward Commissioner for mal-treatment, in July 1973. On the day of 'Bihar Bund' dated 21-1-1974, the driver of the jeep of the Chairman instituted a criminal case against some employees of the Municipality, and some employees were arrested too. A counter case was filed by the employees also.

(b) In December 1973, Sri Jav Kumar Palit, the ward commissioner filed a case against the Chairman, in which allegations of bungling of records and other papers were levelled against him.

(c) The chairman of the Municipality himself filed a case in the Court of the 1st Munsif against the ward commissioners of the Municipality in which he raised objections against the committees formed under Section 49 of the Municipal Act. The same was finally disposed of by the District Judge whereby the committees formed were declared valid. The Municipality uselessly spent Rs. 1,200.97 p. over it.

(d) With reference to the aforesaid case against the Executive Officer and several Commissioners of the Municipality by the Chairman, a criminal case is still pending and the Municipality has been bearing the cost.

(e) Internal disunity cropped up among the members of the Municipality over approval of annual settlement of the Kedarnath Market, regarding which a case was filed in the Hon'ble High Court, Patna in which the Municipality had to spend Rs. 9,905/-. A case was again filed by the Chairman himself in the 1st Court of the Munsif raising objections against the meeting of the member of the Municipality held on 27-8-1974. The municipality had to spend about Rs. 180/- over this case.

7. The Committees which were formed under Section 49 of the Bihar and Orissa Municipal Act themselves took over the entire power of the Municipal

Board and made the Municipal Board idle.

8. A Ward Commissioner has forcibly got a tractor of his close relative plied within the Municipality (area) and is demanding charges therefor.

9. complaints are also being received at time from the general public or other sources against the Municipality. No work is being done by the Municipality decently. Due to internal groupism within the Municipality, the Board is unable to take any decision. Due to contradictory resolutions of the groups, the Executive Officer has always to face difficulties in executing them. No concrete step is being taken in the interest of financial position of the Municipality, on account of which the financial condition of the Municipality has already deteriorated. Within the last six months the employees of the Municipality have already made demonstration before the District Magistrate in connection with their demand regarding salary, etc.

In the aforesaid circumstances, it clearly appears that the Municipal Commissioners are unable to perform their duties faithfully and efficiently. Hence, the Government asks the Commissioners of Gaya Municipality to explain as to why they should not be declared to be unfit under Section 385 of the Bihar and Orissa Municipalities Act on account of their inability to perform duties competently and efficiently or on account of misuse of their powers. The Municipal Commissioners may also be informed that they should send their explanations if any within two weeks of receipt of copy of this letter, to the Government through you and the District Magistrate, Gaya. They should send a copy of their explanation direct to the Government, also. They may also be informed that if the Government will not receive any explanation from the Municipal Commissioners within the said period, the Government will take decision regarding supersession of the Municipality. Fifty copies of it are being sent directly to the District Magistrate.

Yours Faithfully,
Sd/- B. Prasad
Secretary to the Govt.

xxx

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Our attention has been drawn to the concluding portion of Annexure '6' wherein it has been stated: "In the aforesaid circumstances, it clearly appears that the Municipal Commissioners are unable to perform their duties faithfully and efficiently." Learned counsel has submitted that this is beyond the scope of S. 385 of the Act. He has further submitted that grounds Nos. 2, 3, 4 and 6 may be related to incompetency of the Municipality

if they are permissible grounds, they are not valid grounds for the reason that they amount to contempt of Court. As regards grounds Nos. 1, 5, 7, 8 and 9, learned counsel has submitted that they are irrelevant, non est and vague and as such cannot form the basis for any action under Section 385 of the Act.

20. At the very outset I may state that in view of my earlier finding that the mention regarding certain litigations in Annexure '6' do not amount to contempt of Court, it cannot be held that ground Nos. 2, 3, 4 and 6 are not permissible grounds. So far grounds Nos. 1, 5, 7, 8 and 9 are concerned, they are, in my opinion, neither irrelevant nor non est for the purpose of issuing the notice.

21. In this connection, Mr. Basudeva Prasad has relied on a decision of the Supreme Court in *Binnv Ltd. v. Their Workmen*, AIR 1972 SC 1975. In the said case certain Workmen had been dismissed on the ground of misconduct. The charge against one Kuppuswamy was that "on the 3rd of this month at about 9.15 a.m. Kuppuswamy had behaved in an insolent manner towards the Warehouse Master, Mr. Veeraraghavan by shouting at him and creating a disorderly scene in the Warehouse Office." Kuppuswamy was asked to submit his explanation. During an enquiry Kuppuswamy was stated to have misbehaved with the Warehouse Master. Ultimately his service was terminated on the ground of misconduct. The Labour Court ordered his reinstatement although recording a finding that Kuppuswamy was guilty of misconduct. It was argued in that case that the Labour Court has accepted the finding of the domestic tribunal that delinquent was guilty of the misconduct alleged against him, the effect that the order of termination of service mentioned a similar conduct in the past on which no charge had been raised should not make any difference to the result. Their Lordships after considering the various facts and circumstances in that case observed as follows:—

"The language of the order leaves no doubt in our mind that it was the cumulative effect of the lapses on the part of the respondent (Kuppuswamy) that had resulted in the order of termination of service. It was not a case where two separate charges had been framed against the delinquent and they were of such a serious nature that the finding of guilt on any one would warrant the dismissal of the delinquent from service."

22. The facts of the instant case are quite distinguishable from the facts in the case mentioned above. In the instant case several charges have been framed against the Municipal Commissioners, and many of them are of serious

nature. Moreover, in the present case the stage is of showing cause and no final order has yet been passed by the Government. It is still open to the Municipal Commissioners to show to the Government that any of the charges are irrelevant, vague or non est. It has been rightly stated on behalf of the State that the State Government has vet to form their opinion and arrive at the conclusion after holding a quasi judicial enquiry in respect of the matter and that it was, at this stage, premature and embarrassing for the Respondent State to form their own conclusion or refute or affirm the assertions made by the petitioner, the truth or false-hood whereof depended upon enquiry which was vet to be made.

23. In State of Maharashtra v. Babulal Takkamore, AIR 1967 SC 1353 where an order superseding the Municipality was based on two grounds, one of which was relevant and the other irrelevant, it was held that the fact that one of those grounds was irrelevant did not affect the order inasmuch as the second ground showed that in the opinion of the State Government, the ground was serious enough to supersede the Municipality and was sufficient to establish that the Corporation was not competent to perform its duties under the Act. This case is a direct authority on the point which is under consideration. As stated above, Annexure 'G' contains several grounds. The final opinion of the State Government is vet to be formed. The petitioner has ample opportunity to show that the grounds are irrelevant or non est. The State Government is acting in a manner which satisfies the principles of natural justice.

24. The principle that if one of the grounds is vague, irrelevant or non est, the whole order is vitiated, has been laid down in cases of detention, where the detention is based on the subjective satisfaction of the authorities. I do not think that the same principle will apply in the case at hand and more so at a stage when the authority is vet to form its opinion.

25. The conditions for the exercise of power under Section 385 of the Act are clearly stated in the Section. If it appears to the State Government that the Municipality is incompetent or or is persistently making default in performance of the duties imposed on it by or under the Act or exceeds or abuses its power, the State Government must give to the Municipality an opportunity to show cause why it should not be superseded. Upon a consideration of the show cause if the State Government consider that there is no ground for making the order, the State Government may drop the pro-

ceeding. On the other hand, if in the opinion of the State Government, there are good grounds, it may, by an order, declare that the Municipality should be superseded. The order has to be a reasoned order. In a writ application, this Court will not review the facts as an appellate body. That order can be set aside only in a case where no reasonable person on a proper consideration of materials before the State Government could form the opinion that the Municipality was not competent to perform or persistently makes default in the performance of duties imposed on it by or under this Act. The order can also be set aside if it was passed mala fide or in violation of principles of natural justice.

26. As has been held earlier, the show cause notice is not based on any extraneous consideration and satisfies the principles of natural justice. In my opinion, this Court cannot interfere with this show cause notice at this stage.

27. Having considered the facts and circumstances of this case and the submissions made by learned counsel appearing for the parties, I hold that this application has no merit. In the result, this application is dismissed. In the circumstances of the case there will be no order as to cost.

B. D. SINGH, J. :— I agree.

Application dismissed.

AIR 1975 PATNA 259

H. L. AGARWAL, J.

Harnam Singh, Appellant v. Balai Kumar Sinha and another, Respondents.

A. F. O. O. No. 25 of 1972. D/- 6-3-1975.*

(A) Provincial Insolvency Act (1920), Section 9 (c) — Limitation — Initial act of insolvency committed — Subsequent act of insolvency whether provides fresh starting point of limitation.

Once an act of insolvency is committed by the debtor to the knowledge of the creditor, he is not entitled to wait beyond a period of three months and still persist in making demands for payment of debt, from time to time getting refusals and then to present the insolvency petition within a period of three months from one of such refusals of the debtor. Otherwise the whole purpose of fixing a limit of three months in clause (c) of Section 9 for a creditor to make the petition will

*(From order of Sachindranath Basu, Dist. J., Singhbhum at Chalbassa, D/- 10-7-1972).

FS/FS/C95/75/DRG

be nullified altogether and would be contrary to the scheme of the Act itself.

This period of three months is not actually a period of limitation; it is only a condition precedent for making the application on sound reason and matter of public policy. AIR 1935 Mad 857 and AIR 1939 Cal 313, Foll. (Para 2)

(B) Provincial Insolvency Act (1920), Sections 6 (g) and 9 (c) — Act of insolvency by debtor — Subsequent payment by him — Effect of.

A debtor committed an act of insolvency by declaring to suspend payment by him to all his creditors. The creditor took no action within three months thereof. Some payment was made by the debtor thereafter and the creditor kept pressing his demand. On a refusal to pay by the debtor, the creditor filed an insolvency petition contending that the payment had the effect of rescinding the earlier act of insolvency.

Held that the contention cannot be accepted for two reasons: firstly, that it is well settled that a debt may be barred for the purpose of recovery through the assistance of Court but it is not wiped out as such. Therefore, there is no bar at any time for a debtor to make any payment to his creditor. Secondly, the contention must be overruled on a technical ground also that the act of insolvency was made complete on making the declaration of suspension whereas the payment was made much after the expiry of the period of three months within the meaning of Clause (c), Section 9 and it ceased to be an act of insolvency by itself. (Para 3)

(C) Provincial Insolvency Act (1920), Section 25 — Insolvency petition — Grounds for dismissal — Collusion between creditor and debtor can be a ground.

Collusion between the creditor and the debtor can be a valid ground for dismissal of an insolvency petition. Section 25 empowers the Court to dismiss the petition on certain specified grounds; it specifically mentions three circumstances in which the petition made by the creditor must be dismissed. In addition thereto, the Court has been given a discretion to dismiss a petition if it is satisfied that there is other sufficient cause for not making an order against the debtor. It is true that such a general discretion must be read ejusdem generis with the specially mentioned conditions; but even so it enables the Court to take into consideration different circumstances not covered by express conditions. AIR 1966 SC 918, Rel. on. (Para 4)

Cases Referred: Chronological Paras
AIR 1966 SC 918 = (1966) 2 SCR 209 4
AIR 1939 Cal 313 = 69 Cal LJ 84 2

AIR 1935 Mad 857 = 69 Mad LJ 283 2

Arun Chandra Mitra, for Appellant;
C. B. Belwariar, for Respondents.

JUDGMENT:— This is an appeal under Section 75 (2) of the Provincial Insolvency Act (hereinafter referred to as 'the Act') by the creditor. He claims to have advanced a sum of Rs. 5,000/- on a handnote on the 17th August, 1964 to the debtor (respondent No. 1). He served a notice of demand as early as on the 17th July, 1965, but did not bring any suit for recovery of the amount although a sum of Rs. 100/- only is said to have been paid by the debtor on 16th August, 1966. Just a day before the expiry of the limitation, a further sum of Rs. 500/- is said to have been paid by him on the 17th July, 1969. By these two payments, the debt, however, did not become barred. The most relevant fact in this case is that the debtor in pursuance of the notice of demand had clearly informed the appellant and certainly on the 25th May, 1968 by a letter which is on the record of this case as Ext. 3 that he was heavily involved in debts and unable to pay anything to any of his creditors and that he had suspended payments to all of them including the appellant. The petition of insolvency, however, was not filed within the prescribed period from the receipt of those declarations from the debtor, but as late as on the 8th June, 1970. The other intervening fact that should be stated is that respondent No. 2 another creditor of the debtor, had obtained a consent decree for above Rupees 10,000/- on the 11th July, 1969, against the debtor and was proceeding against his house property in the execution proceeding. The petition for insolvency was filed in the year 1970 in this background. The debtor in his rejoinder as well as in his evidence in the proceeding before the District Court had admitted that he was unable to pay the debts and also confirmed his earlier stand communicated to the appellant in pursuance of his notice of demand, already referred to.

The plea of the other creditor, namely, respondent No. 2, was that the appellant and the debtor were hands-in-glove and the entire transaction was collusive in order to deprive him of the fruits of his decree. The District Court, on reference to various circumstances, has dismissed the application under Section 25 of the Act by clearly holding that the insolvency petition was filed by the petitioning creditor in collusion with the debtor. I shall advert to this incident a little later. The District Court has further held that there was no evidence on record to show that the act of insolvency on which the insolvency petition was grounded had occurred within three

months before the presentation of the same.

2. Mr. Mitra, appearing in support of this appeal, has challenged the judgment of the learned District Judge dismissing the petition on the above grounds. With respect to the first ground, learned Counsel contended that the learned District Judge has committed an apparent error in not referring to the evidence of the creditor that he had made demands of the debt from the debtor within a period of three months from the date of the presentation of the petition and has recorded the finding against the appellant with reference to certain written demands only. It is no doubt true that the appellant after adverting to the preliminary demands and previous notice had also subsequently stated that he went personally to the debtor again on the 6th June, 1970 and demanded the dues when he openly expressed his inability to pay the same. However, there is a serious difficulty in the way of the appellant on which this appeal has got to fail. Section 9 of the Act prescribes that a creditor shall not be entitled to present an insolvency petition against a debtor unless, inter alia, the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition (vide Cl. C). Acts of insolvency have been enumerated under Section 6 of the Act. The relevant clause thereof for the present case will be clause (g) which reads as follows:

"6. A debtor commits an act of insolvency in each of the following cases, namely:— (g) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts; or

xx xx xx"

In the petition of insolvency itself, which was filed in the district Court, the appellant himself has very clearly stated that "In his reply the debtor-opposite party stated that he is heavily involved in debts and that he is unable to pay anything to any of his creditors and that he has suspended payments to all the creditors and also gave the names of some other creditors in his letter dated 25-5-1968". It cannot, therefore, be disputed, and the learned counsel for the appellant had ultimately to concede, that the aforesaid unequivocal declaration of the debtor that he was heavily indebted and was unable to pay anything to any of his creditors and had suspended payments to all was an apparent act of insolvency within the meaning of clause (g) of Section 6 of the Act. A question arises as to when once an act of insolvency was committed by the debtor to the knowledge of the creditor, could he wait beyond a period of

three months and still persist in making demands from time to time getting the same reply and then to present the insolvency petition within a period of three months from one of such demands and the refusal of the debtor. In my considered opinion, this view is not acceptable, because in that event, the whole purpose of fixing a limit of three months in clause (c) of Section 9 for a creditor to make the petition will be nullified altogether and would be contrary to the scheme of the Act itself. By prescribing a time-limit to the creditor, the Legislature in its wisdom has foreseen various consequences which might follow in a given case and give rise to serious complication and repercussion in commercial world with respect to the transactions that the debtor may happen to make with other persons. A limit, therefore has been very rightly fixed on time for taking any action for declaring a debtor insolvent. The creditor, therefore on his own accord, is not entitled to go on postponing the making of the insolvency petition by notionally extending the period when once a firm ground and an act of insolvency has already occurred. In a Full Bench decision of the Madras High Court in *Chenchuramana Reddi v. Arunachalam*, AIR 1935 Mad 857 which was a case of a fraudulent transfer by a debtor in preference to the other creditors, it was held that as soon as three months' period fixed under clause (c) of Section 9 had expired, the transaction ceased to be impeachable under the Insolvency Act, and the act of transfer itself immediately on the completion of the period of three months ceased to be an act of insolvency as such. In a Bench decision of the Calcutta High Court in *Muradan Sardar v. Secy. of State*, AIR 1939 Cal 313, it was held that after the expiry of the period of three months the act of insolvency in question did not continue to be an act of insolvency in order to enable a petitioning creditor to take advantage of Cl. (c) of Section 9 of the Act. This, period of three months is not actually a period of limitation, it is only a condition precedent for making the application on sound reason and matter of public policy. The petition of insolvency in question that was filed by the appellant was, therefore, certainly not maintainable and incompetent as such.

3. Mr. Mitra, however, laid emphasis that the debtor made payments towards the debt in question — once on the 16th August, 1966 and again on the 17th July, 1969 on pressing demands by the appellant. On the basis of these materials, he contended that his earlier declaration that he had suspended payments to all the creditors and was unable

to pay anything towards the debt which constituted an act of insolvency within the meaning of Section 6, clause (g) of the Act, would automatically stand rescinded. It is difficult to accept the contention of learned Counsel, for two reasons: firstly, that it is well settled that a debt may be barred for the purpose of recovery through the assistance of Court but it is not wiped out as such. Therefore, there is no bar at any time for a debtor to make any payment to his creditor. Secondly, the contention must be overruled on a technical ground also that the act of insolvency was made complete in May 1968, whereas the payment was made on the 17th July, 1969, much after the expiry of the period of three months within the meaning of clause (c) of Section 9 of the Act, and it thus ceased to be an act of insolvency by itself. The payment of the sum of Rs. 500/-, therefore, would not in any way be of any consequence in this case.

4. Now, I shall also consider briefly the other question on which the petition has been dismissed by the trial Court, namely, on the ground of collusion. Section 25 of the Act empowers the Court to dismiss the petition on certain specified grounds, it specifically mentions three circumstances in which the petition made by the creditor must be dismissed. In addition thereto, the Court has been given a discretion to dismiss a petition if it is satisfied that there is other sufficient cause for not making an order against the debtor. It is true that such a general discretion must be read ejusdem generis with the specially mentioned conditions; but even so it enables the Court to take into consideration different circumstances not covered by express conditions. Reliance can be placed in support of the view on a decision of the Supreme Court *Yenumula Malludora v. Peruri Seetharathnam*, AIR 1966 SC 918. The learned District Judge, therefore, had committed no error of law in proceeding to consider the circumstances and the evidence adduced on behalf of respondent No. 2 to show that the whole action of the appellant was collusive.

5. For the foregoing reasons, this appeal has got no substance and it must fail. It is, accordingly, dismissed. I shall make no order as to costs.

Appeal dismissed.

AIR 1975 PATNA 262

NAGENDRA PRASAD SINGH AND
S. ALI AHMAD, JJ.

Srikrishna Das and others, Petitioners
v. State of Bihar and others, Respondents.

Civil Writ Jurisdiction Case No. 8 of
1975, D/- 3-3-1975.

(A) Bihar Rice and Paddy Procurement Order (1974), Clause 14 (2), Proviso (as amended by notification dated 19-2-1975) — Interpretation of — Not retrospective in operation — Only the wholesalers carrying on business in paddy or rice after 19-2-1975 are liable to deliver levy at the prescribed rate — (Interpretation of Statutes — Retrospective operation).

The newly added proviso to sub-clause (2) of Clause 14 is not retrospective in operation. There are positive indications in the amended provision that it is to come into force from the date when it was published in the Gazette. The expression "on the date of commencement of this order" has been mentioned twice in the amended provision—once in context of the delivery of the levy on the existing stock, and again in connection with the liability of delivery of paddy and rice coming into the possession or custody of the wholesale dealers every day. It is well settled that any amendment cannot be held to have retrospective effect unless the legislature or the authority concerned expresses its intention in clear terms. As such, the amended provision will be deemed to have come into force on and from the 19th February, 1975, when it was published in the Gazette. (Para 4)

Therefore only those licensed wholesale dealers who are carrying on business in paddy and/or rice after the 19th February, 1975, will be liable to deliver paddy and/or rice according to the rate prescribed in the amended provision. There is no question of quantification of the liability of wholesale dealers in respect of the levy at the end of kharif year, because, under the amended clause, the delivery of such levy is to be made every day. (Paras 4, 5)

Although the amendment has been put in the form of a proviso, yet, for all practical purposes, it is an independent sub-clause fixing the liability on the wholesalers and providing a mode of realisation of the levy from them. (Para 4)

(Sub-clause (2) of Clause 14 of the Order as it stood before amendment was conceded as ultra vires — Para. 4).

B. C. Ghose and D. K. Sarkar, for
Petitioners; Balabhadra Prasad Singh

Advocate General of Bihar and G. P. Jayaswal, for the State.

NAGENDRA PRASAD SINGH, J. :—

The petitioners in this writ petition are licensed wholesale dealers in foodgrains under the Bihar Foodgrains Dealers' Licensing Order, 1967 (hereinafter referred to as the 'Licensing Order'). The details of their licences are mentioned in paragraph 1 of the writ petition. In this writ petition they have made a prayer for quashing of the different notices issued to them in exercise of the powers conferred by the Bihar Rice and Paddy Procurement Order, 1974 (hereinafter referred to as the 'Procurement Order') for delivery of rice or paddy as the 'Procurement price' to the State Government or its agent for the kharif year 1974-75, as required by Clause 14(2) of the Procurement Order. Copies of the said notices are Annexure "1" series. The notices have been issued saying that the petitioners have to deliver levy on the basis of the transactions entered into by them during the last five years. The petitioners have challenged the vires of Clause 14(2) of the Procurement Order, saying that it is arbitrary and unreasonable.

2. Clause 14(2) of the Procurement Order, which is relevant for the present case, reads thus:—

"(2) Every licensed wholesale dealer shall deliver to the State Government or its agent at procurement price, for the kharif year 1974-75, at his business premises, a minimum of fifty quintals and a maximum of 1,000 (one thousand) quintals of rice as levy which shall be fixed by the Collector on the basis of the highest annual turnover of business in paddy and/or rice during the last five years, in the following manner:—

Maximum transaction of rice during last five years (1969-70 to 1973-74).	Quantity of levy rice.
--	------------------------

(1) More than 5,000 quintals	1,000 quintals
(2) 3,001 to 5,000 quintals	750 quintals
(3) 2,000 to 3,000 quintals	500 quintals
(4) From 1,751 quintals to 1,999 quintals	425 quintals
(5) From 1,501 to 1,750 quintals	350 quintals
(6) From 1,251 to 1,500 quintals	275 quintals
(7) From 1,001 to 1,250 quintals	200 quintals
(8) From 751 to 1,000 quintals	125 quintals
(9) From 501 to 750 quintals	75 quintals
(10) Up to 500 quintals	50 quintals

"Note I.—If any dealer is dealing in paddy only or in paddy as well as rice his maximum annual turnover according to this table shall be calculated after taking one quintal of paddy as equivalent to 62.5 kilograms of rice.

Note II.—For determination of the quantity of levy to be realised from wholesalers, only those books of accounts shall be taken into consideration as have been inspected and signed by gazetted officers of the State Government in course of their routine work in the past. If no books of account are produced the amount of levy shall be fixed at the highest in the scale, that is, 1,000 quintals."

3. During the pendency of the writ application, the Governor of Bihar, by notification No. G. S. R. 19, dated the 19th February, 1975, published in an extraordinary issue of the Bihar Gazette, dated the 19th February, 1975, with the prior concurrence of the Central Government, was pleased to amend sub-clauses (1) and (2) of Clause 14 of the Procurement Order. The amendment to sub-clause (2) of Clause 14, which is relevant for the present purpose, reads thus:—

"Provided that every licensed wholesale dealer may, in the alternative, elect to deliver to the State Government or its agent, at the procurement price, at his business premises, such quantity of paddy and rice as shall be equal in weight to 20 per cent. of the total quantity of paddy and rice of each of the varieties held in his stock on the date of commencement of this Order, and 20 per cent. of the total quantity of each of the varieties of paddy and rice purchased by him or coming into his custody or possession for sale or disposal through him on commission basis or any other manner every day beginning with the date of commencement of this Order and until such time as the State Government otherwise directs. Delivery of such levy demand shall be made every day. No stocks shall be allowed to be removed from the wholesaler's business premises without delivery of levy demand pertaining to such stocks."

4. During the course of arguments, learned Advocate-General had to concede that sub-clause (2) of Clause 14 of the Procurement Order was ultra vires; but it was submitted that, in view of an alternative mode having been prescribed by the amendment for delivery of paddy and rice, the petitioners are liable to deliver paddy and/or rice according to the rate prescribed in the amended provision. Learned Advocate-General has further submitted that, although the amendment has been put in the form of a proviso, yet, for all practical purposes, it is an independent sub-clause fixing the liability on

the wholesalers and providing a mode of realisation of the levy from them. In my opinion, there is substance in the contention raised by the learned Advocate-General. Now, under the amended provision, the petitioners have to deliver to the State Government or its agent, at the procurement price, at their business premises, such quantity of paddy and rice as shall be equal in weight to 20 per cent. of the total quantity of paddy and rice of each of the varieties held in their stock on the date of commencement of this order. They have also to deliver 20 per cent. of the total quantity of each of the varieties of paddy and rice purchased by them or coming into their custody or possession for sale or disposal through them on commission basis or any other manner every day beginning with the date of commencement of this order and until such time as the State Government otherwise directs. Learned counsel for the petitioners did not challenge the liability of the petitioners in accordance with the amended provision, if it is found that they had in their stock paddy or rice on the date of the commencement of the Procurement Order, or they have entered into transactions in paddy and/or rice on any day after the coming into force of the amended Procurement Order. According to the petitioners, they are not carrying on any business in paddy and rice since the 14th November, 1974, when the Procurement Order came into force. In this connection a question arose as to since which date the amended Procurement Order will be deemed to have come into force. Learned Advocate-General contended that the newly added proviso to sub-clause (2) of Clause 14 should be deemed to have come into force on and from the 14th November, 1974, and in any case the amendment only quantified the liability of the petitioners concerned for the kharif year 1974-75, even if it be held that the amendment came into force on and from the 19th February, 1975. This quantification can be done even at the end of the kharif year on the basis of the total transactions entered into by the petitioners from the 14th Nov., 1974 till the expiry of the kharif year itself. In my opinion, it is difficult to accept this submission made on behalf of the State. There is nothing to show in the amended provision that it was to come into force retrospectively from a date earlier than that when it was published in the Gazette. Apart from that, I find that there are positive indications in the amended provision that it is to come into force from the date when it was published in the Gazette. The expression "on the date of commencement of this order" has been mentioned twice in the amended provision—once in

context of the delivery of the levy on the existing stock, and again in connection with the liability of delivery of paddy and rice coming into the possession or custody of the petitioners every day. It is well settled that any amendment cannot be held to have retrospective effect unless the legislature or the authority concerned expresses its intention in clear terms. As such, I hold that the amended provision will be deemed to have come into force on and from the 19th February, 1975, when it was published in the Gazette. There is no question of quantification of the liability of the petitioners in respect of the levy at the end of the Kharif year, because, under the amended clause, the delivery of such levy is to be made every day.

5. In support of the contention that the petitioners are not liable to deliver any paddy and/or rice to the respondent State or to any of its authorities under the Procurement Order, because they are not carrying on any business in paddy and/or rice, learned counsel appearing for the petitioners has referred to paragraph 12 of the writ petition wherein it is stated that the petitioners are doing no business of rice or paddy in this season, that is, from November, 1974. In paragraph 4 of the counter-affidavit filed on behalf of the respondents the said averment has been challenged. Mr. Ghose, appearing for the petitioners, has pointed out that from paragraph 4 of the counter-affidavit it would appear that there is no statement that the petitioners had done any business in December, 1974 or in January, 1975, and in this connection he has also drawn our attention to the rejoinder filed on behalf of the petitioners. In my opinion, it is difficult to decide this disputed question of fact on the basis of such statements and to find out as to whether the petitioners or anyone of them had done any business in rice and/or paddy during this period. Apart from that, there is no bar on the petitioners carrying on business in paddy and/or rice on any day so long as they hold the licence under the Licensing Order. In that view of the matter, this question is to be examined by the local authorities as to whether the petitioners are carrying on any business in paddy and/or rice. If it is found that the petitioners or anyone of them is carrying on business in paddy and/or rice after the 19th February, 1975, it will be open to the respondents to realise from the petitioners/petitioner concerned paddy and/or rice, as the case may be, in accordance with amended sub-cl. (2) of Clause 14 of the Procurement Order.

6. In the result, the application is allowed and the notices of demand (Annexures "1" series) are quashed, and the

respondents are directed to proceed in accordance with law and in the light of the observations made above. In the circumstances there will be no order as to costs.

S. ALI AHMAD, J.:— I agree.

Application allowed.

AIR 1975 PATNA 265

H. L. AGARWAL, J.

Rajindra Prasad Sinha, Appellant v. M/s. Karam Chand Thapar and Co. (Coal Sales) Ltd., Respondent.

A. F. O. O. No. 314 of 1972. D/- 11-2-1975.*

(A) Civil P. C. (1908), O. 30, R. 1 — Suit against firm — Suit filed after death of a partner — Firm dissolved in meantime — Cause of action against firm accruing before its dissolution — Suit against firm held valid.

It is not always necessary that on death of a partner, a firm must be dissolved. It is settled that if the cause of action has already accrued in favour of person before the dissolution of a firm, such a person can institute a suit in the name of a firm and prosecute it against such a firm, although it might have been dissolved in the meantime. AIR 1969 Pat 340, Rel. on. (Paras 4 and 5)

(B) Civil P. C. (1908), Section 47 — Suit against firm — In a compromise petition, parties accepting appellant to be wrongly impleaded as a defendant — Appellant held not party to suit within the meaning of Section 47.

In a money suit against a firm, a compromise petition specifically accepted that the appellant was wrongly impleaded as defendant and had no liability for dues against the firm, as he was not a partner thereof. It was contended that this amounted to a statement that appellant was wrongly impleaded as party defendant in the suit. Held that in the circumstances of the case, appellant cannot be considered as a party to suit within the meaning of Section 47. AIR 1942 Pat 432 and AIR 1954 Mad 864 (FB). Rel. on. (Paras 5 and 6)

Cases Referred: Chronological Paras
AIR 1969 Pat 340 4
AIR 1954 Mad 864 = (1954) 2 Mad LJ 176 (FB) 5
AIR 1942 Pat 432 = 23 Pat LT 354 5

L. K. Choudhury and Parmanand Sharma, for Appellant; Bimal Bhusan

*(From order of R. S. Prasad, Sub. J., 2nd Court, Patna, D/- 30-8-1972).

ES/ES/B745/75/RSS

Sen and Mihir Kumar Roy, for Respondent.

JUDGMENT:— This is a Miscellaneous First Appeal under Section 47 of the Code of Civil Procedure on behalf of judgment-debtor No. 3.

2. In order to appreciate the various questions of law that arise for decision in this case, it is necessary to state the few relevant facts. Respondent No. 1 instituted Money Suit No. 77 of 1955 in the Court of the Subordinate Judge, Patna, against a firm, namely, M/s. Kameshwar Sinha and Company, and two of its partners, for realisation of Rs. 18,771/- due to it as the balance of the price of coal sold on credit to the firm, who was defendant No. 1. In that suit, the first two defendants did not appear in spite of service of summonses. The plaintiff and defendant No. 3, who is the appellant before me, filed a compromise petition. In the said compromise petition it was stated that the appellant was not a partner of the defendant No. 1 firm at all and the plaintiff therefore, agreed to exonerate him from the claim in the suit "which was hereby withdrawn against him." Later on, the Court passed an ex parte decree on the 26th June 1957 against the other two defendants. The plaintiff thereafter levied Execution Case No. 1 of 1960. In the execution proceeding, the decree-holder proceeded against a sum of Rs. 5,000/- standing to the credit of defendant No. 1 in its Saving Bank Account in the General Post Office, Patna. On this action of the decree-holder, several proceedings were started from time to time by the appellant as well as some other persons as heir and legal representative of a deceased partner of defendant No. 1. Firstly, an appeal against the judgment and decree of the trial Court was filed in this Court in forma pauperis which was registered as M. J. C. No. 550 of 1957. The M. J. C. application having been dismissed and the court-fee not having been paid on the memorandum of appeal within the time allowed, the appeal was dismissed for default. Then several Miscellaneous cases under different provisions of the Code of Civil Procedure were filed in the execution proceeding from time to time and the matter had come up to this Court twice; firstly in Miscellaneous Appeal No. 348 of 1965 and secondly in Civil Revision No. 345 of 1969. It appears that the Miscellaneous Appeal and the Civil Revision were filed in the name of the judgment-debtor firm itself, although through some or the other person. Repeated attempts had all through been made to circumvent and frustrate the attempt of the decree-holder to fall upon the aforesaid sum of Rs. 5,000/- standing to the credit of defendant No. 1 in its

Savings Bank Account in the General Post Office, Patna. Ultimately, in the Civil Revision, this Court directed that the executing Court should proceed against the money in question under O. 21, R. 52 of the Code.

3. The appellant thereafter seems to have filed an application in the executing Court that the decree passed by the trial Court is a nullity, having been passed against defendant No. 2 (Choudhary Indra Narain Jha), as well who was already dead, and, therefore, the execution could not proceed. This argument has been repelled by the executing Court on various grounds, including that this plea was barred by principles of *res judicata*.

4. In this Court Mr. L. K. Choudhury appearing in support of this appeal contended that the decree against defendant No. 1 itself was inexecutable inasmuch as the defendant firm was dissolved or stood dissolved on the date of the passing of the decree as defendant No. 2 (Choudhary Indra Narain Jha), one of the partners, had died. The contention has got no substance and must be rejected for various reasons. Firstly, it is not always necessary that on the death of a partner, a firm must be dissolved. It all depends upon the terms of the agreement of the partnership between them. No evidence has been led on behalf of the appellant on this question. Secondly, the proposition as such has also got no substance in the eye of law. It is well settled that if the cause of action has already accrued in favour of a person before the dissolution of a firm, such a person can institute a suit in the name of the firm and prosecute it against such a firm, although it might have been dissolved in the meantime. This view finds full support from a Bench decision of this Court in the case of *Ram Swarup Maru v. State of Bihar*, AIR 1969 Pat 340.

5. Mr. B. B. Sen on behalf of the decree-holder respondent raised two further points against the appellant. The first point is that the filing of the various proceedings by and in the name of the defendant No. 1 itself, referred to above, clearly proved the fact that the defendant firm was not dissolved and was in existence and would also attract the doctrine of estoppel against the appellant to raise this question. It is not necessary to conclusively decide this question for the view that I have already taken that the plaintiff's decree against the firm, on the facts and in the circumstances of this case, was quite valid and enforceable.

However, there seems to be great force in the second contention of Mr. Sen to the effect that the objection of the

appellant cannot be held to be under Section 47 of the Code as he had no authority to file the objection petition under that Section. If that be so, then the present appeal is not maintainable on this ground alone. Learned counsel contended that the appellant should not be deemed to be a party to the suit within the meaning of Section 47 of the Code, and the explanation that the defendant against whom a suit of the plaintiff had been dismissed should be treated to be a party to the suit, would have no application, inasmuch as on the basis of the stand taken by the parties in the compromise petition, it was specifically accepted that the appellant was wrongly impleaded as a defendant and he had no liability for the dues against the firm, namely, defendant No. 1, because he was not a partner of the firm. Learned counsel contended that the effect of this statement in the compromise petition amounted to a statement that this appellant was wrongly impleaded as a party defendant in the suit and, therefore, he would be deemed to be not before the Court for all practical purposes, although no prayer was made in this behalf and the suit was allowed to be dismissed against him. This contention seems to be well founded and is supported by two decisions; one of this Court and the other of the Madras High Court. A Bench of this Court in the case of *Mt. Kusmi v. Sadasi Mahto*, AIR 1942 Pat 432 held that if instead of striking out the name of a person from the plaint, the Court merely dismisses the suit against him, such a person cannot be said to be a party to the suit within the meaning of the explanation to Section 47 of the Code. A similar view was expressed in the case of *Katragadda China Ramavva v. Chiruvella Venkanraju*, AIR 1954 Mad 864 (FB).

6. On the authority of the aforesaid two decisions, I feel inclined to take a view that the appellant will not be considered to be a party to the suit within the meaning of Section 47 of the Code. Even assuming that his objection in the executing Court could be treated under any other provision of the Code of Civil Procedure, and once it is held that it was not under Section 47 of the Code, this appeal is incompetent as no appeal lay to this Court from the order in question, not being under Section 47 of the Code.

7. For all the foregoing reasons, I do not find any merit in this appeal. It is, accordingly, dismissed; but in the circumstances, I shall make no order as to costs.

Appeal dismissed.

AIR 1975 PATNA 267

C. N. TEWARY, J.

Parmatma Singh, Petitioner v. Sri Ram Lakhan Singh Yadav and others. Respondents.

Election Petition. No. 30 of 1972. D/- 26-9-1974.*

(A) Representation of the People Act (1951), Ss. 83 (1) (b) and 123 (2) — Particulars of corrupt practice — Particulars of names of voters said to be prevented by force from casting vote — Need not be exhaustive — Some such voters only mentioned in Schedule to election petition — Voters not so mentioned can be allowed to be examined to give specific evidence. M. J. C. No. 36 of 1954, D/- 12-4-1955 (Pat); AIR 1961 Pat 189 and (1960) 21 Ele LR 121 (Pat), Not Followed; (1954) 10 Ele LR 245 (Mad); 1969 Doabia's Elec. Cases 166 (SC); AIR 1972 SC 359 and AIR 1973 SC 2158, Dist. (Para 14)

Cases Referred: Chronological Paras
 AIR 1973 SC 2158 = (1974) 1 SCR 52 13
 AIR 1972 SC 359 = (1972) 2 SCJ 464 12
 1969 Doabia's Elec. Cases 166 = (1969) 3 SCC 492 11
 AIR 1961 Pat 189 = ILR 38 Pat 1378 6, 11
 (1960) 21 Elec LR 121 (Pat) 7
 (1955) M. J. C. No. 36 of 1954. D/- 12-4-1955 (Pat) 5
 (1954) 10 Elec LR 245 (Mad) 10

Gorakh Nath Singh, D. Prasad Sharma, Bhupendra Kumar, Akhilesh Kr. Sharma and Ramanugrah Prasad Singh, for Petitioner; Kanhaiya Prasad Verma and C. B. Belwariar and K. K. Prasad, for Respondent No. 1.

ORDER:— The question for consideration is whether a witness (viz. Nawal Kishore Singh, P. W. 3 in the instant case) should be allowed to give specific evidence that he was prevented by force from casting vote at the booth when his name does not appear in the election petition or in the schedule of the election petition as one of the voters, who are said to have been prevented by force from casting vote. In the election petition it has been alleged that respondent No. 1 committed corrupt practices and one of the corrupt practices said to have been committed by respondent No. 1 or his men is that the voters were prevented from casting vote. Paragraph A of Schedule VI of the election petition contains the list of eight villages whose entire voters are said to have been prevented from going to their booths and from casting vote. The village of Nawal

Kishore Singh (P. W. 3), who is a resident of village Devi Asthan Chiraiyatn, is not one of those villages. Thus even the name of the village of this witness is not mentioned in paragraph A of the schedule of the election petition. Paragraph B of Schedule VI of the election petition contains names of the voters, who were prevented from casting their votes. There are nine such voters. Nawal Kishore Singh (P. W. 3) is not one of those voters. Thus there is nothing in the election petition or in its schedule to show that Nawal Kishore Singh (P. W. 3) was one of the voters who are said to have been prevented from casting vote.

2. Learned counsel appearing on behalf of the election petitioner submits that in Schedule IV of the election petition, which contains the details of the booths said to have been captured by respondent No. 1 and his men, booth No. 100 where Nawal Kishore Singh (P. W. 3) had to cast vote is mentioned. The place where booth No. 100 was located is not stated in Schedule IV. What it shows is that one of booths was booth No. 100 and 836 votes were to be cast there and 700 votes were actually polled. This is the only information that is contained in Schedule IV regarding booth No. 100. Even if it be assumed that Nawal Kishore Singh (P. W. 3) had to cast his vote at booth No. 100, it cannot be inferred from these details given in Schedule IV that Nawal Kishore Singh (P. W. 3) had been prevented from going to booth No. 100 or had been prevented from casting his vote at booth No. 100.

3. Thus the question that arises for consideration is whether the election petitioner can legally be permitted to examine voters whose names are not given in the election petition as voters said to have been prevented by force from casting vote to say that they were prevented by respondent No. 1 or his men from casting vote. The learned counsel for the election petitioner submits that in the election petition names of only some of the voters, who were prevented from casting votes have been given by way of illustration and, therefore, the election petitioner can examine any number of voters in addition to the voters, whose names are mentioned in the election petition, to say that they were prevented from casting vote. The learned counsel appearing on behalf of respondent No. 1 submits that if voters not named in the election petition are also allowed to be examined on behalf of the election petitioner to say that they were prevented from casting votes, this will cause great prejudice to respondent No. 1 and he will be handicapped in his defence.

* (Application under Sections 80-A and 81 of the Representation of the People Act, 1951).

4. Section 123 of the Representation of the People Act (hereinafter referred to as 'the Act') describes corrupt practices for the purposes of the Act. According to sub-section (2) of Section 123 of the Act the following shall be deemed to be a corrupt practice—

"Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent, with the free exercise of any electoral right."

Section 83 of the Act lays down *inter alia*—

"(1) An election petition—

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c)"

5. In an unreported case *Chandreshwar Narain Prasad Sinha v. Basu Prasad*, Chairman, Election Tribunal, Patna, M. J. C. No. 36 of 1954 (Pat) decided on 12-4-1955, relied upon by the learned counsel for respondent No. 1, S. K. Das, C. J. while considering what the words "material facts" occurring in cl. (a) of sub-s. (1) of Section 83 of the Act mean observed—

"It is obvious that the expression 'material facts' with regard to such allegations must include the names of the persons who committed the fraud as also the names of the persons who were the subject of the fraud. In other words, it was necessary to ensure a fair and effectual trial of the election petition that the names of the persons who carried the voters in the motor trucks as also the names of the persons who were so carried should be mentioned; so also the names of the persons who gave the bribes as also the names of the persons who accepted the bribes."

6. Reliance has also been placed by the learned counsel for respondent No. 1 on the following observations made in the case *Chandrashekhar Singh v. Sarjoo Prasad Singh*, AIR 1961 Pat 189—

"In my opinion, the contention put forward on behalf of the respondent is sound and that on behalf of the appellant is not tenable. The use of the word 'including' in Cl. (b) of sub-sec. (1) of the S. 83 of the Act, indicates that the names of the parties alleged to have committed the corrupt practice should be deemed to

be one of the particulars required to be given but that does not mean that it exhausts the list of the names of the parties to be given; it only explains and specifies some of them. Under Section 123 (2) it is provided that, if any candidate or his agent threatens any elector with injury of any kind, he shall be deemed to have interfered with the free exercise of the electoral right. The particulars of corrupt practices necessarily include the names of the electors alleged to have been subjected to such corrupt practices. In my opinion, therefore, the election petition suffers from an incurable infirmity in this regard and the charge is bad on this ground alone."

7. Lastly, the learned counsel for respondent No. 1 has relied upon *Singheswar Prasad v. Kamalnath Tiwari*, (1960) 21 Elec LR 121 (Pat). In that case, the names of the person or persons who actually carried the voters on the trailer drawn by the tractor of the petitioner (respondent in the election petition) were not given, the date of the commission of the corrupt practice was also not given, and the names of the villages from which the voters were brought to the polling station were further omitted. It was held that the petitioner's allegations relating to corrupt practice as mentioned in the election petition were not supported by the supply of full particulars and the allegations could be struck off.

8. These decisions lend support to the argument of the learned counsel of respondent No. 1 that so far as the allegation that the voters were prevented by force from casting vote is concerned, a voter whose name does not appear in the election petition or in the schedule of the election petition as a person, who was prevented from casting vote, should not be allowed to give specific evidence that he was prevented from casting his vote. There is force in this contention. If persons not named in the election petition as voters said to have been prevented by force from casting votes are allowed to be examined by the election petitioner to give specific evidence that they were prevented by force from casting their votes, there would be no end of the matter and the election petitioner may examine hundreds of such witnesses resulting in great prejudice to respondent No. 1.

9. Learned counsel appearing on behalf of the election petitioner has referred to some decisions in support of his argument that the election petitioner may examine any number of such persons, whose names do not appear in the election petition or in the schedule of the election petition as the voters said to have been prevented by force from casting votes, to give specific evidence that

they were prevented by force from casting votes. Of course, he submits that the election petitioner will examine only those witnesses whose names appear in the list of witnesses which was filed on his behalf on 15-9-1972. The election petition was filed on 26-4-1972. Even in the list of witnesses which was filed on 15-9-1972, it is not stated as to which of those persons are the voters, who were prevented by force from casting their votes.

10. The decision reported in (1954) 10 Elec LR 245 (Mad). (A. Srinivasan v. G. Vasantha Pai.) relied upon by the learned counsel for the election petitioner is not applicable to the facts of this case. In that case the election was by postal ballot and the voting by the method of proportional representation. The allegation in that case was that the returned candidate by characterising Mr. Vasantha Pai as a communist and carrying a propaganda to that effect exercised undue influence and intimidation on the voters so as to deprive them of freedom to vote. The grievance of the returned candidate was that the election petitioner had not specified the names of electors, who were said to have been called upon not to vote for the election petitioner. The election petitioner in his counter-affidavit stated *inter alia*, as follows:

"The applicants have not denied that there was such a propaganda or widespread belief that the petitioner was a communist. According to them, this was of the petitioner's own making and they were not instrumental for it. It now remains for me to prove that the respondents and their agents carried on such propaganda with a view to deflect my votes and obtain them for themselves."

In such circumstances, the contention that the election petitioner must have set out the names of the voters who were unduly influenced was rejected. This case is clearly distinguishable. In the instant case, the respondent No. 1 has not admitted that the voters were prevented from casting votes. Secondly, in the instant case, the allegation is that the voters were prevented from casting vote by force; whereas in that case the allegation was that a propaganda was being made that the election petitioner was a communist. In that case the corrupt practice alleged to have been committed fell under sub-section (5) (now sub-section (4) of Section 123) of the Act; whereas in the instant case, the corrupt practice alleged to have been committed falls under sub-section (2) of Section 123 of the Act.

11. Paragraph 14 of the judgment of the Supreme Court in the case of Ambika Sharan Singh v. Mahadeva Nand Giri, 1969 Doabla's Elec. Cases 166 (SC) has

also been relied upon by learned counsel for the election petitioner. In para. 14 of the judgment their Lordships of the Supreme Court were considering the allegation of caste appeal to voters made on behalf of Ambika Sharan Singh. That corrupt practice also fell under sub-section (3) of Section 123 of the Act. But as pointed out above, the allegation of corrupt practice in question in the instant case falls under sub-section (2) of Section 123 of the Act. Their Lordships of the Supreme Court observed thus—

"But where the allegation is that such canvassing was widespread and at several places it would be impracticable to call upon the election petitioner to give the names of persons alleged to have been approached with such an appeal and the actual words spoken to each of them. If such an appeal is made, for instance, at a meeting it would be difficult for a witness to name those to whom such an appeal is made. It is for this reason that Courts in England have made a distinction between bribery to voters and treating them..... The case of Chandrasekhar Singh v. Sarjoo Prasad Singh, AIR 1961 Pat 189 relied upon by Mr. Verma, is clearly distinguishable as the allegation there was of intimidation and assault of certain workers and voters who as a result of injuries inflicted on them had to be admitted in a hospital."

Thus their Lordships of the Supreme Court distinguished the cases in which the voters are intimidated and assaulted from the cases in which a mere caste appeal to voters is made. Thus the decision in that case is not applicable to the facts of the instant case in which the allegation is that the voters were prevented by force from going to the booths and from casting vote.

12. In the case of Janak Sinha v. Ram Kishore Das, AIR 1972 SC 359, which has also been relied upon by learned counsel for the election petitioner, it was not the question for consideration whether the election petitioner should have mentioned in the election petition the names of the voters, who were prevented from casting vote. Learned counsel for the election petitioner, however, has relied on certain observations made by their Lordships of the Supreme Court in paragraphs 61 and 62 of the judgment. In para. 61 of that judgment, their Lordships observed:—

"Schedule I of the election petition gives particulars of undue influence committed by or on behalf of the appellant with his consent during the course of election. Column No. 1 gives the names of some of the persons who committed the corrupt practice; Column No. 2 gives the dates on which such corrupt practices

were committed; Column No. 3 gives the places as well as the number of the polling booths where they were committed; and column No. 4 gives the names of some of the persons on whom undue influence was committed."

It is true that in Column No. 4 of Schedule I of the election petition names of some of the persons and not the names of all the persons on whom undue influence was committed were mentioned in that case, but there is nothing in the judgment of their Lordships to show that the election petitioner was allowed to examine any person whose name was not mentioned in the election petition to say that he was prevented from casting vote. Therefore, that case is also clearly distinguishable.

13. Reliance has also been placed on observations of their Lordships of the Supreme Court in paragraph 5 of the judgment in Manphul Singh v. Surinder Singh, AIR 1973 SC 2158. In paragraph 5 their Lordships were considering the issue that fell under clause (b) of sub-sec. (1) of Section 83 of the Act. The following observations of their Lordships in paragraph 5 of the judgment may be quoted:—

"Mr. Garg then went on to argue that where it is alleged that votes have been cast in the name of dead or absent persons it should be specifically stated who exactly voted in place of the dead or absent persons. In respect of his first objection it has to be pointed out that it may very often happen that a candidate has no polling agents at all in various polling stations and polling booths. Very often the polling agent may not be a person belonging to that village so that he may not be able to challenge those voters then and there. Therefore, it is enough if he has made subsequent enquiries and come to know the facts and alleges them within the period of limitation provided in the Act. Whereas Section 83 (1) (a) contemplates giving a concise statement of the material facts on which the petitioner relies, Mr. Garg's argument really amounts to saying that the petition should contain not only the material facts but also the evidence on which he relies to prove those material facts. This is directly contrary to the provisions of Order VI, Rule 2 of the Code of Civil Procedure."

Thus it would appear that in that case the question was whether the election petitioner should have mentioned the names of the persons, who had cast votes in place of dead voters. The decision of that case does not apply to issue that is for consideration in the instant case.

14. Thus on a careful consideration of the facts of this case and the decisions

cited on behalf of both the parties, it must be held that the election petitioner must be allowed to examine any witness to give specific evidence that he was prevented by force from casting vote, if the name of that voter is not mentioned in election petition or in the schedule of the election petition as one of the voters said to have been prevented by force from casting vote.

Interlocutory Application in election petition allowed.

AIR 1975 PATNA 270

B. D. SINGH AND

BIRENDRA PRASAD SINHA, JJ.

Nand Kumar Singh, Petitioner v. Murat Nath Singh and others, Respondents.

Civil Writ Jurisdiction Case No. 101 of 1971, D/- 29-1-1975.

(A) Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), Section 16 (3) — Application under, for pre-emption — Application as well as cognisance was taken prior to completion of registration of sale deed — Application not maintainable — As the applicant had no legal right, he has no legal right to press application under Articles 226 and 227 of the Constitution to quash orders of dismissal of his application under Section 16 (3) — Writ petition, held, not maintainable — (Constitution of India, Arts. 226 and 227).

(Para 5)

Jagdish Sahay and D. K. Sinha, for Petitioner; Rash Bihari Singh, S. B. N. Singh 3rd Govt. Pleader; Basant Kumar Singh Jr. Counsel to 3rd Govt. Pleader and Keshari Pd. Singh, for Respondents.

ORDER:— This application by Nand Kumar Singh under Articles 226 and 227 of the Constitution of India is directed against orders, dated the 6th of January 1969 (Annexure '1'), passed by respondent No. 10 and dated the 17th of November, 1969 (Annexure '2'), passed by respondent No. 11; and the resolution, dated the 22nd of October, 1970 (Annexure '3') passed by respondent No. 12, namely, the Member Board of Revenue.

2. In order to appreciate the points involved in this case, it will be necessary to state, briefly, the facts. Respondents 4 to 9 (third-set) were the owners of 25½ decimals of land out of plot No. 49 under khata No. 115 of touzi No. 776 and 0.84 acre of land out of plot No. 1118 under khata No. 33 of touzi No. 775 of village Manikpur English within Koelwar Police Station in the district of Shahabad (now

Bhoipur). On the 9th of June, 1966, out of the aforesaid lands, respondents (third set) sold 22 decimals of land out of plot No. 49 and 63 decimals of land out of plot No. 1118 to respondents 2 and 3 (second set) for a consideration of Rs. 1,500/- by a registered sale deed. On the 16th of June, 1966, the petitioner filed an application before respondent No. 10 (the Sub-Divisional Officer) under Section 16, Clause (3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter to be referred as 'the Act') for pre-emption on the ground that the petitioner held adjoining lands on the North as well as on the West of plot No. 49 and also on the ground that he was a co-sharer of plot No. 49, being the owner of 25½ decimals of land therein. Besides, as stated by the petitioner in paragraph 4 of the application, he held land on south of plot No. 1118. The application of the petitioner before respondent No. 10 was numbered as Bihar Ceiling Act case No. 8 of 1966-67. Subsequently, on the 23rd of August, 1966, Murat Singh (respondent No. 1-first set) also filed an application for pre-emption under Section 16, Cl. (3) of the Act of the aforesaid lands transferred to respondents (2nd. set) chiefly on the ground that he was a co-sharer in respect of the lands in question. His application was numbered as Ceiling Act case No. 20 of 1966-67 before respondent No. 10. After hearing both the cases and after perusing the evidence on the record, by the impugned order, dated the 6th of January, 1969, (Annexure '1'), respondent No. 10 rejected the application of the petitioner, whereas, he allowed the prayer of respondent No. 1 chiefly on the ground that respondent No. 1 had larger area of land on the boundary of the lands covered in the said registered sale deed whereas the petitioner had a very small area on the boundary. Being aggrieved by the order, the petitioner preferred appeals before respondent No. 11 (the Collector of Shahabad) who also was pleased to dismiss the appeals of the petitioner by his order contained under Annexure '2'. Thereafter, the petitioner preferred revision application before respondent No. 12 who also, by his resolution, dated the 22nd of October, 1970 (Annexure '3'), was pleased to dismiss the revision application. It may be noticed that, apart from the ground for dismissal of the application by respondent Nos. 10 and 11, the Member Board of Revenue also observed in his resolution that the application of the petitioner under Section 16 (3) of the Act was not maintainable as it was premature and also because the cognizance was taken by the Sub-Divisional Magistrate prior to the date when the registration of the sale deed was completed;

whereas, in the case of respondent No. 1, although his application was filed on the 23rd of August, 1966, cognizance was taken by the Sub-Divisional Magistrate on the 20th of November, 1966, on the application filed by respondent No. 1.

3. On behalf of respondent No. 1, a counter-affidavit has been filed on the 13th of May, 1971, in support of the impugned order. Thereafter, reply has been filed by the petitioner on the 23rd of November, 1972, to the counter-affidavit of respondent No. 1. A supplementary affidavit has been filed on behalf of respondent No. 1 on the 22nd of December, 1972.

4. Mr. Jagdish Sahay, learned counsel appearing on behalf of the petitioner has assailed the impugned orders and the resolution and he has contended that they have erred in construing the provisions contained under Section 16 of the Act. He referred to clause 3 of that section, in order to show that the petitioner had better right of pre-emption as against respondent No. 1; as admittedly, an application on behalf of the petitioner was filed on the 16th of June, 1966; whereas, respondent No. 1 had filed his application on the 23rd of August, 1966. Therefore, he submitted, the rule of first come first served should have been applied. Mr. Sahay further contended in the alternative that respondent No. 12 had erred in taking into consideration that the application of respondent No. 1 was maintainable; whereas that of the petitioner was not maintainable on the ground that the cognizance in the case of respondent No. 1 was taken by the Sub-Divisional Magistrate on the completion of the registration. The registration was completed in the instant case on the 20th of September, 1966. According to him, the only consideration ought to have been the filing of the application itself. If the filing was premature, in that case, the applications of both the petitioner as well as respondent No. 1 ought to have been dismissed. Therefore, he submitted that respondent No. 12 had erred in making distinction between the applications of the petitioner and respondent No. 1. In the result, according to him, he has erred in discriminating the case of the petitioner in violation of Article 14 of the Constitution of India.

5. It will be convenient to deal with the two contentions referred to above of the petitioner together. It has already been mentioned that the application of the petitioner was filed on the 16th of June, 1966, whereas, the cognizance in his case was also taken by the Sub-Divisional Magistrate before the registration of the sale deed was completed on the 20th of September, 1966. In that view of

the matter clearly, the application of the petitioner was not maintainable at all and, therefore, the Sub-Divisional Magistrate as well as the appellate Court had no jurisdiction to entertain the application of the petitioner. If the petitioner had no legal right, he has no legal right even today to press the application in this Court under Articles 226 and 227 of the Constitution of India. In our opinion, the application of the petitioner was not entertainable at all under writ jurisdiction. As regards the contention that the case of respondent No. 1 also stood on the same footing is also not tenable, because most of the cases which have been cited before us dealt with the cases where the application as well as the cognizance was taken prior to the completion of the registration. Therefore, we do not wish to quash the order passed on the application of respondent No. 1 under our supervisory jurisdiction under Article 227 of the Constitution of India. That apart, since we have already mentioned that the petitioner has no right to press this application, it will not be necessary now to go into the matter any longer with regard to his second submission about the discrimination having been made in the case of the petitioner vis a vis the case of respondent No. 1.

6. In the result, this application is dismissed and the orders and the resolution aforesaid are upheld. In the circumstances, however, there will be no order as to costs.

Application dismissed.

AIR 1975 PATNA 272

C. P. SINHA, J.

Baleshwar Singh and others, Petitioners v. Ramji Singh, Opposite Party.

Criminal Revn. No. 2691 of 1972. D/- 30-8-1974.*

(A) Limitation Act (1963), Art. 131 — Order dated 30-9-1972 challenged in revision by application dated 20-12-1972 — Illegality of order dated 25-11-1970 set up as a ground to support the prayer in revision application — Whether barred by time. (Criminal P. C. (1898), S. 529 (f).)

Magistrate 'A' by his order D/- 25-11-1970 transferred a criminal case to Court B. Court 'B' by its order dated 30-9-1972 rejected an application of the accused made for their discharge. The accused filed revision against the order on 20-12-1972. It was contended that the order of

* (Against order of D. N. Singh, Munsiff Magistrate, 1st Class, Hajipur, D/- 30-9-1972).

Magistrate 'A' dated 25-11-1970 was illegal and hence the order of Court 'B' dated 30-9-1972 was also illegal and without jurisdiction and the revision application of 20-12-1972 being beyond 90 days from 25-11-1970 was barred by limitation. Held, that the applicant's specific prayer was to set aside the order of Court 'B' dated 30-9-1972. The grounds made for the discharge was that the cognizance in the case and its transfer by 'A' were illegal and improper. This point was raised by way of support to the application for discharge. The prayer of the accused could not be treated as confined to the order of 'A' dated 25-11-1970. After hearing the parties B Court had held that the irregularity in the order of Magistrate 'A' was curable under Section 529 (f) of the Criminal P. C. In such a situation the revision could be treated to be substantially directed against the order of B Court dated 30-9-1972 and not against the order of 'A' dated 25-11-1970. The revision application filed on 20-12-1972 was therefore within the period of limitation under Art. 131 of the Limitation Act, 1963 being within 90 days from 30-9-1972. (Para 5)

(B) Criminal P. C. (1898), S. 529 (f) — Transfer of a case by an officiating Magistrate in good faith — Magistrate not empowered to do so — Order is irregular and not illegal — Irregularity curable under Cl. (f) of S. 529, Criminal P. C.

Where the Magistrate 'A' officiating in place of B after going through the enquiry report submitted under Section 202, Criminal P. C. which was ordered by 'B' transferred the case to another Magistrate for trial and it was contended that transferring Magistrate 'A' not being empowered to do so, his order of transfer was without jurisdiction and hence vitiated the proceedings in the transferee Court it was held, that there was nothing on record to show that the transferring Magistrate 'A' did not act in good faith and assuming that 'A' had no power to make the order of transfer it was only an irregularity in the circumstances of the case, curable under clause (f) of Section 529 of the Criminal P. C. and hence the proceedings in the transferee Court could not be held vitiated on that ground. AIR 1938 Pat 369 = 39 Cri LJ 778. Distinguished. (Paras 10, 11)

Cases Referred : Chronological Paras AIR 1938 Pat 369 = 39 Cri LJ 778 12

Awadh Kishore Prasad and Narendra Kumar Ambastha, for Petitioners; Mazhar Hussain and Harendra Prasad, for Opposite Party.

ORDER:— The revision petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, is on behalf of six accused persons in the case in which

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to create, declare, etc., rights or interests in immovable property and not documents which merely recite an already completed transaction purporting or operating to create, etc., such rights. It is in the light of the accepted interpretation placed on Section 2(14) and clause (b) above mentioned, that the question as to whether secondary evidence of the contents of the Razinama dated 28-3-1963 can or cannot be given has to be answered. If the original Razinama was compulsorily registrable, secondary evidence of its contents would have to be disallowed except as evidence of part-performance of a contract for the purpose of Section 53-A of the Transfer of Property Act or as evidence of any collateral transaction not required to be effected by a registered instrument in accordance with the provisions of Section 49 of the Indian Registration Act. Again, if stamp duty was leviable on the original Razinama no secondary evidence at all of its contents would be admissible because the Razinama itself could not be admitted in evidence in view of the provisions of Section 35 of the Indian Stamp Act. So the crucial point is: Is the Razinama an instrument compulsorily registrable under S. 17(1)(b), or one liable to stamp duty by reason of the fact that it is an "instrument" within the meaning ascribed to it in Section 2(14) of the Indian Stamp Act, or whether it is neither the one nor the other by reason of the fact that it does not itself declare, create, etc., any right but only recites an already completed transaction declaring or creating such a right? The question has to be answered with reference to the contents of the Razinama. It no doubt uses the words "Razinama likh diya ke sanad rahe" at two places and also uses the future tense in regard to the respective rights of the parties in the land left by Basant Singh; and if it were to be literally construed it may be said that it itself created rights of the kind abovementioned. But the document has to be considered as a whole along with its circumstances, and so considered it can be regarded merely as an application to the Roving Revenue Assistant requesting him to sanction a mutation in accordance with a settlement which the parties had already arrived at orally. The purpose of the Razinama was merely to have a mutation sanctioned and its language was obviously chosen by the scribe to express in his own way what was conveyed to him by the parties as the details of the settlement between them. It was addressed to the Roving Revenue Assistant, contained the title of the disputed mutation of gift and inheritance in relation to the land left by Basant Singh and made an express prayer that mutation be sanctioned in accordance with the settlement.

Again it was presented to the Roving Revenue Assistant on the very day on which it was scribed and a mutation was actually entered in pursuance of it and of the endorsement made on it by the Roving Revenue Assistant. All these factors go to indicate unmistakably that it was an application pure and simple which recited the settlement already arrived at and was never meant to be a record of the settlement itself.

Considering a similar document Chatterji, J. observed thus in *Prabh Daval v. Gurmukh*, 1902 Pun Re 98:

"There is no doubt that words used 'iqrar karta hun' and 'I agree and write that I mortgage such right' purport to set forth that the mortgage was made by it, and if these words are literally construed the finding of the Divisional Judge must be admitted to be correct. But the whole document must be read together and its attendant circumstances considered. Now it was addressed to the Munsif and contained the title of the case and other particulars at the top, and wound up by asking the Munsif to strike off the execution proceedings in accordance with it. Below the signature of the defendant the plaintiffs have written 'This faisla is accepted by me' and signed their names. Clearly therefore it was in form an application made to the Court stating the terms of the agreement between the parties. It is not written on the non-judicial stamp, and does not purport to be a mortgage deed. The statement of the mortgagor to the Court, however worded, cannot therefore be anything but an application reciting the facts. Now an application to Court in whatever language it might be couched cannot properly be treated as the original contract between the parties to the case in which it was made. It must be held to be a mere recital of the contract independently entered into between them. In other words the language should have been 'I have agreed to mortgage such right' which would have been proper in a petition filed in Court setting forth the terms of the contract. There cannot be any doubt about the correctness of this proposition. In a proper case it is permissible to supply omitted words, to reject repugnant words, to transpose words and to disregard mistakes in grammar and spelling if the intention of the parties sufficiently appears from the context. Norton and Clark's Interpretation of Deeds, Edition 1885, Rule 17, page 78. See also Rule 16 *ibid*. Here you have only to disregard the use of the present tense. If the above rule is applicable to documents regularly and formally drawn up a fortiori it applies to informal ones written by unskilful scribes. The great point is to find out the intention of the

parties, and it is not possible, in my opinion, to hold that the contract of hypothecation was made for the first time and only by means of the application. The proper reading is that it contains merely a statement of the fact that such an agreement has been made. The agreement thus remained an oral one, and neither the incorrect use of the present tense in the application nor the acceptance of the application and agreement by the Court can make any difference. The document therefore creates no rights and does not require registration."

These observations fully apply to the Razinama with which I am dealing and support my view that the Razinama is only an application and not a settlement. Other decisions in which a similar view was taken are *Mt. Khari-Ul-Niasa v. Bahadur Ali*, 1906 Pun LR 11; *Mt. Jeo v. Jaimal Singh*, AIR 1915 Lah 240; *Hari Chand v. Magi Mal*, AIR 1917 Lah 282 (2) and *Ram Saran Lal v. Emperor*, AIR 1918 All 307.

4. Holding that the Razinama dated the 28th of March, 1963 was neither compulsorily registrable nor was liable to stamp duty under the Indian Stamp Act, I accept the petition, set aside the impugned order and allow Bhagwan Singh defendant to produce secondary evidence of the contents of the Razinama at the trial. No order as to costs. Announced in the presence of counsel for the parties.

Petition allowed.

AIR 1975 PUNJAB & HARYANA 259

M. L. VERMA, J.

Union of India, Appellant v. Hindustan Lever Limited and others, Respondents.

First Appeal No. 103 of 1965. D/- 8-4-1974.*

(A) Tort — Negligence — Actionable negligence includes composite negligence and contributory negligence — Contributory negligence of two parties affecting third party — Liability to third party — Statutory negligence — What is,

"Negligence" may be defined as omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the human affairs, would do, or something which a prudent and reasonable man would not do. So, negligence is a breach of duty to take care resulting in damage to one whether in person or property. The said duty to

*(Against decree of Sh. Dev. Raj Saini, Sr. Sub. J., Rohtak. D/- 28-8-1964).

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take care may be imposed by statute or it may arise due to the relation in which one may stand to another, i.e. when the person or property of one is in such proximity to the person or property of another that, if due care is not taken, damages may be caused by the one to the other.

(Para 6)

When the negligence is a breach of duty to take the care imposed by law, it may be called statutory negligence, and when it is a breach of duty to take care arising out of circumstances of a particular case, it may be termed as actionable negligence.

(Para 6)

'Contributory negligence' is an expression which implies that the person, who has suffered damage, is also guilty of some negligence and has contributed towards the damage. In such a case, the Court has power to apportion the loss between the parties, who can be held guilty of negligence by act or omission on their part, as it deems just and equitable. On the other hand, 'composite negligence' would arise when negligent acts or omissions of two or more persons, have caused damage to a third person. In such a case, the said third person does not contribute to the mishap or to the damage and, as such, he is entitled to sue all or any one of the negligent persons for damages. It is no concern of his, whether there is any duty of contribution or indemnity as between the negligent persons. 1968 ACJ 1 (Madh Pra) and AIR 1968 Mys 345. Rel. on.

(Para 6)

In the case of statutory negligence, the same having arisen out of breach of a statutory obligation, neither the defence of contributory negligence nor that of composite negligence, can be open or available to the wrong-doer. (1938) 1 KB 156, *Bailey v. Giddes*, 1940 AC 152, *Caswell v. Powell Duffryn Associated Collieries Ltd.*, Rel. on.

(Para 6)

(B) Railways Act (1890), Ss. 47, 87 — Rules framed under — S. R. 229 (3) (b) — Level Crossings — Duty to close gates of level crossings when trains pass — Neglect to close the gates when train passes is statutory negligence — Liability of Railway for accident.

When a railway crosses a public carriage road, the authorities owning the Railways are under obligation to erect and maintain good and sufficient gates across the road and must employ proper persons to man the same, so as to keep it open for the traffic and the vehicles to pass when no train is likely to pass and to shut the same when a train is approaching. S. R. 229/3 (b), seems to have been made under the Railways Act and, as such, has the force of law.

(Para 6)

Neglect of this statutory obligation is statutory negligence.

(Para 7)

(C) Tort — Master and servant — Negligence of servant in course of his duty — Master is liable.

The principle that a master is liable for the negligence of his servants, if committed in the course of his employment, is well recognised. If a servant is doing negligently something which he was employed to do carefully, the negligent act would be taken as having been committed in the course of his employment and the master is liable for its consequences.

(Para 7)

(D) Tort — Statutory negligence — Liability — Plea of contributory or composite negligence not available. (Para 7)

(E) Tort — Negligence — Railway level crossing — Gates not shut by gate-man — Green light on the gates — Truck driver crossing the level-crossing cannot be said to be guilty of negligence.

(Para 8)

(F) Interest Act (1839), S. 1 — Interest on damages, prior to suit cannot be awarded. AIR 1931 Bom 386 and AIR 1967 Punj & Har 497 and AIR 1938 PC 67, Rel. on. (Para 10)

(G) Civil P. C., Section 34 — Interest prior and subsequent to suit — Grant of — Power of Court — Discretion wrongly exercised — Interference in appeal.

Interest prior to suit:— The award of interest prior to suit is a matter of substantive law and contractual liability and is outside Section 34. It can be awarded: (1) when there is a contract (2) when there is a usage of trade having the force of law (3) when it is contemplated by any provision of substantive law or (4) under the Interest Act. It may also sometimes be awarded under a rule of equity.

Interest Pendente Lite:— The grant of interest between date of suit and the date of decree upto the limit of the contractual rate is in the discretion of the Court.

Future interest:— The Court has a discretion under Section 34, Civil P. C. to award future interest up to date of payment, subject to the limit of 6 per cent. per annum. The direction granting or not granting such interest would form part of the decree and is appealable under Section 96 of the C. P. Code. In the absence of appeal or cross-objections the party claiming such interest loses his legal right to claim it in an appeal by the other party. But such interest can be granted by the appellate Court under O. 41, R. 33. AIR 1967 Punj & Har 467 and AIR 1969 SC 1144, Rel. on. (Para 11)

Discretion in the matter of granting wrongly exercised.

The appellate Court can interfere with the discretionary order granting or

refusing interest when the discretion has not been exercised in a judicial manner.

(Para 12)

Cases Referred: Chronological Paras
 AIR 1969 SC 1144 = (1969) 3 SCR 944 11
 1968 ACJ 1 = 1967 MPLJ 912 6
 AIR 1968 Mys 345 = 1968 ACJ 127 6
 AIR 1967 SC 188 = (1966) 2 SCWR 98

11. 12

AIR 1967 Punj 497 10. 11
 (1940) AC 152 = (1939) 3 All ER 722 6
 AIR 1938 PC 67 = 65 Ind App 66 10. 11
 (1938) 1 KB 156 = (1937) 3 All ER 671 6
 AIR 1931 Bom 386 = 33 Bom LR 703 10

H. S. Gujral and Birinder Singh, for Appellant; J. M. Sethi and Inderjit Sayal, for Respondents.

ORDER:— The suit, which culminated in this appeal, was instituted by M/s. Hindustan Lever Ltd., New Delhi (now the respondent and hereinafter referred to as the plaintiff) to recover Rs. 19,194.80 from the Union of India (hereinafter referred to as the appellant) or in the alternative from the New Bahadurgarh Delhi Transport Company, Bahadurgarh (now Respondent 2 and hereinafter called the Transport Company) or both, as damages for the price of Vanaspati, which had been destroyed in the accident which had occurred on the night intervening 5th and 6th June, 1962, at the Railway level crossing No. 44 (hereinafter called the level crossing) located on the highway carriage road connecting Delhi with Rohtak between the Railway Stations Sampla and Kalanaur, together with Rs. 2,006.38 as interest thereon at the rate of Rs. 9 per cent. per annum.

2. The case of the plaintiff is that it manufactures vanaspati products. M/s. Hans Rai Om Prakash, Kalanaur (Respondent 3), M/s. Kalu Ram Subh Karan Sethia, Hansi (Respondent 4) and M/s. Ruli Ram Kishan Chand, Jind Mandi (Respondent 5) are the wholesalers of its goods. In compliance with their orders, it (the plaintiff) despatched tins of Dalda and Lotus, 780 in number of various sizes and weights, against Rs. 19,194.80, through the Transport Company to be delivered in proportion to the orders placed by them at the towns of Kalanaur, Hansi and Mandi Jind. The Transport Company arranged to despatch the said consignment in truck No. PNK-6084 and the said tins of vanaspati were loaded in that truck on June 5, 1962. The said truck started from Delhi, loaded with the aforesaid tins of vanaspati, for the aforesaid places at or about the fall of night. A conductor and a coolie had accompanied its driver. At about 12.30 A.M., the said truck approached the level-crossing. Since the gates of the level crossing were lying open on both sides, the driver continued driving the truck.

When it (the truck) negotiated the level crossing, it was hit by the Down Flying Saucers goods train No. 138, and the said train carried it (the truck) to a distance of 1 kilometer. As a result of the said accident, the driver, conductor and coolie of the truck were killed, the truck was completely smashed and the tins were totally smashed and vanaspati was split and destroyed. Therefore, the plaintiff claimed the price of the vanaspati as damages and interest thereon, with the allegation that the aforesaid accident had taken place due to the negligence of the employees of the appellant, inasmuch as the gateman of the level crossing failed in his duty to shut its gates and the driver of the goods train failed to pull out and drove it at a high speed. In the alternative, it was averred that if the driver of the truck was held guilty of negligence, the Transport Company be directed to pay the damages severally or jointly with the appellant. Interest pendente lite at the rate of 9 per cent, per annum as well as future interest at the same rate till realisation of the amount had also been claimed. The suit was instituted through Shri A. D. Moddie, who was the Principal Officer and Attorney of the plaintiff.

3. The suit was contested by the appellant (the Union of India) and the Transport Company, each raising the main defence, besides raising other pleas, that the accident had taken place due to the negligence of the servants of the other. Hence, the suit was tried on the following issues:—

1. Whether the plaintiffs are a Public Limited Company with Shri A. D. Moddie as its principal officer? (onus objected to).

2. Whether defendant No. 1, the Union of India through any of its officers or servants committed negligence on the night between 5th June, 1962 and 6th June, 1962 at the time of the accident? (Onus objected to).

3. Whether defendant No. 2 through any of its servants committed negligence on the night intervening between 5th June, 1962 and 6th June, 1962 at the time of the accident?

4. In case of proof of issue No. 2 or issue No. 3, what amount of damages were sustained by the plaintiffs as a result of the loss suffered in the accident?

5. Whether the plaintiffs are entitled to the interest on the amount of loss as suffered by them, if yes, at what rate?

6. Whether the fact of the gate of the railway level crossing No. 44 remaining open at the time of the accident constituted negligence on the part of defendant No. 1? (Onus objected to).

6-A. Whether no valid notice was served on defendant No. 1 under Section 80, Civil Procedure Code?

7. To what relief, if any, and against whom, are the plaintiffs entitled?

The trial Court decided issues Nos. 1, 2 and 6 in favour of the plaintiff and issue No. 3 against it. Issue No. 6-A was decided against the Union of India. Under issue No. 4, the trial Court assessed the damages suffered by the plaintiff at Rs. 19,194.80 and held under issue No. 5 that the plaintiff was entitled to claim Rs. 2,006.78 as interest for the period prior to the suit. As a result of the aforesaid findings, the trial Court granted the decree for the suit amount of Rs. 21,201.58 to the plaintiff against the appellant. It (the trial Court) did not give any direction with regard to payment of pendente lite interest. Aggrieved by the judgment and decree rendered by the trial Court, the Union of India has appealed.

4. The facts, that there was collision between the goods train and the truck carrying vanaspati at the level crossing on the night intervening 5th and 6th June, 1962, and at that time the gates of the level crossing were lying open, are quite plain and are admitted.

5. Assailing the findings recorded by the trial Court on issues Nos. 2, 3, 4, 5 and 6, Shri H. S. Gujral, learned counsel for the appellant, argued that the aforesaid collision of the goods train and the truck was not due to negligence of the employees of the appellant and that it was mainly due to the negligence of the driver of the truck, who had negotiated the level-crossing without caring for the approaching train, or at least the driver of the truck was guilty of contributory negligence, and as he was the agent of the plaintiff, the latter was not entitled to claim any damages. Continuing his arguments, the learned counsel maintains that since it was not proved that there had been total loss of vanaspati, the trial Court was wrong in allowing the damages at full price of the vanaspati and that no interest could be awarded on the said damages. In reply, Mr. M. J. S. Sethi, learned counsel for the plaintiff, supported the findings returned by the trial Court on these issues, and further claimed pendente lite as well as future interest. Mr. Gujral thereupon pointed out, and it was not disputed, that the plaintiff did not prefer any cross-appeal or cross-objections for claiming pendente lite or future interest and, as such, he urged that it could not claim the same in this appeal which had been preferred by the unsuccessful party.

6. 'Negligence' may be defined as omission to do something which a reasonable man, guided upon those considera-

tions which ordinarily regulate the human affairs, would do, or something which a prudent and reasonable man would not do. The said definition, therefore, assumes a duty to take care and it also assumes that the degree of the said care is to be measured by the standard of a reasonable man. So, negligence is a breach of duty to take care resulting in damage to one whether in person or property. The said duty to take care may be imposed by statute or it may arise due to relation in which one may stand to another, i.e., when the person or property of one is in such proximity to the person or property of another that if due care is not taken, damages may be caused by one to the other. When negligence is breach of duty to take care imposed by law, it may be called statutory negligence, and when it is breach of duty to take care arising out of circumstances of a particular case, it may be termed as actionable negligence. Like human errancy, actionable negligence may be manifold. It may be of various types, including contributory or composite negligence. 'Contributory negligence' is an expression which implies that the person, who has suffered damage, is also guilty of some negligence and has contributed towards the damage. In such a case, the Court has power to apportion the loss between the parties, who can be held guilty of negligence by act or omission on their part, as it deems just and equitable. On the other hand, 'composite negligence' would arise when negligent acts or omissions of two or more persons, have caused damage to a third person. In such a case, the said third person does not contribute to the mishap or to the damage and, as such, he is entitled to sue all or any one of the negligent persons for damages. It is no concern of his, whether there is any duty of contribution or indemnity as between the negligent persons. Similar view of composite negligence was taken in *Maniula Devi; Bhuta v. Manjusri Raha*, 1968 ACJ 1 (Madh Pra) and *K. V. Narasappa v. Kamalamma*, 1969 ACJ 127 = (AIR 1968 Mys 345). In the case of statutory negligence, the same having arisen out of breach of statutory obligation, neither the defence of contributory negligence nor that of composite negligence, can be open or available to the wrong-doer. I am supported in this view by *Bailev v. Geddes*, (1938) 1 KB 156, and *Caswell v. Powell Duffryn Associated Collieries Ltd.*, (1940) AC 152. When a railway crosses a public carriage road, the authorities owning the Railways are under obligation to erect and maintain good and sufficient gates across the road and must employ proper persons to man the same, so as to keep it open for the traffic and the vehicles to pass when no train is likely to

pass and to shut the same when a train is approaching. S. R. 229/3 (b), which seems to have been made under the Railways Act and, as such, has the force of law, reads as under:—

"The gates or chains of these exempted level crossings may normally be kept open to road traffic but must be closed and securely fastened across the road for the passage of a train or trains or for other railway operations."

7. Shri M. N. Budhwar (P.W. 4), who was Permanent Way Inspector at the relevant time, admitted that the level crossing was manned and three gatemen had been detailed there to work it, with eight hours shift. He further stated that the level crossing was provided with gates with road indicators in such a way that when the same (gates) were closed, there was red light on both sides of the road, indicating that the level crossing was closed for traffic. He added that when the gates were open, there was green (and according to Shri S. H. Iyer, D. W. 2, yellow) light towards both sides of the road, indicating that the gates were open and it provided signal for the traffic to pass through the level crossing. Shri V. P. Soni, (D. W. 1) also admitted that when any train came, the gates were bound to be closed. There is evidence on the record, and it is not disputed, that Kewal was the gateman, who was on duty at the time of the accident. Ganga Ram (D. W. 4), who was engine driver of the goods train, B. S. Bhatia (D. W. 6), who was the guard, and Hari Dass (D. W. 12), who was fireman of the goods train, admitted that the gates of the level crossing were lying open at the time of accident and no gateman was present there. Shri V. P. Soni (D. W. 1), who was the President of the Committee, which was constituted by the Railways to make enquiry into the cause of accident, admitted during cross-examination that the accident had occurred due to the negligence of the gateman in keeping the gates of the level crossing open. It is, therefore, proved unmistakably that Kewal, the gateman on duty, was guilty of gross negligence in not closing the gates of the level crossing, and since the gates were lying open there were green or yellow lights on both sides of the road, inviting the traffic, including the trucks, to pass through the level crossing. The driver of the truck was, therefore, justified in deciding to pass through the level crossing on seeing its gates lying open and the green or yellow light towards the road. The omission on the part of Kewal to close the gates of the level crossing constituted breach of duty imposed upon him by S. R. 229/3 (b), reproduced above. As such, he was clearly guilty of statutory negligence. The

principle that a master is liable for the negligence of his servants, if committed in the course of his employment, is well recognised. If a servant is doing negligently something which he was employed to do carefully, the negligent act would be taken as having been committed in the course of his employment and the master is liable for its consequences. The statutory negligence, referred to above, arising out of the omission on the part of Kewal gateman to close the gates of the level crossing was admittedly committed by him during the course of his employment and, as such, the appellant (Union of India), being his employer or master, was undoubtedly liable for the consequences, i.e., for the damages resulting to the plaintiff due to the aforesaid negligence. Since it was statutory negligence, which had been committed by Kewal, it was not open to the appellant to advance the plea of contributory or composite negligence in defence. Otherwise too, as remarked above, when the gates of the level crossing were lying open and showed green or yellow lights on both sides of the road, indicating signal to the driver of the truck to pass through the level crossing, he cannot be said to be guilty of any negligence. Since there is no evidence on the record to show that the plaintiff had any power of control over the driver of the truck, the latter cannot be said to be his servant or agent. In that view of the matter, it would be idle to contend that the plaintiff was guilty of any contributory negligence. Even if it is assumed for the sake of argument — though not conceding — that the driver of the truck was guilty of any negligence, it would then be a case of composite negligence and not that of contributory negligence. The proved fact that the goods train had carried the truck to a distance of one kilometer after the collision, from the level crossing, does indicate that the goods train was being driven at a high speed. That would too show some negligence on the part of the driver of the goods train. But apart from this, as found above, the accident was mainly due to the negligence shown by Kewal gateman in not closing the gates of the level crossing.

It, thus, follows that the accident was due to the negligence of the servants of the appellant and the findings of the trial Court on issues No. 2 and 6 are correct and the same are affirmed.

8. Ganga Ram (D. W. 4), the driver of the goods train, stated that he could not see the truck because it was dark night and there was a cluster of trees, which were obstructing the view. Shri M. N. Budhwar (P. W. 4) too admitted that trees were standing on either

side of the railway track near the level crossing and the said trees had been cut some time after the accident. Now, when the driver of the goods train could not see the truck approaching the level crossing due to a cluster of the trees, the driver of the truck could also not have an uninterrupted view of the approaching train. The evidence present on the record points out that besides there being a cluster of trees, referred to above, there was a curve in the road near the level crossing. In these circumstances, it cannot be maintained that the driver of the truck could possibly conceive that the goods train had approached so near the level crossing that when he would negotiate it, there would be collision between the train and the truck. Further, as remarked in the preceding para., the gates of the level crossing were open and indicated a signal to pass by showing green or yellow light to the driver of the truck and the latter was justified in conceiving that the goods train was still far away and he would have sufficient time to pass through the level crossing safely. Therefore, in no case the driver of the truck can be said to be guilty of any negligence in driving the truck through the level crossing at the time of accident, and the trial Court was right in finding issue No. 3 in the negative.

9. The statements of Gian Chand Bansal (P. W. 2), R. N. Bansal (P. W. 3) and P. A. Gai (P. W. 6), when read together, point out unmistakably that the tins of vanaspati, 780 in number, of various sizes and weights, had been despatched on the evening of June 5, 1962, through the truck involved in the accident, to be delivered at Hansi, Kalanaur and Jind Mandi, and that the price of the vanaspati contained in the said tins was Rs. 19,194.80. Their aforesaid statements receive ample support from the invoices (Exhibits P-14, P-15 and P-16). The evidence given by them further shows that the said vanaspati had been lost in whole in the accident and the same had to be sent again by the plaintiff to the aforesaid wholesalers on June 7, 1962. They are supported in that respect by Ext. P-8, Shri R. Bahadur (P. W. 8), who reached the scene of accident at about 11 A.M. on June 6, 1962, has sworn that all the tins of vanaspati had been broken and vanaspati had leaked out of the same and there was a total loss. His aforesaid statement was allowed to go unchallenged during cross-examination and there is no rebuttal of the same. The statements of Sarvshri S. H. Iyer (D. W. 2), B. S. Bhatia (D. W. 6), Mohan Singh (D. W. 7), Har-dam Singh (D. W. 10) and Chander Bhan (D. W. 11), which are to the effect that all the tins of vanaspati had been crushed

and the vanaspati had been split out on account of summer season, read consistent with the deposition of R. Bahadur (P. W. 8). So, on the said state of evidence, it is difficult to resist the conclusion that there had been total loss of vanaspati and, as such, the trial Court was justified in assessing the damages, suffered by the plaintiff, at Rs. 19,194.80, the same being the price of vanaspati which was completely destroyed. So, the finding of the trial Court on issue No. 4 is again correct and the same is affirmed.

10. The proposition of law that in a pure case of damages, interest cannot be awarded on the same for the period prior to the date of the suit, has been clearly laid down in *Ratanlal Khushalrai v. Brijmohan Pralhadka*, AIR 1931 Bom 386; *Union of India v. Panipat Woollen and General Mills Co. Ltd.*, AIR 1967 Punj 497 and *Bengal Nagpur Railway Company Ltd. v. Ruttanji Ranji*, AIR 1938 PC 67. Therefore, in view of the said judgments, I feel no reluctance in agreeing with the learned counsel for the appellant that the amount of Rs. 2,006.78 could not be granted to the plaintiff by the trial Court as interest on the amount of damages of Rs. 19,194.80 for the period between the date of accident and the date of suit. As such, I find that issue No. 5 was wrongly decided by the trial Court in favour of the plaintiff and I unhesitatingly reverse the finding of the trial Court on that issue.

11. There can be three periods for which in the case of a decree for payment of money, interest may be allowed. The first period is the one which is prior to the date of the suit. The payment of interest for that period is a matter of substantive law and contractual liability, and is outside the scope of Section 34, Civil Procedure Code. According to *Ruttanji Ranji's case*, AIR 1938 PC 67 (supra) and *Vithal Dass v. Rup Chand*, AIR 1967 SC 188, interest can be awarded for that period (1) when there is an agreement for payment of the same, or (2) when it is payable by the usage of trade having the force of law, or (3) when the payment of the same is contemplated by the provision of any substantive law, or (4) under the Interest Act. It may also sometimes be awarded under the rule of equity. The second period is the one which intervenes the date of suit and the date of decree. The Court granting the money decree has discretion to allow interest pendente lite i.e. for the second period up to the limit of contractual rate. The third period is from the date of decree to the date of payment. For the said period, the Court granting the decree has discretion to allow interest, commonly known as future interest, on the amount

adjudged, subject to the limit of 6 per cent. per annum, as it deems reasonable. Section 34, Civil Procedure Code, provides that the Court may, while awarding decree for payment of money, direct the payment of interest at such rate, as it deems reasonable, to be paid on the principal amount for any period prior to the institution of the suit, with future interest on such principal sum at a rate not exceeding 6 per cent. per annum. It is, therefore, clear that some direction with regard to payment of interest pendente lite or future interest has to be given in the decree. So, it would form part of the decree and, as such, it (the direction granting or not granting such interest) is appealable vide Section 96, Civil Procedure Code. The trial Court did remark in its judgment that it was not a fit case in which future interest could be allowed. Therefore, the plaintiff could file the cross-appeal or cross-objection from that part of the decree, refusing the future interest. It however, did not file any such cross-appeal or cross-objection and, as such, I am in agreement with the learned counsel for the appellant that the plaintiff has lost the legal right to claim such interest in this appeal, which was preferred by one of the defendants. The learned counsel for the plaintiff has, relying on *Panipat Woollen and General Mills Co. Ltd.'s case* AIR 1967 Punj 497 (supra), maintained that interest pendente lite and future could be allowed, though the plaintiff did not file any cross-appeal or cross-objection. In that case too, there was no cross-appeal or cross-objection, claiming the pendente lite or future interest on behalf of the *Panipat Woollen and General Mills Co. Ltd.*, but still, the Division Bench of this Court allowed pendente lite and future interest on the amount which was also assessed as damages. It, therefore, appears to me that pendente lite as well as future interest was allowed in *Panipat Woollen and General Mills Co. Ltd.'s case* AIR 1967 Punj 497 (supra) under the provisions contained in Rule 33 of Order XXI, Civil Procedure Code. The said provisions empower the Appellate Court to pass any order, which ought to have been passed, irrespective of the fact whether the party, in whose favour that order is being passed, has filed any appeal or cross-objections. It has been observed in *Giani Ram v. Ramji Lal*, AIR 1969 SC 1144, that the expression "which ought to have been passed", occurring in Rule 33 of Order XXI, Civil Procedure Code, means "which ought in law to have been passed". If the Appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the subordinate Court, it may pass or make such further or other de-

cree or order as the justice of the case may require.

12. As indicated in para. 7 above, it is in evidence from Shri V. P. Soni (D. W. 1) that the result of the enquiry held into the accident was that it had occurred primarily due to the negligence of the gateman in keeping the gate open. Thereafter the plaintiff had served notice under Section 80, Civil Procedure Code, on the appellant, but still the appellant did not care to pay the amount of damages or to settle the dispute with the plaintiff despite the fact that the result of enquiry, held by its employees into the accident, was against it. Therefore, it appears to me that the sum of Rs. 19,194.80, the price of the Vanaspati which was assessed as damages, had been wrongly withheld by the appellant and the plaintiff was deprived of that amount and was further forced to resort to litigation. Therefore, especially in view of the judgment of the Division Bench in Panipat Woollen and General Mills Co. Ltd's, case AIR 1967 Punj 497 (supra). I feel that there were equitable and good grounds for awarding the pendente lite and future interest under the provisions of Rule 33, Order XLII, Civil Procedure Code. Since the trial Court did not record any reason for disallowing the said interest, I do not think that it had exercised the discretion, vested in it in the matter of grant of such interest, in a judicial manner. In the circumstances of the case, I feel that it would be justified and reasonable to grant pendente lite and future interest on Rs. 19,194.80 at the rate of 5 per cent. per annum.

13. It, thus, follows from the discussion above that except the attack against the finding recorded on issue No. 5, there is no force in the other contentions raised by the learned counsel for the appellant and the same are repelled and the appeal fails except to the extent that the amount of Rs. 2,006.78 could not be awarded as interest.

14. Consequently, I partly allow this appeal to the extent of Rs. 2,006.78, and in substitution of the decree of the trial Court, pass a decree for Rs. 19,194.80 with interest at the rate of Rs. 5 per cent. per annum from the date of the suit till the date of payment with proportionate costs in favour of Messrs Hindustan Lever Ltd., plaintiff against the Union of India defendant. The appellant shall also pay the costs of the appeal to the plaintiff respondent. Lawyer's fee to be assessed at Rs. 19,194.80, of course subject to the filing of the necessary certificate.

Appeal partly allowed.

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BAL RAJ TULI, A. D. KOSHAL,
S. S. SANDHAWALLA, PREM CHAND
JAIN AND MAN MOHAN SINGH
GUJRAL, JJ.

B. R. Guliani, Petitioner v. Punjab and Haryana High Court through the Registrar, Punjab and Haryana and others, Respondents.

Civil Writ No. 2586 of 1971, D/- 13-3-1975.*

(A) Constitution of India, Arts. 235 and 311 — Control of High Court over subordinate Courts — Nature and scope — Disciplinary inquiry against member of subordinate judiciary — Procedure of High Court — Relative scope of Arts. 235 and 311 — Government whether bound by recommendation of High Court in regard to punishment of removal or dismissal.

Per Bal Raj Tuli, J. (A. D. Koshal, S. S. Sandhawalla and Prem Chand Jain, JJ. agreeing; Man Mohan Singh Gujral, J. dissenting):— Under Article 235 of the Constitution the High Court is the sole custodian of the control over the Judiciary including disciplinary matters and that control is complete. In exercise of that power of control, the High Court has to decide what punishment is deserved by the delinquent officer, and if the punishment proposed is within its own jurisdiction, it can pass the necessary order itself, but if the same can be inflicted only by the Governor, it has to forward the papers to him for passing the necessary order. The power to pass these orders does not give the power of control to the Governor so as to entitle him to review the whole case himself in order to find out whether the recommendation made by the High Court is correct or not. The disciplinary control cannot be divided between two authorities, viz., the High Court and the Governor. The power of control of the High Court and the power of the Governor to dismiss or remove from service a judicial officer can be harmonised by saying that the quasi-judicial part of the procedure for inflicting one of the two major punishments is to be done by the High Court while the administrative order will be passed by the Governor. In other words, the High Court will propose the punishment and the Governor will impose it. The matter has to be referred to the Governor because (1) he, being the appointing authority has to pass the order under Article 311 (1) of

*(Referred by Division Bench of D. K. Mahajan and Prem Chand Jain, JJ., D/- 16-2-1972).

the Constitution, and (2) the High Court cannot pass an order in the name of the Governor whereas the order dismissing or removing a judicial officer from service has to be passed in the name of the Governor in the manner sanctioned by the Constitution. It is for that purpose alone that the case is forwarded to the Governor. Any other interpretation of the role of the Governor in this matter will impinge upon the solemnity of the control over the Judiciary vested in the High Court. In the exercise of his power of passing an order of removal from service or dismissal from service, the Governor cannot decide whether the delinquent officer is guilty or not; he has to accept the verdict of the High Court in this matter. The Governor and the High Court have to act in harmony as far as the Judiciary is concerned and the cardinal principle of the Constitution being that the Judiciary is to be independent of the Executive, complete control over the Judiciary vests in the High Court including disciplinary matters and it is only proper that the Governor should feel himself bound by the recommendation of the High Court in the matter of the guilt and the punishment that the delinquent officer deserves. AIR 1966 SC 447 and AIR 1974 SC 2192 and AIR 1975 SC 613, Rel. on. (Para 9)

(Procedure to be followed by High Court in disciplinary enquiry against a member of a subordinate judiciary indicated in detail in para. 8).

It is not necessary to decide whether Article 235 overrides Article 311 of the Constitution or vice versa. Both the provisions, being in the same Constitution, have to be worked in harmony and if that is possible, there is no occasion to make one subject to the other. It may, however, be emphasised that Article 311 applies only to such cases in which the appointing authority is also the controlling authority and has the right to inflict all the punishments, whether minor or major and to initiate the departmental enquiries and deal with the case till the award of punishment. In the case of judicial officers, Article 311 has a limited application, that is, the orders of dismissal or removal from service are to be passed by the Governor, but the enquiries have to be held by the High Court. (Para 12)

Held that in the present case as the impugned order of the State Government, exonerating the petitioner from all charges and reinstating him, was not passed in accordance with the mandatory provision of the Constitution embodied in Article 235 of the Constitution, the order is void and non est being ultra vires Article 235 of the Constitution and the High Court was right in not giving effect to it. (Para 13)

Per Man Mohan Singh Gujral, J. (Dissenting: If ever a conflict arises between Art. 235 which is a general provision and Art. 311 which is a special provision, the former would have to be interpreted in a manner so as to leave the applicability of Art. 311 unaffected.

(Para 30)

Though the final decision in the matter of imposing the punishment of dismissal or removal from service is to be taken by the Governor but while arriving at the final conclusion the Governor must have due regard for the recommendation of the High Court and should in all conceivable cases act according to these recommendations. However, if in an isolated case the Governor takes a view, different from the one recommended by the High Court, it cannot be said in law that the order of the Governor is without jurisdiction. If a departure has been made by the Governor from the advice tendered by the High Court, it may be open to examination by a Court whether extraneous considerations are the basis of such a decision, but the decision is not open to challenge on the ground of lack of jurisdiction. (Para 43)

(B) Constitution of India, Arts. 235, 320 (3) (c) and 311 — Disciplinary enquiry against member of subordinate judiciary — High Court recommending removal from service — Consultation with State Public Service Commission by Government is not justified — Order of reinstatement by Government held void.

A departmental inquiry was started against the petitioner who was a subordinate Judge-cum-Magistrate First Class on certain charges. On receipt of the inquiry report a show cause notice under Article 311 (2) was issued through the State Government and on consideration of the explanation of the petitioner the High Court recommended the removal of the petitioner from service. The State Government, however, sought the opinion of the State Public Service Commission under Article 320 (3) (c) and acting on their advice decided to exonerate the petitioner and passed an order reinstating him in service with immediate effect. As the High Court did not give any effect to the order of reinstatement, the petitioner sought certain reliefs against the High Court under Articles 226 and 227 of the Constitution.

Held (Per Full Bench): that as the Public Service Commission was an extraneous body and could not be consulted and was able to influence the decision of the punishing authority, the order suffers from a grave constitutional infirmity and was, therefore, liable to be declared ultra vires Article 235 of the Constitution and hence void and non est. The High Court

was, therefore, right in disregarding that order and not implementing it by giving posting orders to the petitioner.

(Paras 17 and 20 to 23)

Per Bal Raj Tuli, J.:— Consultation with the Public Service Commission in respect of the members of the Judiciary, is expressly ruled out by Article 235 of the Constitution otherwise the Constitution makers would have provided whether the recommendation of the High Court or the advice tendered by the Public Service Commission would be binding on the Government in case there was conflict between the two. If the advice of the Public Service Commission is to prevail against the recommendation of the High Court, then the solemnity of the authority of the High Court in matters of discipline, will be whittled down. (Para 14)

The Public Service Commission has not to be consulted in regard to disciplinary matters when a member of the Judicial Service is involved because of the provision in Article 235 of the Constitution with regard to control. The State Public Service Commission is to be consulted by the State Government or an authority subordinate to it. The High Court, not being subordinate to the State Government, has not to consult the Public Service Commission when it inflicts any punishment within its power. If that be so, the Governor has also not to consult the Public Service Commission when it has to pass the order of removal from service or dismissal from service with respect to a member of the Judicial Service. AIR 1966 SC 1987 and AIR 1967 SC 1599 and AIR 1956 SC 285. Rel. on: Observation of P. B. Mukharji, J. in AIR 1961 Cal 1 (SB) held impliedly overruled in AIR 1966 SC 447. (Para 17)

Cases Referred: Chronological Paras

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H. L. Sibal, Sr. Advocate with Kuldip Singh, G. C. Garg, S. C. Sibal and R. C. Setia, for Petitioner; J. N. Kaushal, Advocate-General, Haryana with Ashok Bhan (for No. 3), Anand Swaroop, Sr. Advocate and R. L. Aggarwal with Amar Dutt, K. G. Chaudhry and C. P. Sapra, for Respondents.

BAL RAJ TULI, J. (Majority judgment):— The petitioner, Shri Baldev Raj Guliani, was recruited to the Punjab Civil Service (Judicial Branch) as a result of his success in the competitive examination held in June, 1954. He was appointed as Subordinate Judge IV Class on February 27, 1956, and was conferred powers of Subordinate Judge I Class in 1957. He was confirmed as a member of the Punjab Civil Service (Judicial) with effect from October 26, 1957, vide order dated March 17, 1961. He was allowed to cross the Efficiency Bar with effect from February 27, 1964, vide order dated February 2, 1965.

2. The petitioner was posted as Subordinate Judge-cum-Magistrate I Class, Amloh, District Patiala, from May 28, 1964 to May 18, 1965, and the Bar Association of that place sent certain complaints against his integrity to the High Court which were entrusted to Shri Gurbachan Singh, District Judge, for a fact-finding enquiry by letter dated May 11, 1965. On the report of Shri Gurbachan Singh, the High Court came to the conclusion that it was a fit case for departmental enquiry. Consequently, Shri Pritam Singh Pattar (then District Judge, Sangrur, and now an Hon'ble Judge of this Court) was appointed an Enquiry Officer on July 21, 1966, to enquire into the charges levelled against the petitioner. The petitioner was suspended by the State Government pending enquiry at the instance of the High Court. The learned Enquiry Officer submitted his report to this Court and found him guilty of all charges except one. On a perusal of that report, the High Court formed an opinion that it was a fit case in which the punishment of removal from service should be inflicted on the petitioner. Consequently, the case was sent to the

State Government to serve the show cause notice under Article 311(2) of the Constitution. That notice was issued to the petitioner by the State Government on March 13, 1967, to show cause why the penalty of removal from service should not be imposed on him. This notice was issued by the State Government on the recommendation of the High Court to which the petitioner submitted his explanation on April 20, 1967, through the High Court. The High Court considered that explanation and expressed the view that it was not satisfactory and recommended that the petitioner should be removed from service. The State Government examined the case and was inclined to agree with the views of the High Court and the recommendation made by it. The Government, however, referred the case to the Haryana Public Service Commission for advice because it was considered that such reference to the Commission was necessary in view of the provisions of Article 320(3)(c) of the Constitution and the relevant rules. The Haryana Public Service Commission advised that no case had been made out against the petitioner and that he should be exonerated. The State Government once again examined the case in the light of the views of the commission and decided to accept its advice that the petitioner should be exonerated. The advice of the Commission, however, was not sent to the High Court for examination or comments and an order reinstating the petitioner in service with immediate effect was issued by the State Government on August 24, 1968, a copy of which was sent to the Registrar of this Court for information and necessary action. This order reads as under :—

"The Governor of Haryana is pleased to reinstate Shri B. R. Guliani, H. C. S. (Judicial Branch) under suspension, in service with immediate effect. Orders regarding his pay and allowance during the suspension period will be issued separately."

A D. O. letter dated August 24, 1968, was also received by the Registrar of this Court from Shri H. V. Goswami, I. A. S. (presumably the Secretary or the Deputy Secretary of the Services Department, Haryana Government) reading as under :—

"I am desired to refer to the Hon'ble High Court's letter No. 671/RHC, dated the 31st May, 1967, and the subsequent correspondence resting with No. 85/RHC, dated the 24th January, 1968, and to say that the case was referred to the Haryana Public Service Commission for advice. The Commission have recommended that Shri Guliani may be completely exonerated of all charges. The State Govern-

ment have decided to accept the advice of the Commission in this case and orders regarding the reinstatement of Shri Guliani in service are being issued separately. I am desired to request that the Hon'ble High Court may kindly consider the question of posting Shri Guliani on his reinstatement in service."

The High Court, however, did not issue any posting orders to the petitioner for it was of the opinion that the order was not legal as it had been passed on the advice of the Public Service Commission which could not be consulted in the matter and the Government should have passed the order in the light of the recommendation made by it. Consequently, the High Court requested the Government to review its order reinstating the petitioner but the Government did not take any action on that suggestion. The petitioner was not allowed any salary for the period subsequent to the order of reinstatement, except the subsistence allowance which was being paid to him during the period of suspension, by the Accountant General on the ground that after reinstatement he had not been appointed to a post by the High Court and unless that was done, he could not be allowed to draw any salary. The High Court refused to give the posting orders because in its view he was still under suspension and had not been validly reinstated. The petitioner then filed the present petition under Article 226 of the Constitution on July 12, 1971, inter alia, for the following reliefs :—

(a) that the writ in the nature of mandamus directing respondents 1 and 2 to post the petitioner as Sub Judge First Class-Cum-Magistrate First Class as a member of the Haryana Civil Service (Judicial) be issued;

(b) that a writ in the nature of mandamus directing the respondents to disburse full salary to the petitioner including the salary for the period when the petitioner remained under suspension, be issued;

(c) that a direction to respondents 1 and 2 that the petitioner be considered for promotion to the higher post of Additional District and Sessions Judge with retrospective effect from the date when person junior to him was promoted to that post, be issued;

(d) that any other writ or order as this Hon'ble Court may deem fit under the circumstances of the case be issued.

3. This petition came up for hearing before a Division Bench of this Court on February 15, 1972, and the Bench expressed the opinion that the points raised in the petition were of considerable importance and the decision, one way or the other, would have a very far-reach-

ing effect and, therefore, it was appropriate if this petition was decided by a larger Bench of five Judges for an authoritative pronouncement. In pursuance of that order of reference, this petition has come up before this Bench for decision.

4. It may also be mentioned that the petitioner attained the age of 55 years on January 5, 1975, and a notice was issued to him on December 16, 1974, informing him that after the expiry of three months from the date of receipt of the notice he shall be deemed to have retired from service under Rule 5.32 (c) of the Punjab Civil Services Rules, Volume II. This notice was issued by the State Government on the recommendation of the High Court. The petitioner has not challenged the issue of that notice and has accepted the same.

5. Before proceeding to discuss the arguments, it seems appropriate to set out the charges of which the petitioner was found guilty by the High Court in agreement with the findings of the Enquiry Officer. These charges were:—

1. (a) That during his posting at Amloh, he was not deciding the cases, both civil and criminal, promptly, but was improperly adjourning them from time to time after the evidence had been recorded and even after the arguments had been heard, for pronouncement of judgment from which the only inference that could be raised was that he was giving opportunity to the parties of the said cases to contact him.

(b) He was intentionally giving false certificates with his monthly statements of work to the effect that all cases had been decided within thirty days of the closing of the evidence.

2. In the matter of awarding costs, he did not exercise proper judicial discretion inasmuch as he awarded costs recklessly and sometimes to favour particular parties.

3. He abused his official position and power in the matter of granting bail. In some cases he granted anticipatory bail although he was not competent to do so.

4. He was not recording evidence in accordance with the provisions of the Code of Civil Procedure and the Code of Criminal Procedure and the instructions contained in the High Court Rules and Orders. In his Court at Amloh, evidence was not recorded by him as required by law, but used to be recorded simultaneously in civil and criminal cases, on the one side, by his Reader with the help of the counsel for the parties, and on the other, by the Steno-typist and another official of his Court with the help of the Prosecuting Sub-Inspector of Police and

the counsel for the accused. He himself used to read the newspapers, sleep or do some other work when evidence was being recorded in the aforesaid manner.

In the statement of allegations supplied with the charge-sheet, the particulars of the civil and criminal cases referred to in the charges, were supplied.

6. The following points of law arise for decision in this case:—

1. Whether the Government was bound by the recommendation of the High Court that the punishment of removal from service should be inflicted on the petitioner and had no right to pass any order contrary to that recommendation?

2. Whether it was necessary for the State Government to consult the Haryana Public Service Commission and be influenced by the advice tendered by it? If not, whether the order of exoneration and reinstatement is void because it was passed on the advice of the Public Service Commission?

7. I shall deal with these points in seriatim.

7-A. The petitioner belongs to the Judicial Service of the State and Art. 234 of the Constitution provides:

"234. Appointments of persons other than District Judges to the Judicial Service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State."

In *Shamsher Singh v. State of Punjab*, AIR 1974 SC 2192, it has been held in para. 88 that "the appointment as well as removal of the members of the Subordinate Judicial Service is an executive action of the Governor to be exercised on the aid and advice of the Council of Ministers in accordance with the provisions of the Constitution" and that appointments and removals of persons are made by the Governor as the constitutional head of the executive on the aid and advice of the Council of Ministers. It has been submitted by the learned counsel for the petitioner that under Article 311 of the Constitution the punishment of dismissal or removal from service could be inflicted only by the Government and that too after holding an enquiry and issuing a show cause notice with regard to the infliction of the proposed punishment. The Punjab Civil Services (Judicial Branch) Rules also prescribe the Government as the punishing authority for awarding the penalty of removal from the Service which does not disqualify from future employment and dismissal from the Service which ordi-

narily disqualifies from future employment. On the basis of these provisions of the Constitution and the Rules, it has been submitted that the Government had the power to inflict the punishment of removal from service or dismissal from service and if it exonerated the petitioner from all the charges, the order was passed with jurisdiction and the High Court cannot refuse to act upon it and must issue posting orders to the petitioner. It has, therefore, to be decided whether the order passed by the Governor on August 24, 1968, reinstating the petitioner into service was a legal order and binding on the High Court.

8. Article 235 of the Constitution, which provides for control over subordinate Courts in the High Court, is in the following words:—

"Article 235. The control over district Courts and Courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district Judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

The scope and ambit of this Article was considered by the Supreme Court in *State of West Bengal v. Nripendra Nath Bagchi*, (1966) 1 SCR 771 = (AIR 1966 SC 447) wherein after tracing the history of the separation of the judiciary from the executive and the meaning of the word 'control' used in Article 235 of the Constitution, their Lordships observed:

"When the Constitution was being drafted, the advance made by the 1935 Act was unfortunately lost sight of. The draft Constitution made no mention of the special provisions, not even similar to those made by the Government of India Act, 1935, in respect of the subordinate judiciary. If that had remained, the judicial services would have come under Part XIV dealing with the services in India. An amendment, fortunately, was accepted and led to the inclusion of Articles 233 to 237. These articles were not placed in the Chapter on services but immediately after the provisions in regard to the High Courts. The articles went a little further than the corresponding sections of the Government of India Act. They vested the 'control' of the district Courts and the Courts subordinate thereto in the High Courts and the main question is what is meant by the word 'control'. The High Court has held

that the word 'control' means not only a general superintendence of the working of the Courts but includes disciplinary control of the presiding judges, that is to say, the District Judge and judges subordinate to him. It is this conclusion which is challenged before us on various grounds.

Mr. B. Sen appearing for the West Bengal Government contends that the word 'control' must be given a restricted meaning. He deduces this (a) on a suggested reading of Article 235 itself and (b) on a comparison of the provisions of Chapter VI with those of Part XIV of the Constitution. We shall examine these two arguments separately as they admit of separate treatment. The first contention is that 'control' means only control of the day to day working of the Courts and emphasis is laid on the words of Article 235 'district Courts' and 'Courts subordinate thereto'. It is pointed out that the expressions 'district Judge' and 'judges subordinate to him' are not used. It is submitted that if the incumbents were mentioned, control might have meant disciplinary control but not when the word 'Court' is used. Lastly, it is contended that conditions of service are outside 'control' envisaged by Article 235 because the conditions of service are to be determined by the Governor in the case of the District Judge and in the case of judges subordinate to the District Judge by the Rules made by the Governor in that behalf after consultation with the State Public Service Commission and with the High Court.

We do not accept this construction. The word 'control' is not defined in the Constitution at all. In Part XIV which deals with Services under the Union and the States the words 'disciplinary control' or 'disciplinary jurisdiction' have not at all been used. It is not to be thought that disciplinary jurisdiction of services is not contemplated. In the context the word 'control' must, in our judgment, include disciplinary jurisdiction. Indeed the word may be said to be used as a term of art because the Civil Services (Classification, Control and Appeal) Rules used the word 'control' and the only rules which can legitimately come under the word 'control' are the Disciplinary Rules. Further, as we have already shown, the history which lies behind the enactment of these articles indicates that 'control' was vested in the High Court to effectuate a purpose, namely, the securing of the independence of the subordinate judiciary and unless it included disciplinary control as well, the very object would be frustrated. This aid to construction is admissible because to find out the meaning of a law, recourse may legitimately

be had to the prior state of the law, the evil sought to be removed and the process by which the law was evolved. The word 'control', as we have seen, was used for the first time in the Constitution and it is accompanied by the word 'vest' which is a strong word. It shows that the High Court is made the sole custodian of the control over the judiciary. Control, therefore, is not merely the power to arrange the day to day working of the Court but contemplates disciplinary jurisdiction over the presiding Judge. Article 227 gives to the High Court superintendence over these Courts and enables the High Court to call for returns etc. The word 'control' in Article 235 must have a different content. It includes something in addition to mere superintendence. It is control over the conduct and discipline of the Judges. This conclusion is further strengthened by two other indications pointing clearly in the same direction. The first is that the order of the High Court is made subject to an appeal if so provided in the law regulating the conditions of service and this necessarily indicates an order passed in disciplinary jurisdiction. Secondly, the words are that the High Court shall 'deal' with the Judge in accordance with the rules of service and the word 'deal' also points to disciplinary and not mere administrative jurisdiction.

Articles 233 and 235 make a mention of two distinct powers. The first is power of appointments of persons, their postings and promotion and the other is power of control. In the case of the District Judges, appointments of persons to be, and posting and promotion of are to be made by the Governor but the control over the District Judge is of the High Court. We are not impressed by the argument that the term used is 'district Court' because the rest of the article clearly indicates that the word 'Court' is used compendiously to denote not only the Court proper but also the presiding Judge. The latter part of Article 235 talks of the man who holds the office. In the case of the judicial service subordinate to the District Judge the appointment has to be made by the Governor in accordance with the rules to be framed after consultation with the State Public Service Commission and the High Court but the power of posting, promotion and grant of leave and the control of the Courts are vested in the High Court. What is vested includes disciplinary jurisdiction. Control is useless if it is not accompanied by disciplinary powers. It is not to be expected that the High Court would run to the Government or the Governor in every case of indiscipline however small and which may not even require the punishment of dismissal or removal. These articles go to show that

by vesting 'control' in the High Court the independence of the subordinate judiciary was in view. This was partly achieved in the Government of India Act, 1935, but it was given effect to fully by the drafters of the present Constitution. This construction is also in accord with the Directive Principles in Article 50 of the Constitution which reads:

'50. The State shall take steps to separate the judiciary from the executive in the public services of the State.'

The learned counsel for the State of West Bengal referred to Articles 309 to 311 of the Constitution and submitted that the dismissal and removal of a Government servant under Article 311 vested in the appointing authority and, therefore, such orders qua the members of the Judicial Service could be made only by the State Government, which meant that the disciplinary control of the High Court was not complete. The learned counsel also argued that this power of the Government must be made by or under the directions of the Governor or the Government. To lend support to his contention, he referred to provisos (b) and (c) to clause (2) of Article 311 but their Lordships repelled the argument with the following observations:

"That the Governor appoints District Judges and the Governor alone can dismiss or remove them goes without saying. That does not impinge upon the control of the High Court. It only means that the High Court cannot appoint or dismiss or remove District Judges. In the same way the High Court cannot use the special jurisdiction conferred by the two provisos. The High Court cannot decide that it is not reasonably practicable to give a District Judge an opportunity of showing cause or that in the interest of the security of the State it is not expedient to give such an opportunity. This the Governor alone can decide. That certain powers are to be exercised by the Governor and not by the High Court does not necessarily take away other powers from the High Courts. The provisos can be given their full effect without giving rise to other implications. It is obvious that if a case arose for the exercise of the special powers under the two provisos, the High Court must leave the matter to the Governor. In this connection we may incidentally add that we have no doubt that in exercising these special powers in relation to inquiries against District Judges, the Governor will always have regard to the opinion of the High Court in the matter. This will be so whoever be the inquiring authority in the State. But this does not lead to the further conclusion that the High Court must not hold the

enquiry any more than that the Governor should personally hold the enquiry.

There is, therefore, nothing in Article 311 which compels the conclusion that the High Court is ousted of the jurisdiction to hold the enquiry if Article 235 vested such a power in it. In our judgment, the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiries, impose punishments other than dismissal or removal, subject however to the conditions of service, to a right of appeal if granted by the conditions of service, and to the giving of an opportunity of showing cause as required by Clause (2) of Article 311 unless such opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that clause. The High Court alone could have held the enquiry in this case. To hold otherwise will be to reverse the policy which has moved determinedly in this direction."

From these observations it is abundantly clear that the High Court alone can hold the enquiry against a member of the Judicial Service and the Government cannot do so. This matter has been further clarified in Samsheer Singh's case (supra), wherein the following pertinent observations are to be found in para. 78 of the report:—

"The High Court for reasons which are not stated requested the Government to depute the Director of Vigilance to hold an enquiry. It is indeed strange that the High Court, which had control over the subordinate judiciary, asked the Government to hold enquiry through the Vigilance Department. The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court. The High Court failed to discharge the duty of preserving its control. The request by the High Court to have the enquiry through the Director of Vigilance was an act of self-abnegation. The contention of the State that the High Court wanted the Government to be satisfied makes matters worse. The Governor will act on the recommendation of the High Court. That is the broad basis of Article 235. The High Court should have conducted the enquiry preferably through District Judges. The members of the subordinate judiciary look up to the High Court not only for discipline but also for dignity. The High Court acted in total disregard of Art. 235

by asking the Government to enquire through the Director of Vigilance." (Emphasis supplied).

According to these observations, the High Court alone is to hold the enquiry against a member of the subordinate judiciary and this view has been reiterated by the Supreme Court in *Shri N. S. Rao v. The State of Haryana*, (C. A. No. 1503 of 1974, decided on January 24, 1975, along with C. A. Nos. 852 and 854 of 1974 = (reported in AIR 1975 SC 613)). From these premises it logically follows that the Enquiry Officer is to submit his report to the High Court which has to consider the same in order to find out whether the findings recorded by the Enquiry Officer are correct or not and whether any punishment is to be inflicted on the delinquent officer. It has not been disputed that the High Court alone is the competent authority to inflict punishments of censure, withholding of increment or promotion, including stoppage at the efficiency bar, reduction to a lower post or time scale or to a lower stage in the time scale and recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of order. If the High Court, on a review of the findings of the Enquiry Officer, is of the opinion that one of these punishments should be inflicted, it can pass the necessary order without reference to the Government, but if it comes to the conclusion that the punishment of removal from service or dismissal from service is called for, two courses may be open to the High Court, namely, (1) the High Court may itself issue the notice to the delinquent officer stating that it is tentatively of the opinion that punishment of removal from service or dismissal from service should be inflicted and he may show cause why a recommendation to inflict that punishment on him should not be made to the Governor and on receipt of his reply, consider the matter, and if it still is of the opinion that the punishment proposed in the notice should be inflicted on the delinquent officer, it shall forward the case to the Governor with the recommendation to pass that order, or (2) the High Court may forward the papers to the Governor with the recommendation that the delinquent officer deserves the punishment of removal or dismissal from service and a notice as required under Article 311 (2) of the Constitution, may be issued to him to show cause against the infliction of that punishment. The reply to the show cause notice will be received by the Government either directly or through the High Court, but the opinion of the High Court will be sought by the Government whether in view of the explanation tendered by the officer, the High Court is still of the opinion that the major punish-

ment of removal from service or dismissal from service should be inflicted. The High Court will then consider the explanation tendered by the delinquent officer and make its recommendation to the Governor with regard to the punishment to be inflicted on him.

9. It is argued that the issuing of the show cause notice under Article 311 (2) of the Constitution and passing of an order of punishment after receipt and consideration of the explanation tendered by the officer, constitute a quasi-judicial function which can be performed only by the punishing authority unaided by the advice of anybody else and, therefore, if the punishment of removal from service or dismissal from service cannot be passed by the High Court, but can be passed only by the Governor, he alone is to issue the show cause notice and decide in the light of the explanation received from the officer concerned whether to impose that punishment or not and that the High Court does not come in the picture at that stage. This argument is inconsistent with the control of the High Court over the subordinate Courts and the Presiding Judges, as has been authoritatively laid down in *Nripendra Nath Bagchi's case* (AIR 1966 SC 447) (*supra*) while interpreting Article 235 of the Constitution. Therein it is said that the High Court is the sole custodian of the control over the Judiciary and that control is complete. In exercise of that power of control, the High Court has to decide what punishment is deserved by the delinquent officer, and if the punishment proposed is within its own jurisdiction, it can pass the necessary order itself, but if the same can be inflicted only by the Governor it has to forward the papers to him for passing the necessary order. The power to pass these orders does not give the power of control to the Governor so as to entitle him to review the whole case himself in order to find out whether the recommendation made by the High Court is correct or not. The disciplinary control cannot be divided between two authorities, viz., the High Court and the Governor. The power of control of the High Court and the power of the Governor to dismiss or remove from service a judicial officer can be harmonised by saying that the quasi-judicial part of the procedure for inflicting one of the two major punishments is to be done by the High Court while the administrative order will be passed by the Governor. In other words, the High Court will propose the punishment and the Governor will impose it. The matter has to be referred to the Governor because (1) he, being the appointing authority has to pass the order under Article 311 (1) of the Constitution, and (2) the High Court can-

not pass an order in the name of the Governor whereas the order dismissing or removing a judicial officer from service has to be passed in the name of the Governor in the manner sanctioned by the Constitution. It is for that purpose alone that the case is forwarded to the Governor. Any other interpretation of the role of the Governor in this matter will impinge upon the soleness of the control over the Judiciary vested in the High Court. In the exercise of his power of passing an order of removal from service or dismissal from service, the Governor cannot decide whether the delinquent officer is guilty or not; he has to accept the verdict of the High Court in this matter. At best (but without conceding) it may be open to the Governor to discuss the matter with the High Court in case he forms an opinion, on the material supplied to him by the High Court, that the punishment of removal from service or dismissal from service as recommended by High Court is too harsh or not justified and if after discussion he still remains unconvinced, he should send back the case to the High Court to impose any other appropriate punishment within its own power. I may emphasise that the Governor and the High Court have to act in harmony as far as the Judiciary is concerned and the cardinal principle of the Constitution being that the Judiciary is to be independent of the Executive, complete control over the Judiciary vests in the High Court including disciplinary matters and it is only proper that the Governor should feel himself bound by the recommendation of the High Court in the matter of the guilt and the punishment that the delinquent officer deserves. This conclusion flows from the control of the High Court embodied in Article 235 of the Constitution as explained by their Lordships of the Supreme Court in *Nripendra Nath Bagchi's case* (*supra*). Some observations in the other decided cases also lead to that conclusion. In para. 78 of the report in *Shamsher Singh's case*, which has been quoted above, it has been ruled that "the Governor will act on the recommendation of the High Court. That is the broad basis of Article 235." It has also been emphasised in that judgment that the Governor cannot hold any enquiry through his own agency even when he does not feel satisfied with the recommendation made by the High Court. In the same judgment, Krishna Iyer, J. for himself and Bhagwati, J., in reference to the provisions of Article 217 (3) of the Constitution which provides that "if any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be

final". observed in paragraph 148 of the report as under:—

"In the light of the scheme of the Constitution we have already referred to, it is doubtful whether such an interpretation as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion, satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant Article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian Justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue." (Emphasis supplied).

It is true that in paragraph 99 of the report, the learned Judge said

"Thirdly, has the High Court the last word regarding termination of service of judicial personnel, Government being a formal agency to implement it? This was challenged at the bar, although we do not finally deal with it for the reasons to be mentioned later."

On the basis of this observation it has been vehemently argued by the learned counsel for the petitioner and the State Government that this Court should not be influenced by the observation of the learned Judge in paragraph 148 of the report. The observations of the learned Judge in paragraph 155 of the report, reading as under, are also pertinent:—

"The second spinal issue in the case, as earlier indicated, bears on fearless justice, another prominent creed of our Constitution. The independence of the Judiciary is a fighting faith of our founding document. Since the days of Lord Coke, judicial independence from executive control has been accomplished in England. The framers of our Constitu-

tion, impressed by this example, have fortified the cherished value of the rule of law by incorporating provisions to insulate the judiciary. Justice becomes fair and free only if institutional immunity and autonomy are guaranteed (of course there are other dimensions to judicial independence which are important but irrelevant for the present discussion). The exclusion of executive interference with the Subordinate Judiciary, i.e., grass-roots justice, can prove a teasing illusion if the control over them is vested in two masters viz., the High Court and the Government, the latter being otherwise stronger. Sometimes a transfer could be more harmful than punishment and disciplinary control by the High Court can also be stultified by an appellate jurisdiction being vested in Government over the High Court's administrative orders. This constitutional perspective informed the framers of our Constitution when they enacted the relevant Articles 233 to 237. Any interpretation of administrative jurisdiction of the High Court over its subordinate limbs must be aglow with the thought that separation of the Executive from the Judiciary is a cardinal principle of our Constitution. However, we do not pursue this question further since, in the present case, Government has agreed with and acted on the High Court's recommendation and, moreover, the methodology of conflict resolution, when the view of the High Court is unpalatable to the Executive, falls to be directly considered in a different set of pending appeals." (Emphasis supplied).

It may be that the matter was not finally decided, but we can certainly take guidance from the observations of the learned Judge because of the soundness of the reasons stated in support of those observations.

10. In N. S. Rao's case also, after reviewing the previous cases, it has been said that "the Governor has power to pass an order of dismissal, removal or termination on the recommendations of the High Court which are made in exercise of the power of control vested in the High Court. The High Court of course under this control cannot terminate the services or impose any punishment on District Judges by removal or reduction. The control over District Judges is that disciplinary proceedings are commenced by the High Court. If as a result of any disciplinary proceedings any District Judge is to be removed from service or any punishment is to be imposed, that will be in accordance with the conditions

of service." These observations clearly lead to the conclusion that the recommendation for inflicting one of the two major punishments, that is, dismissal or removal from service is made by the High Court in the exercise of its power of control and thereafter the Governor cannot assume a superior or appellate power to scrutinise the findings and the recommendations of the High Court as if the High Court is an authority subordinate to him. It has been emphasised more than once that the High Court is not an authority subordinate to the Governor in any matter whatsoever. The High Court represents the third wing of the Government of which the Executive, is another wing with the Governor as the Common link. For this reason too, once the recommendation was made by the High Court in the present case that the petitioner should be removed from service, the Governor had no right to differ from that recommendation and refuse to pass that order on any consideration whatsoever.

11. A Full Bench of this Court in *Inder Parkash Anand v. State of Haryana*, ILR (1972) 1 Punj and Har 698, had to decide whether the Government could issue a notice of retirement from service under Rule 5.32(c) of the Punjab Civil Services Rules, Volume II, against the recommendation of the High Court and it was observed that after a person is appointed to the Judicial Service of a State, he becomes subject to the control of the High Court in all matters, that is, administrative, judicial and pertaining to discipline; except that if an order of dismissal or removal has to be passed qua him, the competent authority to pass that order is the State Government. It was so held by their Lordships of the Supreme Court in *Nripendra Nath Bagchi's case* (AIR 1966 SC 447) (supra). In short, it was held that after a person is appointed to the Judicial Service of a State, the State Government becomes *functus officio* and the entire control — administrative, judicial and disciplinary — vests in the High Court. As long as that officer remains in service, all orders qua him in respect of his service have either to be passed by the High Court or by the State Government only on the recommendation of the High Court in respect of the matters over which the State Government has been given the jurisdiction under the provisions of the Constitution or the conditions of service governing the Judicial Service. The State Government on its own initiative cannot pass any order. In order to understand the ambit of the control of the High Court, we must imagine that there is a house of Judiciary into which a judicial officer is inducted by the order of the Government, but the moment he en-

ters the portals of the house, he comes under the control of the High Court and till he remains in the house, the Government has no right even to peep in and find out how he is behaving or working. As long as he is in the house, it is for the High Court to decide all matters relating to his service, that is, confirmation on the successful completion of the period of probation, transfer, permission to cross the efficiency bar, and promotions to the Selection Grade in the time scale of the judicial officer concerned. If he misbehaves and the misbehaviour is of a serious type, punishment short of removal from service or dismissal from service, will be passed by the High Court. But once the High Court is satisfied that he is not a fit person to continue in the house, it has to inform the Governor of its views and to request that he should be taken out of the house in the same manner in which he was inducted in. The High Court can take him to the exit, but cannot push him out. It is at this stage that the Governor is to exercise his power to take him out of the house by passing a formal order in pursuance of which the officer has to go out and cannot thereafter remain in the house. The decision, that he must be taken out of the house of Judiciary, is for the High Court and High Court alone to make and the Governor cannot insist that he must be retained in the house even if the High Court is firmly of the opinion that he should not remain there. If this analogy be correct, then to borrow the language of Krishna Iyer, J., towards the end of paragraph 148 of the report in *Shamsher Singh's case*, quoted in extenso in an earlier part of this judgment, it can be said that in practice the last word in such a sensitive subject must belong to the High Court and the rejection of its advice shall ordinarily be regarded as prompted by oblique considerations vitiating the order and that it is immaterial whether the Governor or the Chief Minister or the Minister for Justice formally passes the order.

12. As against this interpretation of Article 235 of the Constitution, the learned counsel for the petitioner and respondent No. 3, have strongly urged that power does not mean mere obligation and that when the power to dismiss or remove from service has been vested in the Governor under Article 311 of the Constitution and the Service Rules, the Governor alone has the right to find out whether the delinquent officer is guilty or not and what punishment he deserves. He can also exonerate the judicial officer if he is satisfied that on the evidence on the record he cannot be held to be guilty. I regret my inability to accept this submission. The power given to the Governor is to pass the order of dismissal from ser-

vice or removal from service as recommended by the High Court. Article 311 of the Constitution has to be considered in harmony with Article 235 of the Constitution and I have already given my reasons in an earlier part of the judgment in support of the plea that the Governor has merely to pass an order and not to adjudicate upon the matters. It is not unknown in the provisions of the Constitution that power to the President or the Governor is given only to pass an order in accordance with the advice of some other body. For example, in Article 103, the President has been given the power to decide whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102 of the Constitution and his decision is to be final. But before giving any decision on any such question, the President has been enjoined to obtain the opinion of the Election Commission and to act according to such opinion. This Article clearly means that the opinion on the question of disqualification will be that of the Election Commission and that the President will pass his order in accordance with that opinion, that is, he cannot exercise his own mind in the matter and must abide by the opinion tendered by the Election Commission. A similar provision is made with regard to members of the State Legislatures in Article 192 of the Constitution and the Governor has been given the power to decide whether a member of the Legislature has become subject to any of the disqualifications mentioned in clause (1) of Article 191 but he has to give his decision in accordance with the opinion of the Election Commission. Article 217 (3) gives the power to decide any question relating to the age of a Judge of a High Court to the President after consultation with the Chief Justice of India. While interpreting the phrase 'after consultation with the Chief Justice of India', Krishna Iyer, J., in *Shamsher Singh's* case, has made the observation that "in practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue". The learned Judge emphasised that the purpose of providing consultation with the Chief Justice of India was in accordance with the cardinal principle of the Constitution to preserve the independence of the Judiciary and if the consultation with the Chief Justice is obligatory, the last word must vest with him. Consultation is milder than recommendation and recommendation is

milder than control and it, therefore, stands to reason that the control of the High Court, as enshrined in Article 235 of the Constitution, must be considered to be complete, sole and absolute so that any recommendation made by it, in exercise of that power, must be held binding on all the authorities that have to act in accordance therewith including the Governor under Article 311 of the Constitution and the Service Rules. In this view of the matter, it is not necessary to decide whether Article 235 overrides Article 311 of the Constitution or vice versa. Both the provisions, being in the same Constitution, have to be worked in harmony and if that is possible, there is no occasion to make one subject to the other. It may, however, be emphasised that Article 311 applies only to such cases in which the appointing authority is also the controlling authority and has the right to inflict all the punishments, whether minor or major and to initiate the departmental enquiries and deal with the case till the award of punishment. In the case of judicial officers, Article 311 has a limited application, that is, the orders of dismissal or removal from service are to be passed by the Governor, but the enquiries have to be held by the High Court.

13. It has been stressed by the learned counsel for the petitioner and respondent No. 3 that if the Constitution makers intended that the Governor was not to exercise his own mind and had to pass the order as recommended by the High Court, a provision to that effect would have been expressly made in Article 235 or some other Article of the Constitution. It has been emphasised that in a Conference of the Judges of the Federal Court and the Chief Justices of High Courts held in March, 1948, it was noticed that no specific attention was paid to the subordinate judiciary and neither the Draft Constitution prepared by the Constitutional Adviser in 1947 nor that prepared by the Drafting Committee in 1948 contained any specific provision on the subject. The omission to provide specifically for the subordinate judiciary in the Constitution was prominently mentioned in the memorandum submitted as a result of that Conference to the Government with the observation that:—

"So long as the subordinate judiciary, including the district Judges, have to depend on the provincial executive for their appointment, posting, promotion and leave, they cannot remain entirely free from the influence of members of the party in power and cannot be expected to act impartially and independently in the discharge of their duties. It is, therefore, recommended that provision be made placing exclusively in the hands of the

High Courts the power of appointment and dismissal, posting, promotion and grant of leave in respect of the entire subordinate judiciary including the district Judges".

It was because of that memorandum that the Drafting Committee inserted Chapter VI in Part VI of the Constitution, consisting of Articles 233 to 237, dealing with the subordinate Courts. The Supreme Court in *Nripendra Nath Bagchi's case* (AIR 1966 SC 447) (supra) dealt with this matter at great length and came to the conclusion that the 'control' was vested in the High Court to effectuate a purpose, namely, the securing of the independence of the subordinate judiciary and unless it included disciplinary control as well, the very object would be frustrated. The independence of the judiciary was also emphasised by the Supreme Court in *Jyoti Prakash Mitter v. Hon'ble Mr. Justice H. K. Bose, Chief Justice of the High Court, Calcutta*, AIR 1965 SC 961, in paragraph 29 of the report, as under:—

"There is considerable force in the plea which the appellant took at the initial stages of this controversy that if the Executive is allowed to determine the age of a sitting Judge of a High Court, that would seriously affect the independence of the Judiciary itself."

In *Chandra Mohan v. State of Uttar Pradesh*, (1967) 1 SCR 77 = (AIR 1966 SC 1987), it was observed as under:—

"Till India attained independence, the position was that district Judges were appointed by the Governor from three sources, namely, (i) the Indian Civil Service, (ii) the Provincial Judicial Service, and (iii) the Bar. But after India attained independence in 1947, recruitment to the Indian Civil Service was discontinued and the Government of India decided that the members of the newly created Indian Administrative Service would not be given judicial posts. Thereafter district Judges have been recruited only from either the judicial service or from the Bar. There was no case of a member of the executive having been promoted as a district Judge. If that was a factual position at the time the Constitution came into force, it is unreasonable to attribute to the makers of the Constitution, who had so carefully provided for the independence of the judiciary, an intention to destroy the same by an indirect method." In *State of Assam v. Kuseswar Saikia*, AIR 1970 SC 1616, the learned Judges observed thus:—

"We are of the view that the change is likely to lead to an impairment of the independence of the judiciary at the lowest levels whose promotion which was vested by the Constitution in the High

Court advisedly, will no longer be entirely in the hands of the High Court. The remedy for it is by amendment of the law to restore the former position."

It is thus evident that the Constitution makers, by making provisions in Arts. 233 to 237 of the Constitution specifically for the subordinate Courts, intended to ensure the independence of the Judiciary from the influence of the Executive. If that was the object, Article 235 must be given the same interpretation which effectuates that object. It was observed by *Dennning, L. J.*, in *Seaford Court Estates Ltd. v. Asher*, (1949) 2 All ER 155, as under:—

"The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the Judge's trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. That was clearly laid down ((1584) 3 Co Rep 7a (7b)) by the resolution of the Judges (Sir Roger Manwood, C. B. and the other barons of the Exchequer) in *Haydon's case* and it is the safest guide today. Good practical advice on the subject was given about the same time by *Plowden* in his note ((1574) 2 Plowd 460 (465)) to *Eyston v. Studd* (5). Put into homely metaphor it is this: A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases." These observations were quoted with approval by the Supreme Court in *State of Bihar v. Asis Kumar Mukherjee*, AIR 1975 SC 192, in paragraph 15. Taking the clue from these observations for the construction of Article 235, it must be said that the Constitution makers intended to and did vest the control of the District

Courts and the Courts subordinate thereto in the High Court and made it a sole custodian of that control. If the Constitution makers were called upon to make a specific provision with regard to cases in which the Governor has to pass an order of dismissal from service or removal from service, it would certainly have been provided that the Governor would pass an order in accordance with the recommendation of the High Court on the subject. The independence of the Judiciary has been stated to be the cardinal principle of the Constitution, by the Supreme Court in various judgments referred to above and it, therefore, becomes apparent that complete disciplinary control over the subordinate judiciary vests in the High Court and the High Court has the right to propose the punishment on a delinquent officer who has been found guilty, after a due enquiry and after consideration of his explanation. This interpretation advances the object and purpose of making a separate provision with regard to subordinate Courts in Articles 233 to 237 of the Constitution and provision of control in the High Court in Article 235. Any other interpretation will impinge on the complete control of the High Court over the judicial officers and anomalous situations will arise as in the present case if an undesirable and unwanted judicial officer is thrust on the High Court for service. It will thus create a deadlock or stalemate and confrontation between the Executive and the High Court. Since the impugned order, exonerating the petitioner from all charges and reinstating him, was not passed in accordance with the mandatory provision of the Constitution embodied in Article 235 of the Constitution, the order is void and non est being ultra vires Article 235 of the Constitution and the High Court was right in not giving effect to it.

14. The second point for consideration is whether the Government was justified in seeking the advice of the Public Service Commission under Art. 320 (3) (c) of the Constitution. I have already pointed out above that the High Court is the sole custodian of the control over the subordinate judiciary, as has been emphasised by the Supreme Court in Nripendra Nath Bagchi's case (AIR 1966 SC 447) (supra). Consultation with the Public Service Commission in respect of the members of the Judiciary, in my opinion, is expressly ruled out by Article 235 of the Constitution; otherwise the Constitution makers would have provided whether the recommendation of the High Court or the advice tendered by the Public Service Commission would be binding on the Government in case there was conflict between the two. If the advice of

the Public Service Commission is to prevail against the recommendation of the High Court, then the soleness of the authority of the High Court in matters of discipline, so much emphasised by their Lordships of the Supreme Court in Nripendra Nath Bagchi's case, (AIR 1966 SC 447) will be whittled down. The observation that "the High Court is the sole custodian over the control in judiciary" means that the power has not to be shared with anybody else, much less with an advisory body like the Public Service Commission. In (1967) 1 SCR 77 = (AIR 1966 SC 1987) in relation to Article 233 of the Constitution, it was observed as under:—

"The constitutional mandate is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of District Judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the 'judicial service' or to the Bar, to be appointed as a District Judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him. This mandate can be disobeyed by the Governor in two ways, namely (i) by not consulting the High Court at all, and (ii) by consulting the High Court and also other persons. In one case he directly infringes the mandate of the Constitution and in the other he indirectly does so, for his mind may be influenced by other persons not entitled to advise him."

In that case the rules provided that the Governor could appoint a District Judge in consultation with the Selection Committee which consisted of two Judges of the High Court and the Judicial Secretary to Government. The High Court was practically reduced to the position of a transmitting authority of the lists of suitable candidates for appointment prepared by the Selection Committee. The only discretion left with it was to refuse to recommend for appointment all or some of the persons included in the lists sent to it by the Selection Committee. It could not scrutinise other applications which were screened by the Selection Committee nor could it recommend for appointment persons not found in the lists. On these facts it was held that the selection was bad as the High Court had not been consulted. The relevant observations are:—

"On the assumption that it is open to the Governor to make a provision under

Article 309 for consultation with bodies other than the High Court, even so he cannot avoid consultation with the High Court directly or indirectly. As we have noticed earlier, under the Rules the Consultation with the High Court is an empty formality. The Governor prescribes the qualifications, the Selection Committee appointed by him selects the candidates and the High Court has to recommend from the lists prepared by the said Committee. This is a travesty of the constitutional provision. The Governor, in effect and substance, does neither consult the High Court nor acts on its recommendations, but only consults the Selection Committee or acts on its recommendations. In that view also, the relevant rules are illegal and the appointments made thereunder are bad."

This case was followed in *Prem Nath v. State of Rajasthan*, AIR 1967 SC 1599.

15. The learned counsel for the petitioner strongly relied on a judgment of the Supreme Court in *Pradvat Kumar Bose v. The Hon'ble Chief Justice of Calcutta High Court*, AIR 1956 SC 285, wherein it was held that consultation with the Public Service Commission was not necessary in the case of the members of the High Court staff, who could be appointed by the Chief Justice and who had the authority to dismiss them and to frame rules pertaining to the conditions of service. They were not employees under the State Government and, therefore, Article 320 (3) (c) did not apply. From these observations it is emphasised by the learned counsel that in the case of the Judicial Service of the State under Article 234 of the Constitution, the power to appoint and the power to make rules prescribing the conditions of service vests in the Governor and he is the authority to dismiss or remove from service such a judicial officer and, therefore, the administrative control over the Judicial Service vests in the Governor and the members of the Service can be described as persons serving under the Government of the State. A pertinent observation has been made in this judgment that the phrase "persons serving under the Government of India or the Government of a State" seems to have reference to such persons in respect of whom the administrative control is vested in the respective executive Governments functioning in the name of the President or the Governor or of a Rajpramukh. After making this observations it is said that the officer and staff of the High Court cannot be said to fall within the scope of the above phrase because in respect of them the administrative control is clearly vested in the Chief Justice who, under the Constitution, has the power of appointment and re-

moval and of making rules for the conditions of services. This observation does not mean that these are the only aspects of the administrative control. It has been authoritatively held by the Supreme Court that the complete administrative control in respect of the members of the Judiciary vests in the High Court and, therefore, the members of the Judicial Service, although belonging to the Civil Service of the State, do not serve under the State Government, but only in connection with the affairs of the State and, therefore, consultation with the Public Service Commission cannot be had in the case of disciplinary matters with regard to judicial officers.

16. Lastly, reliance was placed on *Nripendra Nath Bagchi v. Chief Secy., Government of West Bengal*, AIR 1961 Cal 1, wherein it was held that consultation with the Public Service Commission was necessary because it was a safeguard provided by the Constitution to the members of the Civil Service. This observation of P. B. Mukharji, J. in that judgment, should be deemed to have been impliedly overruled by the Supreme Court judgment in *Nripendra Nath Bagchi's case*, (AIR 1966 SC 447) (supra), on an appeal against that judgment, in view of the observation that the sole custodian of the control over the Judiciary is the High Court. The observation in the Calcutta decision is, therefore, of no help to the learned counsel for the petitioner.

17. The learned Advocate General for the State has referred to the *Harvana Public Service Commission (Limitation of Functions) Regulations, 1973*, in which Regulations 4 to 6 enumerate the cases in which it is not necessary to consult the Public Service Commission and it is argued that the members of the Judicial Service are not mentioned therein. The previous regulations presumably contained similar provisions. The Public Service Commission has not to be consulted in regard to disciplinary matters when a member of the Judicial Service is involved because of the provision in Article 235 of the Constitution with regard to control. The State Public Service Commission is to be consulted by the State Government or an authority subordinate to it. The High Court, not being subordinate to the State Government, has not to consult the Public Service Commission when it inflicts any punishment within its power. If that be so, the Governor has also not to consult the Public Service Commission when it has to pass the order of removal from service or dismissal from service with respect to a member of the Judicial Service. The order reinstating the petitioner into service was passed on the basis of the advice tendered by the Public Ser-

vice Commission which was accepted by the State Government in preference to the advice and recommendation of the High Court. Since the Public Service Commission was an extraneous body and could not be consulted and was able to influence the decision of the punishing authority, the order suffers from a grave constitutional infirmity and is, therefore, liable to be declared ultra vires Art. 235 of the Constitution and hence void and non est on this ground too. The High Court was, therefore, right in disregarding that order and not implementing it by giving the posting orders to the petitioner.

18. No other point has been argued.

19. From the above discussion it follows that the petitioner cannot claim any relief on the basis of the order of the Governor dated August 24, 1968, reinstating him in service and his petition is, therefore, dismissed but without any order as to costs. The dismissal of this petition will, however, not bar the State Government from passing an order against the petitioner in accordance with the recommendation of the High Court completely ignoring and keeping out of consideration the advice tendered by the Public Service Commission.

A. D. KOSHAL, J.:— 20. I agree.

S. S. SANDHAWALIA, J.:— 21. I agree.

PREM CHAND JAIN, J.:— 22. I also agree.

MAN MOHAN SINGH GUJRAL, J. (Minority view):— 23. In this petition under Articles 226 and 227 of the Constitution of India filed by Shri B. R. Guliani, a member of the subordinate judiciary, claiming mandamus directing respondent No. 2 to post the petitioner as Subordinate Judge First Class-cum-Judicial Magistrate First Class and other consequential reliefs, the main legal issues claiming consideration and decision may be formulated as follows:—

1. The State Government being the authority to impose the punishment of dismissal or removal from service in view of the provisions of Article 311 read with Article 234 of the Constitution of India, is it bound to pass the order in terms of the recommendation made by the High Court in exercise of its control under Article 235 or is the State Government required to apply its own mind and come to an independent decision whether the order imposing the punishment of removal or dismissal in terms of Article 311 (1) is to be passed or not?

2. In view of the fact that control over the subordinate judiciary vests in the High Court under Article 235, is it

open to the State Government to consult the Public Service Commission and be guided by the advice and whether the order passed by the State Government on the advice of the Public Service Commission would be a valid order?

I have had the advantage of reading the judgment of my learned brother Tuli, J., with which the other learned brethren on the Bench have concurred and I agree with the views expressed on the second point and the conclusion reached that the Public Service Commission could not be consulted and as the order of the punishing authority is based on extraneous consideration, which in this case is the advice of the Public Service Commission, the decision suffers from constitutional infirmity and is void and non est. Consequently I agree with the order proposed that the petition merits dismissal. I, however, have not been able to persuade myself that the finer nuances of the concept of control of the High Court over the subordinate judiciary in relation to the powers of the State Government emerging from the reasoning adopted were in tune with the undertones and overtones of inter-play of Articles 235 and 311 of the Constitution of India. Therefore, with all the respect for my learned brethren I have found it necessary to delineate, what I consider to be the exact scope and outer limits of the power of control vesting in the High Court under Article 235 of the Constitution, through by-ways of reasoning which would help in avoiding to tread on alien territory and to get into a scrape with the powers of the Governor under Articles 233, 234 and 311 of the Constitution.

24. The facts necessary for the decision of this petition lie well beyond the pale of controversy, and having been marshalled succinctly in the judgment of B. R. Tuli, J., do not bear repetition. For our purpose, it would suffice to notice a few salient contours. At the relevant time the petitioner was posted as Subordinate Judge-cum-Magistrate First Class, Amloh. Some complaints having been made against the integrity of the petitioner, at first a fact-finding inquiry was held and this ultimately led to a departmental inquiry. During the pendency of the inquiry the petitioner was suspended by the State Government at the suggestion of the High Court. On receipt of the report of the Inquiry Officer and the explanation of the petitioner to the show cause notice under Article 311 of the Constitution which was served through the State Government, the High Court made a recommendation to the State Government that the petitioner be removed from service. Instead of acting on the advice of the High Court and the material received from it, the Haryana Govern-

ment, being of the opinion that the provisions of Article 320 (3) (c) were attracted and a reference to the Haryana Public Service Commission was necessary, solicited the opinion of the Haryana Public Service Commission and, on its basis, decided to exonerate the petitioner and passed an order on the 24th August, 1968, reinstating him with immediate effect. Simultaneously the High Court was asked to consider the question of posting Shri Guliani as he had been reinstated in service. In spite of this communication, no posting orders were issued by the High Court presumably for the reason that it considered the order of the State Government to be illegal and void, it having been based on the advice of the Haryana Public Service Commission which, in the opinion of the High Court, was extraneous material. The petitioner was still considered to be under suspension, as in the view of the High Court, no valid order of reinstatement had been passed. Finding himself in this unhappy position, the petitioner moved this Court through a writ petition under Articles 226 and 227 of the Constitution claiming a direction that a posting order be issued and the petitioner be paid full salary including the salary for the period of suspension. Other consequential orders were also sought in this petition.

25. Before proceeding to examine the various aspects of the questions raised, it would be pertinent to observe that both the issues relate to the determination of the true intent and scope of Article 235 of the Constitution of India and the nature of the power which the High Court draws from this provision in the field of control over the subordinate judiciary. In case, on an analysis of Article 235 in the light of the other relevant Articles of the Constitution, the conclusion reached is that the control of the High Court over the subordinate judiciary is complete in all respects and in all fields and includes the power to take final decision with regard to the infliction of punishment of dismissal or removal and that the State Government is merely to issue a formal order, the question of the necessity to consult the Public Service Commission would not arise, as the process of consultation in that situation would be an exercise in futility.

26. In order to appreciate the respective contentions of the parties, it would be fruitful to examine the relevant provisions of the Constitution which, for facility of reference, have been set down below.

"233. (1) Appointments of persons to be, and the posting and promotion of, district Judges in any State shall be made by the Governor of the State in consulta-

tion with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

234. Appointments of persons other than district Judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

235. The control over district Courts and Courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district Judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

311. (1) No person who is a member of a civil service of the Union or an All India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed but only on the basis of the evidence adduced during such inquiry:

Provided that this clause shall not apply—

(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

27. The above provisions clearly highlight that so far as control over the district Courts and Courts subordinate thereto is concerned, the power is derived by the High Court from Article 235 and this power of the High Court is absolute in its own sphere and is not shared by any other agency. Neither under this provision nor under any other provision of the Constitution has the State Government any authority to exercise control over the working of the subordinate Courts or to exercise disciplinary control over the judicial officers manning those Courts. The State Government comes in contact with the subordinate judiciary only at two stages. The appointment of district Judges and members of the subordinate judiciary is made by the State Government, and being the appointing authority, the State Government is also the authority for passing the order of dismissal or removal from service. The appointment of district Judges is made by the State Government in consultation with the High Court while the subordinate Judges are appointed by the State Government in accordance with the rules framed in consultation with the High Court and the Public Service Commission. The power of appointment resting in the Governor which in turn leads to the power of dismissal or removal from service of judicial officers carries an implication of control in some measure of the State Government over the subordinate judiciary. Though ordinarily the question of exercising control would arise after a person has been injected into service but as, in the case of the members of the Subordinate Judicial Service, their promotion to Superior Judicial Service also rests with the Governor, the necessary inference would be that even at the initial stage the State Government in a way does have some share, however small it may be, in the field of control over the members of the Subordinate Judicial Service. Therefore, for the decision of the spinal issue arising in this case, the demarcation of the respective areas of control and marking the ridge dividing the two is the task facing us from the outset.

28. In so far as the power to pass order of dismissal or removal from service is concerned, both sides have taken extreme positions. On the one side, it is asserted that in this respect the final decision lies with the State Government and it is open to the Governor to either accept the findings and recommendations made by the High Court or to take action according to its own assessment of the findings of the inquiry and the explanation offered by the delinquent judicial officer and even to decide to completely exonerate him. With equal vehemence, it is urged on the other side, that the power of control vesting in the High Court under Article 235 carries the implication that the final decision to dismiss or remove a judicial officer from service rests with the High Court and the State Government only carries out the formality of passing an order in terms of the recommendations made by the High Court. Carrying the argument further, it is urged that just as in other matters the Governor is bound by the advice of the Council of Ministers, in matters relating to the subordinate judiciary the last word rests with the High Court. To place any other interpretation would, according to this view, impinge on the control of the High Court over the district Courts and the Courts subordinate thereto. To wear away from the opposite view-point, the incongruous results flowing from its acceptance was used as a bait. To cite an example, it was pointed out that, if the interpretation placed by the petitioner is accepted, the High Court would have the power to hold an inquiry against a judicial officer and, after finding him guilty, impose any punishment other than removal or dismissal and that order would be final and binding, but, on the other hand, if on that very material, after coming to the conclusion that the officer was guilty of misconduct, the High Court were to recommend to the State Government for his dismissal or removal, the State Government could not only conclude that the case was not one for dismissal or removal but could completely exonerate the judicial officer and thus take away the right of the High Court even to impose one of the minor punishments. This, it is argued, could not have been the intention of the framers of the Constitution and it is consequently sought to be urged that the only harmonious way in which Articles 235 and 311 could be interpreted is to accept that the final authority to take the decision in departmental proceedings rests with the High Court, leaving it for the Governor to pass a formal order in terms of the High Court's decision to impose one of the major punishments. Continuing this argument, it was asserted that, if the petitioner's inter-

prefation was accepted, it would result in dual control which in turn would create situations causing confusion and uncertainty in judicial services and also affect the independence of the judiciary, to preserve which Article 235 had been introduced.

29. Having projected the opposing view points in broad outlines, the stage is now set for embarking on a close scrutiny of these arguments and for this purpose the relevant provisions of the Constitution and the judicial decisions interpreting the same would provide useful guidelines. In the case of the subordinate judiciary the authority in which the control vests is different from the one which has the power to appoint and also to dismiss or remove from service while such duality of control does not exist in the case of the other services. Does this distinction place the subordinate judiciary on a different footing so far as the applicability of Article 311 is concerned? The answer to my mind appears to be in the negative, as there is nothing in the language of Article 311 to be even remotely suggestive of such an interpretation. To hold otherwise would be to imply that Article 311 is subject to Article 235, for concluding which there is no basis.

30. It is an accepted principle of interpretation that when two provisions in a statute deal with the same subject, one of which is specific or special in character, and the other of a general sweep and applicability, the special qualifies the general and ought to be applied in preference to and unaffected by the general one. Viewed from this standpoint, it would appear that Article 235 is of a general character inasmuch as it relates to the control of the High Court over the subordinate Courts in all spheres including not only control over the day-to-day working of the Courts but also disciplinary and administrative control. On the other hand, Article 311 is only concerned with dismissal or removal of a Government servant to whichever wing or department he may belong. In relation to Article 235, Article 311, is, therefore, a special provision dealing with the imposition of major punishments mentioned therein. This being the relative position, if even a conflict arises between Articles 235 and 311, the former would have to be interpreted in a manner so as to leave the applicability of Article 311 unaffected.

31. It is now well settled that neither Article 309 nor Article 310 controls Article 311 and, in fact, the scope and effect of Article 310 (1) has to be limited in regard to cases falling under Art. 311 (2) and the rule-making authority envisaged in Article 309 cannot be exer-

cised in a manner so as to curtail or affect the rights granted to a public servant under Article 311 (2). This emerges from the decisions of the Supreme Court in Jagannath Prasad v. State of Uttar Pradesh, AIR 1961 SC 1245, and Moti Ram Deka v. General Manager, North East Frontier Rly., AIR 1964 SC 600. In the first of these cases, one of the rules relating to disciplinary proceedings provided that the Governor was enjoined to pass an order of punishment in terms of the recommendation of the Tribunal and it was held that to the extent that this rule required the Governor to accept the recommendation of the Tribunal as binding, the rule was inconsistent with the Constitution, as under Article 311 (2) the officer concerned was entitled to a reasonable opportunity to show cause, to the satisfaction of the Governor, against the action proposed to be taken in regard to him. From the ratio of this decision, it would necessarily follow that notwithstanding the power of control which the High Court has under Article 235, such a construction cannot be placed on it which would have the effect of depriving the judicial officer of the right to a reasonable opportunity to show cause to the satisfaction of the appointing authority when the question of the imposition of the punishment of dismissal or removal from service arises, as otherwise it would amount to a violation of Article 311. The order that the Governor passes under Article 311 is not merely a formal order but an order based on an appreciation of the material placed before him by the agency which had held the departmental inquiry. In the case of Bachittar Singh v. State of Punjab, AIR 1963 SC 395, the view taken was that departmental proceedings taken against a Government servant are just one continuous proceeding though there are two stages in it. Regarding these stages it was observed as follows:

"The first is coming to a conclusion on the evidence as to whether the charges alleged against the Government servant are established or not and the second is reached only if it is found that they are so established. That stage deals with the action to be taken against the Government servant concerned. Both these stages are equally judicial. Therefore, this stage of the proceeding is no less judicial than the earlier one. Consequently any action decided to be taken against a Government servant found guilty of misconduct is a judicial order and as such it cannot be varied at the will of the authority who is empowered to impose the punishment. Indeed, the very object with which notice is required to be given on the question of punishment is to ensure that it will be such as would be justified

upon the charges established and upon the other attendant circumstances of the case. It is thus wholly erroneous to characterise the taking of action against a person found guilty of any charge at a departmental enquiry as an administrative order."

The above observations leave no manner of doubt that at the second stage of departmental proceedings when action is to be taken against a Government servant the appropriate authority has to pass an order based on judicial approach and not merely a formal order. To hold that while passing such an order whether it is termed judicial or administrative, the Governor is merely to act on the recommendation of the High Court without applying his own mind would be rendering the provisions of Article 311 nugatory and depriving the Government servant of its protective shield. The construction sought to be placed on Art. 311 by the first respondent would have the effect of depriving Article 311 of substance and turning it to an empty shell. I find myself unable to accept this as a correct view of the safeguard sought to be created through Article 311. Such a view of this provision can only be projected if it can be canvassed that the power of appointment of judicial officers in fact and substance also rests with the High Court, inasmuch as the Government is bound to pass an order of appointment of judicial officers on the recommendation of the High Court. At no stage was this view commended for acceptance and, in fact having regard to the following observations of the Supreme Court in AIR 1970 SC 1616, such an argument is not available—

"It means that appointment as well as promotion of persons to be District Judges is a matter for the Governor in consultation with the High Court and the expression 'District Judge' includes an Additional District Judge and an Additional Sessions Judge. District Judges may be directly appointed or may be promoted from the subordinate ranks of the judiciary. The article is intended to take care of both. If the promotion is from the junior service to the senior service, it is a 'promotion' of a person to be a District Judge which expression includes an Additional District Judge."

32. On behalf of the petitioner, it was canvassed before us that though there was no clear judicial pronouncement dealing with the extent and nature of the control of the High Court envisaged by Article 235 in relation to the power of the appointing authority, to dismiss or remove a judicial officer, contained in Article 311 of the Constitution, but there are indications in some of the decided cases

that could plausibly and reasonably lead to the conclusion that, though the State Government was bound to give due regard to the recommendations of the High Court and was normally expected to act upon it, but the final decision rested with the State Government and it was not bound in every case to issue an order of dismissal or removal, if so recommended by the High Court. Reference in this connection was first made to *Mohammad Ghouse v. The State of Andhra*, AIR 1957 SC 246. In this case an inquiry was held by one of the Judges of the High Court against the appellant who was a subordinate Judge. The inquiry related to certain charges of bribery and delaying of judgments, etc., and at a meeting of the Judges it was decided that the proper punishment was of dismissal regarding the charge of bribery and removal from service regarding the other charges. The appellant was then placed under suspension and a report was sent to the Government for taking action, on the basis of which a notice was issued to the appellant to show cause why he should not be dismissed or removed from service. Before the Supreme Court one of the arguments advanced was that, as the Governor was the appointing authority of the appellant, the order of suspension passed by the High Court was violative of Article 311. While repelling this contention, it was ruled that it was the appropriate authority under Article 311 that was proceeding to take action against the appellant and it was for that authority to pass the ultimate order in the matter. The decision proceeded on the assumption that it was the Governor who was to pass the final order under Article 311. Again in *Mohammad Ghouse v. State of Andhra Pradesh*, AIR 1959 Andh Pra 497, the decision of the main question involved proceeded on the same assumption that the power to hold an inquiry into the conduct of a judicial officer vested in the High Court and the High Court was to determine provisionally the punishment which could be imposed upon judicial officer prior to his being afforded a reasonable opportunity of showing cause under Article 311 of the Constitution but that the order was ultimately to be passed by the Governor. While challenging the order of dismissal passed against him, one of the contentions raised before the High Court was that the petitioner being a District Judge, the High Court was not competent to hold an inquiry against him and as such the inquiry by the High Court must be deemed to be a preliminary inquiry only and that in case action was sought to be taken against him on its basis the Government ought to have ordered another inquiry before holding the charges proved against him. While

rejecting this contention it was observed as under :—

"Therefore the High Court in exercise of its power of superintendence and control of the Courts subordinate to it and by virtue of the rules having the force of law under the proviso to Art. 309 read with Article 313, is vested with the power to hold an enquiry into the conduct of judicial officers and to determine provisionally the punishment which should be imposed upon them prior to their being afforded a reasonable opportunity of showing cause under Art. 311 of the Constitution. In other words, there are two stages to an enquiry against a public servant; the first stage is when charges are framed and he is asked whether he requires an oral enquiry or to be heard in person. The first opportunity is afforded to him at this stage to contest the allegations against him. The second stage is after the findings have been reached when the person empowered to appoint him must give the delinquent a reasonable opportunity to show cause against the action proposed to be taken against him.

The only purpose for which an enquiry under the Act could be made, is to help the Government to come to a definite conclusion regarding the misbehaviour of a public servant and thus enable it to determine provisionally the punishment which should be imposed upon him, prior to giving him a reasonable opportunity of showing cause, as is required under Article 311 (2) of the Constitution. The essential element in the awarding of penalties and punishments against public servants is not as to who conducts the enquiry, but whether the person has been given the opportunities referred to above and that the enquiry is fair and unbiased". (Emphasis supplied).

If the correct view of Article 235 had been that the High Court was to take the final decision even in the matter of imposing the punishment of dismissal or removal from service on judicial officers, as is now canvassed before us, the argument raised in Mohammad Ghouse's case would have been repelled on that ground and not on the ground that the High Court was to hold the inquiry in exercise of its power of control with a view to help the Government to come to a definite conclusion regarding misbehaviour of the judicial officer and further enable it to provisionally determine the punishment and to give a reasonable opportunity under Article 311 (2) of the Constitution of India.

33. This brings us to the consideration of the ratio of the decision of the Supreme Court in AIR 1966 SC 447, to which reference has been made by both

parties and from some of the observations made therein both sides have sought to draw sustenance. At the relevant time, N. N. Bagchi was posted as Additional District and Sessions Judge at Alipore. Shortly before he was due to retire, he was placed under suspension and served with a charge-sheet, which ultimately led to an inquiry by Mr. B. Sarkar, Commissioner, culminating in a report holding the charges proved. The State Government issued a notice asking him to show cause why he should not be dismissed, and as satisfactory cause could not be shown, an order of dismissal was passed. In this matter the Public Service Commission was consulted, but not the High Court. The order was quashed by a Full Bench of the Calcutta High Court and in appeal before the Supreme Court filed by the State of West Bengal, one of the questions that came up for consideration was whether the Government or the High Court could order, initiate and hold inquiries into the conduct of District Judges. While interpreting Art. 235 a reference was made to the process by which ultimately Articles 233 to 237 came to be included in the Constitution as distinct from the Chapter on Services and after the Chapter on High Courts and it was observed that in order to effectuate the independence of the subordinate judiciary the control of the subordinate Courts was placed with the High Court. It was further observed that "the High Court is made the sole custodian of the control over the judiciary." Basing himself on these observations, it was contended with considerable vehemence on behalf of the first respondent that, in case the final decision regarding dismissal or removal of a judicial officer was to vest in the State Government, it would impinge on the solemnity of the control of the High Court over the subordinate judiciary. Support for this argument was sought from the further observations in N. N. Bagchi's case that the "control which is vested in the High Court is complete control." In formulating this argument the respondents' learned counsel has fallen into the very trap against which a caution was sounded by the Supreme Court in State of Orissa v. Sudhansu Sekhar Misra, AIR 1968 SC 647, wherein accepting the rule laid down in Quinn v. Leatham, 1901 AC 495, it was pointed out that a decision is only an authority for what it actually decides and what is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. A further warning was given that it was not a profitable task to extract a sentence here and there from a judgment and to build upon it. With regard to the observations in N. N. Bagchi's

case that the High Court was made the sole custodian of the control over the subordinate judiciary, these were considered by the Supreme Court in *Sudhansu Sekhar Misra's case* (supra) in the following words:—

"Now let us consider the ratio of the decisions in *Nripendra Nath Bagchi's case* 1966-1 SCR 771 = (AIR 1966 SC 447) and *Ranga Mahammad's case* 1967-1 SCR 454 = (AIR 1967 SC 903). In *Bagchi's case*, 1966-1 SCR 771 = (AIR 1966 SC 447) this Court laid down that the word "control" found in Article 235 includes disciplinary jurisdiction as well. The only question that fell for decision in that case was whether the Government of West Bengal was competent to institute disciplinary proceedings against an additional district and sessions Judge. This Court upheld the decision of the High Court of Calcutta holding that it had no such jurisdiction. That was the single question decided in that case. It is true that in the course of the judgment, this Court observed that the High Court is made the sole custodian of the control of the judiciary, but that observation was made only in the context of the question that arose for decision."

Even otherwise, there are clear indications in *N. N. Bagchi's case* that the complete control which solely vested in the High Court related to power other than the power of the Government in the matter of appointment (including dismissal and removal) and posting and promotion of district Judges. The following observations in *Bagchi's case*, which lend support to this conclusion, may be read with advantage:—

"This argument was not presented in the High Court and does credit to the ingenuity of Mr. Sen but it is fallacious. That the Governor appoints District Judges and the Governor alone can dismiss or remove them goes without saying. That does not impinge upon the control of the High Court. It only means that the High Court cannot appoint or dismiss or remove District Judges. In the same way the High Court cannot use the special jurisdiction conferred by the two provisos. The High Court cannot decide that it is not reasonably practicable to give a District Judge an opportunity of showing cause or that in the interest of the security of the State it is not expedient to give such an opportunity. This the Governor alone can decide. That certain powers are to be exercised by the Governor and not by the High Court does not necessarily take away other powers from the High Courts. The provisos can be given their full effect without giving

rise to other implications. It is obvious that if a case arose for the exercise of the special powers under the two provisos, the High Court must leave the matter to the Governor. In this connection we may incidentally add that we have no doubt that in exercising these special powers in relation to inquiries against District Judges, the Governor will always have regard to the opinion of the High Court in the matter. This will be so whoever be the inquiring authority in the State. But this does not lead to the further conclusion that the High Court must not hold the enquiry any more than that the Governor should personally hold the enquiry.

There is, therefore, nothing in Article 311 which compels the conclusion that the High Court is ousted of the jurisdiction to hold the enquiry if Art. 235 vested such a power in it. In our judgment, the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiries, impose punishments other than dismissal or removal, subject however to the conditions of service, and a right of appeal if granted by the conditions of service, and to the giving of an opportunity of showing cause as required by clause (2) of Article 311 unless such opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that clause. The High Court alone could have held the enquiry in this case. To hold otherwise will be to reverse the policy which has moved determinedly in this direction." (Emphasis supplied)

In the above observations a clear distinction is drawn between the powers of the Governor to appoint district Judges in terms of Article 233 and subordinate Judges in terms of Article 234 and to dismiss or remove a judicial officer under Article 311 and the control which the High Court exercises in spheres other than these. No doubt in the above case the question whether the control vesting in the High Court included the power to take final decision regarding dismissal or removal did not directly arise, but having regard to the observations that the Governor alone could dismiss or remove district Judges and that this did not impinge on the control of the High Court, it cannot be plausibly canvassed that the power of the Governor was limited to the passing of a formal order of dismissal or removal on the basis of the decision which the High Court had reached. To me, therefore, there seems to be no escape from the conclusion that the observations

in Bagchi's case in regard to the extent of the powers of the High Court under Article 235 do offer a drop to the case of the petitioner that the power of dismissal or removal rests with the State Government.

34. It may be mentioned at this stage that the parties are agreed that Article 311 (2) is equally applicable to judicial officers and that they are also entitled to two opportunities before disciplinary action is taken against them. There is also no dispute that at the stage of the second opportunity it is open to the officer to cover the whole ground and to plead that no case has been made out against him for taking any disciplinary action and then to urge, in case he fails to substantiate his innocence, that the action proposed to be taken against him is either unduly severe or not called for. The only controversy is as to whether the High Court alone is to consider the explanation of the officer and to come to a conclusion whether any case has been made out for taking disciplinary action and, if so, what punishment can be appropriately imposed or whether the second opportunity was to be provided by the Governor who was to consider the explanation in the light of the recommendations of the High Court.

35-36. In Chandramouleshwar Prasad v. Patna High Court, AIR 1970 SC 370, the implications of the consultation which the Governor is required to have with the High Court in the matter of appointment of district Judges were considered and it was observed that the underlying idea of Article 233 was that the Governor should make up his mind after there has been a deliberation with the High Court. It was, however, made clear that this did not mean that the Governor must accept whatever advice was given by the High Court and all that this Article required was that the "Governor should obtain from the High Court its views on the merits or demerits of the persons among whom the choice of promotion or appointment was to be limited." Drawing support from these observations, it was contended on behalf of the petitioner that even in matters of dismissal or removal from service, the advice of the High Court could not be binding, as the power of dismissal or removal from service of a judicial officer was drawn from the power of appointment which the State Government has under Articles 233 and 234. It was further pointed out that whereas there was constitutional limitation on the power of the Governor under Article 233, making consultation with the High Court obligatory, there was no such limitation under Article 311 and that as the views of the High Court in matters of dismissal

or removal of a judicial officer were only to be taken into consideration by the State Government because the control over the district Court and Courts subordinate thereto vested in the High Court, the recommendations in this respect could not be binding. The contention appears to be well founded.

37. It may also be added that the power to initiate and conduct departmental inquiries against judicial officers which vests in the High Court does not carry the necessary implication that the High Court alone could take the final decision to dismiss or remove from service a judicial officer and was the appropriate authority to exercise, in substance, the powers under Article 311 (1) of the Constitution. In *State of Madhya Pradesh v. Sardul Singh*, 1970 Serv LR 101 (SC), it was ruled that a guarantee under Article 311 (1) did not in itself include a further guarantee that the disciplinary proceedings resulting in dismissal or removal of a civil servant should also be conducted by the authority mentioned in the Article. It was pointed out that Art. 311 in terms did not require that the authority empowered under this provision to dismiss or remove an officer should itself initiate or conduct the inquiry preceding the dismissal or removal of an officer or even that the inquiry should be conducted at its instance. The ratio of this decision would also be available to repel the converse proposition that the authority which has the power to initiate and conduct the inquiry must necessarily have the power to pass effective orders of dismissal or removal from service. This conclusion would also flow from the decision of the Supreme Court in *A. N. D'Silva v. Union of India*, AIR 1962 SC 1130, wherein it was held that neither the conclusion on the evidence nor the punishment which the inquiring authority may regard as appropriate is binding on the punishing authority and that it was for the punishing authority to propose the punishment and to impose it and that this power was unrestricted. Consequently it is open to the learned counsel for the petitioner to press into service the ratio of the above decisions in support of his arguments. It may be relevant at this stage to refer to another argument raised by Mr. Anand Saroop appearing on behalf of the first respondent that the observations in *Sardul Singh's* case or *D'Silva's* case would not be attracted in the case of judicial officers, as there is a clear distinction in this respect between these officers and other civil servants inasmuch as in the case of other Government servants the punishing authority is always the authority which exercises control over their work and conduct where-

as in the case of judicial officers the control vests in the High Court and only the power of appointment, dismissal and removal is with the State Government. The precise argument is that, in view of this power of control vesting in the High Court under Article 235, a different interpretation on the powers of the appointing authority under Article 311 (1) is to be placed in the case of judicial officers from the one in the case of other Government servants. The basis of this argument is that, as Articles 233 to 237 were introduced to ensure the independence of the judiciary, the extent of control in Article 235 be interpreted in a manner which would support this purpose and not in a way which would negative this object. Support for adopting this construction was sought from *Firm Amar Nath Bashesar Dass v. Tek Chand*, AIR 1972 SC 1548, wherein the following observations occur:—

"Although Courts are not concerned with the policy of the Legislature or with the result of giving effect to the language of the statute, it is their duty to ascertain the meaning and intendment of the Legislature. In doing so, Courts will always presume that the impugned provision was designed to effectuate a particular object or to meet a particular requirement and not that it was intended to negative that which it sought to achieve."

No doubt Article 235 was designed to effectuate the desirable objective of the independence of the judiciary, but the other connected Articles, namely, Articles 233, 234 and 311 clearly and unequivocally provide the limits of the sphere within which this power of control was to be exercised. It can be plausibly concluded that the power of control would extend to other spheres only. The observations in *N. N. Bagchi's* case, to which reference has already been made would clearly negative the contention of Mr. Anand Saroop and would indicate that the laudable objective of the independence of the judiciary was accepted to the extent that it was not inconsistent with the powers of the State Government under Articles 233, 234 and 311 of the Constitution. While drawing up Articles 233, 234 and 311, had the intention been to place effective control even in matters of appointment, dismissal or removal of district Judges or Judges subordinate to them in the High Court, such a legislative intent could have been clothed in appropriate language without any difficulty. The matter becomes further obvious if a reference is made to the recommendation made by the conference of the Judges of the Federal Court and the Chief Justices of High Courts held in March, 1948, wherein it was "recommend-

ed that provision be made placing exclusively in the hands of the High Courts the power of appointment and dismissal, posting, promotion and grant of leave in respect of the entire subordinate judiciary including the district Judges (The Framing of India's Constitution: B. Shiva Rao, page 508)." Though these recommendations were accepted by the Drafting Committee but ultimately the drafts were modified and this led to the framing of Articles 233 to 237 of the Constitution as therein stated. The legislative intent behind these provisions is, therefore, clear, and having ascertained the meaning and intendment of the legislature, it is the duty of the Courts to give effect to it without having any concern with the policy of the legislature or with the result of giving effect to the language of the statute, as was affirmed in *Firm Amar Nath Bashesar Dass's* case (supra). It is not possible to presume that having placed the power of appointment of district Judges and other judicial officers in the hands of the Governor the legislature was not conscious that this power would in turn carry the power of dismissal or removal from service, as envisaged in Article 311 (1), especially when in the resolution of the Conference of the Judges of the Federal Court and the Chief Justices of the High Courts, the desirability of placing the power of appointment, dismissal and removal of judicial officers in the hands of the High Court was pointedly brought to the notice of the framers of the Constitution.

38. This brings us to the consideration of the judgments of the Supreme Court in *Shamsher Singh v. State of Punjab*, AIR 1974 SC 2192, and *The High Court of Punjab and Haryana v. State of Haryana*, Civil Appeals Nos. 852, 854 and 1503 of 1973 decided on the 24-1-1975 = (reported in AIR 1975 SC 613), as reference has been made to some of the observations in these cases. In the first of these cases, both the appellants were members of the Punjab Civil Service (Judicial Branch) and their probation had been terminated by two different orders of the Governor of Punjab on the recommendation of the High Court. The principal question which had arisen for decision in this case was whether under Article 234 of the Constitution the appointment as well as termination of the services of the Subordinate Judges was to be made by the Governor personally or on the aid and advice of the Council of Ministers. While considering this spinal issue, Krishna Iyer, J. made the following observations:—

"In the light of the scheme of the Constitution we have already referred to, it is doubtful whether such an interpreta-

ciple employed to judge whether a provision is directory or mandatory is whether penal consequences have been provided for non-compliance thereof."

These are settled principles which furnish guidelines to find out as to whether the particular provision of a statute is mandatory or directory. Applying the above principles I may state that the Motor Vehicles Act is designed to regulate the motor transport services for public interest in general. Section 54 of the Act provides for certain particulars to be included in an application for grant of permit in respect of a public carrier, namely, (i) an area or route or routes to which application relates; (ii) the number of vehicle it is proposed to operate in relation to each area or route and its type and capacity; (iii) the nature of goods it is proposed to carry; and (iv) the manner in which it is claimed that a public need will be fulfilled, besides other particulars which may be specified in the section. These are vital particulars to be mentioned in the application for grant of public carriers permit though Rule 89 (d) of the Rules provides that the application has to be accompanied by the permit fee as specified in the schedule but no penal consequences have been provided for its non-compliance. Now once the application for permit is filed even if it is in a defective form can it be dismissed summarily? There is no provision for summary dismissal of such applications on the ground of not submitting the permit fee along with the application. As stated earlier no penal consequences are also provided in the rule for its non-compliance. The application after complying with certain formalities as required by Section 57 comes up for consideration on merits before the Transport Authority. In the absence of deposit of permit fee with the application, the R. T. A. may refuse the application for permit after giving reasons. But at the same time the R. T. A. would be acting within its jurisdiction if he calls upon the applicant to remedy the defect. Looking to the object sought to be achieved by the Motor Vehicles Act and also looking to the omission of penal consequences for non-compliance of this provision the provision appears to be directory only. The underlying object of the Motor Vehicles Act is to fulfil the public need and avoid unhealthy competition and also to grant permit in favour of the persons who are capable of meeting the public needs. This is the vital factor which has to be taken into consideration. The remaining being formal and subsidiary are of ancillary nature and non-compliance of which cannot vitiate the validity of the application. The stage for disposal and dismissal is only after the applications are published under Sec-

tion 57 and listed for consideration. Even at that time it is open to the R. T. A. to ignore this formal defect. In the present case the R. T. A. has accepted the deposit of permit fee before the issue of the permit which in my opinion he had jurisdiction to do looking to the object and intentment of the Act. The provision of Rule 89 (d) in my opinion is, therefore, directory in nature.

6. Mr. R. R. Vyas has however invited my attention to the Single Bench decision rendered in Mahesh Transport Company v. R. T. A., Jodhpur, C. W. 1950 of 1967 decided on 25-4-1967 (Rai) and contended that Rule 89 (d) is mandatory. I have perused this judgment. The contention of the learned counsel cannot be accepted. All that has been said in that judgment is that it is open to the R. T. A. to reject the application if the application is not accompanied by requisite permit fee at appropriate stage. That is not the case before me. In this case here the R. T. A. has accepted the permit fee. The case is distinguishable. The T. A. T. was, therefore not justified to reverse the order of the R. T. A.

7. In the result the petitions are accepted; the impugned order of the T. A. T. is hereby quashed. It may, however, be noticed that M/s. Bahari Goods Carrier Private Limited and Shri Chittarmal Yadav are plying under a permit granted to them in consequence of setting aside the permits of both the petitioners who in their turn are plying by virtue of the stay order of this Court. The result is that all the parties are plying since 1969. Learned counsel for the parties state that some more vacancies have since occurred which are still in existence. In view of the above special circumstances relying on the observations of the Supreme Court in P. Palaniswami v. S. R. P. Service, AIR 1974 SC 1117 (para. 9 at p. 1120) I direct that this order shall not preclude the plying of the vehicles by the non-petitioners M/s. Bahari Goods Carrier (Pr.) Limited and Shri Chittarmal Yadav till the Tribunal finally decides about the grant of permits keeping due regard to the fact of existence of vacancies if any. The matter will therefore go before the S. T. A. T. who will decide it as early as possible.

Petitions allowed.

AIR 1975 RAJASTHAN 178

S. N. MODI, J.

Kapoorchand, Appellant v. Lalchand and others, Respondents.

First Appeal No. 87 of 1973, D/- 30-8-1974.*

(A) Evidence Act (1872), S. 90 — Document 30 years old filed — Genuineness disputed — Duty of Court.

The age of document, its unsuspicious character, its production from proper custody and other circumstances are the foundation for the presumption of genuineness under Section 90. Where a mere look at the document shows that it is not free from suspicion and where the party is not afforded any opportunity to prove it, the Court cannot avail of the provisions of Section 90. Court must consider the evidence, after giving opportunity to parties to prove and rebut it, before basing its presumption under Section 90. AIR 1930 Bom 39 and (1904) ILR 26 All 581 (PC), Foll. (Paras 5, 6)

(B) Easements Act (1882), Ss. 60 and 62 — Licence when deemed revoked.

A person having life interest in the property cannot grant any licence whether revocable or irrevocable so as to last after his death or after the ceasing of the life-interest. Section 62 (2) is not controlled by Section 60. Even if a licence has become irrevocable under the provisions of Section 60, it shall be deemed to be revoked if from a cause preceding the grant of it the grantor ceases to have any interest in the property. (Para 9)

Cases Referred: Chronological Paras
AIR 1930 Bom 39 = 31 Bom LR 1279. 5
(1904) ILR 26 All 581 = 31 Ind App 217. 5
(PC)

K. N. Tikku, for Appellant; M. B. L. Bhargava and A. K. Bhandari (for Nos. 4 and 5) and P. N. Dutt (for Nos. 2 and 3), for Respondents.

JUDGMENT:— This first appeal is directed against the judgment and decree of the learned Additional District Judge, Tonk, camp at Jaipur, dated 12-3-73 dismissing the suit for declaration, possession and injunction brought by the deceased-plaintiff Bhonrilal, hereinafter be referred to as the plaintiff.

2. The dispute relates to a house situate at Chokri Modikhana, Rasta Maniharan at Jaipur, fully described in para. No. 1 of the plaint. Briefly stated, the relevant facts on which the plaintiff based his claim are like this:—

*(Against judgment and decree of R. M. Khinvasra, Addl. D. J. Tonk. Camp at Jaipur, in Civil Suit No. 128 of 1972, D/- 12-3-1973).

According to the plaintiff, the house in dispute originally belonged to Motilal and his brother Pannalal, and their sons Baldeo alias Ballulal and Joharilal respectively. The last male member who survived in the family of the aforesaid persons was Badlev. He too died sometime in the year 1912, leaving behind his daughter Mst. Jhamkobai and her children Mst. Gilkhabei, Mst. Teejabai and the plaintiff.

Mst. Gendbai and her daughter-in-law Mst. Gulab Kanwar resided in two of the apartments of the suit house namely, sal and tibara situated in the northern line of the house with the permission of the ancestors of Mst. Jhamkobai and Mst. Jhamkobai herself. The plaintiff's case is that Mst. Gendbai and Mst. Gulabai were permitted to live in the house as they were indigent issueless widows and there was none to look after or support them. Mst. Jhamkobai at the request of Gendbai and Mst. Gulabbai further allowed them to realise rent from other tenants in the house and appropriate the same towards their maintenance. The plaintiff further alleged that with a view to avoid any dispute in future Mst. Gendbai and Mst. Gulabbai executed document Ex. 1 on 11-3-32 in favour of Mst. Jhamkobai. Mst. Gendbai died on 16-11-45, 15 months thereafter Mst. Jhamkobai died on 7-2-46. After the death of Mst. Jhamkobai, the plaintiff succeeded to the property as heir of his maternal grandfather Baldeo. He did not disturb the previous arrangement, in view of the poverty and indigent condition of Mst. Gulabbai. He expressly permitted Mst. Gulabbai to continue to reside in the house and to realise rent from the tenants as hitherto before.

According to the plaintiff, the dispute arose on the death of Mst. Gulabbai on 19-8-62. The plaintiff after her death went to the house to take possession of the apartments which were in occupation of Mst. Gulabbai but he was not allowed to do so by Kistoorchand, defendant No. 1, Tarachand, defendant No. 2 and Bhagchand, defendant No. 3. These defendants asserted their own title to the house. The plaintiff then asked the tenants, defendants Nos. 6 to 10, to execute rent-notes in his favour but they also refused to oblige him. The plaintiff then reported the matter to the police and also initiated proceedings under Section 145, Cr. P. C. but when he failed to obtain any relief from the criminal court, he ultimately brought the present suit on 25-4-63 for grant of a declaration that he is the owner of the house. He also prayed for possession of the house as also that the sale-deed dated 23-8-62 executed by defendant No. 1 Kistoorchand in favour of

defendants Nos. 4 and 5 be held ineffective against his interest. During the pendency of the suit, the plaintiff as also defendant No. 1 Kistoorchand, defendant No. 7 Chandmal, defendant No. 8 Ganpatsingh and defendant No. 9 Mahalji died and their legal representatives were brought on the record.

The suit was resisted by defendants Nos. 1 to 5. They traversed all material allegations pleaded in the plaint. They denied execution of the document Ex. 1 by Mst. Gendbai and Mst. Gulabbai. They asserted that Ex. 1 was a forged document. According to the defendants Mst. Gendbai and Mst. Gulabbai were in possession of the house in their own right as owners. On the pleadings of the parties, several issues were framed by the trial court. Of them the important ones are these:—

- "1. Whether the disputed Haveli belonged to Motilal, Pannalal, Joharilal and Ballulal?
 2. Whether Baldev alias Ballulal was the last owner of the Haveli in dispute and after his death Mst. Jhamkobai became the owner of the same?
 3. Whether Mst. Gendbai and Mst. Gulabbai lived in the northern line of the Haveli and sal facing east and the possession of these ladies was permissive from Mst. Jhamkobai and her ancestors?
 4. Whether Mst. Gendbai and Mst. Gulabbai took rent of other portions of the house with the permission of Mst. Jhamkobai and executed an Ikramnama on 11th March, 1932?
- 5 to 9. x x x
10. Whether the suit is barred by limitation?
 11. x x x".

3. The learned Additional District Judge, on a consideration of the oral and documentary evidence produced by the parties, found against the plaintiff that he was the owner of the house and that Mst. Gendbai and Mst. Gulabbai were in permissive possession of the house. He accordingly decided issues Nos. 1 to 4 against the plaintiff. No finding was recorded on issue No. 10. Since the plaintiff has failed to prove his title or possession, the learned Additional District Judge dismissed the suit. Dissatisfied with the said judgment and decree, the legal representative of the plaintiff, namely, Kapoorchand, has preferred this appeal.

4. The facts narrated in the plaint clearly go to show that from a period prior to 1932 Mst. Gendbai and Mst. Gulabbai were in possession of the entire house and their possession continued up-

to 1962. They were in actual possession of two of the apartments, namely, sal and tibara in the northern line of the house and as regards the rest of the apartments they were in possession through tenants from whom they realised rent and appropriated the same to their own use. After the death of Mst. Gulabbai in 1962 it is admitted that the plaintiff was not allowed to take possession of the house and the defendants continued to remain in possession till the date of the suit. There is thus no doubt that at no time within 12 years from the date of the suit the plaintiff was in possession of the suit house. The plaintiff claims possession of the house through Mst. Gendbai and Mst. Gulabbai, for, according to him, they were in possession of the house as licencees of Mst. Jhamkobai and after the death of Mst. Jhamkobai as licencees of the plaintiff. In support of the above contention, the plaintiff relies upon the document Ex. 1 dated 11-3-32. This document is alleged to have been executed by Mst. Gendbai and Mst. Gulabbai in favour of Mst. Jhamkobai. The relevant portion of this document runs as under:—

"इकरारनामा बर कागज स्टाम्प एक रुपया

१) पर बहक आपके तहरीर करके इकरार करती हैं कि हम दोनो बेवगान ताजीस्त आर्यतन जिन मकानों में रहती आ रही है व आईन्दा भी आर्यतन ही रहती रहेगी और दीगर मकानात हवेली के किराये की आमदनी से अपना पुजारा करती रहेगी।"

It is argued by the learned counsel for the plaintiff that as this document Ex. 1 purports to be more than 30 years old and was produced from proper custody, the trial court by its order dated 17-1-68 rightly raised a presumption as to its genuineness under Section 90 of the Evidence Act. Since the defendants have failed to rebut that presumption, it stands proved from the document that Mst. Gendbai and Mst. Gulabbai were mere licencees and they were in possession of the house on behalf of Mst. Jhamkobai. It is further argued that the learned Additional District Judge in face of his previous order dated 17-1-68 committed gross error in doubting the genuineness of this document in the impugned judgment. On the other hand, it is argued on behalf of the defendant-respondents that the order of the trial court dated 17-1-68 by which a presumption was raised as to the genuineness of the document Ex. 1 was entirely wrong, uncalled for and unwarranted. It is further argued that the trial Judge himself on consideration of the evidence appearing on the face of the document held in his

judgment that the document is not genuine.

5. I have carefully examined the document Ex. 1 and considered the arguments advanced on behalf of the parties. Section 90 of the Evidence Act reads as under:—

"Sec. 90— Where any document, purporting or proved to be thirty years old, is produced from any custody which the court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to be executed and attested.

Explanation.— Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to Section 81."

The principle underlying this section is that if a private document 30 years old or more is produced from proper custody and is on its face free from suspicion, the Court may presume that it has been signed or written by the person whose signatures it bears or in whose handwriting it purports to be. In other words, the age of a document, its unsuspicious character, its production from proper custody and other circumstances are the foundation for the presumption of genuineness under Section 90 of the Evidence Act. If these requirements are satisfied, documents thirty years old prove themselves and their genuineness as to signatures, attestation etc. is presumed. In *Shafiq-un-Nissa v. Shaban Ali Khan*, (1904) ILR 26 All 581 (PC), the courts below notwithstanding that the document was thirty years old and had been produced from proper custody refused to raise the presumption under Section 90 of the Evidence Act on the ground that the document threw great doubt on its genuineness. The courts below therefore did not admit the document in evidence without formal proof and rejected it when no such proof was given. When the case went before the Privy Council, the Judicial Committee held that the discretion exercised by the courts below was rightly exercised. In *Mansukh Pana Chand Shah v. Trikambhai Ichhabhai*, AIR 1930 Bom 39, it was observed that in the case of the document more than 30 years old the genuineness of which is

disputed, the courts should consider the evidence both external and internal appearing on the face of document in order to enable them to decide whether in any particular case they should or should not presume proper signature and execution.

6. If the document Ex. 1 is examined, keeping in mind the above principles, I am of the opinion that the court below was not justified in presuming the genuineness of the document under Section 90 of the Evidence Act by order dated 17-1-68. A bare look at the document would show that it is not free from suspicion. The manner in which it is written, the spreading of the ink on the back side of the paper and the condition in which the two thumb impressions alleged to be of Smt. Gendbai and Smt. Gulabbai appear, indicate that the document is not beyond suspicion. Again, if we read the contents of the document, they also lead to the same inference. The document does not show why Mst. Jhamkoba or her ancestors were so much interested in Mst. Gendbai and Mst. Gulabbai as to allow them to live in the house free of charge. Not only that, Mst. Jhamkoba also permitted them to realise all the rent from other tenants and utilise the same for their maintenance. This sort of philanthropic act of Mst. Jhamkoba would have been easily understandable if Mst. Jhamkoba had been affluent lady with abundant wealth, but the matter appears to be quite reverse. The plaintiff's own witnesses have admitted that Mst. Jhamkoba and her husband owned no house and they resided in a rented house throughout their lives. In these circumstances, it is highly improbable that Mst. Jhamkoba would grant a licence simply because Mst. Gendbai and Gulabbai were childless, indigent widows with none to support them. It is highly improbable that a lady like Mst. Jhamkoba who herself lived in a rented house would allow the two widows with whom she had no apparent relationship to occupy not only certain apartments of the house but also allow them to realise rent from other tenants of the house. The defendants in their written statements not only denied the genuineness of the document Ex. 1 but it was also asserted that it was a forged document. In this background, I have no hesitation to say that the trial court was wholly unjustified in exercising its discretion under Section 90 of the Evidence Act to presume the genuineness of the document Ex. 1 by its order dated 17-1-68. The trial court in the circumstances should have required the plaintiff to prove the document.

7. It is argued on behalf of the plaintiff-appellant that since no opportunity was afforded to the plaintiff to prove

the document the case may either be remanded to the trial court or the plaintiff may be allowed to adduce evidence in this Court to prove Ex. 1. On the other hand, it is strenuously contended on behalf of the defendants that no useful purpose is going to be served even if the plaintiff is allowed to prove the document Ex. 1. It is contended that the document Ex. 1, even if it be deemed to be genuine, merely creates a licence in favour of Mst. Gendbai and Mst. Gulabbai and this licence or permission given by Mst. Jhamkobaï came to an end on her death in 1946. It is further contended that there exists no reliable evidence of granting licence or permission by the plaintiff after the death of Mst. Jhamkobaï. In these circumstances, it is contended that the possession of Mst. Gulabbai after the death of Mst. Jhamkobaï was that of a trespasser and she acquired title to the property on the expiry of 12 years with the result that the suit brought by the plaintiff stands clearly barred by limitation.

8. From the plaint allegations, it is clear that Baldev alias Ballulal died leaving his daughter Mst. Jhamkobaï. The latter being the nearest heir of Baldev, she inherited the property in dispute. Again, it is admitted that Mst. Jhamkobaï being a female heir, she had only a life interest in the property. According to the law prevailing in those days, it is further not in dispute that the plaintiff who is the son of Mst. Jhamkobaï inherited the suit property after the death of Mst. Jhamkobaï not as an heir of Mst. Jhamkobaï but as an heir of his maternal grand-father Baldev. All these facts are no longer in dispute before me.

9. Now it is well settled that a lady who has only a life interest in the property cannot grant a licence so as to continue even after the ceasing of her life interest. The licence granted by Mst. Jhamkobaï who admittedly had life interest in the suit property ceased to have any effect on her death in 1946. Under Section 62 (a) of the Easements Act, the licence would be deemed to have been revoked by operation of law as soon as Mst. Jhamkobaï died. The learned counsel for the plaintiff, however, argues, in the first instance, that the licence granted by Mst. Jhamkobaï being irrevocable, it cannot be deemed to have been revoked or ceased to have any effect on the death of Mst. Jhamkobaï. In this connection my attention has been drawn to the document Ex. 1 which provides that the licence granted to Mst. Gendbai and Mst. Gulabbai shall last till their lifetime. In the circumstances, it is argued that the licence was irrevocable during the lifetime of either of the two licencees. It is next argued that Mst. Gendbai and Mst.

Gulabbai were allowed to realise rent from other tenants of the house and that being the case, the licence granted to Mst. Gendbai and Mst. Gulabbai was not a simple licence but a licence coupled with a grant or profit à prendre. According to the learned counsel, such a licence is irrevocable. I regret to say that these contentions have not impressed me at all. As already pointed out above, a person having life interest in the property cannot grant any licence whether revocable or irrevocable so as to last after her death or after the ceasing of the life-interest. Section 62 (a) of the Easements Act is not controlled by Section 60 of the same Act. Even if a licence has become irrevocable under the provisions of Section 60, it shall be deemed to be revoked if from a cause preceding the grant of it, the grantor ceases to have any interest in the property. In the present case, Mst. Jhamkobaï admittedly had life interest in the property even before the licence was granted by her. The licence therefore came to an end on her death irrespective of the fact whether it was revocable or irrevocable.

10. Lastly, it is argued on behalf of the plaintiff-appellant that it is proved from the statement of the plaintiff that after the death of Mst. Jhamkobaï, the plaintiff orally granted a licence or permission to Mst. Gulabbai to remain in occupation of the apartments and also go on receiving rent from the tenants as hitherto before. It is true that the plaintiff has deposed so in his statement but the question arises whether this statement is reliable one. Having regard to the circumstances of the case, I am not inclined to believe his solitary testimony. As already pointed out above, the plaintiff has no house of his own and he was himself living in a rented house even after the death of Mst. Jhamkobaï. It is difficult to believe that such a person would grant a licence to a widow not only for her residence but also allow her to realise rent from the tenants of the house. In my opinion, the plaintiff's statement has no semblance of truth and cannot be acted upon.

11. For the reasons stated above, the appeal fails and it is dismissed with costs.

Appeal dismissed.

AIR 1975 RAJASTHAN 182

M. L. JOSHI, J.

Champalal, Petitioner v. The State of Rajasthan and others, Respondents.

Civil Writ Petn. No. 1994 of 1973, D/- 9-5-1974.

(A) Constitution of India, Art. 226 — Other remedy open — Petitioner not availing of alternative remedy of revision under S. 30 of Mines and Minerals (Regulation and Development) Act (1957) — Petitioner not entitled to invoke extraordinary jurisdiction of High Court under Art. 226. (Para 11)

(B) Mines and Minerals (Regulation and Development) Act (1957), S. 30 — Scope of — Cannot be restricted to major minerals only.

Section 30 is couched in wider terms and its operation cannot be restricted with reference to Rule 54 of the Central Rules and State Rules framed under Section 15 of the Act. There is nothing in Section 30 to show that the powers of revision conferred under the Act were confined to orders in regard to the major minerals only and not to minor minerals. The Rules cannot limit the scope of the express provisions of Section 30. (Para 11)

(C) Rajasthan Minor Mineral Concession Rules (1959), R. 18 Proviso — Failure to execute lease within one month — Power of Government to extend period.

Under the proviso to Rule 18 the Government is empowered to extend the period of lease even when the person in whose favour the order sanctioning lease has been passed has failed to execute the lease, provided the Government is satisfied that the applicant to the lease was not responsible for the delay in the execution of the formal lease. The proviso manifestly confers powers on the Government to extend the time for the execution of lease. Despite what is provided in first part of Rule 18, the revocation of the lease will stand postponed if the Government chose to extend the time under the powers conferred upon it under the said proviso. Where the Government did extend the period for the execution of lease from time to time, the extended period will stand substituted in place of the original period. (Para 12)

(D) Rajasthan Minor Mineral Concession Rules (1959), R. 18 Proviso — Satisfaction of Government — Order of Government is administrative resting upon subjective satisfaction of Government.

The order of the Government under the proviso to Rule 18 is of an administrative nature and not a judicial one. No

circumstances have been suggested in the proviso which are to be fulfilled before holding that the person was not responsible for the delay. Nor any objective test or guidelines have been indicated for arriving at a decision as to when the applicant to the lease should be held not responsible for the delay. The entire matter for taking decision on the delay in execution of the lease has been entirely left to the subjective satisfaction of the Government. The Government has been given a wide power under the proviso in regard to its satisfaction. (Para 12)

(E) Rajasthan Minor Mineral Concession Rules (1959), R. 18 Proviso — Extension of period for execution of lease — Consideration.

The power of fixation of dead-rent is required under the Act and so also the power to consider the representation in that behalf. If the Government chooses to reduce the rent on the representation of a person it cannot be said that the powers exercised in that regard does not relate to anything required under the Act or the Rules. It is for the Government to decide whether extension of time is to be granted for the execution of the lease in the interest of the revenue of the State and once the Government has exercised the power in the interest of the revenue the High Court cannot sit in appeal and interfere with its action. The inference of the Government that the party was not responsible for the delay may be right or wrong but that is not open to judicial review. (Para 12)

(F) Rajasthan Minor Mineral Concession Rules (1959), R. 18 Proviso — Satisfaction of Government — Whether express statement necessary.

The fact that the Government has not said in so many words that it was satisfied that the party was not responsible for the delay in executing the lease will not make the Government's action in any way illegal. Once the Government postponed the date of execution of the lease it was implicit that it was satisfied as required by the proviso to Rule 18. Moreover, Rule 59 which empowers the Government to relax any of the provisions of the Rules, clearly indicates that the Government is competent to relax any of the provisions of the Rules if it chooses to do in the interest of mineral development or better working of mines. AIR 1959 SC 308 and AIR 1965 SC 1992, Relied on. (Para 13)

Cases Referred: Chronological Paras
 AIR 1974 SC 175 = (1974) 1 SCC 63 12
 AIR 1974 Raj 4 = 1973 Raj LW 387 12
 AIR 1970 SC 564 = (1970) 3 SCR 580 12
 AIR 1970 SC 1789 = (1970) 2 SCR 177 12
 AIR 1969 SC 707 = (1969) 3 SCR 108 12

AIR 1969 Assam 50 (FB)	12
AIR 1969 Assam 55	12
AIR 1968 SC 1444 = 1969 Cri LJ 13	12
AIR 1968 Delhi 6 = (1967) 2 Com LJ 171	12
AIR 1967 SC 295 = 1966 Supp SCR 311	12
AIR 1966 SC 91 = (1964) 1 SCR 243	12
AIR 1965 SC 1992 = 1965-3 SCR 173	13
1964 Raj LW 380 = ILR (1964) 14 Raj 578	12
AIR 1959 SC 308 = 1959 Supp (1) SCR 319	13
AIR 1950 SC 222 = 1950 SCR 621	12
AIR 1949 PC 136 = 76 Ind App 57	12
AIR 1937 PC 265 = 46 Mad LW 232	12

Lekhraj Mehta and Raj Narain, for Petitioner; M. L. Shrimal, Addl. Advocate-General, for the State; M. M. Vyas, for Respondent No. 2.

ORDER:— In this petition under Article 226 of the Constitution of India, the petitioner seeks an appropriate writ, order or direction for (i) quashing the orders of the State Government dated 17-11-1971, 7-9-1973 and 12-11-1973, (ii) an appropriate writ or order or direction restraining the respondents Nos. 1, 3 and 4 from giving effect to the above mentioned orders and further to prohibit the respondent No. 2 from executing the lease-deed, (iii) an appropriate writ, order or direction to the State Government to consider the application of the petitioner dated 24-3-1972 for grant of the mining lease, and (iv) any other appropriate writ, order or direction which the facts and circumstances of the case warrant.

2-3. The facts giving rise to this writ petition briefly stated are as follows:—

An area of ten square miles in village Mandla in Tahsil Sojat which is substantially covered by the impugned order sanctioning lease was previously held by Messrs. Keshav Singh and Shivjisingh on annual dead-rent of Rs. 1,00,000. That lease was to continue upto 30th of March, 1970. Messrs. Keshav Singh and Shivjisingh surrendered the lease in the middle of 1968. This surrender of lease was accepted by the State Government with effect from 1-6-1968. The State Government then took steps for regrant of the area surrendered by Messrs. Keshav Singh and Shivjisingh, and consequently declared the area free for regrant by its notification dated 5-9-1968 as required under Rule 53 of the Rajasthan Minor Mineral Concession Rules, 1959, herein-after called the 'Rules'. No application seems to have been received in response to the said notice dated 8-6-1969 for about 6 months. It was, therefore, thought desirable that the lease for the area should be put to open auction. Accordingly an-

other notification was issued in February 1969 and the area was put to auction on 24/25th of March, 1969, but no bid was received. The matter appears to have been again considered by the Government which again came with an another notification declaring again the area free for grant of mining lease and invited applications for grant of lease for the area declared free for regrant. The facts relating to the notification do not find place in the writ petition but find place in the Government's reply which fact has not been disputed by the petitioner before me.

On 14-1-1970, respondent No. 2 moved an application for grant of lease for the area of ten square miles which substantially covered the area declared free for regrant with some minor changes as will appear from the site plan enclosed with the application. In the application dated 14-1-1970 there were some typographical mistakes and, therefore, the respondent No. 2 rectified the typographical mistakes by submitting an application on 14-11-1970. The Mining Engineer and the Director of Mines and Geology made recommendation on the respondent No. 2's application for grant of lease to the respondent No. 2 at an annual dead-rent of Rs. 84,000, but the Government accepted the recommendation regarding grant of lease but fixed the annual dead-rent at one lac rupees. The order granting lease dated 17-11-1971 in favour of the respondent No. 2 was conveyed by the Mining Engineer on 12-1-1972 wherein the respondent No. 2 was directed to execute formal lease within one month from the date of the receipt of the order and further asked him to submit the stamp papers for execution of the lease-deed along with the security amount and the first instalment of dead-rent. It appears that the amount of dead-rent of Rupees 1,00,000 per annum was not acceptable to the respondent No. 2 who made representation for reduction of dead-rent to Rs. 84,000 on 15-1-1972. The respondent No. 2 further on 16-1-1972 made representation for extension of time until his representation for reduction of dead-rent was finally decided.

On 22-8-1972, the Government turned down the request of respondent No. 2 for reduction of the dead-rent but allowed one month's time to the respondent No. 2 for execution of the formal lease-deed. It will thus appear that the respondent under the order D/- 22-8-1972 could execute the lease upto 21st of September, 1972. It is noteworthy to mention here that in the meantime the petitioner had made an application on 24th of March, 1972 for the grant of lease for ten square miles the very area for which the res-

pondent No. 2 had originally moved an application on 14-1-1972. The respondent No. 2 does not appear to have been satisfied by the Government's stand in persisting in the demand of Rs. 1,00,000 as dead-rent. The respondent No. 2, therefore, made further representation on 8-9-1972 for reconsidering his demand for reduction of the rent. A further application was moved on 11-9-1972 by the respondent No. 2 to the Mining Engineer praying to keep the action in the matter of execution of the lease pending till his representation was finally decided by the Government. The Secretary to the Government by his letter dated 26-10-1972 again turned down the request for reduction of the dead-rent, but further directed the respondent No. 2 to execute the lease within one month from the date of the receipt of that letter.

The respondent No. 2 persisted to be aggrieved by the rate of annual dead-rent of Rs. 1,00,000 and so made another representation to the Mining Engineer on 10-11-1972. This representation was disposed of on 13/14th of December, 1972, whereby the prayer for reconsideration of the revision of the dead-rent was turned down but again the respondent No. 2 was granted one month's time for execution of the lease. On 13-1-1973 the respondent made the last representation for reconsideration of his prayer for reduction of the dead-rent and for extension of the time for execution of the lease-deed. To complete the facts it may be appropriate to mention that in the mean time the respondent No. 2 had sent Rs. 125 along with his letter dated 18-11-1972 demanded as demarcation fees and had remitted Rs. 25,000 along with his letter dated 20th November, 1972 under protest as first quarter's instalment. It may also be mentioned here that before the order sanctioning the grant of lease in favour of respondent No. 2 was made the respondent No. 2 had sent revised plans along with his letter dated 23-4-1971 to be considered at the time of grant. A controversy was raised in regard to the fact of submission of the revised plan on behalf of the respondent No. 2 on the ground that the revised plans were submitted along with the application dated 26-11-1972 and not with the application dated 23-4-71 which at one stage was alleged by the petitioner to be a smuggled one.

In the mean time the Government had called for the report from the Mining Engineer as to whether the lease had been executed by the respondent No. 2. The Mining Engineer by his letter dated 1-11-1972 wrote to the Director Mines and Geology that the party had not yet executed the lease and further informed that the petitioner had applied for the

grant of the lease on 24th of March, 1972 and the same was pending and that if the respondent No. 2's lease is revoked by the Government the petitioner's application for grant of lease may be considered. It is also worthwhile to mention here that the Government had called for the report of the Mining Engineer by its D. O. No. F. 4 (1)/142/I & D/B/64 dated 2-12-1972 in reply to which the Mining Engineer had in his letter dated 12-1-1973 given the previous history of the area in question pointing out that the area had been vastly exploited and in that view of the matter he had recommended for the fixation of dead-rent to Rs. 84,000. Thereafter on 7-9-1973 the State Government accepted the representation of the respondent No. 2 and by its order dated 7-9-1973 reduced the amount of dead-rent from Rs. 1,00,000 to Rs. 84,000 per annum. After the receipt of the order dated 7-9-1973 the Mining Engineer sought instructions as to whether the lease should be got executed as per the revised plan or as per the plans attached with the original application. The Government by its letter dated 12-11-1973 conveyed its approval for the execution of the lease by the respondent No. 2 as per the revised plan.

The case of the petitioner as set up in the writ petition is that the respondent No. 2's lease stood automatically revoked as he failed to execute the lease within one month from the order sanctioning the grant of lease and that the Government has exceeded its jurisdiction in granting extension to the respondent No. 2 who had failed to fulfil the precondition of satisfying the Government that he was not responsible for the delay in the execution of the lease. The further case of the petitioner is that his application dated 24-3-1972 was already pending, and as the respondent No. 2 had submitted the revised plan along with his application dated 26-11-1972 i.e. after his application was filed and therefore, his application was a fresh application. If the respondent No. 2's application in the context of the revised plans is taken to be a fresh application, then only the petitioner's application remained in the field and should have received priority in the matter of grant of lease but the Government failed to exercise jurisdiction which was vested in it in not giving priority to the petitioner's application and, therefore, the impugned orders are void. It is also the case of the petitioner that looking to the Rule 18 of the Rajasthan Minor Mineral Concession Rules, 1959, hereinafter called the Rules, the Government was not competent to invoke the proviso to Rule 18 of the Rules in favour of the petitioner and thus to grant the lease as per the revised plans.

4. The respondents resisted the petition inter alia on various grounds, the principal grounds being that the petitioner could not acquire any legal enforceable right by moving application on 24-3-1972; that there was an alternative remedy of revision under Section 30 of the Mines and Minerals (Regulation and Development) Act, 1957, hereinafter called the Act and that the Government had power to extend time for the execution of lease under the proviso to Rule 18 in the facts and circumstances of the case; that the revised plans were submitted on 23-4-1971 and not on 26-11-1972 as wrongly alleged by the petitioner and therefore the petitioner's application dated 24-3-1972 was of no avail more particularly when that application was defective being not accompanied by the requisite plans and that the Government had power under Rule 59 of the State Rules to relax any of the provisions of the Rules in the interest of development of minerals or better working of the mines and it was within its competence to allow the respondent No. 2 to execute the lease after the prescribed time and its action was not open to judicial review.

5. Mr. Lekhraj Mehta has challenged the impugned orders on various grounds. His contentions may be summarised as under:—

- (1) The lease was not executed in compliance of the order sanctioning lease dated 17-11-1972. No order of extension was obtained within one month of the sanctioning of the lease and, therefore, the lease automatically stood revoked.
- (2) Subsequent orders of the Government extending the period for the execution of lease from time to time were illegal on two grounds: (a) that the Government was not competent to extend the period of execution of the lease after one month from the date of the receipt of the order granting lease by the respondent No. 2; (b) the Government was not empowered to extend the period of lease once the respondent No. 2 failed to execute the lease within the extended time.
- (3) Essential conditions for invoking the powers under Rule 18 of the Rules never existed as there were no materials to satisfy the Government that the respondent-defendant was not responsible for the delay in execution of the lease. It was contended that the order extending the lease neither contained recital to the effect that the Government was satisfied that the respondent No. 2 was not responsible for the delay nor there were valid

reasons for the delay. According to the learned counsel the decision of the Government was based on extraneous and irrelevant consideration of the right to make representation for reduction of the dead-rent.

- (4) The Government had accepted the revised plans from the respondent on 26th of November, 1972 which were wholly different from those submitted along with the original application and submission of the revised plans virtually amounted to a fresh application on 26-11-1972 on which date the petitioner's application for grant of mining lease was already pending for the area which was substantially covered by the revised plans and consequently the petitioner was entitled to priority as per Rule 9 of the Rules, and the Government was not competent to review its own order dated 22-8-1972 whereunder only one month's time was granted for the execution of the lease.

6. Two preliminary objections have been raised on behalf of the respondent, namely, (i) that there is no enforceable legal right in the petitioner to move this Court under Article 226 of the Constitution of India; (ii) that the petitioner did not avail the alternative remedy of revision against the impugned orders of the Government under Section 30 of the Mines and Minerals (Regulation and Development) Act, 1957 (LXVII of 1957).

7. Before I deal with the contentions of Mr. Mehta, learned counsel for the petitioner on merits, it will be proper to dispose of the preliminary objections set out above.

8. The first preliminary objection of the learned counsel for the respondents is that the petitioner has no enforceable right to bring this writ petition and, therefore, the writ petition deserves to be rejected. The argument of the learned counsel for the respondent proceeds thus: The order sanctioning lease was passed on 17-11-1971 which was conveyed to the respondent No. 2 by the Mining Engineer on 12-1-1972. The respondent No. 2 applied for extension on 16-1-1972 for the reduction of dead-rent from Rs. 1,00,000 to Rs. 84,000 per annum and the Government by its order dated 22nd of August, 1972, although rejected the request for reduction of the dead-rent it directed the respondent No. 2 to execute the lease within one month from 22nd of August, 1972. The respondent No. 2 again made another representation on 11-9-1972 for considering his request for reduction of the dead-rent of

Rs. 84,000 per annum and the Government again refused to reconsider the prayer for reduction but again asked the respondent No. 2 to execute the lease within one month from that date. The respondent again moved for reconsidering his prayer for reduction of the rent and the Government again refused to reconsider the request but allowed the respondent No. 2 by its order dated 13/14th of December, 1972, to execute the lease within one month from that date.

On 13-1-1973 the respondent No. 2 again sought the indulgence of the Government by moving an application for reconsidering his reasonable demand for reduction of the rent and eventually the Government accepted the demand for reduction of rent to Rs. 84,000 per annum by its impugned order dated 7-9-1973 and asked the respondent to execute the lease. The respondent No. 2 in compliance of this order took necessary steps as per the order of the Government and consequently the period for execution of the lease stood extended by the Government in exercise of its powers conferred upon it under the proviso to Rule 18. The extended period, therefore, stood substituted for the original period mentioned in the order dated 17-11-1971 sanctioning the lease in favour of the respondent No. 2 and, therefore, there was no room left for the consideration of the petitioner's application dated 24-3-1972 which was premature and was liable to be rejected under Rule 54 of the Rules. Moving of such an application by the petitioner did not confer upon him any legal enforceable right, nor it can be said that the petitioner was affected/aggrieved person to challenge the impugned orders in the extraordinary jurisdiction under Article 226 of the Constitution of India.

9. Mr. Mehta on the other hand replied that the respondent No. 2 failed to execute the lease within one month from 17-11-1971 and, therefore, the order granting lease in his favour stood automatically revoked by virtue of the provisions contained in Rule 18. It was further contended that the various orders passed by the Government for extending the period for execution of the lease were wholly without jurisdiction as the conditions precedent for the exercise of the powers under proviso to Rule 18 did not exist. Consequently the order sanctioning lease would stand revoked leaving only the petitioner's application dated 24-3-1972 for consideration and, therefore, the petitioner has right to maintain this writ petition.

10. I have considered the rival contentions submitted before me. In my opinion the petitioner did not acquire any

enforceable legal right by moving an application on 24th March, 1972, in the facts and circumstances of this case. When the petitioner moved an application for grant of permit on 24-3-1972, the respondent No. 2's representation for extending the period for execution was already pending before the Government which had extended the time for the execution of lease by its order dated 22-8-1972 for one month from the date of its order. The Government is empowered to extend the time under the proviso to Rule 18 of the Rules and by virtue of the order dated 22-8-1972, the original period of execution of lease stood extended upto 22-9-1972 under that order. The respondent No. 2 was entitled to execute the lease at least upto 22-9-1972 under the above mentioned order of the Government. Therefore, there was no question of entertaining the petitioner's application dated 24-3-1972 as the period for execution of lease by the respondent was extended upto 22-9-1972. The petitioner's application was therefore premature and liable to be rejected.

Moreover the Government further extended the period for the execution of lease by the respondent No. 2 and the respondent took necessary steps for the execution of lease within the extended time. So in my opinion there was no scope left for the consideration of the petitioner's application for grant of lease. The contention of the learned counsel that the Government could not extend the period under the proviso to Rule 18 as the essential conditions for the exercise of such power never existed for the exercise of such power is not sound as I shall later on show that the Government was empowered under proviso to Rule 18 to grant extension to the respondent No. 2 for the execution of the lease. In any event looking to the spirit and intentment of Rule 59, the Government was empowered even to relax the provision of any rule including Rule 18 and so granting extension by the Government was well within its power looking to the spirit and the intentment of Rule 59 of the Rules. In this view of the matter there was no occasion for the consideration of the petitioner's application. Moreover mere filing of application for grant of lease by the petitioner did not confer any enforceable right for seeking mandamus. The petition deserves to be dismissed on this score also.

11. The second preliminary objection relates to the existence of alternative remedy of revision, under Section 30 of the Mines and Minerals (Regulation and Development) Act, 1957. Sec. 30 of the Act confers powers of revision upon

the Central Government. It reads as under:—

"The Central Government may of its own motion or on application made within the prescribed time by an aggrieved party revise any order made by State Government or other authority in exercise of the powers conferred on it by or under this Act."

It is contended that the petitioner did not avail the remedy of revision: therefore, he is not entitled to invoke the extraordinary jurisdiction of this Court. Mr. Mehta contended that the remedy of revision is available against only those orders of the State Government which relate to major mines and minerals. In this connection he invited my attention to Section 14 of the Act which excludes the applicability of Sections 4 to 13 to minor minerals. Mr. Mehta tried to confine the scope of Section 30 with reference to Central Rules as well as the Rules framed by the State Government under Section 15 of the Act. It was contended that Rule 54 of the Central Rules made provision for revision in regard to major minerals only and not to minor minerals and further that the Rules framed under Section 15 of the Act do not make provision for the revision before the Central Government against the orders relating to the minor minerals. The contention of Mr. Mehta does not appear to be sound. Section 30 is couched in wider terms and its operation cannot be restricted with reference to the Rules referred to by Mr. Mehta. There is nothing in Section 30 of the Act to show that the powers of revision conferred under the Act were confined to orders in regard to the major minerals only and not to minor minerals. The Rules cannot limit the scope of the express provisions of Section 30 of the Act. There is thus no justification for Mr. Mehta's contention when he seeks to restrict the operation of Section 30 of the Act to major minerals only. I am, therefore, of the opinion that the petitioner had alternative remedy by way of revision under Section 30 of the Act against the impugned orders of the State Government before the Central Government and as he failed to avail the alternative remedy he is not entitled to invoke the extraordinary jurisdiction of this Court. The writ petition, therefore, deserves to be rejected on this score also.

12. I now proceed to deal with Mr. Mehta's contentions on merits set out above. Before I deal with the contentions of Mr. Mehta, it will be proper to set out the relevant provisions of the Rajasthan Minor Mineral Concession Rules, 1959:—

"8. Application for mining lease.—An application for mining lease shall contain the following particulars:—

- (a) name, residence and profession of the applicant and his father's name, in the case of a limited company, its place of business and place of registration and name and address of each partner of the firm.
- (b) name of the mineral or minerals for which the applicant intends to obtain the lease;
- (c) a description, illustrated by a map or plan, showing accurately the situation, boundaries and area of the land in respect of which the lease is desired;
- (d) the areas and minerals within the Rajasthan State for which the applicant already holds a mining lease;
- (e) the period for which the lease is desired;
- (f) certified copy of statement from the Department showing dues outstanding, if any, against the applicant.

9. Priority.—(1) Where two or more persons have applied for a mining lease in respect of the same land, the applicant whose application was received earlier shall have a preferential right for the grant of the lease over an applicant whose application was received later:

Provided that where such applications are received on the same day, the Government after taking into consideration the matters specified below, may grant mining lease to such one of the applicants as it may deem fit:

- (1) Past experience in mining.
- (2) Number of mining leases held.
- (3) Financial soundness and stability.
- (4) Claim of having worked the area at any time and the work having been found systematic.
- (5) Technical qualification.
- (6) Any dues outstanding in his name or on the name of the firm to which he is/was a partner.

(2) Notwithstanding anything contained in sub-rule (1), the Government may, for any special reasons to be recorded, grant a mining lease to an applicant whose application was received later with reference to an applicant whose application was received earlier.

13. Lease to be executed within one month.—Where a lease has been granted under Rule 11 the formal lease in form given in Schedule IV shall be executed within one month from the date of receipt of the sanction by the applicant and if no such formal lease is executed within the aforesaid period, the order granting the lease shall be deemed to have been revoked:

Provided that where the State Government or any officer authorised by the State Government to grant lease in its behalf is satisfied that the applicant for the lease is not responsible for the delay in the execution of the formal lease, the State Government or that officer as the case may be, may permit the execution of formal lease within a reasonable time after the expiry of the aforesaid period of one month.

54. Premature application:— An application for grant of mining lease in respect of areas which have been previously held under a mining lease but in respect of which there is no entry in the register as provided for in the foregoing rule, shall be deemed to be premature and shall be disposed of by the Government accordingly and the application fee paid shall be refunded.

59. Relaxation of rules:— The Government may relax any provision of these rules in the interest of mineral development or better working of mines."

The contention of Mr. Mehta that the lease stood revoked automatically as it was not executed within the time prescribed by the order sanctioning the lease has no substance in it. If we look at the proviso to Rule 18 it will appear that the Government is empowered to extend the period of lease even when the person in whose favour the order sanctioning lease has been passed has failed to execute the lease provided the Government is satisfied that the applicant to the lease was not responsible for the delay in the execution of the formal lease. The proviso manifestly confers powers on the Government to extend the time for the execution of lease. Despite what is provided in first part of Rule 18, the revocation of the lease will stand postponed if the Government chose to extend the time under the powers conferred upon it under the said proviso. The Government did extend the period for the execution of lease from time to time as stated earlier and, therefore, the extended period will stand substituted in place of the original period as held in *Tiwari Jhumar Lal v. State of Rajasthan*, 1964 Raj LW 380. It was contended that the powers under the proviso to Rule 18 are circumscribed by the precondition laid down in the proviso.

It is argued that the Government could invoke the proviso if it was satisfied that the respondent No. 2 was not responsible for delay in the execution of the lease which according to Mr. Mehta is a

condition precedent for invoking the power under the proviso to Rule 18. It is said that such precondition never existed. The Government showed indulgence to permit the respondent No. 2 to execute lease after the prescribed term on wholly irrelevant consideration that the respondent No. 2 had been moving the representations for reduction of the dead-rent. Mr. Mehta submitted that this was wholly extraneous consideration not required by the Rules for the exercise of its power and, therefore, the Government could not invoke its power on such irrelevant consideration. In this connection learned counsel relied upon *Barium Chemicals Ltd. v. Company Law Board*, AIR 1967 SC 295; *Rohtas Industries Ltd. v. S. D. Agarwal*, AIR 1969 SC 707; *R. D. Chemical v. Company Law Board*, AIR 1970 SC 1789; *R. C. Cooper v. Union of India*, AIR 1970 SC 564; *Hubli Electricity Co. v. The Province of Bombay*, AIR 1949 PC 136; *E and T Agencies v. S. I. Trust*, AIR 1937 PC 265; *Vaishnava Dass v. Faqir Chand*, AIR 1968 Delhi 6; *Narayan Shankaran Mooss v. State of Kerala*, (1974) 1 SCC 68 = (AIR 1974 SC 175).

Mr. Vyas on the other hand argued that the powers under the proviso could be exercised on the subjective satisfaction of the Government as the order was purely of an administrative character and was not of a judicial nature. In this connection Mr. Vyas relied upon *Province of Bombay v. Khushaldas S. Advani*, AIR 1950 SC 222; *Sadhusingh v. Delhi Administration*, AIR 1966 SC 91; *R. H. Bhutani v. Main J. Desai*, AIR 1968 SC 1444; *Tiwari Jhumar Lal v. State of Rajasthan*, 1964 Raj LW 380; *Hassam Ali v. Commr., Plains Dwn.*, AIR 1969 Assam 50 (FB); *Silchar Electricity Supply Ltd. v. State*, AIR 1969 Assam 55 and *State v. Raghnath Singh*, AIR 1974 Raj 4. The Privy Council in *Hubli Electricity Co. v. the Province of Bombay*, AIR 1949 PC 136 has observed that when the satisfaction of the Government is not subject to any objective test then such powers of the Government will be of an administrative nature and shall not be subject to judicial examination as to the sufficiency of the ground on which the Government acts in forming an opinion. The Privy Council has, however, added that the opinion should of course relate to anything required under the statutory provisions and if it relates to something which was not required by the statutory provisions, the order of the statutory body will be invalid. The order of the Government under the proviso to Rule 18 is of an administrative nature and not a judicial one. It is to be noticed that no circumstances have been suggested in the

proviso to Rule 18 which are to be fulfilled before holding that the respondent No. 2 was not responsible for the delay in the execution of the lease. Nor any objective test or guidelines have been indicated for arriving at a decision as to when the applicant to the lease should be held not responsible for the delay. The entire matter for taking decision on the delay in execution of the lease has been entirely left to the subjective satisfaction of the Government. The whole matter being left to the entire satisfaction of the Government and the Government being the sole judge on this point, there is no escape from the conclusion that its order is purely of administrative character, resting entirely upon the subjective satisfaction of the Government.

Barium Chemicals Ltd. v. Company Law Board, AIR 1967 SC 295; Rohtas Industries Ltd. v. S. D. Agarwal, AIR 1969 SC 707; and Narayanan Shankaran Mooss v. State of Kerala, (1974) 1 SCC 68 = (AIR 1974 SC 175) are clearly distinguishable as in all those cases either the definite criteria or objective tests or the existence of circumstances or preconditions necessary for the exercise of the powers by the statutory body were indicated in the relevant provisions which were under consideration. The same remarks hold good for the other cases cited by the learned counsel for the petitioner. As I look at the proviso to Rule 18 I find no criteria or circumstances have been indicated for judging as to when the applicant to the lease should be held not responsible for the delay in execution of the lease. To my mind the expression 'the applicant to the lease was not responsible for the delay in the execution of the lease', is purely within the subjective domain of the Government and is not subject to the fulfilment of any objective preconditions. The Government has been given a wide power under the proviso in regard to its satisfaction. It now remains to be seen whether the action of the Government extending the period was based on irrelevant consideration. The power of fixation of dead-rent is required under the Act and so also the power to consider the representation in that behalf. If the Government chooses to reduce the rent on the representation of the petitioner it cannot be said that the powers exercised in that regard do not relate to anything required under the Act or the Rules. The respondent No. 2 had been making continuous representations for reduction of rent and the Government had been granting time to execute the lease although it had rejected some of them. It is well to remember that the revenue from the minerals forms an important part of the State Revenue. The Government is the guardian of the finan-

ces of the State. It is expected to protect the financial interest of the State and that is why the legislature has empowered the Government to see that there is no leakage in the revenue. It is for the Government to decide whether extension of time is to be granted for the execution of the lease in the interest of the revenue of the State and once the Government has exercised the power in the interest of the revenue this Court cannot sit on appeal and interfere with its action. The inference of the Government that the respondent No. 2 was not responsible for the delay may be right or wrong but that was not open to judicial review.

13. The learned counsel then contended that the Government has not said in so many words that it was satisfied that the respondent No. 2 was not responsible for the delay in executing the lease. To my mind absence of such statement will not make the Government's action in any way illegal. Once the Government postponed the date of execution of the lease it was implicit that it was satisfied as required by the proviso to Rule 18. Reference in this connection be made to *G. Nageswara Rao v. A. P. S. R. T.*, AIR 1959 SC 308 wherein it has been held that express recital of formation of the opinion required by the law is not necessary. Moreover Rule 59 of the Rules cannot be lost sight of. Rule 59 empowers the Government to relax any of the provisions of the Rules. It clearly indicates that the Government is competent to relax any of the provisions of the Rules if it chooses to do in the interest of mineral development or better working of mines. The powers of the Government are therefore of wider amplitude in the matter of grant of minor mineral lease. The action of the Government could be justified even on the basis of Rule 59 as it could relax any of the provisions of the Rules. In this view of mine I am fortified by a Supreme Court authority reported in *Nandkishore v. State of Rajasthan*, AIR 1965 SC 1992. In that case the action of the Government to grant mining lease on a reduced rent by refusing a higher bid was challenged but the Supreme Court sustained the order of the Government in view of the spirit underlying Rule 59 by observing that Government could relax any such rules which could in any way come in the way of its granting contract.

14. It was further contended that the Government did not relax the rigour of proviso to Rule 18 under Rule 59 as the Government did not say so in its orders nor in the return filed by it. Be that as it may this will hardly make any difference as the Government could have relaxed the Rules.

15. Moreover the order of extension cannot be taken to affect adversely any one's right. Petitioner's application dated 24-3-1972 was even not accompanied by the requisite plans necessary under Rule 8. I had been shown the original receipt-book by the Additional Advocate-General which was meant for acknowledging the applications in regard to the grant of lease by the State and it was found that all that was written in the counter-foil of the receipt was that the application along with the description was presented but as regards the recital as to the filing of the plans was concerned, it was conspicuously absent although in receipts in regard to other application the submission of the plans was also mentioned in the receipt-book. I called upon the learned counsel for the petitioner to bring the original receipt but no satisfactory answer was rendered in this behalf. Therefore, the fact remains that the petitioner's application was defective besides being premature under Rule 54 as shown earlier.

16. Learned counsel for the petitioner then contended that the revised plans were submitted by the respondent No. 2 on 26-11-1972. According to the learned counsel for the petitioner submission of the new plans will be tantamount to submission of fresh application for lease. This contention is also unacceptable to me. It is incorrect that the revised plans were submitted on 26-11-1972. The fact of the matter is that the revised plans were submitted on 24-3-1971 which was prior to the petitioner's application for grant of lease. The State Government in its return had stated that at the time of sanctioning lease the revised plans were under consideration. It cannot be gainsaid that the order sanctioning lease could be with reference to revised plans. However, when the Government eventually finalised the matter by its impugned order dated 7-9-1973, clarification was sought by the Mining Engineer as to whether the grant of lease related to the revised plans or to the plans which were submitted along with the original application. The Government clarified the position stating that the lease is got to be executed with reference to the revised plans. This contention, therefore, does not merit any consideration.

17. It was next contended that the Government was not empowered to review its own order fixing time for execution of the lease. It is contended that the Government by its order dated 22-8-1972 directed the respondent No. 2 to execute the lease within one month from the receipt of the order. The respondent No. 2 failed to execute the lease and made representation for extension of time

and also for reduction of the dead-rent. The action of the Government allowing further extension of time for execution of the lease would amount to review. It was contended that the review being a creature of the Statute and no power having been conferred upon the State, the Government could not review its order. It is true that the power of review can only be exercised if it is conferred under a Statute. But it is well to remember that the Government had not reviewed the order sanctioning lease but the same was intact. The question before the Government was only for the execution of the lease in pursuance of that order. Nobody's vested right was being affected. Various extensions granted for the execution of the lease to the respondent No. 2 were merely in discharge of administrative functions of the Government and could not be challenged on the ground that the Government had no power to review.

18. Before I conclude I may state that Mr. M. M. Vyas informed the Court in the course of arguments that the Government has revised the dead-rent from Rs. 84,000 to Rs. 1,00,000, a copy of this order has also been placed on the record. In the circumstances there can be no question of even loss to the State revenue. This circumstance also cannot be lost sight of.

19. In the result there is no force in this Writ Petition and it is hereby dismissed. In the facts and circumstances of the case there shall be no order as to costs.

Petition dismissed.

AIR 1975 RAJASTHAN 190

C. M. LODHA, J.

Hari Ram, Appellant v. Lajpat Bhan, Respondent.

Second Appeal No. 240 of 1974, D/- 10-2-1975.*

(A) T. P. Act (1882), Ss. 105, 108 — Attornment— What amounts to— (Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), S. 19-A).

A written rent note or a fresh leasing out is not an essential requirement of attornment which may come into being by payment of rent or by recognition of a person as one's landlord. Having regard to the statement of the defendant where he has admitted that the rent was being paid to "landlord" and on his refusing

*(Against judgment and decree of M. C. Jain, Dist. J., Bikaner, D/- 16-3-1974.)

BS/CS/A767/75/SVM.

the same had been sent by Money Order and that after the death of the landlord the rent receipts issued by his adopted son, were in his name and that the rent had also been deposited in favour of the landlord under Section 19-A of the Act (17 of 1950), it must be accepted that the defendant had attorned in favour of the plaintiff and is now estopped from challenging his position as his landlord. AIR 1973 Guj 131 (FB), Disting.; AIR 1967 SC 174, Rel. on. (Para 10)

Cases Referred: Chronological Paras
AIR 1973 Guj 131 = 13 Guj LR 880 (FB) 7

AIR 1967 SC 174 = (1962) 3 SCR 910 8

Rewachand, for Appellant: C. D. Mundra, for Respondent.

JUDGMENT:— This is a defendant-tenant's second appeal arising out of a suit for ejectment from a shop situated in the city of Bikaner.

2. The plaintiff's case as set out in the plaint was that the defendant was in occupation of the suit shop on a rent of Rs. 5 per month and that he had not paid rent for 16 months since December 1968. It was alleged that the suit shop was required by the plaintiff-respondent for his own use and that the defendant had also caused damage to the suit shop. On the aforesaid grounds the plaintiff claimed a decree for arrears of rent as well as for ejectment. The defendant pleaded that the shop had been leased out to him by Uday Bhan whose widow, Smt. Sunder was alive and the plaintiff alone had no right to file the suit. While denying all the grounds of ejectment relied upon by the plaintiff namely, personal necessity, default in payment of rent and damage to the property, the defendant further pleaded that the notice of termination of tenancy was bad inasmuch as it had not been served on behalf of Smt. Sunder.

3. After recording the evidence produced by the parties, the trial court decreed the plaintiff's suit for Rs. 80 on account of arrears of rent and also for ejectment. On appeal by the defendant the judgment and decree by the trial court were affirmed. Hence this second appeal by the defendant.

4. At this stage, I may point out that the only two points urged on behalf of the defendant-appellant in the lower appellate court were that the plaintiff alone was not entitled to sue and that the notice of termination of tenancy was not valid inasmuch as it had been issued only on behalf of the plaintiff and not on behalf of the co-heir Smt. Sunder. Before me also only these two points have been pressed.

5. The learned District Judge, Bikaner has decided both the aforesaid points against the defendant on the

ground that after the death of Udaybhan, the defendant had attorned in favour of the plaintiff alone and, therefore, the plaintiff was competent to maintain the suit without impleading Smt. Sunder as a party to the suit and that notice of termination of tenancy served on behalf of the plaintiff alone was valid.

6. Learned counsel for the appellant has submitted that the adoption of Lajpatbhan, plaintiff, to the deceased plaintiff Udaybhan is not established and that there is no evidence on the record to show that the defendant had attorned in favour of the plaintiff alone and was, therefore, precluded from challenging the plaintiff's right to maintain the suit on account of the provisions of Section 116 of the Evidence Act. It may be pointed out that the plaintiff's statement that he had been adopted by Udaybhan has been accepted by the courts below and since this point had not been argued and pressed before the lower appellate court, it is now not open to the defendant to agitate this point here. However, the more important point is whether it has been established that the defendant had attorned in favour of the plaintiff and if that is established, the objection regarding lack of proof of adoption of the plaintiff to Udaybhan loses its significance as Section 116 of the Evidence Act would then come to the rescue of the plaintiff.

7. The learned District Judge has relied on the statement of the defendant Hari Ram as DW/1 where he has stated that after the death of Udaybhan the plaintiff used to recover rent and the rent-receipts were also issued by him. He has further stated that when Lajpatbhan, plaintiff, did not accept the rent tendered by him, then he sent it by Money Orders. The defendant goes on to state that after refusal by Lajpatbhan he deposited the rent in court under Section 19-A of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (hereinafter referred to as 'the Act') in favour of the plaintiff. On these admissions the learned District Judge recorded a finding in favour of the plaintiff regarding attornment by the defendant in favour of the plaintiff. Learned counsel for the appellant, however, urged that the rent had been paid to the plaintiff not in his right as sole heir of the landlord but under the instructions of Smt. Sunder who succeeded to the property of the deceased landlord Udaybhan and, therefore, at best the plaintiff can only be considered as one of the two co-heirs of Udaybhan. In support of his contention he has relied upon *Nanlal Girdharlal v. Gulamnabi Jamalbhai Motorwala* AIR 1973 Guj 131 (FB) wherein it was observed that where a lease is granted by a landlord

who is the sole owner of the leased property and thereafter, by testate or intestate succession or by transfer inter vivos, the leased property comes to be owned by two or more co-owners no one single co-owner can give notice to quit determining the lease. The notice must be given by or on behalf of all co-owners. But where a lease is granted by a co-owner professing or claiming to be the sole owner of the leased property or one of the co-owners grants the lease without disclosing that he is also acting on behalf of the other co-owners the notice to quit given by him is sufficient to determine the lease.

8. In the present case lease has not been granted initially by the plaintiff but it was Udaibhan who initially inducted the defendant into the suit premises and the question which arises for consideration is whether the defendant attorned in favour of the plaintiff alone who is consequently competent to terminate the tenancy and file the suit. In this connection reference may be made to *Satyam Narayanaraju v. Josyula Hanumayamma*, AIR 1967 SC 174. It was held in that case that the attornment is one mode of recognising a person as one's landlord, just as payment of rent is another mode for the purpose. Their Lordships in this connection referred to paras. 745 and 747 of Foa's General Law of Landlord and Tenant. In para. 745 it is mentioned that recognition as landlord by the tenant may be by express agreement, by attornment or other formal acknowledgement (as by paying a nominal sum of money), by payment of rent, or of a nominal sum as rent, or by submission to a distress. In para. 747 it is further mentioned that the tenant is not allowed to impeach the title of a person to whom he has paid rent, or whose title he has otherwise recognised, without showing a better title in some other person.

9. Again in *Munavar Basha v. Narayanan* it was held that whatever shows the assent of the tenant to the alienation of the reversion and his recognition of the alienee as landlord is a valid attornment. A promise to pay rent to the alienee and a tenant's continued occupancy under the tenancy with notice of alienation amounts to a recognition of the purchaser as his landlord.

10. The lower court as already stated above, has found that the defendant's version that he was paying rent to the plaintiff only under the instructions of Smt. Sunder is not correct, inasmuch as no such defence was taken in the written statement. I too do not see any reason for taking a different view and concur in the conclusion arrived at by the lower appellate court that the defendant had recognised the plaintiff as his landlord

and had been consistently paying rent to him after the death of Udaibhan. It is true that no fresh tenancy was created between the plaintiff and the defendant but the existing lease was continued with the substitution of the plaintiff Lajpatbhan as a new landlord in place of the old deceased landlord Udaibhan. A written rent-note or a fresh leasing out is not an essential requirement of attornment which may come into being by payment of rent or by recognition of a person as one's landlord. Having regard to the statement of the defendant where he has admitted that the rent was being paid to Lajpatbhan, plaintiff, and on his refusing the same had been sent by Money Order and that after the death of Udaibhan the rent receipts issued by the plaintiff were in his name and that the rent had also been deposited in favour of the plaintiff under Section 19-A of the Act, it must be accepted that the defendant had attorned in favour of the plaintiff and is now estopped from challenging his position as his landlord. In this view of the matter the finding by the learned District Judge that the plaintiff alone could maintain the suit and the notice served on his behalf only was valid and proper must be upheld.

11. No doubt, the grounds of personal necessity and damage to the property have not been pressed by the plaintiff in the courts below, there is no denying the fact that rent for 16 months had fallen into arrears at the time of filing of the suit and the defendant has miserably failed to show that he had tendered the rent and had not committed default in payment of 16 months rent. The defendant is consequently liable to be ejected under Section 13 (a) of the Act.

12. The result is that I do not see any force in this appeal and hereby dismiss it. But in the circumstances of the case I make no order as to costs.

13. Learned counsel for the appellant prays for certifying the case to be a fit one for appeal under Section 18 (2) of the Rajasthan High Court Ordinance. Leave is refused.

14. Learned counsel for the appellant further submits that his client has been in occupation of the suit shop for a very long time and, therefore, some time may be granted to him to enable him to find alternative suitable accommodation. In the circumstances, six months' time is granted to the appellant to hand over vacant possession of the suit shop to the respondent, provided he pays arrears of rent, if any, within one month from today and goes on paying month to month rent thereafter by the 15th of the succeeding month.

Appeal dismissed.

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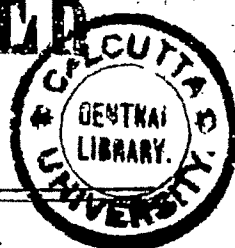
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- S. 82 — See *Ibid*, S. 80 — Orissa 184 B
- S. 83 — See *Ibid*, S. 80 — Orissa 184 B
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—Regn. 7 — See Monopolies and Restrictive Trade Practices Act (1969), S. 10 (a) (iii) — Delhi 204 B

—Regn. 22 — See Monopolies and Restrictive Trade Practices Act (1969), S. 10 (a) (iii) — Delhi 204 B, C

Restrictive Trade Practices (Enquiry) Regulations (1974)

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—S. 114 — See Houses and Rents — C. P. and Berar Letting of Houses and Rent Control Order, (1949), Cl. 13 (3) Bom 242

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—Rr. 21, 57 — Persons, not holding mining lease, removing minerals from their land — They are not liable to pay royalty, but they may be prosecuted under R. 57 All 386 D

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U. P. Urban Buildings Regulation of Letting, Rent and Eviction Rules (1972)
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—Ss. 3 (1), 15 — Administration of Evacuee Property Act (1950), Ss. 55 (2), 11 (1) — Notification under S. 55 (2) delegating powers of Government under S. 11 (1) to Wakf Board in respect of Muslim evacuee property of religious nature — Absence of any indication in notification that suit property was wakf property — Mere exercise of powers by Board under Wakf Act in respect of the said property would not establish that the property was wakf property

SC 1891 B

—S. 3 (1) — Absence of evidence that certain Muslim evacuee property was ever used as wakf property — No dedication of the property to be wakf property — Held, there could never be a wakf attaching to such property

SC 1891 D

—S. 15 — See Ibid, S. 3 (1)

SC 1891 B

Words and Phrases

—“Forthwith” — See Public Safety — Maintenance of Internal Security Act (1971), S. 3
SC 1807

ERRATA

AIR 1975 SC 580 (MARCH)

Substitute the following for the existing Head-note.

“(A):— Criminal P. C. (1898), S. 439 (4) — Revision against acquittal by private complainant — Scope and limits of interference by High Court — Interference justified only in exceptional cases of manifest illegality or prevention of gross miscarriage of justice — Case held did not justify interference — Decision of All H. C. reversed.

The revisional jurisdiction of the High Court when it is invoked by a private complainant against an order of acquittal ought not to be exercised lightly. It cannot be invoked merely because the lower Court has taken a wrong view of the law or misappreciated the evidence on record. It could be exercised only in exceptional cases where the interests of public justice require interference of the correction of manifest illegality or the prevention of a gross miscarriage of justice. AIR 1951 SC 196; AIR 1951 SC 316; AIR 1962 SC 1788; AIR 1968 SC 707; AIR 1970 SC 272, Rel. on. (Para 4)

Where, in the instant case of murder charge, the dominant justification of the order of acquittal, recorded by the Sessions Court, was the rejection of the evidence of eye-witnesses as unreliable, though it also relied partially on the suppression by the prosecution of dying declaration (which in fact was found not to exist), the High Court in revision, while leaving untouched the conclusion recorded by Sessions Judge in regard to the evidence of eye-witnesses, transgresses the narrow limits of its revisional jurisdiction under S. 439 (4), in setting

aside the order of acquittal and directing retrial, just because the Sessions Judge was wrong in its conclusion as to the existence of the dying declaration and that it had been suppressed by the prosecution. In the absence of any circumstances in the case on which the accused could be convicted and the fair assessment of the evidence of the eye-witnesses showed that the acquittal led to no miscarriage of justice, Judgment of the Sessions Judge could not be said to suffer from any manifest illegality not could it be said that the interests of justice required the High Court to interfere with the order of the acquittal. (Paras 15, 16)”

AIR 1975 AUGUST PART

In the Journal Section P. 62, Col. 2 — In the review of ‘Case Briefs & Materials on Rent Control, Slum Clearance and Town Planning read after ‘Planning’ and before 1975—

‘By N. K. Rohatgi, M. A. B. Com., LL. B.’

AIR 1975 KARNATAKA 196 (OCTOBER)

(1) For the title of the Act in Short Note (A) and B read ‘Karnataka, Hindu Law Women’s Rights Act (10 of 1933) For, ‘Hindu Women’s Right to Property Act (1933);’

(2) Page 196, Col. 2, para 2 of the judgment. For Hindu Women’s Right to Property Act’ Read ‘Karnataka Hindu Law Women’s Rights Act’.

AIR 1968 SC 117 (V 53 C 32) (JANUARY)

Page 123, Col. 1, Line 10.
read “Section 190 (1) (c)” for ‘Section 190 (1) (b).’

**LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM
ETC. IN A. I. R. 1975 OCTOBER**

**Diss. = Dissented From in; Not F. = Not Followed in; Over = Overruled in;
Revers. = Reversed in.**

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(1973) Cr. App. No. 2224 of 1968, D/- 10-4-1973 (All) — Revers. AIR 1975 SC 1887 B.

ANDHRA PRADESH

(1971) W. P. No. 4114 of 1969, D/- 29-6-1971 (Andh Pra) — Revers. AIR 1975 Andh Pra 302.

(1964) 1 Andh WR 337 — Diss. AIR 1975 Ker 175.

(1974) Criminal Revn. Case No. 163 of 1973, D/- 28-3-1974 (Andh Pra) — Revers. AIR 1975 SC 1854.

BOMBAY

AIR 1956 Bom 569 (Pt. A) — Diss. AIR 1975 Orissa 166 B.

AIR 1968 Bom 204 = 69 Bom LR 633 — Over. AIR 1975 Bom 244 A (FB)

CALCUTTA

AIR 1960 Cal. 203 = 63 Cal WN 883. — Diss. AIR 1975 Cal 377 B

(1963) Ext. Ord. Suit No. 6 of 1957, D/- 19-6-1963 (Cal) — Revers. AIR 1975 Cal 389 I

DELHI

(1970) Criminal Revn. No. 110 of 1967, D/- 1-5-1970 (Delhi) — Revers. AIR 1975 SC 1842.

GAUHATI

Assam L. R. (1972) Assam 8 — Diss. AIR 1975 Bom 244 A (FB)

AIR 1973 Gauhati 83 — Diss. AIR 1975 Bom 244 A (FB)

AIR 1973 Gauhati 142 (Pt. B) — Diss. AIR 1975 Punj 303 A

1974 Acc CJ 269 (Gauhati) — Diss. AIR 1975 Punj 303 A

KARNATAKA

AIR 1972 Mys 199 = (1972) 1 Mys LJ 310 — Held no longer good law in view of AIR 1974 SC 1480. AIR 1975 Kant 205

AIR 1973 Mys 234 (Pt. A) = (1973) 1 Mys LJ 273 — Diss. AIR 1975 Bom 244 A (FB)

AIR 1974 Kant 16 — Revers. AIR 1975 SC 1805

MADHYA PRADESH

AIR 1967 Madh Pra 127 (Pt. A) = 1966 Jab LJ 348 — Diss. AIR 1975 Bom 244 A (FB)

(1973) Cri. Appeal No. 43 of 1971, D/- 12-4-1973 (Madh Pra) — Revers. AIR 1975 SC 1835 B.

MADRAS

AIR 1959 Mad 16 (Pt. A) = (1958) 2 Mad LJ 330 — Diss. AIR 1975 Cal 354 A

(1966) 2 Mad LJ 38 = 79 Mad LW 312 — Diss. AIR 1975 Kant 203

AIR 1971 Mad 442 (Pt. B) = 39 FJR 137 — Diss. AIR 1975 All 364 B

(1971) 28 STC 227 (Mad) — Revers. AIR 1975 SC 1871

AIR 1972 Mad 212 = (1972) 1 Mad LJ 4 — Over. AIR 1975 Mad 330

(1974) W. P. No. 519 of 1968, D/- 25-7-1974 (Mad) — Revers. AIR 1975 SC 1867 B

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(1973) 2 Cut WR 1727 — Revers. AIR 1975 Orissa 166 B

ILR (1974) Cut 204 — Revers. AIR 1975 SC 1895 A

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1967 BLJR 397 — Over. AIR 1975 Pat 283 B (FB)

AIR 1973 Pat 60 = 1972 BLJR 818 — Over. AIR 1975 Pat 283 B (FB)

AIR 1973 Pat 361 (Pt. C) = 1974 BLJR 531 — Over. AIR 1975 Pat 283 B (FB)

AIR 1973 Pat 424 — Over. AIR 1975 Pat 283 B (FB)

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AIR 1952 Punj 387 (Pt. B) = 54 Pun LR 426 — Held impliedly overruled by AIR 1967 SC 436. AIR 1975 SC 1810 A

(1972) C. W. No. 3343 of 1971, D/- 27-11-1972 (Punj) — Revers. AIR 1975 Punj 299

(1974) Civil Writ Petn. No. 4209 of 1974, D/- 17-9-74 (Punj) — Revers. AIR 1975 SC 1915.

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(10.9-1975)

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Volume I

10 Years L. L. J. Digest

Volume II

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(1966-1975)

(TWO VOLUMES)

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It is arranged, Alphabetically, Act-wise and Section-wise. Cross-references are provided as to leave no point unnoticed. The names of Judges, who delivered the Judgments are also given. Parties names are mentioned in each & every case. As the Editors of L. L. J. have discussed the facts of the Cases in the Headnotes, it makes the point fully understandable. Parallel Citations to the other Law Reports are provided. Wherever needed, Synopsis to the points are also given to find out a case reference easily.

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| (7) where the total income exceeds Rs. 30,000 but does not exceed Rs. 50,000 | Rs. 5,730 plus 50 per cent. of the amount by which the total income exceeds Rs. 30,000; |
| (8) where the total income exceeds Rs. 50,000 but does not exceed Rs. 70,000 | Rs. 15,730 plus 60 per cent. of the amount by which the total income exceeds Rs. 50,000; |
| (9) where the total income exceeds Rs. 70,000 | Rs. 27,730 plus 70 per cent. of the amount by which the total income exceeds Rs. 70,000; |

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Sub-Paragraph II

In the case of every Hindu undivided family which at any time during the previous year has at least one member whose total income of the previous year relevant to the assessment year commencing on the 1st day of April, 1976 exceeds Rs. 6,000.—

Rates of income-tax

- | | |
|--|--|
| (1) where the total income does not exceed Rs. 6,000 | Nil; |
| (2) where the total income exceeds Rs. 6,000 but does not exceed Rs. 10,000 | 15 per cent. of the amount by which the total income exceeds Rs. 6,000; |
| (3) where the total income exceeds Rs. 10,000 but does not exceed Rs. 15,000 | Rs. 600 plus 20 per cent. of the amount by which the total income exceeds Rs. 10,000; |
| (4) where the total income exceeds Rs. 15,000 but does not exceed Rs. 20,000 | Rs. 1,600 plus 30 per cent. of the amount by which the total income exceeds Rs. 15,000; |
| (5) where the total income exceeds Rs. 20,000 but does not exceed Rs. 25,000 | Rs. 3,100 plus 40 per cent. of the amount by which the total income exceeds Rs. 20,000; |
| (6) where the total income exceeds Rs. 25,000 but does not exceed Rs. 30,000 | Rs. 5,100 plus 50 per cent. of the amount by which the total income exceeds Rs. 25,000; |
| (7) where the total income exceeds Rs. 30,000 but does not exceed Rs. 50,000 | Rs. 7,600 plus 60 per cent. of the amount by which the total income exceeds Rs. 30,000; |
| (8) where the total income exceeds Rs. 50,000 | Rs. 19,600 plus 70 per cent. of the amount by which the total income exceeds Rs. 50,000. |

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph B

In the case of every co-operative society,—

Rates of income-tax

- | | |
|--|---|
| (1) where the total income does not exceed Rs. 10,000 | 15 per cent. of the total income; |
| (2) where the total income exceeds Rs. 10,000 but does not exceed Rs. 20,000 | Rs. 1,500 plus 25 per cent. of the amount by which the total income exceeds Rs. 10,000; |
| (3) where the total income exceeds Rs. 20,000 | Rs. 4,000 plus 40 per cent. of the amount by which the total income exceeds Rs. 20,000. |

Surcharge on income-tax

The amount of Income-tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph C

Sub-Paragraph I

In the case of every registered firm, not being a case to which Sub-Paragraph II of this Paragraph applies,—

Rates of income-tax

- (1) where the total income does not exceed Rs. 10,000 Nil;
- (2) where the total income exceeds Rs. 10,000 but does not exceed Rs. 25,000 5 per cent. of the amount by which the total income exceeds Rs. 10,000;
- (3) where the total income exceeds Rs. 25,000 but does not exceed Rs. 50,000 Rs. 750 plus 7 per cent. of the amount by which the total income exceeds Rs. 25,000;
- (4) where the total income exceeds Rs. 50,000 but does not exceed Rs. 1,00,000 Rs. 2,500 plus 15 per cent. of the amount by which the total income exceeds Rs. 50,000;
- (5) where the total income exceeds Rs. 1,00,000 Rs. 10,000 plus 24 per cent. of the amount by which the total income exceeds Rs. 1,00,000.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Sub-Paragraph II

In the case of every registered firm whose total income includes income derived from a profession carried on by it and the income so included is not less than fifty-one per cent. of such total income,—

Rates of income-tax

- (1) where the total income does not exceed Rs. 10,000 Nil;
- (2) where the total income exceeds Rs. 10,000 but does not exceed Rs. 25,000 4 per cent. of the amount by which the total income exceeds Rs. 10,000;
- (3) where the total income exceeds Rs. 25,000 but does not exceed Rs. 50,000 Rs. 600 plus 7 per cent. of the amount by which the total income exceeds Rs. 25,000;
- (4) where the total income exceeds Rs. 50,000 but does not exceed Rs. 1,00,000 Rs. 2,350 plus 13 per cent. of the amount by which the total income exceeds Rs. 50,000;
- (5) where the total income exceeds Rs. 1,00,000 Rs. 8,850 plus 22 per cent. of the amount by which the total income exceeds Rs. 1,00,000.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Explanation. — For the purposes of this Paragraph, "registered firm" includes an unregistered firm assessed as a registered firm under clause (b) of section 183 of the Income-tax Act.

Paragraph D

In the case of every local authority,—

Rate of income-tax

On the whole of the total income 50 per cent.

Surcharge on income-tax

The amount of income-tax computed at the rate hereinbefore specified shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph E

In the case of the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956,—

Rates of income-tax

- (i) on that part of its total income which consists of profits and gains from life insurance business 52.5 per cent.;

- (ii) on the balance, if any, of the total income the rate of income-tax applicable, in accordance with Paragraph F of this Part, to the total income of a domestic company which is a company in which the public are substantially interested.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge calculated at the rate of five per cent. of such income-tax.

Paragraph F

In the case of a company, other than the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956.—

Rates of income-tax

I. In the case of a domestic company,—

(1) where the company is a company in which the public are substantially interested,—

(i) in a case where the total income does not exceed Rs. 1,00,000 45 per cent. of the total income ;

(ii) in a case where the total income exceeds Rs. 1,00,000 55 per cent. of the total income ;

(2) where the company is not a company in which the public are substantially interested,—

(i) in the case of an industrial company,—

(a) where the total income does not exceed Rs. 2,00,000 55 per cent. of the total income ;

(b) where the total income exceeds Rs. 2,00,000 60 per cent. of the total income ;

(ii) in any other case 65 per cent. of the total income ;

Provided that—

(i) the income-tax payable by a domestic company, being a company in which the public are substantially interested, the total income of which exceeds Rs. 1,00,000, shall not exceed the aggregate of —

(a) the income-tax which would have been payable by the company if its total income had been Rs. 1,00,000 (the income of Rs. 1,00,000 for this purpose being computed as if such income included income from various sources in the same proportion as the total income of the company) ; and

(b) eighty per cent. of the amount by which its total income exceeds Rs. 1,00,000 ;

(ii) the income-tax payable by a domestic company, not being a company in which the public are substantially interested, which is an industrial company and the total income of which exceeds Rs. 2,00,000, shall not exceed the aggregate of —

(a) the income-tax which would have been payable by the company if its total income had been Rs. 2,00,000 (the income of Rs. 2,00,000 for this purpose being computed as if such income included income from various sources in the same proportion as the total income of the company) ; and

(b) eighty per cent. of the amount by which its total income exceeds Rs. 2,00,000.

II. In the case of a company other than a domestic company—

(i) on so much of the total income as consists of—

(a) royalties received from an Indian concern in pursuance of an agreement made by it with the Indian concern after the 31st day of March, 1961. or

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50 per cent. ;

(ii) on the balance, if any, of the total income

70 per cent.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge calculated at the rate of five per cent. of such income-tax.

PART IV

[See section 2 (8) (e)]

**RULES FOR COMPUTATION OF NET
AGRICULTURAL INCOME**

Rule 1.—Agricultural income of the nature referred to in sub-clause (a) of clause (1) of section 2 of the Income-tax Act shall be computed as if it were income chargeable to income-tax under that Act under the head "Income from other sources" and the provisions of sections 57 to 59 of that Act shall, so far as may be, apply accordingly:

Provided that sub-section (2) of section 58 shall apply subject to the modification that the reference to section 40A therein shall be construed as not including a reference to sub-sections (3) and (4) of section 40A.

Rule 2.—Agricultural income of the nature referred to in sub-clause (b) or sub-clause (c) of clause (1) of section 2 of the Income-tax Act [other than income derived from any building required as a dwelling house by the receiver of the rent or revenue or the cultivator or the receiver of rent-in-kind referred to in the said sub-clause (c)] shall be computed as if it were income chargeable to income-tax under that Act under the head "Profits and gains of business or profession" and the provisions of sections 30, 31, 32, 34, 36, 37, 38, 40, 40A [other than sub-sections (3) and (4) thereof], 41, 43 and 43A of the Income-tax Act shall, so far as may be, apply accordingly.

Rule 3.—Agricultural income of the nature referred to in sub-clause (c) of clause (1) of section 2 of the Income-tax Act, being income derived from any building required as a dwelling house by the receiver of the rent or revenue or the cultivator or the receiver of rent-in-kind referred to in the said sub-clause (c) shall be computed as if it were income chargeable to income-tax under that Act under the head "Income from house property" and the provisions of sections 23 to 27 of that Act shall, so far as may be, apply accordingly:

Provided that sub-section (2) of the said section 23 shall apply subject to the modifications that the references to "total income" therein shall be construed as references to net agricultural income and that the words, figures and letter "and before making any deduction under Chapter VIA" shall be omitted.

Rule 4.—Notwithstanding anything contained in any other provisions of these rules, in a case where the assessee derives income from sale of tea grown and manufactured by him in India, such income shall be computed in accordance with rule 8 of the Income-tax Rules, 1962, and sixty per cent. of such income shall be regarded as the agricultural income of the assessee.

Rule 5.—Where the assessee is a partner of a registered firm or an unregistered firm assessed as a registered firm under clause (b) of section 183 of the Income-tax Act, which in the previous year has any agricultural income, or is a partner of an unregistered firm which has not been assessed as a registered firm under clause (b) of the said section 183 and which in the previous year has either no income chargeable to tax under the Income-tax Act or has total income not exceeding the maximum amount not chargeable to tax in the case of an unregistered firm but has any agricultural income, then, the agricultural income or loss of the firm shall be computed in accordance with these rules and his share in the agricultural income or loss of the firm shall be computed in the manner laid down in sub-section (1), sub-section (2) and sub-section (3) of section 67 of the Income-tax Act and the share so computed shall be regarded as the agricultural income or loss of the assessee.

Rule 6.—Where the assessee is a member of an association of persons or a body of individuals (other than a Hindu undivided family, a company or a firm) which in the previous year has either no income chargeable to tax under the Income-tax Act or has total income not exceeding the maximum amount not chargeable to tax in the case of an association of persons or a body of individuals (other than a Hindu undivided family, a company or a firm) but has any agricultural income, then, the agricultural income or loss of the association or body shall be computed in accordance with these rules and the share of the assessee in the agricultural income or loss so computed shall be regarded as the agricultural income or loss of the assessee.

Rule 7.—Where the result of the computation for the previous year in respect of any source of agricultural income is a loss, such loss shall be set off against the income of the assessee, if any, for that previous year from any other source of agricultural income:

Provided that where the assessee is a partner of an unregistered firm which has not been assessed as a registered firm under clause (b)

of section 183 of the Income-tax Act or is a member of an association of persons or body of individuals and the share of the assessee in the agricultural income of the firm, association or body, as the case may be, is a loss, such loss shall not be set off against any income of the assessee from any other source of agricultural income.

Rule 8.—Any sum payable by the assessee on account of any tax levied by the State Government on the agricultural income shall be deducted in computing the agricultural income.

Rule 9.—(1) Where the assessee has, in the previous year relevant to the assessment year commencing on the 1st day of April, 1975, any agricultural income and the net result of the computation of the agricultural income of the assessee for the previous year relevant to the assessment year commencing on the 1st day of April, 1974 is a loss, then, for the purposes of sub-section (2) of section 2 of this Act, the loss so computed shall be set off against the agricultural income of the assessee for the previous year relevant to the assessment year commencing on the 1st day of April, 1975.

(2) Where the assessee has, in the previous year relevant to the assessment year commencing on the 1st day of April, 1976 or, if by virtue of any provision of the Income-tax Act, income tax is to be charged in respect of the income of a period other than that previous year, in such other period, any agricultural income and the net result of the computation of the agricultural income of the assessee for the previous year relevant to the assessment year commencing on the 1st day of April, 1974, or the 1st day of April, 1975, or both, is a loss, then, for the purposes of sub-section (7) of section 2 of this Act,—

(i) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1974, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1975, and

(ii) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1975, shall be set off against the agricultural income of the assessee for the previous year relevant to the assessment year commencing on the 1st day of April, 1976 or the period aforesaid.

(3) Where a change has occurred in the constitution of a firm, nothing in sub-rule (1) or sub-rule (2) shall entitle the firm to set off so much of the loss proportionate to the

share of a retired or deceased partner computed in the manner laid down in sub-section (1), sub-section (2) and sub-section (3) of section 67 of the Income-tax Act as exceeds his share of profits, if any, of the previous year in the firm, or entitle any partner to the benefit of any portion of the said loss (computed in the manner aforesaid) which is not apportionable to him.

(4) Where any person deriving any agricultural income from any source has been succeeded in such capacity by another person, otherwise than by inheritance, nothing in sub-rule (1) or sub-rule (2) shall entitle any person, other than the person incurring the loss, to have it set off under sub-rule (1) or, as the case may be, sub-rule (2).

(5) Notwithstanding anything contained in this rule, no loss which has not been determined by the Income-tax Officer under the provisions of these rules, or the rules contained in Part IV of the First Schedule to the Finance Act, 1974, shall be set off under sub-rule (1) or, as the case may be, sub-rule (2).

Rule 10.—Where the net result of the computation made in accordance with these rules is a loss, the loss so computed shall be ignored and the net agricultural income shall be deemed to be nil.

Rule 11.—The provisions of the Income-tax Act relating to procedure for assessment (including the provisions of section 288A relating to rounding off of income) shall, with the necessary modifications, apply in relation to the computation of the net agricultural income of the assessee as they apply in relation to the assessment of the total income.

Rule 12.—For the purposes of computing the net agricultural income of the assessee, the Income-tax Officer shall have the same powers as he has under the Income-tax Act for the purposes of assessment of the total income.

THE SECOND SCHEDULE

[See section 33 (b)]

PART I

In the First Schedule to the Central Excises Act,—

(i) in Item No. 1, for the entry in the third column against sub-item (1), the entry "Thirty-seven and a half per cent. *ad valorem*." shall be substituted;

(ii) in Item No. 4, under "I. Unmanufactured tobacco—", for the entry in the third column against sub-item (8), the entry "One rupee and ninety paise." shall be substituted;

(iii) in Item No. 6, for the entry in the third column, the entry "Two thousand and

one hundred rupees per kilolitre at fifteen degrees of Centigrade thermometer." shall be substituted;

(iv) in Item No. 14D, for the entry in the third column, the entry "Twenty-five per cent. *ad valorem*." shall be substituted;

(v) in Item No. 14F, for the entry in the third column, the entry "Forty per cent. *ad valorem*." shall be substituted;

(vi) in Item No. 18, in the second column, after the words "and includes the inner tube," the words, "the tyre flap" shall be inserted;

(vii) in Item No. 17, for the entry in the third column against sub-item (3), the entry "Ninety paise per kilogram." shall be substituted;

(viii) in Item No. 18A, for the entries in the third column against sub-items (1) and (2), the entries "Ten rupees per kilogram." and "Four rupees per kilogram." shall, respectively, be substituted;

(ix) in Item No. 23, for the entry in the third column, the entry "Thirty-five per cent. *ad valorem*." shall be substituted;

(x) in Item No. 23A, for the entries in the third column against sub-items (1), (3) and (4), the entries "Thirty per cent. *ad valorem*.", "Fifteen per cent. *ad valorem*." and "Thirty per cent. *ad valorem*." shall, respectively, be substituted;

(xi) in Item No. 23B, for the entries in the third column against sub-items (1), (2), (3) and (4), the entries "Thirty per cent. *ad*

valorem.", "Forty per cent. *ad valorem*.", "Forty per cent. *ad valorem*." and "Twenty-five per cent. *ad valorem*." shall, respectively, be substituted;

(xii) in Item No. 26AA, in the second column, the following *Explanation* shall be inserted at the end, namely :

Explanation. — "skelp" means hot rolled narrow strip of width not exceeding six hundred millimetres with rolled (square, slightly round or bevelled) edge.;

(xiii) in Item No. 27, for each of the entries in the third column against sub-items (a) (i), (a) (ii), (b), (c), (d), (e) and (f), the entry "Thirty per cent. *ad valorem plus* two thousand rupees per metric tonne." shall be substituted;

(xiv) in Item No. 29A, for the entries in the third column against sub-items (2) and (3), the entries "One hundred per cent. *ad valorem*." and "One hundred and twenty-five per cent. *ad valorem*." shall, respectively, be substituted;

(xv) in Item No. 33, for the entries in the third column against sub-items (1) and (3), the entries "Fifteen per cent. *ad valorem*." and "Twenty per cent. *ad valorem*." shall, respectively, be substituted;

(xvi) in Item No. 33B, for the entry in the third column against sub-item (i), the entry "Seventeen and a half per cent. *ad valorem*." shall be substituted;

(xvii) in Item No. 48, for the entry in the third column, the entry "Twenty per cent. *ad valorem*." shall be substituted.

PART II

Item No.	Description of goods	Rate of duty
(1)	(2)	(3)
In the First Schedule to the Central Excises Act,—		
(i) in Item No. 4, under "II. Manufactured tobacco—" ,—		
(a) for the entries against sub-item (3), the following entries shall be substituted, namely :—		
(i) Biris in the manufacture of which any process has been conducted with the aid of machines operated with or without the aid of power		Three rupees and eighty paise per thousand
(ii) other biris		Eighty paise per thousand.;
(b) after sub-item (4), the following sub-items shall be inserted, namely :—		
"(b) Chewing tobacco		Ten per cent. <i>ad valorem</i> .
(c) Snuff		Two rupees and fifty paise per kilogram.;"
(ii) for Item No. 18, the following Item shall be substituted, namely :—		

Item No.	Description of goods	Rate of duty
(1)	(2)	(3)

18. RAYON AND SYNTHETIC FIBRES AND YARN INCLUDING TEXTURED YARN, IN OR IN RELATION TO THE MANUFACTURE OF WHICH ANY PROCESS IS ORDINARILY CARRIED ON WITH THE AID OF POWER—

- | | |
|---|---|
| (i) Fibres and Yarn, other than Textured Yarn | Eighty-five rupees per kilogram |
| (ii) Textured Yarn produced out of Base Yarn | The duty for the time being leviable on the Base Yarn, if not already paid, plus twenty rupees per kilo. gram |
| (iii) Other Textured Yarn | One hundred and five rupees per kilogram. |

Explanation I.—"Fibres and Yarn, other than Textured Yarn", shall be deemed to include—

- (i) man-made fibres;
- (ii) man-made metallic yarn;
- (iii) spun (discontinuous) yarn containing not less than ninety per cent. by weight of man-made fibres calculated on the total fibre content; and
- (iv) man-made filament (continuous) yarn that has not been processed to introduce crimps, coils, loops or curls along the length of the filaments, but does not include bulked yarn and stretch yarn.

Explanation II.—"Textured Yarn" means yarn that has been processed to introduce crimps, coils, loops or curls along the length of the filaments and shall include bulked yarn and stretch yarn.

Explanation III.—"Base Yarn" means yarn falling under sub-item (i) of this Item from which the Textured Yarn has been produced.

(iii) for Item No. 33A, the following Item shall be substituted, namely:—

33A WIRELESS RECEIVING SETS, ALL SORTS, INCLUDING ANY COMBINATION OF TWO OR MORE OF THE FOLLOWING, NAMELY, BROADCAST TELEVISION RECEIVER SETS, RADIOS (INCLUDING TRANSISTOR SETS), GRAMOPHONES (INCLUDING RECORD PLAYERS, RECORD PLAYING DECKS AND RECORD CHANGING DECKS) AND TAPE RECORDERS (INCLUDING CASSETTE RECORDERS AND TAPE DECKS), IN EACH CASE WHETHER WITH OR WITHOUT LOUDSPEAKERS—

- | | |
|---|--------------------------------------|
| (1) Broadcast television receiver sets. | Twenty per cent. <i>ad valorem</i> . |
| (2) Radios (including transistor sets). | Three hundred rupees per set. |
| (3) Radiograms (including radio or translator sets with extra space in cabinet for fitting in record players or record changers). | Three hundred rupees per set. |
| (4) Others. | Thirty per cent. <i>ad valorem</i> . |

Item No.	Description of goods	Rate of duty
(1)	(2)	(3)
(iv) for Item No. 48, the following Item shall be substituted, namely:—		
"43	WOOL TOPS, THAT IS TO SAY, TOPS CONTAINING MORE THAN FIFTY PER CENT. BY WEIGHT OF WOOL CALCULATED ON THE TOTAL FIBRE CONTENT	Ten rupees per kilogram."
(v) after Item No. 68, the following Items shall be inserted, namely:—		
67	GRAPHITE ELECTRODES AND ANODES; ALL SORTS	Fifteen per cent. <i>ad valorem</i> .
68	ALL OTHER GOODS, NOT ELSEWHERE SPECIFIED, MANUFACTURED IN A FACTORY BUT EXCLUDING—	One per cent. <i>ad valorem</i> .
	(a) alcohol all sorts including alcoholic liquors for human consumption;	
	(b) opium, Indian hemp and other narcotic drugs and narcotics; and	
	(c) dutiable goods as defined in section 2 (c) of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955	
<i>Explanation.</i> — In this Item, the expression "factory" has the meaning assigned to it in section 2(m) of the Factories Act, 1948.		

THE THIRD SCHEDULE

(See section 35)

Item No. in the First Schedule to the Central Excises and Salt Act, 1944	Description of goods	Rate of additional duty
1	2	3

In the First Schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957, in Item No. 4, under "II. Manufactured tobacco—", for the entries against sub-item (3), the following entries shall be substituted, namely:—

"(i) Biris in the manufacture of which any process has been conducted with the aid of machines operated with or without the aid of power; Eighty paise per thousand;

(ii) Other biris Twenty paise per thousand".

THE CONSTITUTION (THIRTY-SIXTH AMENDMENT) ACT, 1975†

[16th May, 1975]

An Act further to amend the Constitution of India.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called THE CONSTITUTION (THIRTY-SIXTH AMENDMENT) ACT, 1975.

(2) It shall be deemed to have come into force on the date on which the Bill for this Act [introduced in the House of the People as the Constitution (Thirty-sixth Amendment) Bill, 1975], as passed by the House of the People, is passed by the Council of States.

2. Amendment of First Schedule.

In the First Schedule to the Constitution, under the heading "I. THE STATES", after entry 21, the following entry shall be inserted, namely:—

"22. Sikkim The territories which immediately before the commencement of the Constitution (Thirty-sixth Amendment) Act, 1975, were comprised in Sikkim."

3. Insertion of new article 371F.

After article 371E of the Constitution, the following article shall be inserted, namely:

Special provisions with respect to the State of Sikkim.

"371F. Notwithstanding anything in this Constitution,—

(a) the Legislative Assembly of the State of Sikkim shall consist of not less than thirty members;

(b) as from the date of commencement of the Constitution (Thirty-sixth Amendment) Act, 1975 (hereafter in this article referred to as the appointed day)—

(i) the Assembly for Sikkim formed as a result of the elections held in Sikkim in April, 1974 with thirty-two members elected in the said elections (hereinafter referred to as the sitting members) shall be deemed to be the Legislative Assembly of the State of Sikkim duly constituted under this Constitution;

(ii) the sitting members shall be deemed to be the members of the Legislative Assembly of the State of Sikkim duly elected under this Constitution; and

[†] Received the assent of the President on 16-5-1975. Act published in Gaz. of India; 16-5-1975 Part II-S. 1, Ext. p. 195. For Statement of Objects and Reasons, see Gaz. of India; 21-4-1975, Part II-S. 2, Ext. p. 889.

(iii) the said Legislative Assembly of the State of Sikkim shall exercise the powers and perform the functions of the Legislative Assembly of a State under this Constitution;

(c) in the case of the Assembly deemed to be the Legislative Assembly of the State of Sikkim under clause (b), the references to the period of five years in clause (1) of article 172 shall be construed as references to a period of four years and the said period of four years shall be deemed to commence from the appointed day;

(d) until other provisions are made by Parliament by law, there shall be allotted to the State of Sikkim one seat in the House of the People and the State of Sikkim shall form one parliamentary constituency to be called the parliamentary constituency for Sikkim;

(e) the representative of the State of Sikkim in the House of the People in existence on the appointed day shall be elected by the members of the Legislative Assembly of the State of Sikkim;

(f) Parliament may, for the purpose of protecting the rights and interests of the different sections of the population of Sikkim make provision for the number of seats in the Legislative Assembly of the State of Sikkim which may be filled by candidates belonging to such sections and for the delimitation of the assembly constituencies from which candidates belonging to such sections alone may stand for election to the Legislative Assembly of the State of Sikkim;

(g) the Governor of Sikkim shall have special responsibility for peace and for an equitable arrangement for ensuring the social and economic advancement of different sections of the population of Sikkim and in the discharge of his special responsibility under this clause, the Governor of Sikkim shall, subject to such directions as the President may, from time to time, deem fit to issue, act in his discretion;

(h) all property and assets (whether within or outside the territories comprised in the State of Sikkim) which immediately before the appointed day were vested in the Government of Sikkim or in any other authority or in any person for the purposes of the Government of Sikkim shall, as from the appointed day, vest in the Government of the State of Sikkim;

(i) the High Court functioning as such immediately before the appointed day in the territories comprised in the State of Sikkim shall, on and from the appointed day, be deemed to be the High Court for the State of Sikkim;

(j) all courts of civil, criminal and revenue jurisdiction, all authorities and all officers,

judicial, executive and ministerial, throughout the territory of the State of Sikkim shall continue on and from the appointed day to exercise their respective functions subject to the provisions of this Constitution;

(k) all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority;

(l) for the purpose of facilitating the application of any such law as is referred to in clause (k) in relation to the administration of the State of Sikkim and for the purpose of bringing the provisions of any such law into accord with the provisions of this Constitution, the President may, within two years from the appointed day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon, every such law shall have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law;

(m) neither the Supreme Court nor any other court shall have jurisdiction in respect of any dispute or other matter arising out of any treaty, agreement, engagement or other similar instrument relating to Sikkim which was entered into or executed before the appointed day and to which the Government of India or any of its predecessor Governments was a party, but nothing in this clause shall be construed to derogate from the provisions of article 143;

(n) the President may, by public notification, extend with such restrictions or modifications as he thinks fit to the State of Sikkim any enactment which is in force in a State in India at the date of the notification;

(o) if any difficulty arises in giving effect to any of the foregoing provisions of this article, the President may, by order, do anything (including any adaptation or modification of any other article) which appears to him to be necessary for the purpose of removing that difficulty;

Provided that no such order shall be made after the expiry of two years from the appointed day;

(p) all things done and all actions taken in or in relation to the State of Sikkim or the territories comprised therein during the period commencing on the appointed day and ending immediately before the date on which the Constitution (Thirty-sixth Amendment) Act, 1975, receives the assent of the President shall, in so far as they are in conformity with the provisions of this Constitution as amended

by the Constitution (Thirty-sixth Amendment) Act, 1975, be deemed for all purposes to have been validly done or taken under this Constitution as so amended."

4. Amendment of Fourth Schedule.

In the Fourth Schedule to the Constitution, in the Table, —

(a) after entry 21, the following entry shall be inserted, namely:—

"22. Sikkim 1";

(b) existing entries 22 to 25 shall be re-numbered as entries 23 to 26 respectively;

(c) for the figures "231", the figures "232" shall be substituted.

5. Consequential amendments.

The following consequential amendments shall be made in the Constitution, namely:—

(a) article 2A shall be omitted;

(b) in article 80, in clause (1), the words and figure "Subject to the provisions of paragraph 4 of the Tenth Schedule," shall be omitted;

(c) in article 81, in clause (1), the words and figure "and paragraph 4 of the Tenth Schedule" shall be omitted;

(d) the Tenth Schedule shall be omitted.

THE TOKYO CONVENTION ACT, 1975

[Act No. 20 of 1975]*

[8th May, 1975]

An Act to give effect to the Convention on offences and certain other acts committed on board aircraft.

Whereas a Convention on offences and certain other acts committed on board aircraft was on the Fourteenth day of September, 1963, signed at Tokyo;

And whereas it is expedient that India should accede to the said Convention and should make provisions for giving effect thereto;

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement.

(1) This Act may be called THE TOKYO CONVENTION ACT, 1975.

[*] Received the assent of the President on 8-5-1975. Act published in Gaz. of India; 8-5-1975. Part II-S. 1, Ext., p. 109.

For Statement of Objects and Reasons, see Gaz. of India, 11-11-1974, Part II-S. 2, Ext., p. 1020.

- (2) It extends to the whole of India.
- (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

CHAPTER II

DEFINITIONS

2. Definitions.

(1) In this Act, unless the context otherwise requires,—

(a) "aircraft" means any aircraft, whether or not registered in India, other than—

(i) a military aircraft; or

(ii) an aircraft belonging to, or exclusively employed in the service of, the State;

(b) "appropriate authority" means—

(i) in relation to India, any police officer not below the rank of an Assistant Sub-Inspector or any Immigration Officer, and

(ii) in relation to any other country, being a Convention country, any officer having functions corresponding to the functions in India either of a police officer not below the rank of an Assistant Sub-Inspector or of an Immigration Officer;

(c) "commander", in relation to an aircraft, means the member of the crew designated as commander of the aircraft by the operator thereof, or failing such a person, the person who is for the time being the pilot in command of the aircraft;

(d) "Convention country" means a country in which the Tokyo Convention is for the time being in force;

(e) "Indian registered aircraft" means an aircraft—

(A) which is for the time being registered in India;

(B) which is not for the time being registered in any country but in the case of which either the operator of the aircraft or each person entitled as owner to any legal or beneficial interest in it satisfies the following requirements, namely:—

(i) that he is a person qualified to be owner of a legal or beneficial interest in an aircraft registered in India; and

(ii) that he resides or has his principal place of business in India; or

(C) which, for the time being registered in any country other than India, is for the time being chartered by demise to a person who, or to persons each of whom, satisfies the requirements specified in sub-clause (B) (i) and (ii);

(f) "military aircraft" means an aircraft of the naval, military or air force of any country and includes every aircraft, commanded by a person in naval, military or air force service, detailed for the purpose;

(g) "operator", in relation to an aircraft at any time, means the person who at that time has the management of the aircraft;

(h) "pilot in command", in relation to an aircraft, means a person who for the time being is in charge of the piloting of the aircraft without being under the direction of any other pilot in the aircraft and responsible for the operation and safety of the aircraft during flight time;

(i) "Tokyo Convention" means the Convention on offences and certain other acts committed on board aircraft signed at Tokyo on the Fourteenth day of September, 1963;

(j) any reference to a country or to the territorial limits thereof shall be construed as including a reference to the territorial waters, if any, of that country, and any reference to an aircraft in flight shall include a reference to an aircraft during any period when it is on the surface of the sea or land but not within the territorial limits of any country.

(2) For the purposes of this Act, the period during which an aircraft is in flight shall be deemed to include any period from the moment when power is applied for the purpose of the aircraft taking off on a flight until the moment when the landing run, if any, at the termination of that flight ends; and for the purpose of section 5 the aforesaid period shall also be deemed to include—

(i) any further period from the moment when all external doors, if any, of the aircraft are closed following embarkation for a flight until the moment when any such door is opened for disembarkation, after that flight;

(ii) if the aircraft makes a forced landing, any period thereafter until the time—

(a) in a case where the forced landing takes place in India, when the appropriate authority arrives at the place of such forced landing; and

(b) in any other case, when the appropriate authority takes over the responsibility for the aircraft and for the persons and property on board the aircraft.

CHAPTER III

OFFENCES

3. Application of criminal law to aircraft.

(1) Any act or omission taking place on board an Indian registered aircraft while in flight elsewhere than in or over India which, if taking place in India, would constitute an offence under any law in force in India shall constitute that offence.

Provided that this sub-section shall not apply to any act or omission which is expressly or impliedly authorised by or under any law

of a country outside India where the aircraft is in flight.

(2) No proceedings for an offence under any law in force in India, committed on board an aircraft while in flight elsewhere than in or over India (other than an offence under the Aircraft Act, 1934) shall be instituted except by or with the consent of the Central Government.

(3) Nothing contained in sub-section (2) shall prevent the arrest, or the issue of a warrant for the arrest, of any person in respect of any offence, or the remanding in custody or on bail of any person charged with any offence.

4. Provisions as to Extradition Act.

For the purposes of application of the Extradition Act, 1962, to crimes committed on board an aircraft in flight, any aircraft registered in a Convention country shall, at any time while that aircraft is in flight, be deemed to be within the jurisdiction of that country, whether or not it is for the time being also within the jurisdiction of any other country.

5. Powers of commander of aircraft.

(1) If the commander of an aircraft in flight, wherever the aircraft may be, has reasonable grounds to believe in respect of any person on board the aircraft—

(a) that the person in question has done or is about to do any act on the aircraft while it is in flight which jeopardises or may jeopardise—

(i) the safety of the aircraft or of persons or property on board the aircraft; or

(ii) the good order and discipline on board the aircraft; or

(b) that the person in question has done on the aircraft while in flight any act which in the opinion of the commander is an offence under any law in force in the country in which the aircraft is registered, not being a law of a political nature or based on racial or religious discrimination,

then, subject to the provisions of sub-section (4), the commander may take with respect to that person such reasonable measures, including restraint of his person; as may be necessary—

(i) to protect the safety of the aircraft or of persons or property on board the aircraft; or

(ii) to maintain good order and discipline on board the aircraft; or

(iii) to enable the commander to disembark or deliver that person in accordance with the provisions of sub-section (5).

(2) The aircraft commander may require the assistance of other crew members and

may request, but not require, the assistance of passengers or authorise other crew members and passengers, to restrain any person whom he is entitled to restrain.

(3) Any crew member or passenger may also take reasonable preventive measures without any authorisation under sub-section (2) when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.

(4) Any restraint imposed on any person on board an aircraft under the powers conferred by the foregoing provisions of this section shall not be continued after the time when the aircraft first thereafter ceases to be in flight unless before or as soon as is reasonably practicable after that time, the commander of the aircraft causes notification of the fact that a person on board the aircraft is under restraint and of the reasons therefor to be sent to the appropriate authority of the country in which the aircraft so ceases to be in flight but subject to such notification may be continued after that time—

(a) for any period (including the period of any further flight) between that time and the first occasion thereafter on which the commander is able with any requisite consent of the appropriate authorities to disembark or deliver the person under restraint in accordance with the provisions of sub-section (5); or

(b) if the person under restraint agrees to continue his journey under restraint on board that aircraft.

(5) The commander of an aircraft,—

(a) if, in the case of any person on board the aircraft, he has reasonable grounds—

(i) to believe as mentioned in clause (a) of sub-section (1); and

(ii) to believe that it is necessary so to do in order to protect the safety of the aircraft or of persons or property on board the aircraft or to maintain good order and discipline on board the aircraft, may disembark that person in any country in which that aircraft may be; and

(b) if, in the case of any person on board the aircraft, he has reasonable grounds to believe as mentioned in clause (b) of sub-section (1) may deliver that person to the appropriate authority.

(6) The commander of an aircraft—

(a) if he disembarks any person in pursuance of clause (a) of sub-section (5), in the case of an Indian registered aircraft, in any country or, in the case of any other aircraft, in India, shall report the fact of, and the reasons for, that disembarkation to—

(i) the appropriate authority in the country of disembarkation; and

(ii) the appropriate diplomatic or consular officer of the country of nationality of that person;

(b) if he intends to deliver any person in pursuance of clause (b) of sub-section (5) in India, or in the case of an Indian registered aircraft, in any other country which is a Convention country, shall before or as soon as reasonably practicable after landing give notification of his intention and of the reasons therefor—

(i) to the appropriate authority; and

(ii) in either case, to the appropriate diplomatic or consular officer of the country of nationality of that person;

and any commander of an aircraft who without reasonable cause fails to comply with the requirements of this sub-section shall be liable on summary conviction to a fine not exceeding one thousand rupees.

6. Jurisdiction.

(1) For the avoidance of doubt, it is hereby declared that for the purpose of any proceedings before a court in India, any court having jurisdiction in respect of piracy committed on the high seas shall have jurisdiction in respect of offences and other acts committed on board an aircraft as described in this Act wherever that offence or act is committed.

(2) For the purposes of conferring jurisdiction an offence under any law in force in India, committed on board an aircraft in flight shall be deemed to have been committed in any place in India where the offender may for the time being be.

7. Provisions as to evidence in connection with aircraft.

(1) Where in any proceedings before a court in India for an offence or other act committed on board an aircraft the testimony of any person is required and the court is satisfied that the person in question cannot be found in India, there shall be admissible in evidence before that court any deposition relating to the subject matter of those proceedings previously made on oath by that person outside India which was so made—

(a) in the presence of the person charged with the offence; and

(b) before a judge or a magistrate of a country such as is mentioned in the First Schedule to the Citizenship Act, 1955 or before a consular officer of the Central Government.

(2) Any such deposition shall be authenticated by the signature of the judge, magistrate or consular officer before whom it was made and he shall certify that the person charged with the offence was present at the taking of the deposition.

(3) It shall not be necessary in any proceedings to prove the signature or official character of the person appearing so to have authenticated any such deposition or to have given such a certificate and such a certificate shall, unless the contrary is proved, be sufficient evidence in any proceedings that the person charged with the offence was present at the making of the deposition.

(4) If a complaint is made to such a consular officer as aforesaid that any offence has been committed on an Indian registered aircraft while in flight elsewhere than in or over India, that officer may enquire into the case upon oath.

(5) In this section—

(a) the expression "deposition" includes an affidavit, affirmation or statement made upon oath; and

(b) the expression "oath" includes an affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swearing; and nothing contained in this section shall prejudice the admission as evidence of any deposition which is admissible in evidence apart from this section.

8. Provisions as to documentary evidence.

(1) In any legal proceedings under this Act, a document published by the Ministry of the Central Government dealing with Civil Aviation and purporting to be the publication known as "Aeronautical Information Publication" or a publication of the series known as "Notam" and "Aeronautical Information Circular" shall be evidence of the matters appearing from that document.

(2) Any message or signal transmitted to or received from an aircraft which relates to the position of the aircraft will be treated as evidence of certain records and shall apply to any legal proceedings.

CHAPTER IV

MISCELLANEOUS

9. Power to apply the provisions of Act with modifications to certain aircraft.

The Central Government may, by notification in the Official Gazette, direct that all or any of the provisions of this Act shall apply to an aircraft referred to in sub-clause (B) of clause (e) of sub-section (1) of section 2, subject to such modifications as may be specified in the notification.

10. Contracting parties to Convention.

The Central Government may, by notification in the Official Gazette, certify as to who

are the contracting parties to the Tokyo Convention and to what extent they have availed themselves of the provisions of the Convention, and any such notification by the Central Government shall be conclusive evidence of the matters certified therein.

11. Power to treat certain aircraft to be registered in Convention country.

If the Central Government is satisfied that the requirements of Article 18 of the Tokyo Convention have been satisfied in relation to any aircraft, it may, by notification in the Official Gazette, direct that such aircraft shall, for the purposes of this Act, be treated as registered in such Convention country as may be specified in the notification.

**THE APPROPRIATION (No. 2)
ACT, 1975**

(Act No. 21 of 1975)

[8th May, 1975]

An Act to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of India for the services of the financial year 1975-76.

(Text of the Act Not Printed.)

**THE RAMPUR RAZA LIBRARY
ACT, 1975**

(Act No. 22 of 1975)

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**THE RAMPUR RAZA LIBRARY
ACT, 1975**

(Act No. 22 of 1975)†

[9th May, 1975]

An Act to declare the Rampur Raza Library to be an institution of national importance and to provide for its administration and matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:

CHAPTER I

PRELIMINARY

1. Short title and commencement.
(1) This Act may be called **THE RAMPUR RAZA LIBRARY ACT, 1975.**

(†) Received the assent of the President on 9-5-1975. Act published in Gaz. of India, 9-5-1975 Part II-S. 1, Ext. P. 117.

For Statement of Objects and Reasons, see Gaz. of India, 7-5-1974, Part II-S. 2, Ext. p. 455.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Declaration of Rampur Raza Library as an institution of national importance.

It is hereby declared that the Rampur Raza Library, at Rampur, is an institution of national importance.

3. Definitions.

In this Act, unless the context otherwise requires,—

(a) "Board" means the Board established under section 4;

(b) "Chairman" means the Chairman of the Board;

(c) "deed of trust" means the deed of trust executed by the late Nawab Sir Syed Raza Ali Khan Bahadur of Rampur on the 6th August, 1951, and registered as No. 103, Book IV, Volume No. 8, on pages 74 to 93 of the Officiating Chief Sub-Registrar, Rampur;

(d) "Fund" means the Fund referred to in section 18;

(e) "library" means the Rampur Raza Library, which is declared by this Act to be an institution of national importance;

(f) "member" means a member of the Board and includes the Chairman, and also includes the Vice-Chairman, if any;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "Rampur" means the headquarters of the District of Rampur in the State of Uttar Pradesh;

(i) "State Government" means the Government of the State of Uttar Pradesh.

CHAPTER II

RAMPUR RAZA LIBRARY BOARD

4. Establishment and incorporation of Board.

(1) With effect from such date as the Central Government may by notification in the Official Gazette, appoint, there shall be established, for the purposes of this Act, a Board, to be known as the "Rampur Raza Library Board".

(2) The Board shall be a body corporate with the name aforesaid, having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property and to contract, and may, by that name, sue and, be sued.

5. Composition of Board.

(1) The Board shall consist of the following persons, namely:

(a) the Governor of the State of Uttar Pradesh, *ex officio*, who shall be the Chairman;

(b) Shri Syed Murtaza Ali Khan, for life who shall be the Vice Chairman;

(c) Colonel Bashir Hussain Zaidi, for life;

(d) the Accountant-General, Uttar Pradesh, *ex officio*;

(e) a descendant of the late Nawab Sir Syed Raza Ali Khan Bahadur of Rampur, to be nominated by the Central Government.

(f) four persons to be nominated by the Central Government, out of whom—

(i) two shall be persons who, in the opinion of the Central Government, have expert knowledge with regard to the collections in the library or are distinguished historians or scholars of Arabic, Persian or Urdu.

(ii) one shall be an officer, not below the rank of a Deputy Secretary to the Government of India in the Department dealing with matters connected with the library.

(iii) one shall be a person who, in the opinion of the Central Government, has expert knowledge of, and experience in, management of public libraries;

(g) the Collector and District Magistrate, Rampur, *ex officio*;

(h) three other persons, of whom at least two shall be scholars of repute, to be nominated by the State Government;

(i) the Director of the Library, *ex officio*, who shall be the Member-Secretary.

(2) Every nomination made under this section shall be notified by the Central Government in the Official Gazette and every nomination so notified shall take effect from the date of the notification.

6. Term of office and fresh nomination in certain cases.

(1) The term of office of nominated members shall be such as may be prescribed.

(2) Any nominated member may resign his office by giving notice in writing to the Government nominating him, and on such resignation being notified by the Central Government in the Official Gazette, he shall be deemed to have vacated his office on the date of publication of such notification.

(3) If the office of any nominated member is vacated before the expiry of the term of his office, the resulting vacancy may be filled by fresh nomination by the Government by which such member was nominated, and the member so nominated shall hold office for the remainder of the term of office of the member in whose place he is nominated.

(4) An outgoing member shall be eligible for re-nomination.

(5) If any nominated member is, by infirmity or otherwise, rendered temporarily incapable of carrying out his duties or is

absent on leave or otherwise in circumstances not involving the vacation of his office, the Central Government or the State Government, as the case may be, may nominate another person to act in his place during his absence.

7. Vacancies, etc., not to invalidate acts.

No act of the Board shall be invalid merely by reason of—

(a) any vacancy in, or defect in the constitution of, the Board, or

(b) any defect in the nomination of a person acting as a member thereof, or

(c) any irregularity in its procedure not affecting the merits of the case.

8. Duty of Government nominating persons.

(1) Before nominating a person to be a member of the Board, the Central Government or the State Government, as the case may be, shall satisfy itself that the person will have no such financial or other interest as is likely to affect prejudicially the exercise or performance by him of his functions as a member, and the Central Government or the State Government, as the case may be, shall also satisfy itself from time to time with respect to every member nominated by it that he has no such interest; and any person who is or whom the Central Government or the State Government, as the case may be, proposes to nominate and who has consented to be a member shall, whenever requested by the Central Government or the State Government so to do, furnish to it such information with regard to his financial or other interest in the library as that Government considers necessary for the performance by it of its duties under this sub section.

(2) A nominated member who is, in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement, entered into or to be entered into, by or on behalf of the Board shall, as soon as possible, after relevant circumstances have come to his knowledge, disclose the nature of his concern or interest at a meeting of the Board and the disclosure shall be recorded in the minutes of the Board and the member shall not take any part after such disclosure in the discussion, or vote, on the contract or arrangement; and if he does vote, his vote shall be void.

9. Meetings of Board.

(1) The Board shall meet at such times and places and shall, subject to the provisions of sub-sections (2), (3) and (4), observe such rules of procedure in regard to the transaction of business at its meetings (including the

quorum at meetings) as may be provided by regulations made under this Act.

(2) Chairman or, in his absence, the Vice-Chairman, if any, or in the absence of both, any member chosen by the members present from amongst themselves, shall preside at a meeting of the Board.

(3) If an officer of Government who is nominated as a member of the Board by virtue of his office is unable to attend any meeting of the Board, he may, with the previous approval of the Chairman, authorise in writing, any person to attend that meeting, but the person so authorised shall not be entitled to vote at that meeting.

(4) All questions at a meeting of the Board shall be decided by a majority of the votes of the members present and voting and in the case of an equality of votes, the Chairman or, in his absence, the Vice-Chairman, if any, or, in the absence of both, the member presiding, shall have a second or casting vote.

10. Temporary association of persons with Board for particular purposes.

(1) The Board may associate with itself in such manner and for such purposes as may be provided by regulations made under this Act, any person whose assistance or advice it may desire to have with regard to the performance of any of its functions under this Act.

(2) A person associated with it by the Board under sub-section (1) for any purpose shall have the right to take part in the discussions of the Board relating to that purpose, but shall not, by virtue of this section, be entitled to vote.

11. Authentication of orders and other instruments of Board.

(1) All orders and decisions of the Board shall be authenticated by the signature of the Chairman or the Vice-Chairman, if any, or any other member authorised by the Board in this behalf, and all other instruments issued by the Board shall be authenticated by the signature of an officer of the Board authorised in like manner in this behalf.

(2) Orders, decisions or instruments authenticated in accordance with the provisions of sub-section (1) shall be evidence of the matters recorded therein and shall be admissible in evidence notwithstanding anything contained in the Indian Evidence Act, 1872, or in any other law for the time being in force.

(3) Any member, officer or other employee of the Board or any other person interested in the library shall be entitled to be furnished, within seven days after he has made a request in that behalf to the library, with a copy of

JOURNAL SECTION

1975 October

Social Change and The Instrumentality of the Constitution and the Laws

By Shree R. N. Byra Reddy,

Advocate & Advocate-General, Karnataka.

Social change does not convey to everyone the same body of ideas or the same set of changes in the property and production relations in the society. It does not also convey the same socio-economic philosophy which underlines the particular social change visualised by an individual or a group of individuals.

2. The search for a precise understanding or definition of Social Change often reminds one of the proverbial attempt of the seven blind men identifying the seven different parts of the huge elephant as the elephant itself.

3. It shall be my endeavour in this humble contribution with several limitations including my present physical disability to draw attention only to a few salient facets of the problem and the pre-conditions for making the Constitution and the laws framed within its framework effective and true instruments of the social change visualised.

4. I further confine myself to social justice, the foundations of which are found in the preamble to the Constitution which solemnly declares that the Constitution of India is adopted by its people in order to secure to all its citizens Justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and unity of the Nation.

5. It is an indisputable fact of history that the socio-economic structure which independent India inherited from the British was feudal in character and exploitation with the aid of coercive machinery of the State was its foundation.

6. The society which can claim to reflect the great ideals which have gone into the preamble to the Constitution can have no meaning unless the Directive Principles of State Policy solemnly enshrined in Part IV of the Constitution are to a substantial extent implemented by the new organs of State Power conceived by the Constitution.

7. Article 37 of Part IV of the Constitution declares that the provisions contained in the said part though not enforceable by any Court, they are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

8. Article 38 enjoins upon the State to promote the welfare of the people by securing and protecting a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

9. Article 39 inter alia enjoins that the State shall, in particular, direct its policy towards securing to all its citizens—

(a) adequate means of livelihood;

(b) the ownership, control and distribution of the material resources of the community so as to subserve the common good;

(c) the operation of the economic system which would not result in the concentration of wealth and means of production to the common detriment. . . .

10. What is stated above is only a part of several other concepts which have gone into the making of Part IV of the Constitution.

11. From the preamble and Part IV of the Constitution it is therefore clear that social justice conceived by the Constitution itself is not some goody-goody social justice which means everything for everybody. It definitely

means the end of feudal and capitalist exploitation of the toiling millions and the establishment of an order in which human dignity and human values rule the norms of conduct in society and the power of money and the power of property held by a few in society cease to have its stranglehold on the toiling millions who are the real producers of wealth and all things of value to human existence.

12. A. M. Honore (of New College, Oxford) in his contribution "Social Justice" to 'Essays in Legal Philosophy', edited by Robert S. Summers at page 62 (1970 Edition) has the following to say in dealing with the controversies regarding the concept of social justice:

"But the most important reason for re-opening old controversies is that I believe that it is possible to make some progress in the inquiry and to reach a conclusion which is not a purely *skeptical* one. The thesis I shall argue is that the notion of social justice represents something more than merely the opinion of a group as to what demands they think should be conceded. It represents something more than merely a formal notion. It is not merely a question of conforming to the rules whatever they may be. The view I shall advocate is that the principle of social justice consists in two propositions. The first is the contention that all men considered merely as men and apart from their conduct or choice have a claim to an equal share in all those things, here called advantages, which are generally desired and are in fact conducive to their well-being. By this I mean such things as life, health, food, shelter, clothing, places to move in, opportunities for acquiring knowledge and skill, for sharing in the process of making decisions, for recreation, travel, etc.

Men not only have a claim to these things but to an equal share in them. It would be misleading to advance the first half of this proposition without the second or vice versa. If we say that men have a claim to equal shares in all advantages without saying that they have a claim to them irrespective of shares, then this claim might be satisfied by a system which distributed misery equally and gave men no share or an infinitesimal share in the advantages generally desired. Conversely if we say that men have a claim to these advantages without adding that their claim is to an equal share, then the proposition might be satisfied by a system which allots or distributes advantages in an arbitrary way. The word 'claim' is used rather than the words 'opportunity' or 'privilege'. Following Hohfeld's usage it seems appropriate to use

the word 'claim' in this context to mark the point that we are here concerned not, as we are in the analysis of liberty, with the question 'What are men permitted to do', but with the question 'What are men entitled to demand?'

13. I submit it is a fair and moderate summary of the concept of Social Justice. The point to be underlined is that the concept of social justice cannot consist of a few goody-goody slogans meaning all things to all men.

14. "Democracy" in a society oppressed by a capitalist and feudal social order can only be a deception practised on the people flattering the oppressed with the idea that they are ruling themselves under a democracy while in fact the power of money and the power of property determines the entire course of life in society.

15. It must be remembered that :

"after all there remains the simple fact, hitherto concealed by an overgrowth of ideology, that mankind must first of all eat and drink, have shelter and clothing, before it can pursue politics, science, art, religion etc.; and that therefore the production of the immediate material means of subsistence and consequently the degree of economic development attained by a given people or during a given epoch, form the foundation upon which the State institutions, the legal conceptions, the art and even the religious ideas of the people concerned have been evolved and in the light of it these things must therefore be explained, instead of vice versa, as had hitherto been the case."

(Marx & Engels SW I. 12—P. 13 of Lokayata by Debiprasad Chattopadhyaya)

16. Social Justice on the basis of which alone democracy can flourish can have a meaning for the toiling masses only when the foundation of the present feudal and capitalist social order is uprooted and exploitation of man by man has ended and all men and women are enabled to live in freedom and given an opportunity to grow to the full stature for the attainment of which the Maker intended them to be.

17. Before such ends could be attained through the instrumentality of the Constitution and the laws made under it, it is necessary that those responsible for making laws are the ones who are earnestly devoted to the concept of social justice which has meaning to the exploited millions and who are ideologically prepared to conceive and scrutinise the laws intended to achieve such ends.

18. I may here quote Swami Vivekananda from his speech delivered at the Victoria Hall, Madras on "My Plan of Campaign" published in "Lectures from Colombo to Almora" by Advaita Ashrama at Page 114 :—

"The whole problem of social reform, therefore, resolves itself into this: where are those who want reform? Make them first. Where are the people? The tyranny of a minority is the worst tyranny that the world ever sees. A few men who think that certain things are evil will not make a nation move. Why does not the nation move? First educate the nation, create your legislative body, and then the law will be forthcoming. First create the power, the sanction from which the law will spring. The kings are gone; where is the new sanction; the new power of the people? Bring it up. Therefore, even for social reform, the first duty is to educate the people, and you will have to wait till that time comes. Most of the reforms that have been agitated for during the past century have been ornamental. . . ."

19. Though Swami Vivekananda was speaking of Social Reform of a different type, the various questions posed by him and the need spoken of by him for the creation of the power which should be the power behind the law, are absolutely appropriate in the context of our changing present social order. The first requisite therefore is the ideological *steeling* of those who are to become our leaders and legislators and who will have the will and the determination to make the laws that can be truly effective to bring about the change in the social order which will establish social justice conceived by the preamble and elaborated in the Directive Principles of Part IV of the Constitution.

20. Even when such laws are made, it still requires proper and effective instruments for the implementation of those laws. The Judicial System left behind by the British is fit and only fit to be an effective instrument of a Police State. It is totally unprepared mentally and by training to be an instrument of a State which is honestly and sincerely determined to bring about and sustain a social order in which social justice prevails and human dignity is protected and the human values and not the power of money and the power of property as at present, truly govern the nation.

21. Such a system is capable of being created only if we have the legal training and the requisite socio-economic background essential in the men administering the laws through the courts of the land and in the men assisting the courts in the process of their administering justice.

22. I may here quote Justice Krishna Iyer (now on the Bench of the Supreme Court) what he has said on the topic "Judiciary: Our Trust with Destiny" at page 65 in his work 'Law and the People':—

"When the Indian story after independence comes to be written, critics prophesy, only a few dubious pages may be devoted to the judiciary of the first quarter century of the republic because the national balance-sheet shows against it more debits than credits. Placed among the three great institutions of democracy, our judicial department has been assigned an important role in the Indian Constitution the keynote of which is justice—social, economic and political.

A country, steeped in material and cultural poverty and wrapped in a feudal economy and mentality, venturing on a revolutionary course, needs vibrant instruments and activist cadres turned to the national urges and aspirations? And the question that is being obstreperously and currently debated is: Has the Indian judiciary sustained or stalled the constitutional evolution of a just society. Has it helped or obstructed the new rule of law which breathes the spirit of rapid but peaceful democratic changes in the economic, political and social fields in response to popular demands in accordance with law and not in defiance of law? Lawless protests, even if understandable, present the peril of breeding paralawless counter-pressures, both together contributing to a stalemate, instability and chaos or political free-for-all in the country, pushing back national advance and social change.

It is in this context that we have to view the demand for judicial activism and the force in the charge that the judiciary squints towards the status quo and looks askance at rapid legislative action. The constitutional fires of socio-economic controversy have been ranging in the highest courts in the land for some years now, even as counsel have elaborated endlessly the legal nuances relating to land legislation and socialistic measures, and learned Judges have independently delivered formidable pages of scholarly and contradictory opinions. But all this has affected the country's destiny a great deal and in a profound sense, so much so that an Indian Judge may repeat about our Supreme Court and High Court the words of Justice Holmes: "We are very quiet there, but it is the quiet of a storm centre."

The founding fathers of the Constitution the appellation euphemistically applied to

the members of the Constituent Assembly must have had high expectations about the judiciary in India playing an active role in bringing about the social revolution which would fulfil the national aspirations. 'Long years ago we made a tryst with destiny and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially.' This was the voice of India speaking, and, twenty-two years after, Indian masses wonder whether the judiciary has redeemed its portion of the pledge".

23. Further comment is unnecessary. It is therefore clear that the establishment of social justice through the instrumentality of the Constitution and the laws made within its

framework, would be possible only if the nation is able to create men who have imbibed the right ideology necessary for apprehending the realities of the society as it is and the society to take shape by the implementation of the Directive Principles and who will be able to man the judiciary and function as those who aid the administration of justice.

24. It is further needless to add that the institutional structure of the courts of law as at present constituted is hardly suited to achieve the stupendous task of social change necessary to make this nation one which reflects the true social justice and the institutional pattern that must be evolved in order to achieve the purpose should be the subject of an independent study.

REVIEWS

LAW OF WRITS. By V. G. Ramachandran, M.A., B.L., Honorary Editor. Supreme Court Cases. 2nd Edition, 1975. Eastern Book Company, 34 Lalbagh, Lucknow. Pp. li & 821. Price, Rs. 60.

The Union President's declaration of Emergency and the latest suspension of the right of the citizen to move the Courts in matters affecting his fundamental rights in several ways must be having their necessary impact on the legislative exclusion of judicial review by Courts. It is said that writs, followed by stay orders of Courts, have come in the way of investigation of tax evasion cases and Government are therefore considering changes in the Constitution to ensure that judicial processes do not interfere with the investigation of economic offences. It is worth examining how popular and effective has been the writ remedy as a weapon for the citizen to question the ever-increasing State interference in this vital field. Since 1963, when the present treatise was originally published, the Law of Writs has seen vast changes, both substantively and procedurally. The original treatise on Fundamental Rights and Constitutional Remedies (4 Volumes) has in the second edition been converted to two separate publications: Fundamental Rights and Constitutional Remedies., Volumes I and II (1970 Edition), and the Law of Writs (1975 Edition).

2. The chapters in the earlier edition dealing with Government Privilege and Constitutional Appellate Remedies have now been omitted as they do not come within the scope of a treatise on writs, and there has been a general re-arrangement of the chapters, each of which is introduced by a very useful

synopsis. A new chapter has been added on Practice and Procedure. It deals with the legal interest required to apply for a writ, parties in a writ proceeding the respondents in a writ, Court-fees, and mis-statements in writ petitions. Affidavits, estoppel, pleadings, jurisdictional objections, and domestic and other tribunals are covered, as well as limitation, costs, and the practice in the Supreme Court and the High Courts.

3. The Courts in India now recognise the rule in *Bidge v. Baldwin* (see A.I.R. 1970 S C 150) that the rules of natural justice have to be obeyed even in administrative and executive inquiries. This matter has been dealt with at length in the chapter on the Writ of Habeas Corpus, which considers cases of preventive detention, procedure, appeal, scope of review, the Extradition Acts, the Maintenance of Internal Security Act, 1971, and suspension of the right to Habeas Corpus by the President.

4. The book deals with the history of prerogative writs in India and constitutional remedies through writs. It is concerned with the writs of Certiorari, Prohibition, Mandamus, and Quo Warranto, and discusses the rule of natural justice in judicial review and the scope of judicial remedies in the High Courts and the Supreme Court, while examining where judicial review is excluded. In addition to a useful index and table of cases, in the Appendices have been included copious forms and model petitions of writs. The rules of the Supreme Court and the various High Courts as to writ jurisdiction have also been given. The present volume should be quite as popular with the Bench and the Bar as the earlier edition.

R.S.S.

THE LAW OF CENTRAL SALES

TAX. By Shambhu Dayal Singh, MA., LL.B., formerly Judge, Allahabad High Court, assisted by Vishnu Dayal Singh, M.A., LL.B., Advocate, Eastern Book Company, Lucknow, 2nd Edition, 1975. Pp. liii & 705. Price, Rs. 55.

When the last edition of this book was in the press, an amending bill was before Parliament. That bill has since then been passed as Act 61 of 1972, with some further amendments in it. There has been substantial addition to the case law under the different provisions of the Act. The case law has therefore been brought up to date and revised suitably in order to remove the flaws discovered in the meanwhile.

2. The view taken by the Courts in *State of Mysore v. Yadalam L. Setty & Sons*, (1965) 19 S T O 231 and other connected cases now stands overruled by virtue of the amendments made in Sections 8 and 9, as not being in keeping with the intention of Parliament. It is said that the movement of goods from one State to another was resulting in evasion of tax, and Section 8-A therefore places the burden of proof on the assessee to prove that such transfer of goods was not the result of a "sale". The amendment to Section 15 makes it necessary for an assessee to pay tax on the inter-State sale of declared goods first before claiming refund of intra-State sales tax he had paid earlier. Even the different clauses of Section 14 have been amended, particularly those relating to "iron and steel" and "oil-seeds".

3. The Central Sales Tax Act, 1956 defines "inter-State sales or purchases", "sales in or outside the State", "sales in the course of import or export", and "goods essential for the life of the community"; it also levies a tax on inter-State sales, though for the benefit of the States. Act having been enacted against the background of the law which had earlier developed under Art. 286 of the Constitution, that law has been discussed in the present publication under the heads of constitutional provisions, sales inside or outside the State, sales or purchases in the course of import or export, inter-State sales or purchases, and essential goods. The text of the Act is then reproduced, with a exhaustive commentary, which is followed by a useful synopsis. The commentary analyses and explains the different provisions of the Act in the light of the accepted principles of interpretation, all connected information being duly incorporated. The Appendices give all the amending Acts, Rules, Ordinances and Orders as issued from time to time.

4. Members of the Bench and Bar as well as the business community should find the book as useful as ever. An exhaustive index and table of cases add to the utility of the book. R.S.S.

THE CONSERVATION OF FOREIGN EXCHANGE AND PREVENTION OF SMUGGLING ACTIVITIES ACT 1974 (A critical study). By S. K. Ghosh, Formerly Inspector-General of Police, Orissa. Foreword by S. R. Das, Retired Chief Justice of India. Eastern Law House, 54 Ganesh Chunder Avenue, Calcutta. 1975. Pp. xi & 155. Price, Rs. 30.

This book is a commentary on the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974; Maintenance of Internal Security (MISA Amendment) Ordinance; and Presidential Orders barring judicial remedies to persons suspected of smuggling and foreign exchange racketing. This Act replaced the MISA (Amendment) Ordinance and came into force with effect from 19th December, 1974. The pronouncements of the High Courts on the detention of these suspected offenders have been taken from newspapers, as they had not yet been officially reported at the time the book went to press.

2. The book includes chapters on the Presidential Orders suspending fundamental rights, reported judicial decisions, preventive detention in selected foreign countries, the impact of administrative lapses on the national economy and the role of lawyers in the protection of the freedom of the individual. Relevant extracts from the Constitution of India have been given as well as the Fundamental Rights mentioned in Part III of the Constitution and the Universal Declaration of Human Rights. Excerpts are given from the Rules on Standards of Professional Conduct and Etiquette (Advocates Act 1961), and there is a note on the right of detenus to communicate with those whom it is necessary for them to consult in order to ensure their defence or to protect their essential interests.

3. A distinguished public servant, who has retired from the police department and has been in the midst of the fray, here offers comments and opinion borne out of a lifetime of experience and observation. His *Crisis in Administration* already pinpointed the deficiencies and irregularities in the administration which clamour for a thorough overhaul. His latest thesis on COFEPOSA only reinforces his oft-repeated plea that the existing provisions in the Constitution are adequate

enough to handle any situation however difficult, if only the Government were functioning with a full sense of alertness and efficiency. The Foreign Exchange Regulation Act, the Customs Act and the Preventive Detention Act contain stringent provisions for the apprehension and detention of offenders, and where was the need, it may be wondered, for the COFEPOSA and making it impossible for the offenders to move the courts for relief. Ostensibly because these measures in the armoury of the executive have proved inadequate. An outspoken piece of criticism, which is no tribute to the way in which the executive arm of Government has been functioning.

4. On the question of barring judicial remedy to the detenus, how can we be sure it is asked, that either by mistake or by malice an innocent man has not been detained, and what is there to prevent misuse of the law? What is the guarantee that corrupt officials will not involve innocent men or shelter the guilty if it pays them to do so? These are questions to ponder over. B.S.S.

THE WEST BENGAL LAND REFORMS ACT 1955. By A. N. Saha, B.Sc., LL.B., Eastern Law House, Calcutta. 3rd Edition. 1975. Pp. (21), 296 & xii. Price, Rs. 20.

The book under review includes the West Bengal Land Reforms (Bargadars) Rules 1956, the W. B. L. R. (Prescribed Authority) Rules 1964, the W. B. L. R. (Transfer of Holding) Rules 1965, the W. B. L. R. Rules 1965, the W. B. Bargadars Act 1956, the W. B. Restoration of Alienated Land Act and Rules 1973. Since the publication of the second edition of this book in 1969, several amending Acts have been passed. The most outstanding feature of these Amending Acts is the introduction of Chapter IIB in this statute in 1971. The new sections in this Chapter were again amended in 1974, but some of the sections have been declared to be void, they being violative of Article 31A (1) of the Constitution of India (*Dayamaya Devi v. State of West Bengal*, 78 C. W. N. 639) and, in consequence, some other sections also cannot be given effect to. A Letters Patent Appeal against this decision was pending at the time of the publication of this book and the matter is perhaps, still *sub judice*.

2. The West Bengal Land Reforms Act 1955 has 60 sections including those on raiyats, restrictions on alienation of land by scheduled tribes, bargadars, provisions as to revenue consolidation of lands in holdings

and co-operative farming societies, principles of distribution of lands, maintenance and revision of the record-of-rights, and the management of estates vested in the State. There is a useful historical introduction, table of cases and index.

3. The present edition has been entirely revised, enlarged, and brought up to date and expounds the latest position in law; it is supposed to be the only complete book on the subject. Each topic has been illustrated by decisions reported and unreported on this statute, as well as by the case law on analogous statutes of other States. Citations and Rules have been brought up to date, and the principles behind the law can be traced in the author's method of historical development.

4. Believed to be highly dependable, the volume should be of assistance to the lawyer, the Judge, and others interested in the working of this statute. B.S.S.

ANDHRA PRADESH CO-OPERATIVE SOCIETIES ACT, 1964 AND RULES (WITH COMMENTARY). By M. S. Hanumantha Rao, Joint Registrar of Co-operative Societies (Retd.) 1974. Prasad Publishers, Saraswathi, New Nallakunta, Hyderabad. Pp. xx, vii & 484. Price, Rs. 30.

The Andhra Pradesh Co-operative Societies Act 1964 provides for the appointment of the Registrar of Co-operative Societies and other persons to assist him in the registration and supervision of the societies, and deals with the qualifications for membership of the society and its committee of management and rights of members. It covers certain privileges of societies such as first charge on certain movable properties of members and the properties exempt from attachment, State-aid to societies and incidental matters. It confers on the Registrar and the Auditor certain powers of inquiry, inspection and auditing and recognises the Registrar as the judicial authority to adjudicate on disputes between societies and members and their employees, and provides the mode of dissolution of societies. It vests in the Registrar the powers of executing decisions, decrees and orders, and creates the revisional and appellate authorities under the Act. It regulates land mortgage banks in the matter of raising funds, advancing loans, and recovering dues. It specifies the offences under the Act and the penalties for them. It provides for matters such as supervision of societies, creation of common cadres of employees, bar of jurisdiction of civil courts except under the extraordinary powers of

the High Court under Article 226 of the Constitution.

2. This lucid and exhaustive commentary covers all the important aspects of co-operative law, and states the principles in a simple form, illustrated with cases, Government notifications, and Registrar's circulars. The legal position in relation to subjects like the organisation, registration and management and adjudication of disputes should minimise the chances of fruitless litigation. The author has collected both reported and unreported decisions and included other State and Central legislation bearing on the subject. There is a useful introduction, table of cases, and index; extracts from relevant statutes and labour laws are an additional feature.

3. There is little doubt that the publication will be of great assistance not only to the officers of the co-operative department but also to lawyers, teachers and students alike.

R. S. S.

NARAYANAN ON TRADE MARKS AND PASSING OFF. 2nd Edition, 1975. By P. Narayanan, M. A., LL.B. Eastern Law House, Calcutta. Pp. (56) & 1272. Price. Rs. 150.

This exhaustive and authoritative treatise on the law and practice relating to trade marks, passing off, and criminal offences relating to trade marks and false trade descriptions was first published in 1971, the author having served in the Trade Marks Registry for over thirty years. Since then a number of judicial decisions, Indian and English, have been reported, of which the GE case ((1972) 2 All E R 507 (H. L.)) and the DRISTAN case (75 O. W. N. 119) are the most important. Licensing of trade marks has still remained on the fringes of trade mark law, but in view of the current importance of this topic, a separate section has been devoted to it in this edition. It deals with licensing and assignment, how far licensing is possible, and licensing of registered and unregistered trade marks. Dealing with registered users, the book discusses trafficking in trade marks, control by registered proprietor, procedure for registration, consideration by Central Government, interests of the general public, rights conferred on the registered user, appeal and breach of contract.

2. The present edition incorporates all the new cases. The chapters on Action for infringement and Passing Off have been made more exhaustive. They cover, inter alia,

pleadings, defences, evidence, relief, injunctions, damages and account of profits, and costs. The distinction between infringement and passing off action is discussed, and topics like likelihood of deception, passing off based on use of words, imitation of get-up, and trade names have been covered. Certain provisions in the Foreign Exchange Regulations Act 1973 affecting the permitted use in India of trade marks owned by certain categories of persons have also been discussed.

3. The full texts of all relevant statutes, both Indian and English, repealed as well as unrepealed, along with comparative tables of corresponding provisions under the different statutes are included in the Appendix, which contains also the text of the Trade and Merchandise Marks Act 1958, the Trade Marks Act 1940, and extracts from various U. K. Trade Marks Acts. While the index has been made more exhaustive, a new feature of this Edition is the inclusion of a Table of Statutes and Rules. There are as usual the tables of cases and of statutes.

R. S. S.

NARAYANAN ON PATENT LAW. By P. Narayanan, M. A., LL. B. 1975. Eastern Law House, Calcutta. Pp. xxi and 1027. Price. Rs. 180.

A patent forms, in combination with technical knowhow, an essential part in every collaboration agreement between industrialists all over the world, and its importance in the economic development of a country can therefore hardly be exaggerated. In India, the Patents Act 1970, which embodies the personal law, is modelled largely on the lines of the Patents Act 1949 of the United Kingdom. It also embodies many principles recognised in the patent systems of other industrially advanced countries. The basic principles of patent law are broadly the same throughout the world; differences exist mainly in the details of each system.

2. The present exhaustive treatise presents the law and practice relating to patents in India in a readily accessible and comprehensible form. After an introductory chapter, the book deals with patentable inventions, how to obtain a patent, patent of addition, specification and amendment of specification. It considers opposition to the grant of patent, grounds of opposition, register of patents, powers of Controller of Patents, Central Government and appeals, rights and obliga-

tions of a patentee, and transfer of patent rights. It is concerned with Government use of inventions, compulsory licences and licences of right, revocation and surrender of patents, grounds of revocation, action for infringement of patents offences and penalties, and proceedings before the High Court.

3. The book refers to a large number of decisions by Courts in England. They are not binding on Indian Courts, but their analysis of various problems and the principles expounded in determining them should be of value in the solution of similar problems not unlikely to arise under the Indian law. While interpreting the provisions of the Patents and Designs Act, 1911, the Courts in India have often followed with approval the principles contained in English decisions. Besides, the present Indian Act has adopted many important provisions of the U. K. Patents Act, 1949 and has also given statutory recognition to many principles enunciated in the decisions of British Courts.

4. The book deals with the subject topically and illustrates every principle by case law drawn from Indian and English decisions. The author does not follow the conventional way of writing a running commentary on the sections of the Act. His method of presentation may be particularly useful to those who have no legal training but are, all the same, interested in the protection of inventions or in their commercial working.

5. The texts of all important Indian and English statutes, both current and repealed, are included in the Appendix, in order to enable the reader to have a critical appreciation of the principles embodied in the decisions referred to in the book. The comparative tables of statutes in the Appendix should facilitate the location of the sections of the English Acts corresponding to particular sections of the Indian Act and vice versa. Besides the table of cases and exhaustive index the book also includes a table of statutes. The text of the Patent Act, 1970 in the Appendix contains footnotes giving references to the paragraphs in the book where particular sections have been discussed. Arranged in a convenient manner, this mass of information can justly be called an Encyclopedia of patent law and practice in India.

R.S.S.

WEST BENGAL AND DELHI SALES TAX LAWS. By Deviprasad Pal, Ph.D., D.Litt., and Pabitra Kumar Bose, Member, Commercial Taxes Tribunal, West Bengal. 1975. Eastern Law House, Calcutta. Pp. (82), 52 & 220. Price, Rs. 100.

The publication before us contains the Bengal Finance (Sales Tax) Act, 1941, with commentary, the Bengal Sales Tax Rules, West Bengal Tribunal Regulations, West Bengal Incentive Scheme, the Bengal Finance (Sales Tax) Act as extends to the Union Territory of Delhi, Delhi Sales Tax Rules, and relevant provisions of the Central Sales Tax Act and the Constitution of India. Many other States have followed the scheme and pattern of the Bengal Finance (Sales Tax) Act, 1941 and, therefore, in writing a book on the principles of Sales Tax legislation, the authors have adopted the Bengal Act as the basis for discussing the fundamental principles and the judicial decisions which have grown around them. The Courts, while interpreting the law, often make the law and the present book has tried to highlight also this judge-made law. There is a detailed survey of the judicial decisions as useful guidelines in the applied fields and conflicting decisions have been sorted out on lines followed by the judiciary.

2. The spate of amendments and volume of judicial decisions has called for such a volume as this, and readers who may be interested in particular topics may find useful the reference in the foot-notes to the text shown by italics. The book opens with a chapter on the interpretation of statutes, especially of fiscal legislation, and a section-wise commentary on the Act. The authors have had also to deal with legal fictions, writs, ouster of the civil Courts' jurisdiction, delegated legislation, doctrine of *ultra vires*, waiver, estoppel, res judicata and like topics drawn from many other branches of law like Contract, Sale of Goods, Partnership, Agency, Hire-Purchase, Companies Act, Income-tax Act, Civil Procedure Code I. P. O., Evidence, and Limitation. Although the basic principles of sales taxation appear simple, the difficulties arise in the solution of such vexed questions as the constitutional validity of searches seizure and confiscation, liability of firms, liability of quondam firms, and the juristic personality of abnormal persons—questions of law which have to be interpreted in the light of judicial decisions.

3. The book carries a table of cases and index.

R.S.S.

OFFICER'S COMPANION IN ADMINISTRATION AND LAW. By Ananda Swarup Misra, Advocate, High Court. Foreword by H. N. Bahuguna, Chief Minister, Uttar Pradesh. 1975. Eastern Book Co., Lucknow. Pp. xl & 976. Price, Rs. 75.

Here is a complete study of the whole field of an administrative officer's duties and responsibilities, rights and privileges, whether the officer is in the executive or the judicial branches of Government and whether he is in State Government, Central Government, or the All-India Services. A convenient reference book, its perusal should lead to a better understanding of the duties and responsibilities of the civil servants. Officers on the judicial side and legal practitioners should also find the book of assistance. Judges and Magistrates are equally subject to the same rules in service matters and they have also their administrative functions to perform.

2. Matters arising from administrative decisions frequently come within the purview of the Courts whose pronouncements are intended to regulate the conduct of administrative business, notably cases arising from the violation of the rules of natural justice. The book should be specially useful to those members of the legal profession who undertake the drafting of appeals and representations for aggrieved civil servants. It goes much further than the author's *Government Servants' Companion* and contains many new chapters dealing with the obligations and responsibilities of administrative officers as propounded by the Supreme Court and the High Courts.

3. The book deals with the Constitution and its relationship to civil services, the rule of law and its observance by the executive authorities, quasi-judicial functions of the administrator, rules of natural justice, and freedom from bias and mala fides. Contempt of Parliament and integrity certificates and measures to check corruption, general service matters, financial subjects, and secretariat, office management, and routine are considered. The part dealing with disciplinary proceedings contains practical guidelines for the enquiry officer, the punishing and appellate authorities, and the accused officer himself. Copious references have been given to the G. Os. of the Uttar Pradesh Government. Matters connected with law Courts, contempt of Court with special reference to administrators, protection of officers against legal action, judicial control of administration, remedies against defective orders, writs and suits in aid of civil servants have received ample treatment. There is a table of cases,

subject index, and synopses at the head of each chapter.

4. The book is liberally documented by reference to the authorities upon which the various propositions in the text are based. Where necessary the text itself is given to give one a clear idea of the subject. On points on which there are rulings of the Supreme Court and the High Courts, reference has been made to them. For the benefit of officers with no training in law, the propositions have been illustrated by examples, and, sometimes, the author himself makes suggestions of an advisory character. R.S.S.

THE COMPULSORY DEPOSIT SCHEMES ACTS. By C. C. Anajwala, B.A.(Hons.), LL.B. 1975. C. Jamnadas & Co., 146-C, Samaldas Gandhi Marg, Bombay. Pp. xxii & 320. Price, Rs. 20.

It is common knowledge that inflationary forces have been plaguing the country for some time. The persistent rise in prices has eroded the capacity to save and imposed a painful constraint on the flow of investible resources so badly needed for the development of the nation. In 1974 the Government too did their best to fight the inflationary forces. They launched a vigorous drive against economic offences like smuggling, hoarding and black-marketing, tax evasion, foreign exchange racketeering, and spurious units indulging in malpractices relating to scarce commodities. Consumer expenditure was restrained by limiting dividend incomes, and impounding increases in wages, salaries and part of additional dearness allowance. And now signs are not wanting that stability is slowly returning.

2. The present volume contains detailed and analytical commentaries on the three anti-inflationary enactments, the Additional Emoluments (Compulsory Deposit) Act, 1974, the Compulsory Deposit Scheme (Income-tax Payers) Act, 1974, and the Companies (Temporary Restrictions on Dividends) Act, 1974, with schemes, rules, notifications, orders, press notes, and explanatory and critical commentaries. They concern almost everybody, whether employer, employee or shop, establishment, company, shareholder or taxpayer. The Commentaries should enable the reader to comprehend the meaning and scope of the various statutory provisions and his obligations under them.

3. The book includes a table of cases and index. It should be quite useful to all concerned with the enforcement of the provisions of these laws, including employers and em-

employees, income-tax payers and income-tax authorities, companies and their shareholders, as well as legal practitioners and chartered accountants. R.S.S.

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974) by S. C. Sarkar. Vols. I & II 4th Edn. 1975. Pp. 140+885. Price Rs. 90/-. Published by S. C. Sarkar & Sons Ltd., Calcutta.

There has been a spate of 'Commentaries' on the new Criminal Procedure Code since it was enforced on 1.4.1974. However only a few of them could properly be so called. It would therefore seem that old classics in the field still hold the fort.

One such classic first to appear in complete form is S. C. Sarkar's Criminal Procedure Code, 1973. The fact that it has run into four editions within a span of two decades speaks volumes about its quality.

Since the new Code has effected drastic changes in the procedural pattern, with a view to minimise 'proverbial laws' delays and introduced new concepts hitherto unknown, the task before the revising editors was a demanding and meticulous one. Even a cursory glance at the comments convinces one that the editors have acquitted themselves well in sifting the wide and wild mass of case law and deducing therefrom general propositions of universal application.

The authors have succeeded in fully bringing out the contents and meanings of the new provisions and explained lucidly the changes made in the old provisions. All aspects of procedure have been treated most comprehensively and precisely. Critical comments on the provisions are based on their court experience. Exhaustive indices, topical & nominal, will help the busy practitioner to find out relevant topics and particular cases easily & quickly. It is thus an indispensable work of reference for practitioners and presiding officers of Magistrate Courts alike—nay it is their *vade meum*. AGT

STROUD'S JUDICIAL DICTIONARY:

(4th Edition—In 5 Volumes): By Mr. John S. James, Barrister-at-law. Published by Sweet & Maxwell Ltd., London. (Available in India with M/s. N. M. Tripathi Private Ltd., Bombay). Price (per set of 5 Vols.) Rs. 1050.00.

The 3rd edition having been published in 1951-53, the publication of the 4th edition in 1971 has come not too soon. In fact, the legal profession had been eagerly waiting for

the arrival of this new edition for quite some time.

In the preface of the 1st edition the author had declared that it is a "Dictionary of the English language" and does not cover the same ground trodden by "Law Lexicon". Even in this latest edition Mr. James has taken care to see that all words and phrases used in judicial pronouncements, Legislations, Orders, Rules, etc. give their full import and nuances of shades also.

Knowledge never gets stale. Statutes may get amended or repealed, yet interpretation placed on them can never become useless simply because a certain enactment is no longer on the statute book or not in its original form. The judicial interpretation thereon is always invaluable and the present author has done well in retaining those judicial interpretations although the statutes have either been amended or even repealed. He has also retained changes adopted in the third edition thereby increasing its value to those who have been familiar with the get up of the third edition.

The entire dictionary is suitably divided in five handy volumes, well bound, nicely printed in easy to read type, though one would not venture to say as moderately priced. But one also cannot forget that such monumental work needs alert mind, industrious disposition and dedication to the cause undertaken. When such rare virtues are combined in a book one must be ready for paying adequate price also.

Even for a fresher, standing on the threshold of legal profession, the dictionary presents large avenues of knowledge. To think of "Charitable purpose" one will find that judicial pronouncements have noticed as many as 102 purposes as charitable while 58 have not been recognized as such.

Throughout the dictionary, nothing is said about anything without quoting an act or a judicial decision, to support what is stated.

Indian Statute Law is mostly modelled on British statutes, so what is stated herein about British statutes and decision though not binding on any of the Courts in India can certainly help an Indian lawyer or a Judge in interpreting corresponding provision of an Indian Statute.

No judicial Library — in Law Courts, Law Departments or good lawyers — can be complete without a copy of the latest edition of this dictionary. B.D.B.

COMPANY DIRECTORS. Third Edition. By S. R. Brown, LL. B., F.C.A., and P. R. Grogan, B.A., LL.B., B.Ec. With a Foreword by Justice L. W. Street, Chief Justice of New South Wales. 1974. The Law Book Company Ltd., 301-305, Kent Street, Sydney (Tripathi). Pp. xviii and 463.

Since the publication of the second edition of this concise treatise on the duties, powers, rights and liabilities of company directors in Australia, extensive amendments have been made to the Companies Acts, new State Securities Industry Acts have been introduced, and considerable changes effected in the regulations and listing requirements of the Australian Associated Stock Exchanges, and the present revised text deals with these developments.

2. In 1967 the Company Law Advisory Committee (the Eggleston Committee) recommended additional provisions for the protection of the investing public, and the 1971 amending legislation was on the lines suggested. In 1970 the Australian Senate appointed a Select Committee to report on the desirability of establishing a securities and exchange commission, and the main finding of this Committee (the "Rae Report" so named after the Chairman of the Committee) was that the regulation of the securities market needed reform and that an "Australian Securities Commission" be established by the Government for the purpose. As the present book went to press, a Corporations and Securities Bill had been drafted by the Government, but it is understood to deal with only public companies.

3. The 1971 amending legislation made far-reaching changes in the accounts and audit provisions, in the duties and responsibilities of directors in their reporting to members, and in the law relating to takeovers and disclosure of substantial share holdings. The text of the present edition has had to be considerably expanded in order to incorporate these amendments. New chapters have been added on general meetings, directors and the stock exchange, and takeovers; the order of chapters has been rearranged, including relevant decisions up to 31st March 1974. The Companies Act of New South Wales has been generally quoted in the book, but where there are material differences in other State Acts, these have been mentioned, and the law is stated as at 31st March 1974.

4. After an introductory chapter, the book deals with the appointment and qualifications of a director, remuneration and loans, meet-

ings, directors as fiduciary agents, and their authority and powers. Their liability in general, and on contracts, and under prospectuses and in course of winding up, is covered, as well as the duty of care and vacation of office. There is a table of cases and index.

5. The entire responsibility for the management of a company rests on the Board of directors, and progress depends on their character and administrative acumen; and the present authors have presented an analysis of the requirements imposed by law on the directors and the discharge by them of their duties. They have steered a middle course between a heavy company lawyer's treatise and a student's elementary text book.

B. S. S.

RUSSEL-CLARKE ON COPYRIGHT IN INDUSTRIAL DESIGNS. Fifth Edition, 1974. By Michael Fysh of the Inner Temple, Barrister-at-Law. Sweet and Maxwell (Tripathi). Pp. xxiii and 314. Price, £ 10.50 net.

Among the important events which have occurred since the last edition of this work was prepared are the Design Copyright Act of 1968 and the House of Lords' decisions in *Amp Inc. v. Utilux Pty. Ltd.* and *G. Hensher Ltd. v. Restawile Upholstery (Lancs.) Ltd.* The House of Lords' decision in the former case has opened to the highest authority the important topic of exclusion from protection of designs having features which are dictated solely by function, while the decision in the latter case, which became available while the book was in the press, has been dealt with in a special Appendix. The far-reaching consequences of the Design Copyright Act 1968 have made it necessary to extend the short treatment accorded to copyright proper which appeared in the previous edition in connection with the decision in *Dorling v. Honnor Marine Ltd.*

2. After a brief description of the law of copyright in industrial designs, the author discusses the qualifications which an alleged design must possess in order to be a design within the meaning of the Act and the question of novelty and originality of the design. He deals with the topics of publication, applications for and dealings under registration, correction and rectification of the register, infringement of copyright in registered designs and action for such infringement. Action for threats, restrictions on registration, overlapping between the copyright acts and the designs acts, and copyright in artistic works, are then covered in this edition, the first in which the original author has had no part.

The Design Copyright Act 1988 radically changes the relationships between artistic copyright, under the Copyright Act 1956, and design copyright.

3. The last chapter considers how monopoly rights (and agreements involving those rights) stand in relation to the aims and working of the EEC, and examines the rules of competition which have been developed by the Community to meet the situation. The scope of this investigation of course trespasses into the province of patents, trade-marks, and know-how, but the emerging principles are generally applicable to the subjects with which this book is concerned.

4. The book, which carries tables of cases and of statutes and an index, reproduces, among the appendices, Registered Designs Act 1949, Copyright Act 1956, Design Copyright Act 1988 and the Design Rules 1949. The establishment of the Departmental Committee on Copyright Law under the Chairmanship of Mr. Justice Whitford was announced as the preparation of this edition was being completed, and the Committee was still taking evidence when the book appeared. Reported cases are covered up to and including (1974) *B. P. C.* 582; (1974) *F. S. R.* 28 and (1974) *I. C. M. L. R.* 428.

B. S. S.

SMUGGLERS' PARADISE AND FOREIGN EXCHANGE LAW. By H. L. Mansukhani. 1975. Vikas Publishing House Pvt. Ltd., 5 Daryaganj, Ansari Road, Delhi. Pp. xxiii and 535. Price, Rs. 60.

What amounts to infringement of foreign exchange and import-export control regulations through the medium of under-invoicing and over-invoicing? How is "concern" in any smuggling deal an offence? What to do with "notified" goods in any business pertaining to them? And, above all, how to go about all transactions with foreign countries? These and several other topics constitute the central theme of the book under review. It is a methodical study of every feature of the Foreign Exchange Regulation Act, along with its numerous rules, orders, and notifications.

2. The book has been divided into four parts, the first part dealing with the text of the Act itself analytically and describing its various provisions under convenient subject-heads like restrictions, powers and penalties. Every aspect of exchange law has been discussed in a systematic manner. The second part concerns important aspects of the law as it has operated and describes all the practices

and procedures regarding the processes of adjudications and prosecutions. It gives a subject-wise treatment of the broad issues which have emerged out of the enforcement processes.

3. Every successful "deal" under smuggling consumes foreign exchange and infringes the exchange laws, and the third part covers the many aspects of these smuggling operations, which the law proved woefully inadequate to prevent, detect or punish. The last, and final, part furnishes an authentic account to illustrate the episodes and other aspects of exchange law. Entitled "The Courts Speak", it provides a key subject-heading, a brief outline, the main ruling, and a condensed version of the Court's decision. Under Appendix I there is a further bunch of important decisions on clear-cut issues. These should serve as dependable reference and citation material for use in appeals and other Court proceedings. There are other appendices which furnish the text of the important rules, orders and notifications issued under the Act, besides the text of the special anti-smuggling enactment, the *Conservation of Foreign Exchange and Prevention of Smuggling Activities Act*.

4. This painstaking study clearly describes each step that needs to be taken to stay on the right side of the law. It discusses the provisions of the law that must be observed in declarations, collaborations, foreign commissions, royalties and other transactions. The book is a comprehensive and handy reference book for business houses; students of law and commerce should also find it highly useful. The case index and subject index are useful.

B. S. S.

A HANDBOOK ON STANDING ORDERS. Compiled by Bipin B. Vakil, B.A., LL.M. Advocate, and K. H. Rana, B.A., LL.B., D.L.P., Advocate. The New Gujarat Law House, Three Gates, Ahmedabad. 1975. Pp. xiv and 255. Price, Rs. 35.

The Bombay Industrial Relations Act 1946, which came into force on 29th September 1947, was made applicable to the various industries to which the Bombay Industrial Disputes Act 1938 applied. At present it applies to the following industries, viz., cotton textile, silk textile, woollen textile, hosiery, textile processing, sugar, banking, transport and electric supply services. The Act provides the procedure for settlement of Standing Orders for all industrial matters covered under Schedule I of the Act. Schedule I enlists the matters for which an em-

ployer is required to submit draft Standing Orders regulating the relationships between himself and his employees within six weeks from the date of the application of this Act or within six months of the starting of the undertaking.

2. In the handbook before us have been included the Model Standing Orders under the Bombay Industrial Relations Act 1946 and the Industrial Employment (Standing Orders) Act 1946, as well as the Standing Orders for the various categories of employees of the cotton textile industry at Ahmedabad and in the undertakings of the members of the Federation of Gujarat Mills and Industries. Almost the entire industrial scene of Gujarat has been covered, though it has not been possible to include model standing orders for the sugar industry.

3. Divided into four parts, the first part covers the model standing orders for operatives and other employees in the areas of Bombay State excluding Kutch and Saurashtra, the second part covers the areas of Kutch and Saurashtra in Gujarat State, the third part is concerned with the cotton textile industry of Ahmedabad and the members of the Gujarat State Mills and Industries, and the final part, consists of model standing orders framed under the Industrial Employment (Standing Orders) Act 1946 and the Bombay Industrial Employment (Standing Orders) Rules 1959 for workmen doing manual or technical work, clerical or supervisory work, and for working journalists.

4. The work should be useful to those who have to frame these standing orders and to officers who certify them.

R. S. S.

SOCIAL WORKERS, THEIR CLIENTS, AND THE LAW. By Michael Zander, Reader in Law at the London School of Economics. 1974. Sweet and Maxwell (Tripathi). Pp. ix and 122. Price, £ 1.40 net.

The work before us had its origin in the work of the Study Group on legal studies for social workers set up in 1972 by the Central Council for Education and Training in Social Work, of which the author was a member. The report of the Study Group suggested that social workers should be taught, first and foremost, "professional law", the law which concerns the carrying out by social workers of their professional duties. In addition to this, the Committee thought it essential that social workers should have a grasp of the general function and nature of law (described as "law

and society"), the structure and workings of the courts and tribunals and of the legal profession (described as the "administration of law") and the law that affects the day-to-day life of the client as an ordinary citizen, relating, for example, to his position as a tenant, consumer, recipient of social security or victim of an accident, (described as "general law").

2. The purpose of the present book is to give students and teachers the tools for such a desired course. Its aim is mainly to provide a basic text for social work students on law and society, the administration of law, and, especially general law. It does not include professional law. How to go about it in dealing with a legal problem is described, and then follow chapters on the courts system and tribunals, landlord and tenant, the family, personal injuries, social security, and the consumer and defective goods and services. Abortion, racial discrimination, wills, losing one's job, handling a criminal case, and action in the country court, are also covered. The law stated is that at May 1, 1974, but the Rent Bill and the Housing Bill, which were on the legislative anvil at the time the book was in the press, have been dealt with in a postscript. There is a useful index.

3. This is believed to be a first book to deal in a practical way with the day-to-day legal problems met by the typical clients of the social worker. It is a guide to the fundamental nature of law and to the basic organisation of the English legal system, and therefore invaluable to the social worker as a reference book. This book, it is hoped, will enable social workers to determine when legal problems can be adequately tackled by them and when they may require the help of a professional lawyer.

R.S.S.

THE LAW ON SECONDARY EDUCATION IN WEST BENGAL. By Harasit Chakravorty, Advocate, 1974. (Foreword by Mr. Sankar Prasad Mitra, Chief Justice, Calcutta High Court, and Introduction by Justice Anil K. Sinha. Amit Chakravorty, B. Sc. (Hons.). "Law Chamber", P. 36 Radhabazar Street, Calcutta 1. Pp. 218 and 462. Price, Rs. 20.

The publication before us contains the West Bengal Board of Secondary Education Act 1983, the repealed Act of 1950, old and new Rules, Government orders, notifications circulars, and up to date amendments. There has been such a lot of litigation in the Calcutta High Court and the different subordinate courts on questions affecting the interests of

educational institutions all over the State, that lawyers, teachers and school managing committees have been at a loss for a book containing up to date amendments and decisions on the subject. Legal practitioners and others have been in need of a book containing case law, with up to date amendments, together with commentaries on the West Bengal Board of Secondary Education Act 1963.

2. The present book includes a list containing references of important judicial decisions, important circulars and Government orders and a separate commentary with special reference to Article 226 of the Constitution of India. The author has discussed in detail the constitutional aspect of the statutes, with special reference to the constitutional remedies. There are also several chapters dealing with matters relating to appointment, termination of service, suspension and dismissal of teachers. Various decisions mutually conflicting have been analysed. The cases of the termination of the services of teachers on the ground of superannuation, of the supercession of managing committees, and the appointment of administrators and ad hoc committees have been discussed.

3. Only a few books are said to be available on the subject, which has been dealt with insight and ability. Several decisions of the Supreme Court, Calcutta High Court and other High Courts have been used to support the author's precise comments. Members of the legal profession and the educational institutions in West Bengal should find the volume of great assistance. R.S.S.

EUROPEAN INSTITUTIONS (Co-operation : Integration; Unification). By A. H. Robertson, B.C.L. (Oxon.) S.J.D. (Harvard). Third Edition. 1973. Stevens & Sons Ltd. London (Tripathi); Mathew Bender, New York. Pp. xix, 478 and viii. Price, \$ 6 net.

Published under the auspices of the London Institute of World Affairs, this volume describes the structure and functions of the more important European Organisations, with some information about their principal activities. It studies the practices followed and the conventions which are being established in the various international institutions in addition to the legal texts by which they were created. The institutions described in this book owe their origin to a specifically European movement for co-operation, integration, and unification, and have specifically European purposes.

2. The book starts with a historical survey of developments over the last twentyfive years and then deals with eight major insti-

tutions, viz., the Council of Europe, OECD, NATO, Western European Union, the Steel and Coal Community, the Economic Community, Euratom, and the European Free Trade Association. A separate chapter is devoted to each, except that the three European Communities are dealt with together; the author gives essential facts about the enlargement of the Communities and the text of the Treaty of Accession. The EEC constituent treaties and amending treaties have been published separately in two volumes, with the promise that the material will be kept up to date with further treaties and annual revisions of the annotations of the main texts (Sweet and Maxwell, 1974); these have already been reviewed. The present volume describes more summarily nine smaller or more specialised organisations. These are the European Conference of Ministers of Transport, the European Civil Aviation Conference, the Conference of Posts and Telecommunications, the European Organisation for Nuclear Research, the Space Research Organisation, the Launcher Development Organisation, and the Central Commission for the Rhine, Benelux and the Nordic Council. The various attempts made in pursuit of the goal of European political co-operation have also been described.

3. The value of the book has been greatly increased by the inclusion, as appendices, of the various treaties by which the different institutions have been created. In the present third edition the organisations dealt with are the same as in the second edition, but their development and enlargement have been described, and, in general, developments down to the end of 1971 are covered. The author has prepared a separate bibliography for each chapter, which includes the more important or general works; more detailed references are to be found in the footnotes. This objective and scientific study should contribute to a wider knowledge of what these European Institutions are, how they function, and what they are trying to do.

4. There is an index and a list of members of the European Organisations R.S.S.

INTERPRETATION OF STATUTES.

By Vepa P. Sarathi, Assistant Editor, Supreme Court Reports. Foreword by Dr. P. B. Gajendragadkar, Former Chief Justice of India. Eastern Book Co., 34 Lalbagh, Lucknow, 1975 Pp. xxvii and 579. Price, Rs. 40.

It is well known that the rules of interpretation of statutes in courts are rather unsatisfactory, because, among other reasons, they do not place sufficient emphasis on the

object of the legislature but try to get at the intention of the legislature. The existing rules can be properly understood only if one applies them to concrete situations and therefore, in giving illustrative cases, the author of the present study has given the facts, the problem involved, and the manner in which the Judges have tried to face them. In the introductory chapter he deals with the question why the interpretation of statutes is an important subject. He has evolved certain acceptable principles of interpretation and formulated them serially. He has referred to three broad methods of interpretation, the literal method of interpretation, the modifying method of interpretation, and "mischief method". Under the last method the court asks and answers the questions: What was the law before the statute? What was the mischief that the previous law did not deal with? And what is the remedy which the legislature has offered? Among the rules formulated by him are that the legislature's object should be ascertained as well as the literal meaning of the provisions of the statute, and that it should be determined whether the provisions are consistent with one another and achieve the object in view.

2. In attempting to cover the subject in a comprehensive manner, the author has divided the book into twelve chapters, which deal with the important topics which fall to be considered under the general problem of interpretation of statutes. Each chapter, which opens with a useful synopsis, is divided into different topics, and each topic is carefully examined and considered. The author deals with the general rules of construction, presumptions, internal aids, external aids, retrospective effect of statutes and repeals and temporary statutes. Taxing statutes, penal and remedial statutes, delegated legislations and interpretation of the Constitution are also discussed. The discussion of the different topics is supported by a wealth of authorities, consisting of the writings of jurists, and judgments, both Indian and foreign (Judicial Committee of the Privy Council and the Supreme Court). The author's method has been applied by him in dealing with different topics, and reference to them has been pointedly made in dealing with the interpretation of the Constitution. He has expressed views on the interpretation of Articles 19 and 31 and the consequential effect on the amending power in Article 368. He has also expressed some views on the administrative law as applied in our courts which require examination.

3. In Appendix I has been given the latest case law, that is, up to December 1974, in

appendix II, the General Clauses Act, and in appendix III, a list of Latin maxims and their English equivalents, followed by the usual index. There is also a table of cases. The subject of the present book is of general importance to students of law, jurists, lawyers as well as judges. R. S. S.

LAW RELATING TO GOVERNMENT SERVANTS. (With reference to provisions of the Indian Constitution.) By D. S. Chopra, B.Sc., LL. M., Advocate, Eastern Law House, Calcutta 13. 1975. (29) and 295.

An attempt has been made in this book to elucidate the law relating to Government servants as provided in the Constitution. Though only a few Articles (viz., 14, 16, 19, 309, 310 and 311) of the Constitution have been examined, many judgments of the Supreme Court and the High Courts have been analysed and explained.

2. Under Article 309 of the Constitution, statutory provisions can be made by Parliament and the State legislatures to regulate the recruitment and conditions of service of persons appointed to the public services and posts in connection with the affairs of the Union or the State. Until this is done, the President or Governors can make rules by executive orders. No comprehensive statute, it would appear, regulates the recruitment or conditions of service of Government servants. What we have is a mass of rules, by-laws, regulations and Government regulations.

3. It is believed that the two chief sources of litigation centre on Articles 14 and 16, and Art 311 of the Constitution. For an alleged violation of Art. 14 or 16 one may approach the Supreme Court directly; while for non-observance of the provisions of Art. 311, the remedy first lies with the High Court. Art. 16 guarantees to all citizens equality of opportunity in matters relating to employment or appointment to any office under the State. According to Art. 14 "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Service rules, if they violate any of the fundamental rights, including the right to equality under Articles 14, 15 and 16 would be to that extent null and void. Article 311 deals with a Government servant's dismissal, removal, or reduction in rank. It gives a Government servant the right to defend himself, and, while Art. 311 ensures to him an opportunity to show cause against the action proposed, Art. 320 interposes between him and the Government an independent and

responsible authority like the Public Service Commission for consultation and advice.

4. Following an introductory chapter, there are chapters in the book on the right to equality of the Government servants, civil servants and fundamental freedoms, recruitment and conditions of service, doctrine of pleasure, and security of service, besides appendices on the All India Service Act 1951 and Rules, High Court Judges (Conditions of Service) Act 1954, and Central Services Rules. There is also a table of cases, bibliography and index.

5. The right to transfer an employee, the author opines, is still the Government's exclusive right, and cannot be challenged except on grounds of mala fides. A senior or retired civil servant from a different State should be appointed as the head of the Tribunal to look into the grievances of Government servants in service matters. In dealing with service matters, the author adds, the Constitution should be amended and the writ jurisdiction of the High Courts should be abolished. R.S.S.

LAW OF EMERGENCY & SECURITY

(With special reference to the Maintenance of Internal Security Act 1971 and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974). By Mahabaleshwar N. Morje, B.Com., B.A., A.C.C.S. (Lond.), LL.M. Advocate, High Court, Bombay, and Professor, Government Law College, Bombay. Foreword by Justice G. N. Vaidya, of the Bombay High Court. S. S. Pradnya Prakashan, 23, Hamam Street, Fort, Bombay. Pp. xxiii & 326. Price, Rs. 50.

This book is the result of a study made by the author in the case of one of his clients who was arrested under the Maintenance of Internal Security Act 1971; but it took the shape of a book after the promulgation of the Ordinance of 17th September 1974, which applied to persons acting in a manner prejudicial to the conservation of foreign exchange and were also engaged in smuggling activities. In addition to the problems arising out of the Defence of India Act 1971, Preventive Detention Act 1950, and Essential Commodities Act 1955, the book specifically deals with the problems under MISA & COFEPOSA, and incorporates all these Acts and Ordinances.

2. The inclusion of the relevant Acts and Ordinances and important judgments bearing on them has made the book up to date. While the book was ready for publication a State of Emer-

gency was declared and the Fundamental Rights under Art. 19 of the Constitution remained suspended. Subsequently, another Presidential Order was issued forbidding those detained under the Emergency from moving the Court for relief, and a further Order was issued on 30th June '75 enabling the Government to detain one without assigning reasons, for a maximum period of one year, and another Order enabled the detention of alleged smugglers without furnishing grounds. There is no question of referring these persons to an Advisory Board during the Emergency. These Orders and Ordinances have been reproduced in the book. A Supplement (Ba. 5); which includes the MISA amendment empowering attachment of the property of the absconder and the amendment of the Constitution making the President's "satisfaction" about the existence of an emergency non-justiciable, has also been separately issued.

3. The three Parts of the book deal, respectively, with MISA and the Emergency Ordinances in the context of the constitutional provisions, the comments full and up to date, being preceded by useful synopses with COFEPOSA, and relevant Acts and Orders. These raise important constitutional, legal and political issues and pose a challenge to the executive, judiciary, and legislature, which have to exercise a rare degree of discipline and self-restraint in the interests of justice. As remarked by Justice Vaidya, the author of this book has taken extraordinary pains to present to the readers the legal aspects emerging from the rapidly evolving volume of case law through judicial decisions and juristic thinking. In this connection, we cannot but refer to the very handsome compliment paid by the author when he says, "this book could not have been written without the assistance of the Journal of the All India Reporter, which is very fast (?) in publishing the latest judgments of the Supreme Court".

While delivering judgments the law Courts have several times pronounced in favour of the privileges claimed by the detaining authorities, regarding the secrecy of their operations.

4. Recipient of a prize of Rs. 500 awarded by the Bombay Branch of the Indian Institute of Law for a research paper on Rent Acts and Ownership Flat Acts, the present author has written some other books.

5. The Table of Cases and Index are very useful. There is no doubt that the book can be of immense value to the Bench, the Bar, the authorities concerned, and even the general reader. R.S.S.

there been a definition of 'controlled accommodation', he who runs and reads would have gathered the intentment of the statute. Here is a further complication introduced by the addition of a proviso of sorts by the amending Act and a whole host of authorities on the canons of construction and functional role of a proviso and its indirect impact on the main provision has been brought to our notice. Does a proviso carve out something from the whole? Does it serve an independent enacting purpose? We do not think that legislative simplicity is an abstruse art, provided we reform our drafting methodology. The Renton Committee in England highlighted the importance of easy comprehensibility of law and wrote:

"There is hardly any part of our national life or of our personal lives that is not affected by one statute or another. The affairs of local authorities, nationalised industries, public corporations, and private commerce are regulated by legislation. The life of the ordinary citizen is affected by various provisions of the statute book from cradle to grave."

The instant case which deals with a legislation affecting the shelter of common people brings up the same problem.

6. The main definition of 'accommodation' in the Act brings within its sweep not all kinds of buildings nor all types of realty leases. The protected category is confined to those species of leases whose purpose and subject matter answer the statutory prescriptions. More explicitly, the wider connotation or dictionary meaning of 'accommodation' must yield to the definitional delimitation. The core of the controversy here is (a) whether the lease is of the building, the fittings and other fixtures merely making for the beneficial enjoyment of and ancillary to the building, as urged by the tenant, or whether the building provides a bare, though appropriately designed, enclosure to house an enterprise, the dominant purpose or real subject of the lease being the cinema, apparatus and fittings, including subsidiarily and incidentally, though necessarily, the structure of brick and mortar; and (b) whether the cinema, to fall within the exclusionary clause

added by the Amending Act, must be actually a going concern with all the licenses for showing films and running the theatre being in the name of the lessor. Lastly, the effect of the repeal of the Act and the opening provision of the later Act putting cinemas out of its application, has been debated at the bar.

7. The Central Act (The Cinematograph Act) and the State Act (The U. P. Cinema Regulation Act) govern the exhibition of films and it is not in dispute that the theatre had been built for and used as a cinema house even before the first lease to the respondent in 1953. The further agreed facts are that when the last renewed lease of 1959 with which we are directly concerned was executed, there was a running cinema business and further that the rent apportioned for the building qua building was only a fraction of the rent for the costly fixtures intended for the cinema business'.

8. Looking at the three problems posed, unaided by the many decisions cited by counsel, we are inclined to the view that a lease of an 'accommodation' must essentially be of a building — not a business or industry together with the building in which it is situated. Of course, a building which is ordinarily let, be it for residential or non-residential purposes, will not be the bare walls, floor and roof, but will have necessary amenities to make habitation happy. That is why the legislature has fairly included gardens, grounds and out-houses, if any, appurtenant to such building. Likewise, leases sometimes are of furnished buildings and that is why 'any furniture supplied by the landlord for use in such building' is treated as part of the building. In the same strain, we may notice, as a matter of common occurrence, many fittings such as electrical fittings, sanitary fittings, curtains and venetian blinds and air-conditioning equipment being fixed to the building by the landlord so that the tenant's enjoyment of the tenement may be more attractive. The crucial point is that these additions are appurtenant, subservient and beneficial to the building itself. They make occupation of the building more convenient and plea-

sant but the principal thing demised is the building and the additives are auxiliary. Where the lease is composite and has a plurality of purposes, the decisive test is the dominant purpose of the demise.

9. Forgetting for a moment the clause introduced by the amending Act, it is plain that the furniture and fittings visualized in the concept of 'accommodation' are calculated to improve the beneficial enjoyment of the premises leased. Counsel for the tenant has countered this interpretation by an ingenious and plausible submission. He emphasizes that the present building was conceived, designed and structured expressly as a cinema house conforming to the regulations in this behalf and the purpose of the owner was to use the auditorium and annexes purely as a cinema house. According to him, when a cinema theatre is erected, it becomes useless unless the necessary equipment for exhibiting films are also fitted up. In this view, the relative cost of the fixtures is immaterial and all these items, however costly, are calculated to fulfil the very object of the construction of the cinema theatre. In short, the fittings and furniture and like items are beneficial to and enhance the worth of the building and cannot be divorced or dissected from the whole object which animated the project of the building construction qua a cinema house. So presented, there is a certain attractiveness in the argument, although this facet of interpretation does not find a place in the submission on behalf of the respondent in the High Court.

10. What then is the flaw in this submission, or merit in the earlier one? The legislative policy, so far as we can glean from the scheme of the Act, is to control rents and evictions of buildings, rack-renting and profiteering by indiscriminate eviction from buildings, residential and non-residential, being the evil sought to be suppressed. The law sought to rescue exploited tenants of buildings. If this be a sound reading of the mind of the legislature it is fair to hold that the protected category of accommodation was residential and non-residential buildings and not business houses.

11. We have been at pains to explain that the subject matter of the leases covered by the definition of 'accommodation' is 'any building or part of a building'. We have carefully analysed the inclusive expressions in the original definition such as appurtenant gardens, grounds and out-houses furniture for use in the building and fittings affixed to the building. In this statutory context, gardens, outhouses, furniture and fittings mean annexures for the better enjoyment of the building. In this sense, the dominant intention must be to lease the building qua building. If that be the intention, the rent control law protects. On the other hand, if a going undertaking such as a running or ready-to-launch and fully equipped cinema house is covered by the provision, the emphasis is not so much on the building but on the business, actual or imminent. There is nothing in the present definition which helps this shift in accent.

12. We may reinforce our view from the expressions used, because all the three categories included as additions play a subservient role, while if a business were the subject matter of the lease, the prominent thing will be not what houses the business but the business itself. The building becomes secondary since every business or industry has to be accommodated in some enclosure or building. In all such cases, the lessor makes over possession of the building as part and parcel of the transfer of possession of the business. It would be a travesty of language to speak of a lease of a building when what is substantially made over is a business or industrial plant.

13. How then do we distinguish between a lease of a business or industry housed in a building from a building which has fixtures for more beneficial enjoyment? The former is a protected 'accommodation' while the latter is left for free market operation. In the present case we have to visualize what was the dominant or decisive component of the transaction between the parties, the tenancy of the building qua building or the taking over of a cinema house as a business, the projectors, furniture, fitting and annexes being the moving factor, the

building itself playing a secondary, though necessary, role in the calculations of the parties. Going by the rental apportioned, it is obvious that the parties stressed the cinema equipment as by far the more important. Judging by the fact that there had already been a cinema in this house for several years, with the necessary certificates under the various statutes for running a cinema theatre obtained by the landlord and that the lease itself was to commence only from the date of the first show of the films, doubts regarding the essential object and subject of the bargain stand dispelled. The mere circumstance that the licence for showing films was taken by the tenant is of little consequence as the law itself requires it to be in his name. The further circumstance that the term of the lease in one case may vary from the other also where, as here two deeds are executed, is not a telling factor, in view of the clear admission by counsel for the respondent that the two lease deeds together constituted a single transaction and that the lease was for an industrial purpose, to wit, running a cinema business. The conspectus of factors — no one circumstance taken by itself — thus settles the issue in favour of the landlord who contends that what has been granted is a lease of a cinema business and, at any rate, the real intent of the parties to the lease was to demise primarily the cinema equipment and secondarily the building, the lease itself being a composite one.

14. Social justice, legislative policy, legal phraseology and precedential wisdom converge to the same point that the scheme of control includes, as its beneficiary, premises simpliciter and excludes from its ambit businesses accommodated in buildings. To hold otherwise is to pervert the purpose and distort the language of S. 2 (a).

15. The amending clause, argues Shri Tarkunde, strikes a contrary note. For, if the main definition in itself fences off leases of business and industry, why this superfluous proviso expressly excluding accommodation 'used as a factory or for an industrial purpose where the business is

carried on in or upon the building is also leased out to a lessee by the same transaction'? The whole section must be read harmoniously, each part throwing light on the other and redundancy being frowned upon. A proviso carves out of a larger concept and the argument is that the need for the exclusionary clause itself shows that otherwise factories and businesses are within the operational area of the main definition.

16. There is some validity in this submission but if, on a fair construction, the principal provision is clear, a proviso cannot expand or limit it. Sometimes a proviso is engrafted by an apprehensive draftsman to remove possible doubts, to make matters plain, to light up ambiguous edges. Here, such is the case. In a country where factories and industries may still be in the developmental stage, it is not unusual to come across several such units which may not have costly machinery or plant or fittings and superficially consist of bare buildings plus minor fixtures. For example, a beedi factory or handicraft or carpentry unit—a few tools, some small contrivances or collection of materials housed in a building, will superficially look like a mere 'accommodation' but actually be a humming factory or business with a goodwill as business, with a prosperous reputation and a name among the business community and customers. Its value is qua business, although it has a habitation or building to accommodate it. The personality of the thing let out is a going concern or enterprise, not a lifeless edifice. The legislature, quite conceivably, thought that a marginal, yet substantial, class of buildings, with minimal equipments may still be good businesses and did not require protection as in the case of ordinary building tenancies. So, to dispel confusion from this region and to exclude what seemingly might be leases only of buildings but in truth might be leases of businesses, the legislature introduced the exclusionary proviso.

17. While rulings and text books bearing on statutory construction have assigned many functions for provisos, we have to be selective, having regard to the text and context of

a statute. Nothing is gained by extensive references to luminous classics or supportive case-law. Having explained the approach we make to the specific 'proviso' situation in Sec. 2 (a) of the Act, what strikes us as meaningful here is that the legislature by the amending Act clarified what was implicit earlier and expressly carved out what otherwise might be mistakenly covered by the main definition. The proviso does not, in this case, expand, by implication, the protected area of building tenancies to embrace 'business' leases.

18. We may mention in fairness to counsel that the following, among other decisions, were cited at the bar bearing on the uses of provisos in statutes: *Commr. of Income-tax v. Indo-Mercantile Bank Ltd.* (1959) Supp 2 SCR 256 at p. 266 = (AIR 1959 SC 713 at p. 718); *M/s. Ram Narain Sons Ltd. v. Asst. Commissioner of Sales Tax*, (1955) 2 SCR 483 at p. 493 = (AIR 1955 SC 765 at p. 769); *Thompson v. Dibdin*, 1912 AC 533 at p. 541; *Rex v. Dibdin*, 1910 P.D. 57 at pp. 110, 125 and *Tahsildar Singh v. State of U.P.*, (1959) Supp 2 SCR 785 at p. 893 = (AIR 1959 SC 1012 at p. 1022). The law is trite. A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must *prima facie* be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. 'Words are dependent on the principal enacting words, to which they are tacked as a proviso. They cannot be read as divorced from their context' (1912 A.C. 544). If the rule of construction is that *prima facie* a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.

"The proper course is to apply the broad general rule of construction which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest.

The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail."

(Maxwell on Interpretation of Statutes, 10th Edn. p. 162)

19. We now move on to 'dominant intent' as the governing rule. In our view, the dominant intent is found in leading decision of this Court. Indeed, some State Legislatures, accepting the position that where the dominant intention of the lease is the enjoyment of a cinema, as distinguished from the building, have deliberately amended the definition by suitable changes (e.g. Kerala and Andhra Pradesh) while other Legislatures, on the opposite policy decision, have expressly excluded the rent control enactment (e.g., the later Act).

20. In *Uttam Chand v. S. M. Lalwani*, (AIR 1965 SC 716) this Court had to consider an analogous position under the Madhya Pradesh Accommodation Control Act where also the term 'accommodation' was defined substantially in the same language. The Court was considering the grant of the lease of a Dal Mill vis-a-vis 'accommodation', as defined in that Act. Gajendragadkar, C. J., elucidated the legal concept which reinforces our stand, if we may say so with respect. The learned Chief Justice observed:

"What then was the dominant intention of the parties when they entered into the present transaction? We have already set out the material terms of the lease and it seems to us plain that the dominant intention of the appellant in accepting the lease from the respondent was to use the building as a Dal Mill. It is true that the document purports to be a lease in respect of the Dal Mill building; but the said description is not decisive of the matter because even if the intention of the parties was to let out the Mill to the appellant, the building

would still have to be described as the Dal Mill building. It is not a case where the subject-matter of the lease is the building and along with the leased building incidentally passes the fixture of the machinery in regard to the Mill; in truth, it is the Mill which is the subject-matter of the lease, and it was because the Mill was intended to be let out that the building had inevitably to be let out along with the Mill. The fact that the appellant contends that the machinery which was transferred to him under the lease was found to be not very serviceable and that he had to bring in his own machinery, would not alter the character of the transaction. This is not a lease under which the appellant entered into possession for the purpose of residing in the building at all; this is a case where the appellant entered into the lease for the purpose of running the Dal Mill which was located in the building. It is obvious that a Mill of this kind will have to be located in some building or another and so, the mere fact that the lease purports to be in respect of the building will not make it a lease in respect of an accommodation as defined by S. 3 (a) (y) (3). The fixtures described in the schedule to the lease are in no sense intended for the more beneficial enjoyment of the building. The fixtures are the primary object which the lease was intended to cover and the building in which the fixtures are located comes in incidentally. That is why we think the High Court was right in coming to the conclusion that the rent which the appellant had agreed to pay to the respondent under the document in question cannot be said to be rent payable for any accommodation to which the Act applies."

The ratio of that case is that the Court must apply the test of 'dominant intention of the parties' to determine the character of the lease i.e., what was the primary purpose of the parties in executing the document? The mere fact that the demise deals with a building does not bring it within the ambit of accommodation. In the case before us, the fixtures are not for the more beneficial enjoyment of the building. On the contrary, the possession of the building is made

over as an integral part of, and incidental to, the making over of the cinema apparatus and costly appliances. In the language of the learned Chief Justice in 'Uttam Chand' the 'fixtures are the primary object which the lease was intended to cover and the building in which the fixtures are located comes in incidentally'.

21. The following decisions were relied on, or referred to, by counsel for the appellant: *Raja Chetty v. Jagannathadas*, AIR 1950 Mad 284; *Mohd. Jaffer Ali v. S. R. Rao*, AIR 1971 Andh Pra 156 (FB); *Govindan v. Kunhilekshmi Amma*, AIR 1966 Ker 244, (FB).

22. *Rajamannar, C. J.*, speaking for the Division Bench in *Raja Chetty's case*, AIR 1950 Mad 284 dealt with the case of a lease of a cinema theatre in Madras in relation to the rent control law as it obtained in that State then. In that connection, the learned Chief Justice observed:

"We have come to the conclusion that the lessors' application in this case is not maintainable on other grounds as well. In our opinion the lease in question is not governed by the provisions of Madras Act, XV of 1946. That Act regulates only the letting of residential and non-residential buildings. In S. 2, building has been defined as to include the garden, grounds and outhouses appurtenant to the building and furniture supplied by the landlord for use in such building. In the case before us, there is no lease of a mere building or a building with compound and furniture of the sort covered by the definition. The lease is of land and building together with fixtures, fittings, cinematographic talkie equipments, machinery and other articles. The lessors, evidently aware of the composite nature of the demise, have prayed in their petition for eviction of the lessees from the land and buildings only. On behalf of the respondent, Mr. K. V. Ramachandra Iyer relied strongly on the provision in the deed which splits up the monthly rent and hire of Rupees 3,200/- into Rs. 1600 being rent for the ground and superstructure, Rs. 800/- being hire of furniture and Rs. 800/- being hire of talkie equipments and machinery, fittings and lessors' fixtures. We have no hesitation in holding

that this splitting is purely notional and nominal and intended probably for purposes relating to the municipal assessment and other extraneous considerations. When we asked Mr. Ramachandra Iyer what would happen, in this case when there is an eviction of the lessees from the land and building, to the machinery and equipments etc., and whether there was any provision in the deed relating to them, he confessed that there was no specific provision in the deed. Obviously they cannot be governed by Madras Act XV of 1946 and so he said they must be governed by the general law of contract. He also conceded that if the lessees paid Rupees 1600/- but defaulted in the payment of the balance which is due as hire, the lessors have no right to ask for eviction under the Rent Control Act. We think that the attempted division of the lease and separation of rights in regard to two classes of property is in the highest degree artificial, never contemplated by the parties. Here is a lease of a talkie house with everything that is necessary to run cinema shows. To split up such a composite lease as this into separate contracts of lease and hire is to destroy it altogether. Mr. Ramachandra Iyer argued that the furniture which was covered by the lease fell within the definition of Section 2 of the Act. We do not agree. The observations of the learned Judges in App. No. 590 of 1945 (Patanjali Sastri and Bell JJ.) in dealing with the plant, machinery and other moveables which were demised along with a factory are very apposite in this connection:

'No doubt in one sense the buildings comprised in the lease deed contain articles supplied by the landlord; but we cannot agree that what was so supplied can be considered in any modern sense as being furniture.'

Though in that case the learned Judges were dealing with the lease of a factory called the West Coast Match Co., which consisted of land and buildings including a bungalow used for residential purposes together with plant, machinery and moveables contained therein, we think the principle of that decision would apply equally to the case before us in which there is a lease not merely of a build-

ing but of a cinema theatre with all necessary equipment for the exhibition of films."

23. It is true that in Jaffer Ali's case AIR 1971 Andh. Pra 156 (FB) and in Govindan's case AIR 1966 Ker 244 (FB) (the Andhra and Kerala decisions referred to above) cinema theatres have been held to fall within the definition of building, under the relevant rent control law of those States. A bare reading of the two cases would show that certain amendments had been made to the parent statutes whereby the definition was expanded and its wide range was made to include all tenancies relating to all structures, even though accessories, furniture and fittings for use in the house were also made over. There is no doubt that the word 'fittings' may take in a projector or other apparatus used for a cinema but it is one thing to say that apparatus is fixed in a building and it is another to say that such fixture or apparatus is for the beneficial enjoyment of the building. Therefore it depends on the words used reflecting the legislative policy of each State Legislature. Indeed in Venkayya v. Venkata Subba Rao, AIR 1957 Andh Pra 619 a Division Bench of the Andhra Pradesh High Court considered whether the lease of a fixture comprising buildings and machinery came within the sweep of the rent control law. The court held that the lease of a running factory, comprising costly machinery intended to be used for manufacture, did not fall within the definition. The question, in each case, the learned Judges pointed out, would be what is the dominant part of the demise and what the main purpose for which the building was let out is. In Amritlal N. Shah v. Annapurnamma, AIR 1959 Andh Pra 9 the same court held that the lease of a cinema did not come within the purview of Madras Act 25 of 1949. Definitional ramifications need not detain us nor decisions turning on them.

24. Shri Tarkunde pressed upon us the decision in Karsandas v. Karsanji, AIR 1953 Sau 113 and Karnani Properties Ltd. v. Miss Augustine, AIR 1957 SC 309. One of them did refer to a cinema theatre with fittings and generators.

Certain Calcutta decisions, *Kali Prosad v. Jagadish Pada*, AIR 1953 Cal 149 and *D. S. Jain v. Meghamala Roy*, (1964) 68 Cal WN 1136 were also cited before us. In all these cases, the decision turned on the precise language used. We do not see any need to discuss these and the other decisions cited before us because we have explained why the conclusion we have reached is in consonance with the sense, purpose and language of the Act. For the same reason we content ourselves with merely mentioning that in *Harisingh v. Ratanlal* 1969 Jab LJ 639 a Division Bench of the Madhya Pradesh High Court held that a fully equipped cinema theatre let out for showing films of a commercial basis, being of a running cinema theatre, fell out of the scope of accommodation on the score that costly fittings, fixtures and equipment could, in no sense, be regarded and meant for the beneficial enjoyment of the building in which the cinema theatre was housed. The primary object and the definitional language used determine the issue.

25. Respondent's counsel did try to approximate the definition in the Act to that found in the enactments with reference to which decisions in his favour had been rendered. We do not agree. To hair-split is an unhappy interpretative exercise. Here the plain intendment is to encompass leases of buildings only (inclusive of what renders them more congenial) but not of businesses accommodated in buildings nor of premises let out with the predominant purpose of running a business. A lease of a lucrative theatre with expensive cinema equipment, which latter pressed the lessee to go into the transaction, cannot reasonably be reduced into a mere tenancy of a building together with fittings which but make the user more comfortable.

26. For these reasons we hold that the lease sued on does not fall within the scope of the definition of 'accommodation'. The appellant is, therefore, entitled to a decree for eviction, in allowance of his appeal.

27. The further question is as to whether the new Act which came into force in July 1972 applies to the present proceedings does not arise, al-

though Shri R. K. Garg, for the appellant, relied upon the express exclusion of cinemas by the new enactment. He also relied upon the ruling of this Court in *Quadratullah v. Bareilly Municipality*, AIR 1974 SC 396. We are not considering this argument or the counter-submissions made by Shri Tarkunde in this connection because the old Act itself does not cover the suit lease.

28. The short surviving point that remains is about the mesne profits. It is admitted by the respondent that he has been making a net income of Rs. 2,000/-. Adding Rs. 1,400/- which is the net rent under the lease, mesne profits at Rs. 3,400/- has been claimed by the appellant. It may not be quite correct to read into the admission a 'net income' although Shri Garg would have us do. It may be more appropriate to direct the trial Court to fix the mesne profits to be decreed from the date of the suit.

29. In the circumstances of the case we direct that on account of the uncertain position of the law and divergent decisions of courts, the parties do pay and bear their respective costs throughout.

30. A long-standing running cinema with outstanding contracts with film distributors cannot be uprooted overnight without considerable financial and business trauma to the affected party. It is but fair that we grant one year's time for the respondent to vacate the premises.

Appeal allowed.

AIR 1975 SUPREME COURT 1767

(From: Bombay)*

P. N. BHAGWATI, A. C. GUPTA
AND N. L. UNTWALIA, JJ.

Balwant Narayan Bhagde, Appellant (In both the Appeals) v. M. D. Bhagwat and others, Respondents. (In Appeal No. 75 of 1974) and The Punjabrao Krishni Vidyapeeth Akola and others, Respondents (In Appeal No. 76 of 1974).

Civil Appeals Nos. 75 and 76 of 1974, D/- 23-4-1975.

*(Spl. Civil Applns. Nos. 826 of 1968 and 389 of 1971, D/- 27/28-9-1973—Bom. at Nagpur).

GS/GS/B723/75/VSS

(A) Land Acquisition Act (1894), Ss. 16 and 17 (1) and S. 48 (1) (as amended by Maharashtra Act, 8 of 1958) — Mode of taking possession under — Waste and arable land — Government or Commissioner, when can withdraw from acquisition of land under S. 48 (1)—(Civil P.C. (1908), O. 21, Rr. 35, 36, 95 and 96).

It is well settled that after possession of the land forming the subject-matter of acquisition has been taken in accordance with Section 16 or 17 (1) of the Act, the land vests in the Government and the Government or any authority is not at liberty to withdraw from acquisition of any land of which possession has been taken. AIR 1966 SC 1593 and AIR 1970 SC 1576, Rel. on. (Para 4)

When the Government proceeds to take possession of the land acquired by it under the Land Acquisition Act, 1894, it must take actual possession of the land since all interests in the land are sought to be acquired by it. There can be no question of taking 'symbolical' possession in the sense understood by judicial decisions under the Code of Civil Procedure. Nor would possession merely on paper be enough. What the Act contemplates as a necessary condition of vesting of the land in the Government is the taking of actual possession of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard and fast rule laying down what act would be sufficient to constitute taking of possession of land. The presence of the owner or the occupant of the land is not necessary to effectuate the taking of possession. It is also not strictly necessary as a matter of legal requirement that notice should be given to the owner or the occupant of the land that possession would be taken at a particular time, though it may be desirable where possible, to give such notice before possession is taken by the authorities.

(Paras 1, 26, 28)

Though it cannot be laid down as an absolute and inviolable rule that merely going on the spot and making a declaration by beat of drum or otherwise would be sufficient to constitute taking of possession of land in every case it was held on the facts

and circumstances of the case that since the land was lying fallow and there was no crop on it at the material time, the act of the Tahsildar in going on the spot and inspecting the land for the purpose of determining what part was waste and arable and should, therefore, be taken possession of and determining its extent, was sufficient to constitute taking of possession. Even if the appellant (tenant) entered upon the land and resumed possession of it the very next moment after the land was actually taken possession of and became vested in the Government, such act on the part of the appellant did not have the effect of obliterating the consequences of vesting. Neither the Government nor the Commissioner could thereafter withdraw from the acquisition of any portion of this land under S. 48 (1) of the Act. (Spl. Civil Applns. Nos. 826 of 1968 and 389 of 1971, D/- 27/28-9-1973 (Bom) Affirmed.

(Paras 1, 2, 28, 29)

[Observations of Untwalia, J. regarding 'symbolical' and 'actual' possession under Rr. 35, 36, 95 and 96 of O. 21, Civil P.C., not assented to by Bhagwati and Gupta JJ.—Ed.]

Cases Referred: Chronological Paras

AIR 1970 SC 1576 = (1970) 2 SCC	4
149	4
AIR 1966 SC 470 = (1966) 1 SCR 628	22
AIR 1966 SC 1593 = (1966) 3 SCC	4
557	4
AIR 1954 Mad 760 = (1954) 1 Mad	24
LJ 585	24
AIR 1934 Pat 565 = 36 Cri LJ 146	23
AIR 1932 Pat 145 = 13 Pat LT 121	22
AIR 1917 PC 197 (2) = 16 All LJ	33
	21
(1889) ILR 16 Cal 530 (FB)	20
(1880) ILR 5 Cal 584 = 5 Cal LR 548	20, 21
(FB)	20, 21

M/s. Sardar Bahadur Saharya and Vishnu Bahadur Saharya, Advocates, for Appellants; Mr. M. N. Phadke, Sr. Advocate (A. G. Ratnaparkhi, Advocate with him) (for Nos. 1 and 2) In Appeal No. 75 of 1974; Mr. Niren De, Attorney General for India (Mr. M. N. Phadke, Sr. Advocate and Mr. A. G. Ratnaparkhi, Advocate, with him) (for No. 1) In Appeal No. 76 of 1974. M/s. K. L. Rathi and M. N. Shroff, Advocates, (for Nos. 3-6) in Appeal No. 75

of 1974 and (for No. 3) in Appeal No. 76 of 1974, for Respondents.

The following Judgments were delivered by

BHAGWATI, J. (on behalf of himself and Gupta J.):—We agree with the conclusion reached by our brother Untwalia, J., as also with the reasoning on which the conclusion is based. But we are writing a separate judgment as we feel that the discussion in the judgment of our learned brother Untwalia, J., in regard to delivery of 'symbolical' and 'actual' possession under Rules 35, 36, 95 and 96 of Order XXI of the Code of Civil Procedure, is not necessary for the disposal of the present appeals and we do not wish to subscribe to what has been said by our learned brother Untwalia, J., in that connection, nor do we wish to express our assent with the discussion of the various authorities made by him in his judgment. We think it is enough to state that when the Government proceeds to take possession of the land acquired by it under the Land Acquisition Act, 1894, it must take actual possession of the land since all interests in the land are sought to be acquired by it. There can be no question of taking 'symbolical' possession in the sense understood by judicial decisions under the Code of Civil Procedure. Nor would possession merely on paper be enough. What the Act contemplates as a necessary condition of vesting of the land in the Government is the taking of actual possession of the land. How such possession may be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard and fast rule laying down what act would be sufficient to constitute taking of possession of land. We should not, therefore, be taken as laying down an absolute and inviolable rule that merely going on the spot and making a declaration by beat of drum or otherwise would be sufficient to constitute taking of possession of land in every case. But here, in our opinion, since the land was lying fallow and there was no crop on it at the material time, the act of the Tehsildar in going on the spot and inspecting the land for the purpose of deter-

mining what part was waste and arable and should, therefore, be taken possession of and determining its extent, was sufficient to constitute taking of possession. It appears that the appellant was not present when this was done by the Tehsildar, but the presence of the owner or the occupant of the land is not necessary to effectuate the taking of possession. It is also not strictly necessary as a matter of legal requirement that notice should be given to the owner or the occupant of the land that possession would be taken at a particular time, though it may be desirable where possible, to give such notice before possession is taken by the authorities, as that would eliminate the possibility of any fraudulent or collusive transaction of taking of mere paper possession, without the occupant or the owner ever coming to know of it.

2. We are of the view, on the facts and circumstances of the present case, that the Tahsildar took actual possession of that part of the land which was waste or arable and handed it over to the Principal of the Agricultural College. It is true that the Special Land Acquisition Officer in his letter dated 13th December, 1961 to the Commissioner stated that possession of the entire land was still with the appellant and it was not actually taken possession of by the Principal, Agricultural College. But it is obvious that this statement was made by the Special Land Acquisition Officer because he thought that actual possession of the land could not be regarded as having been taken, unless the appellant was excluded from the land and since the appellant immediately, without any obstruction, entered upon the land and continued in possession, "the land was not actually taken possession of by the Principal, Agricultural College". This was plainly erroneous view, for the legal position is clear that even if the appellant entered upon the land and resumed possession of it the very next moment after the land was actually taken possession of and became vested in the Government, such act on the part of the appellant did not have the effect of obliterating the consequences of vesting. There can, therefore, be no doubt that actual posses-

sion of 19 acres 16 gunthas of waste and arable land was taken by the Tahsildar on 3rd April, 1959 and it became vested in the Government. Neither the Government nor the Commissioner could thereafter withdraw from the acquisition of any portion of this land under S. 48 (1) of the Act.

3. The result is that the appeals fail and are dismissed with costs. There will be only one set of costs.

UNTWALIA, J.:— 4. These two Civil Appeals filed by Shri Balwant Narayan Bhagde on grant of special leave by this Court arise out of a common judgment of the Bombay High Court allowing Special Civil Application No. 826/1968 filed by Shri M. D. Bhagwat and Shri E. R. Mahajani, respondent nos. 1 and 2 in Civil Appeal No. 75 of 1974 and Special Civil Application No. 389/1971 filed by the Punjabrao Krishi Vidyapeeth—hereinafter called the Agricultural College—to quash the order of the Commissioner, Nagpur purporting to give sanction for withdrawal of the acquisition by his letter dated 8-8-1968 in respect of a portion of the land comprised in Survey No. 30/2 in village Umari, District Akola. The High Court has held that possession of the land in question was taken by the Collector, Akola and given to the Principal, Agricultural College it was, therefore, not open to the Commissioner to withdraw from the acquisition of the land under Section 48 (1) of the Land Acquisition Act, 1894 as it stands amended by the Land Acquisition (Maharashtra Extension and Amendment) Act—hereinafter called the Act. It is well settled and nothing to the contrary was canvassed before us, that after possession of the land forming the subject matter of acquisition has been taken in accordance with Section 16 or Section 17 (1) of the Act, the land vests in the Government and the Government or any other authority is not at liberty to withdraw from the acquisition of any land of which possession has been taken vide, *State of Madhya Pradesh v. Vishnu Prasad Sharma*, (1966) 3 SCR 557 = (AIR 1966 SC 1593) and *Governor of Himachal Pradesh v. Sri Avinash Sharma*, (1970) 2 SCC 149 = (AIR 1970 SC 1576). The controversy,

therefore, centered round the question as to whether possession of the land which was released by the Commissioner under Section 48 (1) of the Act had been taken or not.

5. For the purpose of the Agricultural College a large area of land was acquired near Akola. A notification under Section 4 of the Act was issued on the 24th January, 1959 by which several pieces of land measuring 236 acres 7 gunthas (40 gunthas make one acre) were sought to be acquired including 20 acres 32 gunthas of Survey No. 30/2 in Village Umari, Pargana Akola. The total area of this plot is 20 acres 33 gunthas. A separate notification under Section 4 was issued for acquisition of the remaining one guntha which contained a well. As the land was urgently required for the purpose of the College, action under Section 17 of the Act was taken dispensing with the following of the procedure under Section 5A. The Sub-Divisional Officer, Akola was appointed the Land Acquisition Officer to perform the functions of the Collector under the Act. A notification under Section 6 of the Act was issued on the 17th February, 1959. A direction was given for taking possession of the land under Section 17 (1) on the expiration of 15 days from the publication of the notice under section 9 (1). Notice under Section 9 (1) of the Act was subsequently published on 6-3-1959. After expiry of 15 days from the publication of the notice under section 9 (1), on 24-3-1959 the Land Acquisition Officer ordered the Tehsildar, Akola to deliver possession of the land to the Principal, Agricultural College or his nominee in the presence of the Sub-Divisional Officer, P.W.D. Buildings and Roads Section, Akola and directed him to report compliance along with the possession receipt obtained from the Principal by 2-4-1959. The Tehsildar took and handed over possession on 3-4-1959 and made a report. Out of 20 acres 33 gunthas of land comprised in Survey No. 30/2 possession was taken and handed over in regard to 19 acres and 16 gunthas only. An area of 1 acre 17 gunthas which contained a double storied house of the appellant and a well etc. was for the time being left and possession of the same was not taken.

6. It appears, just after the issuance of the notification under Section 6 of the Act, the appellant who claimed to be the tenant of the land, the owners admittedly being respondents 1 and 2 in Civil Appeal No. 75 of 1974 made a representation to the Government that his field in Survey No. 30/2 should not be acquired and the acquisition should be withdrawn. He seems to have filed an application to that effect before the State Government on 18-2-1959. Some stay order thereupon is said to have been passed staying the proceeding in respect of the appellant's land. Following upon this correspondence took place and reports came to be made in April, 1959 and thereafter until the withdrawal from the acquisition of 12 acres and 23 gunthas of the land in Survey No. 30/2 was directed to be made by the Commissioner in the year 1968. As already stated the withdrawal was challenged by filing two writ petitions in the Bombay High Court.

7. The appellant filed a counter in the writ application of the owners but did not do so in answer to the writ application of the College. On behalf of the Governmental authorities two counters were filed in the two Writ Petitions. In the owners' petition the petitioners had stated that pursuant to the relevant notifications, Government took possession of 19 acres, 16 gunthas of land on 3-4-1959 and gave possession of the same to the Principal, Agricultural College. The Government in its return filed in the said case denied that possession as alleged was taken from the appellant and given to the Principal, Agricultural College. In paragraph 3 of Special Civil Application No. 389/1971 it was stated on behalf of the Agricultural College that the Tehsildar took possession only of 19 acres and 16 gunthas out of the field as the remaining area was found in the meantime on spot inspection not to be waste or arable to which the provision of Section 17 of the Act could apply. Actual possession of 19 acres 16 gunthas along with the other pieces of land measuring 200 acres and odd was delivered to the Principal, Agricultural College. In the return filed on behalf of the Officers of the Government the contents of paragraph 3

of the petition were admitted. But it was asserted that Government had taken only symbolical possession and the physical possession of the land remained with the appellant. On consideration of the relevant materials placed before the High Court it has come to the conclusion that actual possession of the land in question was taken and handed over on 3-4-1959 on the spot; and, even symbolical possession, if land is occupied by a person other than the owner, would be good possession for the purpose of S. 48 of the Act.

8. Mr. Sardar Bahadur Saharya, learned counsel for the appellant, submitted that possession of any portion of the land comprised in Survey No. 30/2 was not taken by the Government or given to the Principal, Agricultural College, it was all a paper delivery of possession, no notice was ever given to the appellant as to the date and time of taking possession of the land on the spot, and the symbolical delivery of possession, even if any, had not the effect of divesting the appellant from his actual possession over the land. Counsel further submitted that the order of withdrawal which is confined to an area of 12 acres 23 gunthas only out of Survey No. 30/2 leaving a further balance of 6 acres 33 gunthas to the College was valid. Mr. Hathi appearing for the Government and its authorities stuck to their stand that only symbolical possession was taken and actual possession remained with the appellant. Learned Attorney General for the Agricultural College, followed by Mr. Phadke for the owners, submitted that nowhere the appellant had challenged the taking of possession of the land on the spot on 3-4-1959. The effect of taking possession of the land was to vest it in the Government and no portion of it could be released under Section 48 (1) of the Act. It was further submitted that there is no provision in the Act requiring the giving of any notice to the possessor of the land of the exact date and time of taking possession on the spot and notice published under Section 9 (1) is sufficient.

9. It may be stated at the outset that there does not seem to be any

dispute as respects the fact that Bhagwat and Mahajani were the owners of the land at the time of the issuance of the notification under Section 4 of the Act and the appellant was in its occupation or actual possession as a tenant. It is also not in dispute that possession was taken on 3-4-1959 in respect of the large portion of land measuring more than 200 acres. There is no controversy that the Agricultural College not only needed the land in question but subsequently steps were taken for acquiring an additional area of 340 acres for the needs of the College.

10. The Commissioner in his order dated 17th February, 1959 had directed that the possession of the land may be taken on the expiration of 15 days from the publication of the notice mentioned in section 9 (1) of the Act. The order recorded on 11-3-1959 shows that the notice in form 'D' under section 9 (1) of the Act was published on 6-3-1959, so the possession of the land could be taken on 21-3-59 or thereafter. Some persons filed their written statement showing their interest in the land to be acquired and their claims for compensation on 11-3-1959. On 24-3-1959 various other persons including the appellant appeared before the Land Acquisition Officer. Appellant's counsel prayed for time to file his written statement. He was directed to do so by 5.00 p.m. on 24-3-1959. On this date the Land Acquisition Officer recorded the order in presence of the parties including the appellant directing Tehsildar Akola to take possession of the land and hand it over to the Principal, Agricultural College, in the presence of S.D.O., P.W.D., Akola and to report compliance with possession receipt by 2-4-1959. A written statement on behalf of the appellant was filed by 4.20 p.m. on 24-3-1959.

11. It is necessary to refer to the claim of the appellant made in the written statement aforesaid. He stated that he was interested in the field as he was its protected lessee and as such he was entitled to receive compensation that may be granted. The amount of claim put forward in respect of the field in Survey No. 30/2 by Bhagwat and Mahajani was stated to be acceptable to the appellant. But

he said that he was entitled to the said amount. In respect of the bungalow the appellant stated that it was his residential house, it was not necessary to be acquired, dispensing with the provision of Section 5A in respect of the house was not legal, therefore, the proceeding being not in accordance with law be dropped. Finally, the prayer in the written statement was to stay the delivery of possession of the bungalow at least for two months. It would thus be seen that in his written statement filed on 24-3-1959 the appellant did not deny the publication of notice on the spot under Section 9 (1) nor did he propose to put any impediment in the taking of possession of the land comprised in Survey No. 30/2. He merely wanted the stay of taking possession in respect of the house.

12. The Principal of the Agricultural College wrote a letter to the Sub-Divisional Officer and Land Acquisition Officer, Akola on the 6th April, 59 with an endorsement of the Revenue Inspector who it appears was the Tehsildar, stating therein that he had taken possession of the fields mentioned below in the letter on the 3rd April, 1959, in presence of the Sub-Divisional Officer, P.W.D. and the Naib Tehsildar, Akola. The total area mentioned in this letter is 234 acres 31 gunthas including 19 acres and 16 gunthas in Survey No. 30/2. The Revenue Inspector endorsed "handed over as above."

13. On the facts and in the circumstances of this case it is difficult to accept the argument put forward on behalf of the appellant that the taking and giving of possession on 3-4-1959 was only on paper and not on the spot.

14. The High Court in its judgment has referred to a letter dated 7-4-1959 by the Land Acquisition Officer to the Collector, Akola to say that the appellant represented before him that a stay order had been passed in respect of Survey No. 30/2 by the Minister for Agriculture and the proceedings for taking possession of this land may be deferred pending further instructions from the higher authorities; but before any step could be taken on the representation of the ap-

pellant, the Land Acquisition Officer got the information that possession had been taken and given but in spite of that in the letter dated 7-4-1959 a direction was given to the Tehsildar to withhold taking possession of the field in Survey No. 30/2 of village Umari temporarily. Thereupon, the Tehsildar made a report dated 11-4-1959 stating therein "possession has already been delivered to the Principal, Agricultural College, Akola and the possession receipt is enclosed. In case possession of S. No. 30/2 is still to be withheld, the Principal, Agricultural College, S. D. O., P.W.D and the lessee of the field would be approached in this respect and necessary action would be taken accordingly." As a matter of fact it would appear from the letter dated 16-4-1959 written by the Assistant Secretary of the Government of Bombay to the appellant in reply to his letter addressed to the Minister for Agriculture a copy of which was forwarded to the Collector, Akola that for the first time in this letter he was requested to stay the proceedings until further orders. No stay order of the State Government seems to have been received earlier and prior to the taking of possession of the land in question.

15. Then comes the letter dated 4-5-1959 written by the Land Acquisition Officer to the Collector, Akola. Reference was made to all these documents on behalf of both the parties. The S.D.O and the Land Acquisition Officer sought instructions of the Collector as to what action was to be taken in respect of land measuring 19 acres 16 gunthas out of Survey No. 30/2 "the possession of which has already been delivered to the Agricultural Department." The next letter is one from the Principal of the College to the Land Acquisition Officer dated the 27th May, 1959 asking clarification of the stay order received in regard to Survey No. 30/2. The reply is dated 4-6-1959 informing him that clarification will be made on receipt of further communication from the Collector.

16. The next letter is dated 18-7-1959 from the Principal of the College to the Director of Agriculture stating therein that possession of

the whole field No. 30/2 excluding the area of 1 acre 16 gunthas which was also required for the purpose of the College, was delivered on 3-4-1959 but in view of the Government order contained in their letter dated 16-4-1959 the land was not being cultivated and was lying as a sort of no man's land.

17. Then comes an important letter again referred at the Bar on behalf of both the parties written by the Special Land Acquisition Officer, Akola to the Commissioner, Nagpur on the 13th December, 1961. The difficulty in releasing the land under Section 48 (1) was pointed out and further, in this letter it is stated "Taking over possession of 1A-15G of land to be acquired under urgency clause was deferred as on joint spot inspection made by the then Sub-Divisional Officer, Principal Agricultural College and S.D.O. (P.W.D) Akola, it was thought that acquisition of this portion which contains one double storied building, some converted land etc. would entail heavy expenditure." It would thus be clear beyond any shadow of doubt that possession was taken on the spot. On spot inspection the area of 1 acre and odd only was left out of possession. But then in this very letter there is a statement "The Collector Akola was directed to stay the acquisition proceedings in respect of this field until further orders, though possession receipt for S. No. 30/2 was passed on 3-4-59, the possession (physical) of the entire field S. No. 30/2 of Umari is still retained by the lessee of that field and the land was not actually taken possession of by the Principal Agricultural College, Akola." Learned counsel for the appellant submitted that physical possession of the entire land comprised in Survey No. 30/2 remained with the appellant and the possession delivered was either on paper or merely symbolic; it, therefore, could not prevent the release of the land from acquisition under section 48 (1) of the Act.

18. It is not necessary to refer to the further correspondence which ensued. It may, however, be stated that because of the stay order and dispute raised in respect of the land comprised in Survey No. 30/2 in the award prepared by the Collector on 30-1-1960 compensation for the said

land was not determined. And eventually in the year 1968 an area of 12 acres 23 gunthas was sought to be released from acquisition. The question for consideration is — was the release valid and proper?

19. In order to appreciate what is meant by taking possession of the land under Section 16 or 17 (1) of the Act and what is the mode of taking such possession in regard to the waste or arable land with which we are concerned in this case, it is necessary to refer to certain provisions of the Code of Civil Procedure—hereinafter called the Code, and some decisions thereon. Order 21, Rr. 35, 36, 95 and 96 of the Code prescribe two modes of delivery of possession based upon the nature of the property concerned. The Code does not prescribe that in respect of a particular property there can be two modes of giving possession either to a decree-holder or to an auction-purchaser one "symbolical" and the other "actual". These Rules prescribe that if the property is in the occupation of the judgment-debtor, or some-one on his behalf the possession shall be given if necessary by removing the judgment-debtor and placing the decree-holder or the auction-purchaser in occupation of the same. On the other hand if the property is of such a nature that the judgment-debtor cannot be in actual occupation of it, as for instance, property in the possession of a tenant, the only mode of giving possession is by proclaiming on the spot that the possession has been given to the decree-holder or the auction-purchaser. In some decisions the former mode of possession has been called "actual" and the latter "symbolical". Really speaking even the delivery of so-called "symbolical" possession is delivery of "actual" possession of the right title and interest of the judgment-debtor. It completely dispossesses him. It does not affect the physical occupation of the property by a person who is not bound by the decree or whose interest is not affected by sale of the judgment-debtor's interest in execution of a decree. If the property is land over which does not stand any building or structure, then delivery of possession over the judgment-debtor's property becomes com-

plete and effective against him the moment the delivery is effected by going upon the land, or in case of resistance, by removing the person resisting unauthorisedly. A different mode of delivery is prescribed in the Code in the rules aforesaid in regard to a building, with which we are not concerned in this case. Sometimes the expression symbolical or formal delivery of possession has been used in decisions to connote the actual delivery of possession effective against the judgment-debtor leading to his dispossession in the eye of law even though the duration of the dispossession may be momentary or temporary.

20. In *Juggobundhu v. Ram Chander* (1880) ILR 5 Cal 584 (FB), Garth, C. J. delivering the judgment of the Full Bench consisting of five Judges pointed out at page 588:

"In the one case, the delivery of the land is to be made by placing the plaintiff in direct possession. In the other, the delivery is effected by the officer of the Court by going through a certain process prescribed by Section 224, and proclaiming to the occupants of the property that the plaintiff has recovered it from the defendant. This is the only way in which the decree of the Court, awarding possession to the plaintiff, can be enforced; and as, in contemplation of law, both parties must be considered as being present at the time when the delivery is made, we consider that, as against the defendant, the delivery thus given must be deemed equivalent to actual possession."

"As against third parties, of course, this symbolical possession (as it is called) would be of no avail; because they are no parties to the proceeding. But if the defendant should, after this, again dispossess the plaintiff by receiving the rents and profits, we think that the plaintiff would have twelve years from such dispossession to bring another suit."

Another Full Bench consisting again of five learned Judges of the Calcutta High Court presided over by Petheram, C. J. in the case of *Joggo-bundhu Mitter v. Purnanund Gossami*, (1889) ILR 16 Cal 530 (FB), reaffirmed the view taken in *Juggobun-*

dhu Mukherjee's case (1880) ILR 5 Cal 584 (FB) in the following words:

"The Full Bench held that the symbolical possession obtained by the plaintiff's vendor was effective as against the judgment-debtor, defendant, and that the suit brought against him within 12 years of that event was not barred by limitation."

21. The facts of the case of Sri Radha Krishna Chanderji v. Ram Bahadur, AIR 1917 PC 197 (2) are these: The dispute related to 150 bighas of land. The plaintiffs had filed a suit to recover possession of the said land. The principal defendant who was the appellant before the Privy Council was an idol by shebiats who was in actual possession of the land by their tenants. The predecessors of the defendants in the suit were parties to an earlier mortgage action. In due course a decree was obtained. The property which, according to the finding, included the disputed land was sold. The mortgagee decree-holders were the purchasers of the property. "The land being in occupation by cultivating tenants under an apparently bona fide title they received formal possession as usual after due proclamation by beat of drum in 1898." — (vide page 200 column 2). Lord Sumner delivering the judgment of the Board said at the same page "This interruption, if such it was, of the defendants' actual possession was not of long duration. Hence the necessity for the present suit. Hence also the defence of adverse possession for more than twelve years before suit began." It would thus be seen that formal possession of the land in actual occupation of the tenants, which in a sense was symbolical, was characterised as interruption of defendant's actual possession. And finally the ratio of the decision of the Full Bench of the Calcutta High Court in Juggobundhu Mukherjee's case ((1880) ILR 5 Cal 584 (FB)) was approved thus at page 201, column 1:

"In the High Court and before their Lordships it was further argued that symbolical possession would not avail against the defendants, but that only actual dispossession would interrupt their adverse possession. The High Court, following a decision of

the Full Bench in Juggobundhu Mukherjee v. Ram Chandra Bysack, (1880) ILR 5 Cal 584 = 5 Cal LR 548 (FB) held that symbolical possession availed to dispossess the defendants sufficiently, because they were parties to the proceedings in which it was ordered and given. This decision is one of long standing, and has been followed for many years. Their Lordships see no reason to question it or to hold that this rule of procedure should now be altered."

In a case of joint possession the decision of the Privy Council in Sri Radha Krishna Chanderji's case (AIR 1917 P. C. 197 (2)) has been referred with approval by this Court in the case of M. V. S. Manikayala Rao v. M. Narasimhaswami, AIR 1966 SC 470 in paragraph 7 at page 474 in the judgment of Sarkar, J. as he then was, as also in paragraph 20 at page 478 is that of Ramaswami, J. I may just quote a sentence from paragraph 7 which says:

"By the delivery of symbolical possession under the order of November 6, 1939, the adverse possession of the defendants was interrupted."

22. Mohammad Noor, J. in the case of Ram Prasad Ojha v. Bindeshwari Prasad, AIR 1932 Pat 145, has considered the point in his separate but concurring judgment with reference to the relevant provisions of the Code at page 147. In that case the question of defendants' adverse possession arose with reference to a property which was not in occupation of any tenant. The suit for possession after the mortgage sale and delivery was being resisted by a person who was in no better position than the mortgagor judgment-debtor. The learned Judge pointed out at pages 147 and 148:

"When it is said that symbolical possession is not binding upon a third party but actual possession is, it is only meant that when a decree-holder or an auction-purchaser has been put in actual occupation of the property everybody else has been ousted from it, and consequently dispossessed. This is an obvious fact and not a question of law. On the other hand if the Court simply proclaims that the decree-holder or auction-purchaser

has been given possession but on account of the nature of the property they have not been placed in physical occupation of the property itself such a delivery of possession can be binding only upon those who are parties to those proceedings or on those who claim through them. The difference, as I have said, is due to the nature of the property and not on account of the difference in the nature of possession. The question will always be not what was the mode of delivery of possession but who has in fact been ousted by it."

23. The same learned Judge had the occasion to consider the question again in the case of Mahabir Singh v. Emperor AIR 1934 Pat 565. And that too with reference to a property which was not in possession of any tenant but of the judgment-debtor. The question arose in a criminal case and the confusion arising out of the use of the expressions — "the actual" and "symbolical" possession was again discussed at page 568. The writ of delivery was issued in the previous litigation under Order 21, Rule 95 of the Code and in that connection the different modes of delivery of possession over a piece of land were discussed. The momentary possession given to the purchaser was characterised as delivery of symbolical possession by the Additional Sessions Judge and not actual possession. The learned Judge pointed out at page 569, column 1:

"It issued its writ under R. 95, and the peon formally put the auction-purchaser in possession of the property. It is wrong to think that there are two kinds of delivery of possession; one actual and the other symbolical independent of the nature of possession of the judgment-debtor. Even if the delivery of possession was symbolical, its effect against the judgment-debtor was the same."

24. The so-called paper possession or possession on paper is no delivery of possession, actual, formal or symbolical. A Bench of the Madras High Court consisting of Rajamanar, C. J. and Rajagopala Aiyangar, J. has stated at page 762 in the case of Pethaperumal Ambalam v. Chidambaram Chettiar, AIR 1954 Mad 760:

"The next question is whether it makes any difference in legal effect if possession is taken through court. The Code contemplates no notice to the judgment-debtor at that stage or any objection being raised by him to the delivery of possession under R. 95, or Rule 96, and as the full title to the property has passed from the judgment-debtor to the auction purchaser, he has no interest in the property to protect."

It has further been pointed out:

"The characterisation of possession taken under Order 21 Rule 96, as "paper possession" is hardly justified and runs counter to the principle on which the provision is based. Symbolical possession obtained under Order 21, Rule 96 is quite a different thing from paper possession, which might correctly describe only the possession obtained by a party who being entitled to actual possession, the judgment-debtor himself being in possession, obtains delivery of possession on paper without actual possession or those cases where without complying with the requisites of the statute a false return is made as if they were complied with."

25. It would thus be seen that a symbolical or formal delivery of possession as understood in law has the effect of dispossessing the judgment-debtor from his right, title or interest in the property. It does not dispossess the person in actual possession in his own right not liable to be evicted under the decree or in pursuance of the auction sale. A symbolical or formal delivery of possession against the judgment-debtor is giving of actual possession of the property in the eye of law and has the effect of dispossessing him although as a matter of fact he may have succeeded in resuming back possession as before shortly after dispossession.

26. In a proceeding under the Act for acquisition of land all interests are wiped out. Actual possession of the land becomes necessary for its use for the public purpose for which it has been acquired. Therefore, the taking of possession under the Act cannot be "symbolical" in the sense as generally understood in Civil Law. Surely it cannot be a possession merely on paper. What is required under

the Act is the taking of actual possession on the spot. In the eye of law the taking of possession will have the effect of transferring possession from the owner or the occupant of the land to the Government.

27. Section 9 (1) of the Act reads as follows:

"The Collector shall then cause public notice to be given at convenient places or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land may be made to him."

28. When a public notice is published at a convenient place or near the land to be taken stating that the Government intends to take possession of the land, then ordinarily and generally there would be no question of resisting or impeding the taking of possession. Delivery or giving of possession by the owner or the occupant of the land is not required. The Collector can enforce the surrender of the land to himself under Section 47 of the Act if impeded in taking possession. On publication of the notice under Section 9 (1) claims to compensation for all interests in the land has to be made; be it the interest of the owner or of a person entitled to the occupation of the land. On the taking of possession of the land under Section 16 or 17 (1) it vests absolutely in the Government free from all incumbrances. It is, therefore, clear that taking of possession within the meaning of S. 16 or 17 (1) means taking of possession on the spot. It is neither a possession on paper nor a "symbolical" possession as generally understood in Civil Law. But the question is what is the mode of taking possession? The Act is silent on the point. Unless possession is taken by the written agreement of the party concerned the mode of taking possession obviously would be for the authority to go upon the land and to do some act which would indicate that the authority has taken possession of the land. It may be in the form of a declaration by beat of drum or otherwise or by hanging a written declaration on the spot that the authority has taken possession of

the land. The presence of the owner or the occupant of the land to effectuate the taking of possession is not necessary. No further notice beyond that under Section 9 (1) of the Act is required. When possession has been taken, the owner or the occupant of the land is dispossessed. Once possession has been taken the land vests in the Government.

29. In the instant case in agreement with the findings of the High Court, I hold that in the eye of law actual possession of the land in question was taken by the Tahsildar on the spot and the possession was handed over to the Principal of the Agricultural College. It appears that the appellant on his part thought that he never gave up possession and claimed to continue in actual possession of the disputed land, because of the stay order passed by the Government on or about the 16th April, 1959. It is in the background of the law discussed above that the statement that "the possession (physical) of the entire field S. No. 30/2 of Umari is still retained by the lessee of that field and the land was not actually taken possession of by the Principal, Agricultural College, Akola", occurring in the letter dated the 13th December, 1961 written by the Special Land Acquisition Officer, Akola to the Commissioner, Nagpur has got to be appreciated and so also the stand of the Government in its counter as to what was meant by taking of symbolical possession. Viewed in the light of the discussion of law I have made above, it would be noticed that possession of the land, in any event, was taken on the spot and it vested in the Government. The appellant's resuming possession of the land after once it was validly taken by the Government had not the effect of undoing the fact of the vesting of the land in the Government. The Government or the Commissioner was not at liberty to withdraw from the acquisition of any portion of the land of which possession had been taken, under Section 48 (1) of the Act.

30. In the result the appeals fail and are dismissed with costs. One set of hearing fee.

Appeals dismissed.



AIR 1975 SUPREME COURT 1778

(From: Industrial Tribunal Bombay)*

**H R. KHANNA, P. N. BHAGWATI
AND P. K. GOSWAMI, JJ.**

M/s. Killick Nixon Ltd., Appel-
lant v. Killick & Allied Companies
Employees' Union, Respondent.

Civil Appeals Nos 734 and 735 of
1973, D/- 2-5-1975.

**(A) Industrial Disputes Act (1947),
Sch. 3 Item 2 — Dearness Allowance
—Imposition of ceiling on D.A. —
Matters to be considered by Tribunal.**

It cannot be laid down as an in-
variable rule that in all cases there
should be ceiling on D.A. Whether or
not there should be a ceiling in a
given case must depend on the facts
and circumstances of that case. When-
ever a case of this nature comes for
industrial adjudication it will always
be a delicate task for the Tribunal to
strike a balance keeping in view the
principles, weightage of each one of
which being variable according to
conditions obtaining. (Para 37)

The problem will have to be
viewed from the following aspects.

- (1) Condition of the wage scale pre-
valent in the company.
- (2) Condition of the wage level pre-
valent in the industry and the
region.
- (3) The wage packet as a whole of
each earner in the company
with all amenities and benefits
its ability and potency to cope
with the economic requirements
of daily existence consistent
with his status in society, res-
ponsibilities, efficiency at work
and industrial peace.
- (4) The position of the company
viewed in relation to other
comparable concerns in the in-
dustry and the region.
- (5) Peremptive necessity for full
neutralisation of the cost of
living at the rock-bottom of
wage scale if at or just above
the subsistence level.
- (6) The rate of neutralisation which
is being given to the employees
in each salary slab.

- (7) Avoidance of huge distortion of
wage differentials taking into
reckoning all persons employed
in the concern.
- (8) Degree of sacrifice necessary
even on the part of workers in
general interest.
- (9) The compulsive necessity of se-
curing social and distributive
justice to the workmen.
- (10) Capacity of the company to
bear the additional burden.
- (11) Interest of national economy.
- (12) Repercussions in other indus-
tries and society as a whole.
- (13) The state of the consumer price
index at the time of decision.
- (14) Forebodings and possibilities in
the foreseeable future as far as
can be envisaged.

The Tribunal must take into con-
sideration the above principles in de-
termining this question but the most
dominant of these must always be
that of social justice, for, that is the
ideal which we have resolved to
achieve when we framed our Constitu-
tion. (Para 37)

It could not be contended by the
workmen that unless there was a
ceiling on profits there could not be
a ceiling on D.A. The question of
D.A. being intimately connected with
the cost of living, the matter could
not be judged by the test of such a
submission of the workmen.

(Para 36)

Held, that the company in ques-
tion had been able to make out a case
for imposition of a ceiling and the re-
moval by the Tribunal in the context
was not justified. At what particular
amount there should be a ceiling on
D.A. is a matter which will have to
be gone into by the Tribunal keeping
in view the above principles. The
financial capacity will have to be
judged with regard to the commit-
ment of the company as a whole to-
wards all its employees. (Para 35)

However, so far as the lowest
paid employees at or just above the
subsistence level are concerned, they
are entitled to 100 per cent or at any
rate not less than 95 per cent neutra-
lisation of the rise in the cost of liv-
ing and hence there should be no
ceiling on dearness allowance payable
to employees within the slab of first

*(Ref. Nos. (I.T.) 149 and 257 of 1966,
D/- 24-1-1973 Ind. Tri. — Bom.)

Rs. 100, unless it can be shown by the management that the rate of neutralisation in their case is more than 100 per cent. So far as the employees in the higher slabs are concerned, it would be for the Tribunal to consider, having regard to the aforesaid principles, whether a ceiling should be imposed at the second slab of Rs. 100 or only at the last slab of Rs. 201 to Rs. 500. The manner in which the ceiling may be imposed would also have to be decided by the Tribunal in the exercise of its judicial discretion keeping in view the aforesaid principles. The ceiling may be fixed either by prescribing a certain amount as the outside limit of the dearness allowance or by reference to the quantum of dearness allowance payable at a certain wage level.

(Para 37)

Cases Referred: Chronological Paras

AIR 1972 SC 2332 = (1972) 1 Lab LJ

576 = 1972 Lab IC 1012 20

AIR 1969 SC 360 = (1969) 2 SCR 113

3. 12

AIR 1964 SC 689 = (1964) 5 SCR 362 3

(1962) 1 Lab LJ 287 = (1962) 4 Fac

LR 508 (SC) 20

Judgment of the Court was delivered by

GOSWAMI, J.:— The only question with which we are concerned in these appeals by special leave is: Should there be a ceiling on dearness allowance in this case?

2. On May 11, 1966, the employers gave a notice of change for placing a ceiling on dearness allowance (for brevity D.A.) already in vogue at the figure of Rs. 325/-. Since this was not acceptable to the union, both sides agreed for a reference to the Industrial Tribunal, Maharashtra. By the impugned order of January 24, 1973, the Tribunal removed the ceiling and hence this appeal.

3. There was also another demand with regard to the D. A. for drivers on the same basis as that for clerical staff. The Tribunal following this Court's decisions in *Bengal Chemical & Pharmaceuticals Works Ltd. v. Its Workmen* (1969) 2 SCR 113 = (AIR 1969 SC 360) and *Greaves Cotton and Co. v. Their Workmen*, (1964) 5 SCR 362 = (AIR 1964 SC 689) allowed the union's claim for the two

categories to be treated on equal footing. This Court held in the above decisions that employees getting the same wages should get the same D.A. irrespective of whether they are working as clerks or as members of subordinate staff or as factory workmen. This part of the award is, therefore, rightly not challenged before us.

4. The reference was made in June 1966. There was an earlier award in the reference. At the instance of the management, the High Court set it aside and remanded the above two items of dispute alone for disposal. The Tribunal had in the earlier award rejected all other claims of the union including that of revision of wage scale.

5. The only point that survives, therefore, is with regard to the ceiling on D.A. When the reference was made in June 1966 the cost of living index for Bombay city was 626. At the time of the impugned award in January 1973 it rose to 906 and in December 1974 it reached 1335 mark.

6. Various expert committees and commissions have dealt with the question of wages and D.A. from time to time. Dearness allowance as such is not known in foreign countries with the exception of Ceylon and Pakistan. Whenever there is any significant rise in the cost of living in foreign countries there is a revision of wage rather than payment of any D.A. as such. D.A. in India is a relic of the First World War to cope with the rise of cost of living although then in the shape of ad-hoc payments not linked to any consumer price index. During the Second World War it was introduced in the form of a Grain Compensation Allowance to compensate the hardship of the employees for the rise in prices of foodgrains. So far as the Central Government employees were concerned, the Government constituted the First Pay Commission in 1947 to examine the wage structure. The Government of India also set up a Committee on Fair Wages and the report was submitted in June 1949. A Second Pay Commission was also constituted by the Government in 1959. The Government of India in August 1964 constituted a One-man Independent Body to enquire into the question of D.A. pay-

able to the Central Government employees and the report was submitted in January 1965 by Shri S. K. Das. In July 1966, the Government of India appointed a Dearness Allowance Commission presided over by Shri P. B. Gajendragadkar. The Commission examined the principles which should govern the grant of D.A. to Central Government employees in future and was also required to review the formula for the grant of D.A. as recommended by the Second Pay Commission and to recommend, changes, if any. In December 1966, the Government of India set up a National Commission on Labour presided over by Shri P. B. Gajendragadkar with exhaustive terms of reference and the Commission submitted its report on August 28, 1969. Then in sequence came the report of the Third Pay Commission in 1973. The parties have extensively quoted from the above reports during arguments.

7. Historically and by the industrial texts and also observations of various commissions and committees, D.A. was regarded as "applicable to those employees whose salaries are at the subsistence level or little above it. . . . in order to enable them to face the increasing dearness of essential commodities". (See Gajendragadkar Commission on Dearness Allowance, May, 1967.)

8. Like all changes in life and in continuous march in progress of society the concept of D.A. also may change to take in a wider range of commodities and services to make life worth living as far as practicable subject to compelling limitations of general interest. We recognise that the old definition of D. A. may not even serve the climate of new aspirations of various classes of employees of this vast country. Luxuries of yesterday may be the comforts of to-day and necessities of tomorrow. Economic solutions must reckon the turn-about in social urges. Because even the worm turns. Industrial adjudication which has not the limitations of the ordinary courts has to respond to the needs of changing society and it may be possible to widen the scope of D.A. if that serves the cause of general welfare. There may be no inexorable

rule tying down economic existence to definitions of bygone days, if unsuitable or irrelevant in the context of the times.

9. The National Commission on Labour (1969) while dealing with D.A. observed:

"We consider that payment of D.A. has to be viewed in broader context of wage policy, many elements of which have been discussed in the previous chapter. In a developing economy where price stabilisation has proved ineffective, or the inflationary potential cannot be controlled, any arrangement for compensating for price rise will have its *raison d'être*. At the same time, a direct linkage between a rise in the index and the D.A. may create problems for price stabilisation. It can hardly be disputed that the index is the best available indicator of changes of price level. The reason for a disproportionately high D.A. is the fixation of basic wage on a date far remote from the present". (Para 16.39, page 240). The Commission further observed:

"It is obvious that unless money wages rise as fast as the consumer prices, it would result in an erosion of real wages. But the extent of its impact will depend on the margin of cushion available at different levels of income. . . . We accordingly recommend that 95 per cent neutralisation should be granted against rise in cost of living to those drawing minimum wage in non-scheduled employments". (Para 16.47, Page 242.) The Third Pay Commission in its Interim Report made some significant observations:

"We need hardly emphasise that it would be an exercise in futility to keep on increasing the emoluments of Central Government employees, if these increases are largely wiped out soon afterwards by increases in prices of goods and services. There is, therefore, paramount need to maintain price stability and we are confident that the Government will take all necessary fiscal, monetary and other measures, including control over production and distribution, to maintain the price line".

10. D.A. was primarily intended to be a temporary expedient and

was sought to be made available as a protection to those who have no cushion at all in their wage packet in the face of any appreciable rise in prices. Some relief was given to others also. The hope of the two Pay Commissions that prices will decline and stabilise, never came true. D.A. has, therefore, come to stay. The price indices have now assumed menacing figures. This is the stark reality of the situation and any problem regarding wage or D.A. has to be considered in that background at the same time not losing sight of the national economy.

11. In considering the question of D.A. the total wage packet of the employee must be kept in view. The first and foremost consideration is the case of the employees at the minimum wage level. It must, however, be remembered that minimum wage should enable an employee not merely for the bare sustenance of life but for the preservation of his efficiency by providing for some measure of education, medical requirements and amenities. The concept of minimum wage as also of fair wage cannot be static. It will change with the progress of time and development.

12. In a recent decision of this Court in *Bengal Chemical*, (1969) 2 SCR 113 = (AIR 1969 SC 360) (supra) the principles for fixing of D.A. came up for consideration. After reviewing the earlier decisions, this Court held as follows:

- "1. Full neutralisation is not normally given, except to the very lowest class of employees.
2. The purpose of dearness allowance being to neutralise a portion of the increase in the cost of living, it should ordinarily be on a sliding scale and provide for an increase on the rise in the cost of living and a decrease on a fall in the cost of living.
3. The basis of fixation of wages and dearness allowance is industry-cum-region.
4. Employees getting the same wages should get the same dearness allowance, irrespective of whether they are working as clerks or members of subor-

dinate staff or factory workmen.

5. The additional financial burden which a revision of the wage structure or dearness allowance would impose upon an employer, and his ability to bear such burden, are very material and relevant factors to be taken into account".

13. It is submitted on behalf of the employers that in a scheme of D.A. linked not only to the cost of living index but also to basic wages by way of slabs, there must be a ceiling as otherwise it will not be a compensation for increased cost of living but additional remuneration unconnected with the increasing cost of living at the lowest level. It is emphasised that where there is a dual link, a ceiling removes the incongruity in the D. A. rising with the basic wages out of proportion to the cost of living compensation at the lowest level. It is fairly admitted that the ceiling fixed at any given time on the basis of a possible rise in the cost of living index in the foreseeable future may be altered if the rise in the cost of living index later makes the ceiling unreflective of the requisite neutralisation of the increase in the cost of living at the lowest level. It is submitted that without a ceiling it will be impossible for any management to plan the business of the employers including production, expansion, etc. without any certainty of wage bill being estimated at any definite figure for the foreseeable future.

14. On the other hand it is submitted on behalf of the workers that there should be no ceiling on D.A. till the workers reach the level of living wage. It is also submitted that in the interest of social justice there should be no ceiling on wages without first putting a ceiling on profits and controlling and stabilising prices.

15. The award pertains to the clerical staff and drivers working in the Head Office of the appellant numbering about 265 out of about 743 workmen in its various establishments (page 120 of the record). Out of that also only two classes of workers are involved, namely, the clerks and the

drivers. Amongst the clerical staff there are three grades, Grade A, Grade B and Grade C as under: The wage scale for drivers is as follows:

Grade A: Rs. 165-15-240-20-400-E.B. 25-500.
Grade B: Rs. 110-10-150-12½-200-15-280-E.B.-
20-360.

Rs. 75-5-100-7-135-7.50-1 0.

Grade C: Rs. 70-5-90-8-130-10-200-E. B.-12½-
250

The scheme of D.A. which is sought to be introduced with the ceiling is as under:

(Contd. on Col. 2.)

Basic Pay slabs	Percentage of Basic Salary (C. P. I. 441.450)	Variations for every 10 points of C. P. I.
1st Rs. 100	120	5%
2nd Rs. 100	40	2%
Rs. 201 to Rs. 500	30	1%
Over Rs. 500	25	

Maximum D. A. Rs. 325/-

16. Mr. Mehta, representing the union, has drawn our attention to a few awards in the Bombay region prescribing slab system of D.A. without ceiling. The first is that of the Ahmedabad Manufacturing & Calico Printing Company Limited. It is true that on 4th slab of Rs. 100/- and balance, 9.75% D.A. was allowed without imposition of any ceiling. D.A. was awarded by the Industrial Tribunal in this case on a slab system at the consumer price index 841-850. The second is the case of Indian Vegetables Products Limited, Bombay, where there was no introduction of any ceiling and 10% D.A. at the 3rd slab of Rs. 100/- and above was granted. In that case the consumer price index was at 311-320. The third case is that of Godrej Soap Private Limited where again although no ceiling on D.A. was imposed, the Tribunal was dealing with a case when the consumer price index was at 396-405. It is pointed out that in all the three above cases special leave was refused by this Court. That, however, cannot be a ground for holding that this Court endorsed non-imposition of ceiling on D.A. as a principle. The question as such was neither raised before the Tribunal nor before this Court in any of the above cases.

17. Mr. Mehta also filed a list of 25 awards during the period between 1-1-1970 and December, 1974 in the Bombay region. This was with the object of establishing his case for a slab system of D.A. linked to the consumer price index with point variation without ceiling. Mr. A. K. Sen has commented that some of these awards

were as a result of settlement and the question of ceiling on D.A. was not even raised for a decision. In the case of Dorr-Oliver (India) Limited, the scale of pay was fixed on the basis of the consumer price index 700 and D.A. was fixed, if the index rose beyond 700, on a slab system. It is to be noted that a flat sum of Rs. 9/- as D.A. was allowed on the salary of Rs. 500/- and above and for variation for rise of every ten points in slab above 700, Rs. 9/- was fixed for such slab. It is to be noted that there is no percentage basis of D.A. on the salary and it is only linked to the consumer price index. In the case of Kanji Jadhavji & Company, it is, however, seen that for pay in excess of Rs. 210/- but upto Rs. 670/- per month 1/2 paisa per rupee per point upto Rs. 180/- per month plus 1/3 paisa per rupee per point in excess of Rs. 180/- upto Rs. 210/- plus 1/4th paisa per rupee per point in excess of Rs. 210/- subject to a maximum of Rs. 1.65 per point per month was allowed. There is a fixed salary of Rs. 670/- beyond which D.A. was not made admissible. In the case of Tata Press Limited which is an award said to be by settlement, additional D.A. of 10 per cent has been given on the basic wage of above Rs. 401, but there is no linkage to the consumer price index. In Godavari Sugar Mills Mamli Private Limited, D.A. stopped at the 4th Rs. 100/- of basic salary. At this slab 36 per cent D.A. was awarded with variation of 1 per cent for every ten points rise or fall in the consumer price index 791-800. Identical is the case of another award in the case of

Somaiya Organo Chemicals Limited. In Britannia Biscuit Company Limited's case, no D.A. has been awarded beyond the salary slab of Rs. 500/-. D.A. was considered in this case when the cost of living index number was 301-310 (old series). In several awards (Contd. on Col. 2)

1. National Machinery Manufacturers Ltd.
2. Indian Organic Chemicals Ltd.
3. The Millowners Association.
4. Phoenix Mills Ltd.
5. Bayer (India) Ltd.
6. West Coast Paper Mills Ltd.
7. Voltas Limited
8. Murphy India Limited
9. Polychem Limited

19. Mr. Mehta has, however, submitted that most of the settlements in pursuance of which awards had been made have expired and notices of termination have been served on the employers and in some cases disputes have been raised.

20. The management also argued that this Court in M/s Unichem Laboratories Ltd. v. The Workmen, (1972) 1 Lab LJ 576 = (AIR 1972 SC 2332 = 1972 Lab IC 1012) noticed in paragraph 33 of the decision (Lab LJ) = (Para 37 of AIR and Lab IC).

"Another feature of the scheme adopted by the Tribunal is that it puts a ceiling on the employees drawing basic wages up to Rs. 300 per month alone being eligible for dearness allowance; whereas under the practice originally obtaining in the company there was no such limit".

and, therefore, must be held to have approved of imposition of ceiling. We are unable to accept that this Court was called upon to decide about the question of ceiling in that appeal which was at the instance of the employers and not of the employees nor against the imposition of ceiling. The management also drew our attention to a decision of this Court in Remington Rand of India v. Its Workmen (1962) 1 Lab L.J. 287 (SC) wherein the scheme of D.A. contained a maximum of Rs. 200/- at the index figure 351-360 and the maximum was not interfered with by this Court. It is suffi-

cient to point out that the question of desirability of ceiling or otherwise was not at all in issue in that appeal and, therefore, this Court was not called upon to pronounce upon the matter.

18. On the other hand Mr. Kaka intervening for Cyanamid India Limited has drawn our attention to a number of awards in the Bombay region wherein there appears to be a ceiling on D.A. These are:

- Maharashtra Gazette (M.G.G.) dated 30-6-1966.
M.G.G. dated 21-11-1974.
M.G.G. dated 31-10-1974.
M.G.G. Part I-L dated 22-6-1972.
M.G.G. dated 31-1-1974.
M.G.G. dated 20-7-1972.
I.C.R. February 1970, page 57.
M.G.G. dated 27-7-1972.
M.G.G. dated 6-8-1970.

21. We, however, find that in the case of employees under the Central Government a kind of ceiling has been in vogue. For example one of the Second Pay Commission's recommendations was that the benefit of D.A. should in future adjustments be extended to all employees drawing a basic pay below Rs. 400/- per mensem in such a way that the total of basic pay and D.A. paid to an employee in the pay range of Rs. 300/- to Rs. 400/- does not exceed Rs. 400/- (page 97, paragraph 16). The Third Pay Commission also after fixing D.A. at a percentage of 3.5% of pay upto the pay range of Rs. 300/- fixed a maximum of Rs. 10/- per month and a minimum of Rs. 7/- per month. Similarly for the pay range above Rs. 300/- a percentage of 2.5% of pay was fixed subject to a maximum of Rs. 20/- per month and a minimum of Rs. 10/- per month. The Commission further recommended that the pay plus D.A. should in no case exceed Rs. 2,400/- per month.

22. From the above one thing, however, is clear that the question of imposition of ceiling on D.A. is not an absolutely alien phenomenon. Although it might not have been the general practice, ceiling was not rejected out of hand as irrational or un-

just by unions in the course of collective bargaining in the Bombay region.

23. So far as the workers involved in these appeals are concerned the question whether D.A. should cease at a certain level of salary does not arise for consideration. The maximum basic of the highest grade in the case of these employees is Rupees 500/-. It may, however be noted that a system has been in vogue in the case of Government employees where D.A. ceases to be admissible on reaching a certain level of salary. The question remains as to whether a ceiling should be placed on D.A. itself, when it exceeds Rs. 325/- as has been sought to be done by the employers. The employers gave a notice of change for imposition of ceiling on D.A. in May 1966 when the cost of living index has been on the constant rise each year. While the average for 1966 was 630 those for the subsequent years from 1967 to 1974 were 697, 740, 766, 797, 832, 876, 982 and 1198. In December 1974 it was 1336. The cost of living index being on a constant rise it is necessary to consider the totality of the wage packet of the workers and other relevant factors in order to decide if a ceiling on D.A. should be imposed. In this context our attention has been drawn by Mr. Sen to the statement of objects and reasons to the Additional Emoluments (Compulsory Deposit) Bill 1974 which is as follows:

"Controlling inflation is today the single most important task facing the country. Periodical revision of wages and adjustments in the rates of dearness allowance, which have been adopted as remedies for moderating the impact of rising prices, have been proving ineffective. In view of the mounting pressure of inflationary forces, payments of additional wages or dearness allowance will give an upward thrust to prices and will inevitably aggravate the situation, and also neutralise the effect of any increase in the wages or dearness allowance. In the circumstances, urgent steps aimed at breaking this vicious circle of money incomes chasing prices became inescapable. These measures undoubtedly involve some sacrifices by different sections of the community. As a part of these anti-infla-

tionary measures, the Additional Emoluments (Compulsory Deposit) Ordinance, 1974, was promulgated by the President on the 6th July, 1974. . ."

24. Reference to the above is made in order to highlight the dreadful consequences of inflation and the inefficacy of mere wage rise as a solution.

25. We may, however, in this connection usefully refer to what the National Commission on Labour said on this subject:

"Firstly, the increased purchasing power in the hands of the workers on account of compensatory payments for rise in cost of living forms a small part of the overall increase in purchasing power. Secondly, the elasticity of compensatory payments to changes in cost of living is generally less than unity so that the feed-back must taper off. Money wage stability, though important for price stability, is seldom a necessary, much less a sufficient condition for it. On the other hand, holding of the price line, particularly of the cost of living is an adequate condition for preventing increases in money wage payments that are not related to increases in productivity. This alone can prevent a fall in real wages".

26. Before we proceed further we have to take note of certain facts concerning the dispute. Although the company employs a total of 1142 workmen in its various factories and branches the present dispute relates to 265 workers in the Head Office (Bombay) out of them. It is not disputed that the supervisory staff consisting of 86 members, although not involved in this reference, have been in receipt of D.A. under the same scheme. There is no ceiling on D.A. in the Calcutta branch of the company where the workers are paid according to the Bengal Chamber of Commerce's rates. The industry-cum-region aspect may at present take care of the few employees working in Calcutta. It is, however, not unlikely that all the employees of the company may claim to be treated alike. There are also disputes pending in respect of the subordinate staff at the Head Office. Without adding further details it is sufficient to state that a general problem

like imposition of ceiling on D.A. in a company cannot be treated on the statistical burden relevant only to a section of the employees. Both the parties realise the importance of this aspect and produced before us a large number of documents containing various details including balance-sheets of the company upto 1973 to enable us

(Contd. on Col. 2)

KILICK NIXON LIMITED BOMBAY
COMPARISON OF TOTAL EMOLUMENTS OF CLERICAL,
SUPERVISORY AND JUNIOR EXECUTIVE STAFF

CLERICAL				SUPERVISORY				JUNIOR EXECUTIVE			
CLERICAL			SUPERVISORY			JUNIOR EXECUTIVE			JUNIOR EXECUTIVE		
Basic Salary	D. A.	Total	Basic Salary	D. A.	Total	Basic Salary	House Rent Allowance	Traveling allowance	Total		
Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.
April 1973 Minimum	70	840	410	Min.	275	555	880	400	150	150	700
(Feb. C.P.I. Middle	300	574	874	Mid.	520	730	1250	580	150	150	880
924). Maximum	500	780	1280	Mid.	800	730	1580	800	200	150	1150
				Max.	1200	730	1980	1000	200	150	1350
July 1974 Minimum	70	475	545	Min.	275	784	1089	400	150	150	700
(May C.P.I. Middle	800	790	1090	Mid.	520	1000	1520	580	150	150	880
1194). Maximum	500	1000	1500	Mid.	800	1000	1800	800	200	150	1150
				Max.	1200	1000	2200	1000	200	150	1350

It will be seen that the minimum basic salary of a junior executive is Rs. 400 and maximum is Rs. 1000/- With allowances the junior executive at the minimum gets a total of Rs. 700/- and at intermediate stages, namely of Rs. 530 and Rs. 800, he gets a total of Rs. 830/- and Rs. 1150/- respectively. When he reaches the maximum the total with allowance is Rs. 1350/-. The clerical staff at the maximum grade which is Rs. 500/- gets a total amount of Rs. 1230/- inclusive of D.A. of Rs. 730/- after removal of the ceiling at the C.P.I. 924. At the intermediate stage a clerk gets Rs. 874/- in the same index (Rs. 300/- basic salary plus Rupees 574/- D.A.) At the minimum he gets Rs. 70/- basic pay plus Rs. 340/- D.A. totalling Rs. 410/- in the same index 924. The position is worse when the consumer price index touches 1194 as seen above. The absence of ceiling on D.A. can result in curious anomalous situations wherein the pay packet of clerical staff would exceed the pay packet of junior executive staff. This is hardly conducive to discipline, efficiency and effective exercise of control.

28. Although the change in the D.A. scheme imposing the ceiling was notified in May 1966, it could not have

to have a complete picture of the entire matter.

27. The management has produced a statement showing the comparison of total emoluments of clerical and supervisory staff after implementation of the award and those of the junior executive staff. We have quoted therefrom showing the figures in April 1973 and July 1974 with the respective index at 924 and 1194.

been then contemplated that the index would touch such a high mark; yet within these nearly nine years that the dispute unfortunately has dragged on, it has given the court an idea of the effect of removal of the ceiling.

29. The management has submitted statements showing the actual working of the D.A. formula without the ceiling and tried to show that it would not be possible for it to bear the financial burden. The Tribunal went into this aspect, although at that time the figures of the actual working could not be there, and refused to accept the plea of incapacity to bear the burden. The main argument of the management was about the loss of Managing Agency which, according to it, resulted in shrinkage of income. The Tribunal went into the matter and came to the conclusion and, according to us, rightly, that the said plea had no substance.

30. The company is one of the twenty big industrial houses in the country. Originally there were two companies, one Killick Industries Limited and another Killick Nixon & Co. Private Limited. Killick Industries Limited was incorporated as a Public Limited Company on Novem-

ber 14, 1947 and Killick Nixon & Co. Private Limited was incorporated as a Private Company on January 23, 1948. Some time in 1957 the Killick Industries Limited purchased all the shares of Killick Nixon & Co. Private Limited with the result that Killick Nixon & Co. Private Limited became a wholly owned subsidiary of Killick Industries Limited. Under Section 43A of the Companies Act, 1956, Killick Nixon & Co. Private Limited became a public limited company with effect from March 28, 1961 and by an order of the Bombay High Court of March 24, 1970, was amalgamated with Killick Industries Limited with effect from August 1, 1969. Following the amalgamation and with the approval of the Central Government the name of Killick Industries Limited was changed to Killick Nixon Limited (the appellant). The activities of the company are: manufacturing of engineering products, namely, Jhonson Vibrators, Udall Pressing equipments and E.F.C.C. Furnaces; Selling agency of engineering products such as Vibrators, drilling equipment, electric meters and dredgers; general selling agency in respect of snowcem cement paint and allied products, carbon papers, slotted angles, Hawkins pressure cookers; export of piecegoods; and agency of City Line and Hall Line of U. K. and clearing and forwarding work.

31. The question, however, in this case may not be simply the financial capacity of the company alone. Ordinarily the capacity to bear the additional burden would certainly be a relevant factor. We are, however, not considering the matter from that aspect in the present case. We will assume that the company will be able to bear the additional financial burden if the ceiling is removed. We do not agree with the Tribunal that it is only if the company would be required to close down that such a demand should be rejected. That is an incorrect view to take in dealing with the problem with which we are concerned.

32. We have, therefore, a company which is prosperous. The consumer price index has been soaring higher and higher. The employees have to get protection of their real

wages. It is well settled that complete neutralisation of the rise of cost of living cannot be allowed except to the lowest category of employees. In the view of the National Commission on Labour "the only purpose of dearness allowance is to enable a worker in the event of a rise in cost of living to purchase the same amount of goods of basic necessity as before. This purpose would be served by an equal amount of dearness allowance to all employees irrespective of differences in their emoluments" (page 243). It was strenuously submitted that this view of the Commission should be accepted by us. In other words we should first ascertain what is the minimum wage in this company at which a worker would require complete neutralisation of the cost of living and whatever amount is found to be necessary for him as a protection against his real wages should only be available to all other employees. We are not required to give our opinion about this submission for the simple reason that the management here has already introduced a scheme in which there is percentage system on salary slabs linked with the consumer price index and there is no dispute about it.

33. All that the management wants in this case is that D.A. must not go on rising with the soaring price index and a limit should be imposed. We have already observed that in view of the status of the company the capacity to pay will not alone be of moment in favour of removal of the ceiling. The problem will have to be viewed from the following important aspects:

- (1) Condition of the wage scale prevalent in the company.
- (2) Condition of the wage level prevalent in the industry and the region.
- (3) The wage packet as a whole of each earner in the company with all amenities and benefits and its ability and potency to cope with the economic requirements of daily existence consistent with his status in society, responsibilities, efficiency at work and industrial peace.

- (4) The position of the company viewed in relation to other comparable concerns in the industry and the region.
- (5) Peremptive necessity for full neutralisation of the cost of living at the rock-bottom of wage scale if at or just above the subsistence level.
- (6) The rate of neutralisation which is being given to the employees in each salary slab.
- (7) Avoidance of huge distortion of wage differentials taking into reckoning all persons employed in the concern.
- (8) Degree of sacrifice necessary even on the part of workers in general interest.
- (9) The compulsive necessity of securing social and distributive justice to the workmen.
- (10) Capacity of the company to bear the additional burden.
- (11) Interest of national economy.
- (12) Repercussions in other industries and society as a whole.
- (13) The state of the consumer price index at the time of decision.
- (14) Forebodings and possibilities in the foreseeable future as far as can be envisaged.

34. We should also add that revision of D.A. is not the same thing as revision of wages.

35. Having given our anxious thought to all the above aspects, which are not exhaustive, we are unable to come to the conclusion that removal of the ceiling in the present context will be justified. The company has been able to make out a case for imposition of a ceiling. At what particular amount there should be a ceiling on D.A. is a matter which will have to be gone into by the Tribunal keeping in view the above principles. The financial capacity will have to be judged with regard to the commitment of the company as a whole towards all its employees.

36. We are unable to agree with the contention of the workers that unless there is a ceiling on profits there cannot be a ceiling on D.A. The question of D.A. being intimately connected with the cost of living, the matter cannot be judged by the

test of the aforesaid submission of the workmen.

37. There is, however, one thing which we must point out, lest there should be some misconception about it and that is that so far as the lowest paid employees at or just above the subsistence level are concerned, they are entitled to 100 per cent or at any rate not less than 95 per cent neutralisation of the rise in the cost of living and hence there should be no ceiling on dearness allowance payable to employees within the slab of first Rs. 100, unless it can be shown by the management that the rate of neutralisation in their case is more than 100 per cent. So far as the employees in the higher slabs are concerned, it would be for the Tribunal to consider, having regard to the aforesaid principles, whether a ceiling should be imposed at the second slab of Rs. 100 or only at the last slab of Rs. 201 to Rs. 500. The manner in which the ceiling may be imposed would also have to be decided by the Tribunal in the exercise of its judicial discretion keeping in view the aforesaid principles. The ceiling may be fixed either by prescribing a certain amount as the outside limit of the dearness allowance or by reference to the quantum of dearness allowance payable at a certain wage level. We do not wish to lay down as an invariable rule that in all cases there should be ceiling on D.A. Whenever a case of this nature comes for industrial adjudication it will always be a delicate task for the Tribunal to strike a balance keeping in view the above principles, weightage of each one of which being variable according to conditions obtaining. Whether or not there should be a ceiling on dearness allowance in a given case must depend on the facts and circumstances of that case. There can be no inexorable rule in that respect. We have formulated the various principles which must be taken into account by the Tribunal in determining this question but the most dominant of these must always be that of social justice, for that is the ideal which we have resolved to achieve when we framed our constitution.

38. In the result the award is set aside with regard to demand No. 2 (a)

relating to ceiling. The reference stands restored with regard to that specific matter and will be disposed of by the Tribunal as early as possible after giving opportunity to the parties. The appeals are partly allowed without costs.

Appeals partly allowed.

AIR 1975 SUPREME COURT 1788

(From: Bombay)*

M. H. BEG, A. ALAGIRISWAMI
AND N. L. UNTWALIA, JJ.

Ziyauddin Burhanuddin Bukhari,
Appellant v. Brijmohan Ramdass
Mehra and others, Respondents.

Civil Appeal No. 134 of 1973, D/-
25-4-1975.

(A) Representation of the People Act (1951), S. 83 (1) Proviso — Contents of election petition — Affidavit in prescribed form — Allegations of corrupt practices under Section 123 (2), (3) and (3A) — Absence of source of information regarding corrupt practices under Section 123 (3) and (3A) — Not a defect of the required form but may form the subject-matter of objection based on Ss. 86 and 123 (7) relating to supply of material particulars — Petition can only be dismissed for a substantial defect — AIR 1972 SC 515 and AIR 1975 SC 968, Foll. (Para 6)

(B) Representation of the People Act (1951), Section 116A — Appeal to Supreme Court — New point — Defect of want of particulars set up in written statement on which a issue was framed given up by appellant — Objection based on alleged want of particulars cannot be entertained in Supreme Court particularly when nothing material appears to have been wanting. (Para 7)

The Court can presume that, if such an objection on the ground of insufficient particulars is actually given up by a party so that an issue actually framed on it is not tried, the party could have suffered no disadvantage from alleged want of further details which are really matters of evidence. The law does not require

the whole evidence to be set out with the petition in the form of particulars.

(Para 7)

(C) Representation of the People Act (1951), Section 86 (5) — Amendment of election petition — Amendments really removing vagueness from the petition by confining the allegations of corrupt practices to what the appellant himself had said in his speeches — Objection to the order allowing amendment of petition which only clarified the petitioner's case, held not sustainable. (Para 8)

(D) Representation of the People Act (1951) Section 123 (2), (3) and (3A) — Scope and object of — Allegations of corrupt practices, under — Duty of Court.

Section 123, sub-ss. (2), (3) and (3A) were enacted so as to eliminate, from the electoral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of the Constitution, and, indeed, of any civilized political and social order. Due respect for the religious beliefs and practices, race, creed, culture, and language of other citizens is one of the basic postulates of the democratic system. Under the guise of protecting your own religion, culture, or creed you cannot embark on personal attacks on those of others or whip up low herd instincts and animosities or irrational fears between groups to secure electoral victories. The line has to be drawn by the Courts, between what is permissible and what is prohibited, after taking into account the facts and circumstances of each case interpreted in the context in which the statements or acts complained of were made. (Para 12)

(E) Representation of the People Act (1951) S. 123 (2) — Corrupt practice — Undue influence.

Section 123 (2) gives the "undue influence" which could be exercised by a candidate or his agent during an election a much wider connotation than this expression has under the Contract Act. The Court have to determine the effect of statements proved to have been made by a candidate, or, on his behalf and with his consent, during his election, upon the minds and feelings of the ordinary average voters of the country in every

* (Ele. Petn. No. 4 of 1972, D/- 28-11-1972 (Bom)).

case of alleged corrupt practice of undue influence by making statements. (Paras 13, 15)

(F) Representation of the People Act (1951) S. 123—Corrupt practice—Evidence and proof — Tape record speeches — Shorthand transcripts of tape records — Evidentiary value. (Evidence Act (1872), Ss. 3 and 7).

The tape records of speeches are 'documents' as defined in Section 3 of the Evidence Act which stand on no different footing than photographs and they are admissible in evidence on satisfying the following conditions:

(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.

(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

(c) The subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act. (Para 19)

In the instant case the tape record had been prepared and preserved safely by an independent authority, the police, and not by a party to the case; the transcripts from the tape records, shown to have been duly prepared under independent supervision and control, very soon afterwards, made subsequent tampering with the cassettes easy to detect; and, the police had made the tape records as parts of its routine duties in relation to election speeches and not for the purpose of laying any trap to procure evidence. It was clear from the deposition of the appellant, the returned candidate, that although he was identified by police officers as the person who was speaking when the relevant tape records were made, he did not, at any stage, dispute that the tape recorded voice was his. He only denied having made some of the statements found recorded after the tape records had been played in Court in his presence. In fact, he admitted that he knew that "the cassettes were recorded by police officers who gave evidence" in court. No suggestion was put to the police officers concerned

indicating that there had been any interpolation in the records the making of which was proved beyond all reasonable doubt by evidence which had not been shaken. (Para 23)

The tape records were the primary evidence of what was recorded. The transcripts could be used to show what the transcriber had found recorded there at the time of the transcription. This operated as a check against tampering. They could be used as corroborative evidence. (Para 24)

(G) Representation of the People Act (1951), Section 123 (2), (3) and (3A) — Corrupt practices, under — Evidence and proof — Shorthand notes and full shorthand transcripts made by persons who heard the speeches — Can be treated as corroborative evidence which can be used by a witness to refresh his memory — Their contents can be brought on record by direct oral evidence in the manner prescribed by S. 160, Evidence Act — (Evidence Act (1872), Ss. 159, 160). (Para 25)

(H) Representation of the People Act (1951), S. 123 (3)—Corrupt practice — Systematic appeal on ground of religion.

A candidate appealing to voters in the name of his religion could be guilty of a corrupt practice struck by Section 123 (3) if he accused a rival candidate, though of the same religious denomination, to be a renegade or a heretic. In the instant case the appellant had made a direct attack of a personal character upon the competence of rival candidate C to represent Muslims because C was not, according to him a Muslim of the kind who could represent Muslims. Nothing could be a clearer denunciation of a rival on the ground of religion. Such accusation, held, was contravention of S. 123 (3). (Para 18)

(I) Representation of the People Act (1951), S. 123 (3) and (3A) — Corrupt practice — Appeal to voters on ground of religion — Promoting feeling of enmity or hatred between citizens on ground of religion.

Candidates at an election to a legislature, which is a part of "the State", cannot be allowed to tell electors that their rivals are unfit to act as their representatives on grounds of their religious professions or practices.

To permit such propaganda would be not merely to permit undignified personal attacks on candidates concerned but also to allow assaults on what sustains the basic structure of the Democratic State. (Para 44)

The Constitution and the laws framed thereunder leave citizens free to work out happy and harmonious relationships between their religions and the quite separable secular fields of law and politics. But, they do not permit an unjustifiable invasion of what belongs to one sphere by what appertains really to another. It is for Courts to determine, in a case of dispute, whether any sphere was or was not properly interfered with, in accordance with the Constitution, even by a purported law. What is relevant in such a case is what is professed or put forward by a candidate as a ground for preferring him over another and not the motive or reality behind the profession which may or may not be very secular or mundane. It is the professed or ostensible ground that matters. If that ground is religion, which is put on the same footing as race, caste, or language as an objectionable ground for seeking votes, it is not permissible. On the other hand, if support is sought on a ground distinguishable from those falling in the prohibited categories, it will not be struck by S. 123 whatever else it may or may not offend.

(Paras 45, 46)

Held that the election speeches made by the returned candidate were highly inflammatory. The High Court had rightly found him guilty of corrupt practices defined by the provisions of S. 123 (3) and (3A).

(Paras 31 to 36 and 47)

(J) Representation of the People Act (1951), S. 99—Award of special cost — Election petition by a voter — Returned candidate B and a rival candidate C impleaded as respondents — B found guilty of corrupt practice — Order awarding Rs. 3000/- as costs to C held was not proper and set aside— Costs awarded to successful petitioner also reduced from Rs. 12,000/- to Rs. 6,000/-. (Para 49)

Cases Referred: Chronological Paras

AIR 1975 SC 968 = (1975) 1 SCC 788 6

AIR 1974 SC 66 = (1974) 3 SCC 425 25
 AIR 1972 SC 515 = (1972) 2 SCR 742 6
 AIR 1971 SC 1162 = (1971) 1 SCR 399 21
 AIR 1969 SC 734 = (1969) 3 SCR 217 8
 AIR 1969 SC 1201 = (1969) 3 SCR 603 8
 AIR 1969 SC 851 = (1969) 3 SCR 400 25
 AIR 1968 SC 147 = 70 Bom LR 76 = 1968 Cri LJ 103 20
 AIR 1965 SC 141 = (1964) 7 SCR 790 30
 (1965) 2 All ER 464 19

M/s. K. K. Singhvi, R. K. Garg, V. J. Francis, and S. C. Agarwala, Advocates of M/s. Ramamurthi & Co., for Appellant; Mr. M. C. Bhandare, Sr. Advocate (Mr. P. H. Parekh and Mrs. S. Bhandare, Advocates of M/s. Bhandare Parekh & Co. with him), (for No. 1) and Mr. D. V. Patel, Sr. Advocate, (Mr. B. R. Agarwala, Advocate of M/s. Gagrut & Co. with him), (for No. 2) for Respondents.

Judgment of the Court was delivered by

BEG, J.:— This appeal under Section 116A of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act') is directed against the judgment and order of the High Court of Bombay setting aside the election of the appellant to the Maharashtra State Assembly from Kumbharwada constituency held on 9-8-1972 on a voter's election petition.

2. The voter alleged that the appellant, in the course of his election, had committed corrupt practices defined in Sec. 123, sub-ss. (2) and (3) and (3A) of the Act. The gist of the charges against the appellant Ziyauddin Burhanuddin Bukhari (hereinafter referred to as 'Bukhari'), a Muslim League candidate, was: that, he had made speeches in the course of his election campaign calculated to induce a belief in the voters that they will be objects of divine displeasure or spiritual censure if they voted for Shaukat Currimbhoy Chagla (hereinafter referred to as 'Chagla'), a Congress party candidate, who was impleaded as the 2nd respondent;

that, in the above mentioned speeches, the appellant had called upon the electors to vote for him and not for Chagla on the ground that he alone stood for all that was Muslim whereas Chagla represented all that was against Muslim religion and belief so that Chagla could not be a true Muslim at all, the object of such appeals being to further the chances of election of Bukhari and to prejudicially affect the prospects of the election of Chagla; that, the appellant, Bukhari, had attempted to promote feelings of enmity and hatred between Muslims and Hindus on grounds of religion and community. Particulars of the speeches delivered at sixteen meetings and what was said there by Bukhari were furnished with the election petition.

3. The alleged corrupt practices are defined in the following provisions of Section 123:

"(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent, with the free exercise of any electoral right:

Provided that:

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who:—

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or,

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;

(b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be in-

terference within the meaning of this clause.

(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

(3A) The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate."

4. Before considering whether the allegations made in the petition are substantiated, and, if so, whether any corrupt practice, as defined above, was committed, beyond reasonable doubt, by the appellant, we will deal with certain technical objections placed before us at the outset by learned-counsel for the appellant.

5. It is urged that allegations of corrupt practices, falling under Sections 123(3) and 123(3A), are not supported by the affidavit required by the proviso to Section 83(1) of the Act. Section 83 of the Act enacts:

"83. Contents of petition. — (1) An election petition—

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure,

1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

6. It was submitted that Section 80 of the Act amounts to a prohibition against calling in question any election, "except by an election petition presented in accordance with the provisions of this part" (i.e. Chapter II which contains Section 83). Apart from the fact that the High Court dealing with this question had, in our opinion, rightly recorded the finding that the issue No. 2, framed on this objection, was specifically given up in its entirety by the learned Counsel for the appellant, so that he could not wriggle out of it by a vague reservation of some right to urge that the affidavit filed was not in proper form, we were not shown any defect of form at all in the affidavit filed. All that was urged is that the relevant affidavit does not give the sources of information so far as corrupt practices under Section 123 (3) and 123 (3A) are concerned. As was pointed out by this Court in *Hardwari Lal v. Kanwal Singh*, (1972) 2 SCR 742 = (AIR 1972 SC 515) this is not a defect of the required form but may, in suitable cases, form the subject-matter of an objection based on Section 86 and S. 123 (7) of the Act relating to supply of material particulars. It was indicated by this Court in *Prabhu Narayan v. A. K. Srivastava*, C.A. No. 1174 of 1973, delivered on 14-2-1975 = (AIR 1975 SC 968) that a petition can only be dismissed for a substantial defect.

7. In the case before us, as there is no defect at all in the form of the affidavit, and the alleged defect of want of particulars, set up in paragraph 2 of the written statement on which issue No. 2 was framed, must be deemed to have been given up on behalf of the appellant, we cannot now entertain in this Court an

objection, based on alleged want of particulars, particularly as nothing material seems to have been wanting. We also think there is no substance in the appellant's objection that the Trial Court had not framed an issue on an alleged vagueness of the petition which is another way of saying that it was wanting in particulars. The particulars of the speeches made by the appellant were given in great detail in the statements annexed to the petition with the necessary affidavit. We can presume that, if such an objection on the ground of insufficient particulars is actually given up by a party so that an issue actually framed on it is not tried, the party could have suffered no disadvantage from alleged want of further details which are really matters of evidence. The law does not require the whole evidence to be set out with the petition in the form of particulars.

8. Still another objection was that the Trial Court had erroneously allowed an amendment of the election petition by an order dated 29-9-1972. Reliance was placed upon this Court's decision in *Manubhai Nandlal v. Popatlal Manilal Joshi*, (1969) 3 SCR 217 = (AIR 1969 SC 734) and *Samant N. Balakrishna v. George Fernandes*, (1969) 3 SCR 603 = (AIR 1969 SC 1201), to contend that the amendment asked for should not have been allowed. We have examined the application for amendments of the petition sought by the petitioner and allowed by the Court. We think that the amendments really removed vagueness from the petition by confining the allegations of corrupt practice to what the appellant Bukhari himself had said in his speeches. Attributions of those very statements to his agents, in the alternative, which introduced some ambiguity, were deleted. Another amendment sought was the insertion of names of persons said to have made certain other speeches. The High Court had allowed the amendments on the ground that they did not amount to any allegation of a fresh corrupt practice. The question whether the speeches of certain persons other than the appellant were rightly permitted to become the subject-matter of consideration by the amendment has lost all importance.

as the appellant has been held guilty of corrupt practices solely for speeches made by himself and we propose to deal with these only. We, therefore, find no force in the objections to the order allowing amendment of the election petition, which only clarified the petitioner's case.

9. Learned Counsel for the appellant invited our attention especially to ground 'H' of the grounds of appeal. This is the most prolix of all the grounds of appeal the number of which not only exhausts the whole alphabet 'A' to 'Z' but ground numbered 'X' is divided into sub-grounds 'X1' to 'Z15', and each of these sub-grounds is further split up into a number of minor grounds. Ground 'H' itself is split up into 22 parts which cover 5 printed pages of our paper book. Ground 'H' thus consists of a long statement of the appellant's grievances about multifarious matters covering the whole course of trial of the case, such as a permission given by the Court to recall a police Sub-Inspector for further examination, permission accorded by the Court to the respondent's Counsel for getting transcripts of the appellant's tape recorded speeches made under the supervision of a Court officer, permission granted to the Solicitors of Chagla to obtain copies of documents filed, the observations recorded by the learned Judge about the demeanour of witnesses and other similar matters. No illegality whatsoever is even alleged in most of these purported grounds of objection. If these grounds indicate a carpingly unreasonable attitude of the appellant's Counsel during the course of the trial in the High Court or attempts to make mountains out of molehills, they may afford some light on why the rather unusual order of heavy costs was passed by the learned Judge with which we shall deal separately at the end of this judgment. We are, however, unable to find, from material on record, that the conduct of the trial by the learned trial Judge was unfair in any respect. Moreover, we think that the only really material questions before the Court for decision, on which we have ourselves re-examined the whole evidence on record, were: Did the appellant's speeches

contain what was said to be tape-recorded and also sought to be proved by oral evidence supported by the notes of those who are alleged to have heard these speeches themselves? If this was so, was their effect upon the ordinary average voters of this country such as to come within the mischief provided for by any of the three heads of provisions of Section 123 of the Act set out above? These are questions capable of determination objectively irrespective of the subjective inclinations or opinions of the Judge deciding such issues although we cannot, and should not even try to, escape the consequences, upon any case before us, of our conclusions about the purposes and meanings of the relevant provisions of Section 123 of the Act, set out above, reached by applying relevant rules of interpretation of such provisions.

10. We propose to indicate, at this stage, what mischief the provisions were designed to suppress because that seems to us to be the most illuminating and certain way of correctly construing these statutory provisions. We cannot do so without adverting to the historical, political, and Constitutional background of our democratic set up, such provisions are necessary, in our opinion, to sustain the spirit or climate in which the electoral machinery of this set up could work.

11. Our Constitution makers certainly intended to set up a Secular Democratic Republic the binding spirit of which is summed up by the objectives set forth in the preamble to the Constitution. No democratic political and social order, in which the conditions of freedom and their progressive expansion for all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed, and language. Our political history made it particularly necessary that these differences, which can generate powerful emotions, depriving people of their powers of rational thought and action, should not

be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed.

12. It seems to us that S. 123, sub-ss. (2), (3) and (3A) were enacted so as to eliminate, from the electoral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution, and, indeed, of any civilized political and social order. Due respect for the religious beliefs and practices, race, creed, culture, and language of other citizens is one of the basic postulates of our democratic system. Under the guise of protecting your own religion, culture, or creed you cannot embark on personal attacks on those of others or whip up low herd instincts and animosities or irrational fears between groups to secure electoral victories. The line has to be drawn by the Courts, between what is permissible and what is prohibited, after taking into account the facts and circumstances of each case interpreted in the context in which the statements or acts complained of were made.

13. Section 123 (2) gives the "undue influence" which could be exercised by a candidate or his agent during an election a much wider connotation than this expression has under the Indian Contract Act. "Undue influence", as an election offence under the English law is explained as follows in Halsbury's Laws of England, Third Edition, Vol. 14, pp. 223-224 (para 387):

"A person is guilty of undue influence, if he, directly or indirectly, by himself or by any other person on his behalf, makes use of or threatens to make use of any force, violence or restraint, or inflicts, or threatens to inflict by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting.

A person is also guilty of undue influence if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents the free exer-

cise of the franchise of an elector or proxy for an elector, or thereby compels, induces or prevails upon an elector or proxy for an elector either to vote or to refrain from voting".

14. It will be seen that the English law on the subject has the same object as the relevant provisions of Section 123 of our Act. But, the provisions of Section 123 (2), (3) and (3A) seem wider in scope and also contain specific mention of what may be construed as: "undue influence" viewed in the background of our political history and the special conditions which have prevailed in this country.

15. We have to determine the effect of statements proved to have been made by a candidate, or, on his behalf and with his consent, during his election, upon the minds and feelings of the ordinary average voters of this country in every case of alleged corrupt practice of undue influence by making statements. We will, therefore, proceed to consider the particular facts of the case before us.

16. We have already mentioned above that the offending statements were alleged to have been made by the appellant at sixteen election meetings addressed at various places between 12-2-1972 and 6-3-1973. Out of these, the petitioner's counsel had given up, in the Trial Court, reliance on speeches at four meetings some of which were held at places outside the appellant's constituency. The High Court held that the contents of speeches alleged to have been made on 1-3-1972 at Erskine Road and on 3-3-1972 at Ismail Cur-tay Road and on 4-3-1972 at Nizam Street by the appellant were not duly proved. The High Court did not find that the statements made by the appellant in the course of the speeches on 12-2-1972 at Kachi Memon Jamat Khana and on 23-2-1972 and 28-2-1972 at Chimna Butcher Street had transgressed the limits of propriety set by Section 123 (2) and (3) and (3A) of the Act. But, it found that the appellant had violated the provisions of either Section 123 (2) or 123 (3) or 123 (3A) of the Act by statements made in the course of the remaining

six speeches proved to have been made by the appellant.

17. The evidence relating to the appellant's speeches, discussed fully by the High Court, consisted of

1. Cassettes or tape records of the appellant's speeches.

2. Transcripts of tape recorded speeches prepared shortly after tape-recording them.

3. Full shorthand records of speeches of the appellant by those who heard them at meetings.

4. Notes and reports containing summaries of the appellant's speeches made by persons attending meetings.

5. Statements of witnesses present at the meetings who had actually heard what was said by the appellant.

18. There could be and was no objection raised to the admissibility of the last mentioned type of the evidence. But, questions relating to the admissibility of the first four types of evidence, mentioned above, were taken and may be conveniently dealt with here.

19. We think that the High Court was quite right in holding that the tape records of speeches were "documents", as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying the following conditions:

(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.

(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

(c) The subject matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act.

These requirements were deduced by the High Court from *R. v. Maqsd Ali*, (1965) 2 All ER 464.

20. The High Court had also relied on *Yusufalli Esmail Nagrea v. State of Maharashtra*, 70 Bom LR 76

at p. 78 = (AIR 1968 SC 147 at p. 149) to hold that a contemporaneous tape record of a relevant conversation or speech would be part of *Res Gestae*. In this case, this Court, while laying down requirements of admissibility of tape records as evidence, also pointed out that the ease with which the recording on a tape could be erased by subsequent recording, so that insertions could be superimposed, made it necessary to receive such evidence with caution, and it said that the Court should be satisfied, beyond reasonable doubt, that the record had not been tampered with.

21. The High Court also referred to *N. Sri Rama Reddy v. V. V. Giri*, (1971) 1 SCR 399 = (AIR 1971 SC 1162), for the proposition that, like any document, the tape record itself was "primary and direct evidence admissible of what has been said and picked up by the receiver." In other words, its use was not confined to purposes of corroboration and contradiction only, but, when duly proved by satisfactory evidence of what was found recorded and of absence of tampering, it could, subject the provisions of the Evidence Act, be used as substantive evidence. Thus, when it was disputed or in issue whether a person's speech, on a particular occasion, contained a particular statement there could be no more direct or better evidence of it than its tape record, assuming its authenticity to be duly established.

22. In our opinion the High Court had rightly relied upon the tape recorded reproductions of the appellant's speeches. It had given three grounds for considering the tape records to be reliable and authentic; firstly, the tape records had been prepared and preserved safely by an independent authority, the police, and not by a party to the case; secondly, the transcripts from the tape records, shown to have been duly prepared under independent supervision and control very soon afterwards, made subsequent tampering with the cassettes easy to detect; and, thirdly, the police had made the tape records as parts of its routine duties in relation to election speeches and not for the purpose of laying any trap to procure evidence.

23. We may add a fourth reason. This is that, after going through the deposition of Bukhari in Court, we find that, although he was identified by police officers as the person who was speaking when the relevant tape records were made, he did not, at any stage, dispute that the tape recorded voice was his. He only denied having made some of the statements found recorded after the tape records had been played in Court in his presence. In fact, he admitted that he knew that "the cassettes were recorded by police officers who gave evidence" in Court. If the indirect implication of his dubious statement, in denying some of the statements found in the speeches without denying that the voice making these statements was his, could be that some portions had been interpolated, the police officers should have been cross-examined about it. Nevertheless, the appellant admitted, under cross-examination, that he had given no instructions to his Counsel to cross-examine these officers on this matter. No suggestion was put to the police officers concerned indicating that there had been any interpolation in the records the making of which was proved beyond all reasonable doubt by evidence which had not been shaken.

24. As regards the shorthand transcripts of the tape records, the evidence of their makers is there. It is certainly corroborative inasmuch as it only goes to confirm what the tape records contained. The tape records were the primary evidence of what was recorded. The transcripts could be used to show what the transcriber had found recorded there at the time of the transcription. This operated as a check against tampering. They had been rightly used by the High Court only as corroborative evidence.

25. As regards the shorthand notes full shorthand transcripts made by those who heard the speeches, the High Court had treated these also as corroborative evidence which could be used by a witness to refresh his memory as laid down in Section 159 of the Evidence Act. It held that their contents could be brought on record by direct oral evidence in the manner prescribed by Section 160 of the Evidence Act, a course the propriety of

which has the support of decisions in this Court in *Laxminarayan v. Returning Officer*, (1974) 3 SCC 425 = (AIR 1974 SC 66) and in *Kanti Prasad Jayshanker v. Purshottamdas Ranchhoddas*, (1969) 3 SCR 400 = (AIR 1969 SC 851). We find no errors in the views adopted by the High Court on these questions.

26. It was suggested that the tape recording, the making of transcripts, the making of shorthand notes by the police had taken place at the instance of a Journalist, Yunus Rehman Ansari, who appeared as a witness for the petitioner in the case. He had frankly stated in his evidence in Court:

"During the elections I was looking after the interest of the second respondent. I did feel disappointed when the second respondent lost the election. Every worker of the candidate feels disappointed if the candidate loses".

27. After having been taken through the evidence, in the light of the submissions made by the learned Counsel for the appellant, we are unable to hold that there must have been a conspiracy between the Police Officers and Yunus Rehman Ansari to procure evidence for declaring the election of Bukhari void. Ansari, although not a disinterested witness, had stood the test of cross-examination well and could not be disbelieved merely because he was a worker of Chagla. His evidence is corroborated by the duly proved contents of tape recorded speeches, and, indeed by some of the admissions of Bukhari himself showing, inter alia, that he considered any one who advocated reform of Muslim personal law to be a person unfit to get the support of "any Muslim". He said:

"It is true that Muslim personal law is a part of our religion (Wit, gives this answer after first attempting to evade giving a direct answer). It would follow that whoever attempted to change the Muslim personal law would be attempting to affect the Muslim religion. It is true that whoever attempted to do so would not be entitled to the support of a true Muslim or of any Muslim. I conveyed this repeatedly in my speeches to my electorate".

28. We will now take up the contents of each of the six offending speeches, which, for the reasons indicated above, were rightly held to have been proved beyond reasonable doubt to have been made by the appellant.

29. The first of the speeches found to be objectionable was delivered by the appellant on 27-2-1972, at Masjid Street, within his own constituency. It is true that the contents of this speech are proved only by the evidence of Ansari corroborated by the notes prepared by Ansari himself. But, as these correspond with contents of other speeches examined by us, there seems no reason to disbelieve Ansari when he says that the appellant told the audience that Muslim personal law was a matter of religious faith for Muslims and that it extended to the mode of disposing of bodies of the dead. The appellant went on to tell the listeners that, if they voted for Chagla, they would have to cremate the bodies of their dead instead of burying them because Chagla had cremated the dead body of his sister. The appellant also attacked Chagla's religion by stating that everyone had to observe his religion whole-heartedly and not like one who was (to put it in the equivalent English idiom) "neither fish nor fowl". The appellant entreated his audience not to vote for those who stood against their religion. The clear implication of his words was that Chagla was not true to his religion whereas the appellant was, and, therefore, the voters should prefer Bukhari. His absolutely unambiguous object was to persuade the audience not to vote for Chagla but to vote for Bukhari on the ground that Bukhari was a true Muslim whereas Chagla was not.

30. The High Court had referred to *Kultar Singh v. Mukhtiar Singh*, (1964) 7 SCR 790 = (AIR 1965 SC 141) and said that a candidate appealing to voters in the name of his religion could be guilty of a corrupt practice struck by Section 123 (3) of the Act if he accused a rival candidate, though of the same religious denomination, to be a renegade or a heretic. The appellant had made a

direct attack of a personal character upon the competence of Chagla to represent Muslims because Chagla was not, according to Bukhari, a Muslim of the kind who could represent Muslims. Nothing could be a clearer denunciation of a rival on the ground of religion. In our opinion, the High Court had rightly held such accusations to be contraventions of Section 123 (3) of the Act.

31. The second speech found to contain objectionable matter was proved to have been delivered by the appellant on 29-2-1972 at Hussaini-bagh, a place said to be so situated that, though it lies outside the Kumbharwada constituency, a meeting there would be attended largely by persons residing within Kumbharwada constituency. Its contents were proved by a police Stenographer, Sheikh, who had made a full shorthand record of it which was translated. In this speech, the appellant was shown to have stated that, although Muslim personal law may be considered a personal matter by Chagla, it was considered to be "the law of God" by Muslims who would not tolerate any attempts to amend it as that would raise a religious question. In the course of this speech, the appellant is reported to have said that, if the Congress Government brought in "amendments in our religious law", the "battle would be fought in every street" as "the question of religion has arisen". The appellant had threatened the ruling Congress party with open rebellion if attempts were made to change Muslim personal law which he called "a question of religion". The appellant had also made statements implying that Chagla was a supporter of this policy of change in what Bukhari called "a matter of religion" for Muslims. The High Court had held that these statements amounted to a violation of Section 123 (3A) of the Act, on the ground that Bukhari's language was calculated to promote hostility between Hindus and Muslims. It opined that, in the appellant's mind, the Congress stood for the Hindu majority. We think that the language employed, viewed in the context of its purposes, could also fall within the purview of Section 123 (3) of the Act inasmuch

as Chagla was represented as candidate advocating what was contrary to Bukhari's view of Muslim religion. Indeed, the words used by Bukhari could be said to have even graver implications. However, we think that it was sufficiently unrestrained and irresponsible so as to promote feelings of hostility between different classes of citizens of India on grounds of religion and also directed personally against Chagla, an alleged supporter of an assumed attack on Bukhari's religion. We do not find sufficient reason to differ from the view adopted by the High Court that these statements amounted to electoral offences struck by Section 123 (3A) of the Act.

32. The third speech containing objectionable matter was proved to have been delivered by the appellant on 2-3-1972 at Saifi Jubilee Street within his own constituency. Its contents are proved by a full transcript made by Police Stenographer Shaikh, of which an English translation was before the Court, and by the oral evidence of Ansari corroborated by Ansari's notes. It contained allegations against Chagla's faithfulness to Muslim religion on the ground that he had advocated inter-communal or inter-caste marriages and that he wanted a Hindu to be a member of the Haj Committee. After the usual fulminations against Chagla, the appellant flung a question addressed to Chagla. It was translated: "With what cheek you say that you are a representative of ours"? In addition, there were references to riots in which only Muslims were alleged to have been killed. There was also the usual statement that Muslim Personal law was a matter of religion to Muslims. Bukhari then declared that if this law was sought to be changed, Muslim league candidates "would become such a wall for them against which they will break their heads". Bukhari claimed that he could die for Islam. He then said; "God has blessed us that every drop of our blood would give birth to thousands of Bukharis".

33. It appears to us that the High Court was right in construing the speech as highly inflammatory. It certainly amounted to the assertion that Muslim religion (or, what Bu-

khari thought it was) was in danger and could only be saved by man like Bukhari and not by Chagla. We think that it is a fair construction on the speech to hold that it amounted to at least a violation of Section 123 (3) of the Act. We think that it was also struck by Section 123 (3A) of the Act.

34. The fourth speech of the appellant, said to contain offending matter, was shown to have been delivered on 6-3-1972 at Bara Imam Road within the appellant's constituency. It was tape recorded by Sub Inspector N. A. Khan. In it, after the usual accusations, Chagla is attacked in the following words:

"At the moment we are in such a war in which our opponent is such a person who is playing with our religious affairs. He considers us to be a community whose conscience is dead".

The High Court rightly held it to be a violation of Section 123 (3) of the Act.

35. Another part of the speech which the High Court is held to be violative of Section 123 (3A) of the Act runs as follows:

"We have not signed any deed of slavery for the Government. When we feel that this Government is working against us, our rights are being crushed, our religious affairs are being interfered with, then we will rise openly against it. We would rise like a wall cemented with lead. Then who would bang with this wall, would get his head broken. No harm would be done to us".

It could be argued that, even if it did not directly contravene the letter of Section 123 (3A) of the Act, it was an incitement to violence. We, however, do not think it necessary to go further into this question here. We are not prepared to disagree with the opinion of the High Court about this speech. The High Court had rightly concluded that, in the appellant's mind, the Congress Government constituted "Hindu Raj".

36. The fifth objectionable speech of the appellant was shown to have been made on 6-3-1972 at Saifi Jubilee Street within the Kumbharwada constituency. This speech was

heard by Sub-Inspector Kulkarni who had made notes containing the gist of all the speeches delivered at the meeting. Nothing was brought out to cast any doubt on the veracity of Sub Inspector Kulkarni, who appeared as a witness and gave out the contents of the appellant's speech. In the speech, the appellant had attacked Chagla and his family on the ground that Chagla had advocated the inclusion of Hindus in the Haj Committee. Bukhari alleged that Chagla's wife, a Hindu lady called Nalini his son Ashok, as well as Chagla, used to attend the mosque as well as the temple. Bukhari went so far as to state that Chagla should be excluded from Muslim localities. Bukhari alleged that Chagla and his family pleased neither Allah nor Bhagwan. In other words, Bukhari, apart from making a direct attack on the alleged religious beliefs and practices of the Chagla family, clearly conveyed to the hearers that Chagla was an unfit person, on the ground of his mixed religious faith and practices, to represent Muslims. Bukhari had also called upon Muslims to unite against such a person if they wanted their religion to survive. The High Court had very rightly held that these statements contravened the provisions of Sec. 123 (3) of the Act.

37. The sixth and the last speech containing offensive matter was shown to have been made on 6-3-1972 at Chowki Mohalla Underia Street which, although outside the Kumbharwada constituency, was so situated as to attract the voters from the Kumbharwada constituency hardly 600 ft. away. The speech was tape recorded by Sub Inspector N. A. Khan. In this speech, the appellant again attacked Chagla and repeated what, according to him, he had also stated at another meeting, that is to say, that Chagla was neither a good Hindu nor a true Muslim so that neither God nor Bhagwan was pleased with him. He compared Chagla to a Dhobi's dog who neither belonged to the Dhobi nor to the Ghat. The appellant, while thus attacking the alleged personal beliefs and practises of Chagla, obviously in an attempt to induce the voters to refrain from voting for Chagla, prayed to God for suc-

cess so that no one may be able to attack the religion of Bukhari.

38. The whole outlook revealed by the speeches of Bukhari is that of a mediaeval crusader who had embarked on a Jihad for extirpation of the heresy or "kufr" which, in Bukhari's imagination, was represented by Chagla and his party. We do not consider such speeches to have any place in a democratic set up under our Constitution. Indeed, they have none in the world of modern science which has compelled every type of religion, for its own survival, to seek securer foundations than child-like faith in and unquestioning conformity or obedience to an invariable set of religious beliefs and practices.

39. We do not think that any useful purpose is served by citing authorities, as the learned Counsel for the appellant tried to do, to interpret the facts of the case before us by comparing them to the very different facts of other cases. In all such cases, the line has no doubt to be drawn with care so as not to equate possible impersonal attacks on religious bigotry and intolerance with personal ones actuated by bigotry and intolerance.

40. As already indicated by us, our democracy can only survive if those who aspire to become people's representatives and leaders understand the spirit of secular democracy. That spirit was characterised by Montesquieu long ago as one of "virtue". It implies, as the late Pandit Jawaharlal Nehru once said, "self discipline". For such a spirit to prevail, candidates at elections have to try to persuade electors by showing them the light of reason and not by inflaming their blind and disruptive passions. Heresy hunting propaganda on professedly religious grounds directed against a candidate at an election may be permitted in a theocratic state but not in a secular republic like ours. It is evident that, if such propaganda was permitted here, it would injure the interests of members of religious minority groups more than those of others. It is forbidden in this country in order to preserve the spirit of equality, fraternity, and amity between rivals even during elections. Indeed,

such prohibitions are necessary in the interests of elementary public peace and order.

41. Learned Counsel for the appellant submitted that if we considered the substance of what was said by the appellant it would only amount to a plea that the voters should support one who opposes any change in Muslim personal law as against another who wanted to change it. If change of personal law is, it is suggested, only a secular matter, opposition to its change could not become an appeal on grounds of religion. To accept this argument would be to view the appeal to the voters after turning it upside down, or, perhaps, inside out. We are not concerned so much with the real nature of what is opposed or supported as with the grounds on which a candidate claims support over a rival. We have to primarily examine the cloak which the appeal wears to parade in and not only what lies beneath it.

42. If all human activity in this world could be labelled "secular", on the ground that it appertains to "this world" as against "the other world", all religions thought and activity could be described as "secular", as it takes place in this world. But, the term is not used so broadly. It is a convenient label to distinguish all that is done in this world without seeking the intervention or favour of or propitiating a Super-human or Divine Power or Being from that which is done professedly to please or to carry out the will of the Divinity. Secularism, in the realm of Philosophy, is a system of Utilitarian ethics, seeking to maximize human happiness or welfare quite independently of what may be either religious or the occult.

43. Primitive man does practically nothing without making it wear a religious garb because his understanding of the physical world, of human nature, and of social needs and realities, is limited. He surrounds customary modes of action with an aura of superstitious reverence. He is fearful of departures from these lest he is visited by Divine wrath. Modern man, with his greater range of scientific knowledge and better understand-

ing of his own needs as well as of the nature of the Universe, attempts to confine religion to its proper sphere—that where he reaches a satisfying relationship between himself and the Divinity he believes in so as to get an inner strength and solace which enable him to overcome psychological crises or fears when confronted with disturbing or disrupting events, such as a Death, or their prospects. He does permit his religion, which should be essentially his individual affair, to invade what are properly the spheres of law, politics, ethics, aesthetics, economics, and technology, even where its administration is institutionalised and it operates as a social force.

44. The Secular State, rising above all differences of religion, attempts to secure the good of all its citizens irrespective of their religious beliefs and practices. It is neutral or impartial in extending its benefits to citizens of all castes and creeds. Maitland had pointed out that such a State has to ensure, through its laws, that the existence or exercise of a political or Civil right or the right or capacity to occupy any office or position under it or to perform any public duty connected with it does not depend upon the profession or practise of any particular religion. Therefore, candidates at an election to a legislature, which is a part of "the State", cannot be allowed to tell electors that their rivals are unfit to act as their representatives on grounds of their religious professions or practices. To permit such propaganda would be not merely to permit undignified personal attacks on candidates concerned but also to allow assaults on what sustains the basic structure of our Democratic State.

45. Our Constitution and the laws framed thereunder leave citizens free to work out happy and harmonious relationships between their religions and the quite separable secular fields of law and politics. But, they do not permit an unjustifiable invasion of what belongs to one sphere by what appertains really to another. It is for Courts to determine, in a case of dispute, whether any sphere was or was not properly interfered with, in accordance with the Constitution,

even by a purported law. The validity of Section 123 (2), (3) and (3A) has not been questioned before us. And, we have explained above what these provisions are meant for.

46. To return to the precise question before us now, we may repeat that what is relevant in such a case is what is professed or put forward by a candidate as a ground for preferring him over another and not the motive or reality behind the profession which may or may not be very secular or mundane. It is the professed or ostensible ground that matters. If that ground is religion, which is put on the same footing as race, caste, or language as an objectionable ground for seeking votes, it is not permissible. On the other hand, if support is sought on a ground distinguishable from those falling in the prohibited categories, it will not be struck by Section 123 of the Act whatever else it may or may not offend. It is then left to the electorate to decide whether a permissible view is right or wrong.

47. According to his own professions, the appellant wanted votes for himself on the grounds that he staunchly adhered to what he believed to be Muslim religion as contrasted with Chagla who did not. There is no doubt whatsoever in our minds that the High Court had rightly found the appellant guilty of the corrupt practices defined by the provisions of Sections 123 (2), 123 (3) and 123 (3A) of the Act by making the various speeches closely examined by us also.

48. Lastly, we have before us the order for costs made by the High Court in the following terms:

"Having regard to the provisions of Section 99 of the Act and Rules 24 and 26 of the Rules framed by this Court under the Act, I order the first respondent to pay to the petitioner the sum of Rs. 12,000/- for costs. I also order the first respondent to pay to the second respondent the sum of Rs. 3,000/- for costs. There will be no order in regard to costs of the other respondents as they have not filed written statements or appeared at the hearing".

49. We think that, although Section 99 of the Act may permit the

award of special costs in suitable cases, and, although, the appellant has been found guilty of corrupt practices of quite an offensive kind, yet, the order for costs appears to us to err on the side of severity. If the respondent Chagla is aggrieved in such a manner that he has grounds for some actionable claim against the appellant, he can, if so advised, take other steps which may be open to him under the law. An order for costs should not become a substitute for such other action with which we are not concerned here. Moreover, in the case before us, the petition itself was not filed by the 2nd respondent Chagla. In these circumstances, we do not think that there should have been an order for costs payable by the appellant to the second respondent Chagla. We, therefore, set aside the order awarding Rs. 3,000/- as costs to Chagla. We also reduce by half the costs awarded to the successful petitioner, that is to say, from Rs. 12,000/- to Rs. 6,000/-. We, however, think that the appellant must pay respondents 1 and 2 in this Court their costs occasioned by his appeal to this Court.

50. The result is that, subject to the modifications of the order for costs, to the extent indicated above, this appeal is dismissed with costs to respondents 1 and 2 on whose behalf appearance was put in.

Order accordingly.

AIR 1975 SUPREME COURT 1801

(From: ILR (1970) 2 Mad. 486)

V. R. KRISHNA IYER, R. S. SARKARIA AND A. C. GUPTA, JJ.

Joint Commercial Tax Officer
Division III, Madras, Appellant v. M/s. Spencer & Co. etc. etc., Respondents.

Civil Appeals Nos. 2005 to 2016
of 1970, D/- 2-5-1975.

(A) Tamil Nadu General Sales Tax Act (1 of 1959) Ss. 2 (r), (g) and 3 (1) — Turnover and total turnover — Tax collected by dealer in foreign liquor from purchaser under S. 21-A Madras Prohibition Act — Cannot form part of his taxable turnover. (Tamil Nadu Prohibition Act (10 of 1937), S. 21-A).

GS/GS/B943/75/KSB

Under the Madras General Sales Tax Act, 1959 the dealer has no statutory duty to collect the sales tax payable by him from his customer, and when the dealer passes on to the customer the amount of tax which the former is liable to pay, the said amount does not cease to be the price for the goods although "the price is expressed as X plus purchase tax". But the tax payable on the price of foreign liquor by the purchaser under S. 21-A Madras Prohibition Act cannot form part of the Taxable Turnover of the dealer assessee under the Madras General Sales Tax Act as the tax has been collected under a statutory obligation under S. 21-A. AIR 1962 SC 1037 and AIR 1966 SC 1738 and AIR 1971 SC 2216 Dist. ILR (1970) 2 Mad 486 Affirmed. (Para 3)

Cases Referred: Chronological Paras
 AIR 1971 SC 2216 = 1971 (Supp) SCR 945 = 1971 Tax LR 1510 2
 AIR 1966 SC 1738 = (1966) 3 SCR 582 2
 AIR 1962 SC 1037 = (1962) 2 SCR 570 2
 (1944) 1 All ER 372 = 1944 KB 237 3

Mr. S. Govind Swaminathan, Advocate General for the State of Tamil Nadu, (M/s. K. Venkataswami, N. S. Sivam, A. V. Rangam and Miss A. Subhashini, Advocates, with him), for Appellant, In Civil Appeals Nos. 2005-2008 and 2013-2016 of 1970; Mr. T. A. Ramchandran, Advocate, for Respondents; In Civil Appeals Nos. 2009-2012 of 1970; Mr. Vineet Kumar Advocate, for Respondent No. 1.

Judgment of the Court was delivered by

GUPTA, J.:— These twelve appeals arise out of a common Judgment of the Madras High Court disposing of the writ petitions filed by the respondents in which they challenged certain orders of the assessing authority under the Madras General Sales Tax Act, 1959 proposing to re-determine the taxable turnover of the respondents by including the sale-price of foreign liquor which, it was alleged, had escaped assessment. The High Court directed the sales tax authorities not to include in the assessable turnover the tax paid by the respondents under Section 21-A of the Madras Prohibition Act, 1937. In

these appeals, brought on certificate of fitness, the correctness of the High Court's decision is questioned by the sales tax authorities. The appeals have three different assesseees as respondents and relate to different assessment years concerning each assessee, ranging from 1959-60 to 1964-65.

2. The assesseees are dealers in foreign liquor, among other goods. They have been assessed to sales tax as dealers on sales or purchases of other goods under Section 3 (1) of the Madras General Sales Tax Act, 1959. Sec. 3(1) is the charging section providing generally that a dealer whose total turnover for a year is not less than the specified amount, shall pay a tax for each year at the specified rate. 'Turnover' is defined in sec. 2 (r) of the Act. The relevant part of the definition is as follows:

"'Turnover' means the aggregate amount for which goods are bought or sold or supplied or distributed, by a dealer, either directly or through another, on his own account or on account of others whether for cash or for deferred payment or other valuable consideration...."

'Total turnover' is defined in Sec. 2 (q) of the Act as "the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax". The question is whether the 'sales tax' collected by these assesseees under Section 21-A of the Madras Prohibition Act, 1937 can be treated as part of their total turnover. Section 21-A, so far as it is relevant for the present purpose, is in these terms:

"Every person or institution which sells foreign liquor—

(a) x x x x

(b) x x x x

shall collect from the purchaser and pay over to the Government at such intervals and in such manner as may be prescribed, a sales tax calculated at the rate of eight annas in the rupee, or at such other rate as may be notified by the Government from time to time, on the price of the liquor so sold."

Counsel for the appellants contended relying on several decisions of this Court to which we shall presently

refer, that the amounts collected by the assessee by way of sales tax from the purchasers were part of their total turnover and as such liable to be taxed under Section 3 (1) of the Madras General Sales Tax Act, 1959. In *M/s. George Dakes (P) Ltd. v. State of Madras*, (1962) 2 SCR 570 = (AIR 1972 SC 1037) this Court considered the question whether inclusion of the amounts collected by the appellants in that case as sales tax under the Madras General Sales Tax Act, 1959 was valid. The expression 'turnover' in the 1959 Act meant, as it does in the 1959 Act, aggregate amount for which goods are bought or sold, whether for cash or for deferred payment or other valuable consideration. This Court observed:

".....when a sale attracts purchase tax and the tax is passed on to the consumer, what the buyer has to pay for the goods includes the tax as well and the aggregate amount so paid would fall within the definition of turnover.....so far as the purchaser is concerned, he pays for the goods what the seller demands, viz, price even though it may include tax. That is the whole consideration for the sale and there is no reason why the whole amount paid to the seller by the purchaser should not be treated as the consideration for the sale and included in the turnover."

A similar view was taken by this Court in *State of Kerala v. Ramaswamy Iyer & Sons*, (1966) 3 SCR 582 = (AIR 1966 SC 1738). This was a case under the Travancore Cochin General Sales Tax Act, 1950. Here also the decision turned on the definition of 'turnover' which is similar to the definition of the term in the Madras General Sales Tax Act, 1959. The position was further explained in *Delhi Cloth and General Mills Ltd. v. Commr. of Sales Tax, Indore*, 1971 (Supp) SCR 945 = (AIR 1971 SC 2216 = 1971 Tax LR 1510) which was a case under the Madhya Pradesh General Sales Tax Act, 1958. The relevant provisions of this Act appear to be similar to those of the Madras General Sales Tax Act, 1959. Stating that the liability to pay tax under the Act is that of the dealer, Hegde J. speaking for the Court said that the Act did not confer

"any statutory power on the dealer to collect sales tax as such from any class of buyers.... Unless the price of an article is controlled, it is always open to the buyer and the seller to agree upon the price to be payable. While doing so it is open to the dealer to include in the price the tax payable by him to the Government. If he does so, he cannot be said to be collecting the tax payable by him from his buyers. The levy and collection of tax is regulated by law and not by contract. So long as there is no law empowering the dealer to collect tax from his buyer or seller, there is no legal basis for saying that the dealer is entitled to collect the tax payable by him from his buyer or seller. Whatever collection that may be made by the dealer from his customers same can only be considered as valuable consideration for the goods sold".

3 It is clear from sec. 21-A of the Madras Prohibition Act, 1937 that the sales tax, which the section requires the seller of foreign liquor to collect from the purchaser is a tax on the purchaser and not on the seller. This is what makes the authorities on which counsel for the appellants relied inapplicable to the cases before us. Under S. 21-A the tax payable is on the price of the liquor and that tax is to be paid by the purchaser, the seller is required to collect the tax from the purchaser which he has to pay over to the Government. Section 21-A makes the seller a collector of tax for the Government, and the amount collected by him as tax under this section cannot therefore be a part of his turnover. Under the Madras General Sales Tax Act, 1959 the dealer has no statutory duty to collect the sales tax payable by him from his customer, and when the dealer passes on to the customer the amount of tax which the former is liable to pay, the said amount does not cease to be the price for the goods although "the price is expressed as X plus purchase tax" *Paprika Ltd. v. Board of Trade* (1944) 1 All ER 372. But the amounts collected by the assessee concerned in these appeals under a statutory obligation cannot be a part of their taxable turnover under the Madras General Sales Tax Act, 1959. |

4. The appeals are dismissed with costs: one hearing fee.

Appeals dismissed.

AIR 1975 SUPREME COURT 1804

N. L. UNTWALIA AND S. MURTAZA
FAZL ALI, JJ.

Dhena Hembram, Petitioner v. The District Magistrate, West Dinajpur and another, Respondents.

Writ Petn. No. 16 of 1975, D/- 9-4-1975.

(A) Maintenance of Internal Security Act 1971, Sec. 3—Grounds of detention — Detenu alleged to have committed two dacoities in succession within a period of two months — Use of fire arms in both dacoities and threatening of witnesses so that nobody was available to depose against him — Held that “public order” was undoubtedly disturbed and the order of detention could not be disturbed.

(Para 3)

Judgment of the Court was delivered by

FAZL ALI, J.:— An order of detention was passed against the detenu by the District Magistrate, West Dinajpur on 4th May, 1974 under sub-section (1) read with sub-section (2) of Section 3 of the Maintenance of Internal Security Act, 1971. In pursuance of this order the detenu was arrested on May 8, 1974. On June 6, 1974 the case of the detenu was referred to the Advisory Board which reported on 6th July, 1974 that there were sufficient grounds for detaining the petitioner. The petitioner also made a representation which was received by the Government on June 25, 1974 and it was rejected by the State Government on July 2, 1974.

2. It is conceded by learned counsel appearing as amicus curiae for the petitioner that all the formalities required under the provisions of the Maintenance of Internal Security Act have been duly complied with. The grounds served on the petitioner are as follows:

1. That on the night of 21/22-1-74 at about .01 hrs. you along with your associates Chandu Murmu, Naz-

rul Islam alias Bisan and others being armed with fire-arms and other deadly weapons while proceeding to commit dacoity elsewhere were detected at village Bhitar Masum, P. S. Banshihar, District West Dinajpur by one Jolok Debsharma s/o Shahat Debsharma of that village who along with his brother Pashendra Debsharma was going to the village Chowghora under Banshihari P. S. for fetching medicine for their cattle with a burning hurricane lantern in his hand. Being challenged by Shri Jolok Debsharma, you fired one round causing his instantaneous death. On hearing the sound of gun fire, the R. G. members on duty and other villagers rushed to the spot when you and your associates fired another three rounds at a time causing gunshot injuries on the person of other four men. When a gun licensee living nearby fired one round, you and your associates fired several rounds indiscriminately to terrorise the villagers. This daring incident created a wide-spread panic in the minds of the law-abiding citizens and a sense of insecurity, fear and fright prevailed in the area for a considerable period disrupting the even tempo of lives of the local people. Some of the witnesses could recognise you and some of your associates but they dared not open their lips against you and some of your associates out of fear of further trouble. Thus you disrupted the public order in Banshihari P. S. area.

2. That on the night of 2-3-74 at about 2.30 hrs. you along with your associates Chandu Murmu, Nazrul Islam alias Bisan and many others being armed with fire-arms, spears, Hasuas, bows and arrows etc. raided the house of Pajiruddin Mia s/o Jobaruddin Mia of Narayanpur, P. S. Banshihari, District West Dinajpur as well as five neighbouring houses belonging to Giasuddin Ahmmed, Dhan Mohd. Hayat Mohd. Dasiruddin Mia and Tosadakshya Hossen of the same hamlet and looted away cash, rice, utensils and other household properties valued Rs. 2,000-00. During the the commission of the crime, you fired one round to terrorise the R. G. members and other villagers who had approached to resist the crime on hearing hue and cry raised by the

inmates of the victims of the houses. As a result of this firing one of the R. G. members sustained gunshot injuries on his person. This incident also created a wide-spread panic in the minds of the law abiding citizens and a sense of insecurity, fear and fright prevailed in the area for a considerable period disrupting the normal flow of avocation of the people of the locality. Some of the witnesses could recognise you and your associates but out of fear of further trouble they dared not speak against you. Thus you disturbed the public order.

3. The grounds are absolutely clear and specific and learned counsel has also conceded that the grounds are relevant and do not suffer from any ambiguity. The detenu is alleged to have committed two dacoities, one after the other within a period of two months. In the course of both the occurrences he is said to have used fire arms and threatened witnesses and therefore nobody is available to depose against him. This has undoubtedly disturbed public order.

4. We find no merits in this petition which is accordingly dismissed and the rule discharged.

Petition dismissed.

AIR 1975 SUPREME COURT 1805

(From: AIR 1974 Kant. 16)

A. ALAGIRISWAMI, P. K.
GOSWAMI AND N. L. UNT-
WALLA, JJ.

Kundur Rudrappa, Appellant v. The Mysore Revenue Appellate Tribunal and others, Respondents.

Civil Appeal No. 481 of 1973, D/- 31-7-1975.

(A) Motor Vehicles Act (1939), S. 64 (1) (a) — Order granting permit affirmed in appeals — Appeal against order issuing permit in pursuance of order granting permit not competent. (Mysore Motor Vehicles Rules (1963), R. 178). AIR 1974 Kant. 16 Reversed.

Sec. 64 has to be read with R. 178 of the Mysore Motor Vehicles Rules, 1963, which prescribes the procedure for appeal to the various authorities. There is no appeal provided for under

Section 64 against an order issuing a permit in pursuance of the order granting the permit. Issuance of the permit is only a ministerial act necessarily following the grant of the permit. The appeals before the State Transport Appellate Tribunal and the further appeal to the Mysore Revenue Appellate Tribunal against the order issuing permit were, therefore, not competent under Section 64 and both the Tribunals had no jurisdiction to entertain the appeals and to interfere with the order of the Regional Transport Authority granting the permit which had already been affirmed in appeal by the State Transport Appellate Tribunal and further in second appeal by Mysore Revenue Appellate Tribunal. The High Court was, therefore, not right in dismissing the writ application of the appellant by which the orders of the State Transport Appellate Tribunal and the Mysore Revenue Appellate Tribunal had been challenged. AIR 1974 Kant. 16 Reversed. (Para 5)

Mr. H. B. Datar, Sr. Advocate (Mr. K. N. Bhat, Advocate with him), for Appellant; Mr. S. S. Javali and Mr. B. P. Singh, Advocates, for Respondents Nos. 1, 3-13.

The Judgment of the Court was delivered by

GOSWAMI, J.:— This appeal by special leave is directed against the judgment of the Mysore High Court (now High Court of Karnataka) of February 9, 1973, rejecting the appellant's writ petition under Article 226 of the Constitution by which the orders of the State Transport Appellate Tribunal and the Mysore Revenue Appellate Tribunal had been challenged.

2. Briefly the facts are as follows:

The appellant was granted a stage carriage permit under Section 48 of the Motor Vehicles Act, 1939 (briefly the Act) for the route Devanagere to Shimoga via Honnali by the Regional Transport Authority, Shimoga, by its order dated May 3/4, 1963. Some of the respondents preferred appeals against the said order to the State Transport Appellate Tribunal and obtained stay of the order. The appeals were, however, dismissed on Septem-

ber 27, 1963. Again, some of the respondents preferred further appeals to the Mysore Revenue Appellate Tribunal against the order of the State Transport Appellate Tribunal. This time also the appeals met with the same fate and were dismissed on 27-2-1967. It appears, however, that no order of stay was granted by the Mysore Revenue Appellate Tribunal.

3. On April 25, 1967, the Secretary to the Regional Transport Authority, Shimoga, called upon the appellant to produce the relevant documents and the certificate of registration for making necessary entry in the permit. The appellant produced the same on April 26, 1967, and the permit was issued on the same day. Against the order of the issue of the permit, respondents 4 to 13 preferred appeals to the State Transport Appellate Tribunal on the ground that the Secretary to the Regional Transport Authority, Shimoga, had no jurisdiction to issue a permit under R. 119 of the Mysore Motor Vehicles Rules, 1963 (briefly the Rules) after a lapse of such a long time from the date of the grant of the permit. It was contended that the issue of the permit was made beyond the prescribed period of limitation under Rule 119. It may be mentioned that at the time of the grant of the permit the Mysore Motor Vehicles Rules, 1945 (old Rules) were in force and Rule 151 of the old Rules was replaced by Rule 119 with effect from July 1, 1963. It was contended by the appellant before the appellate authorities that there was no period of limitation under R. 151 of the old Rules, which was applicable to his case, for the issue of a permit. The appeals of the respondents were allowed by the State Transport Appellate Tribunal by majority on January 29, 1969. The District Judge Member, however, dissented. An appeal filed by the appellant to the Revenue Appellate Tribunal against the order of the State Transport Appellate Tribunal was dismissed which led to the unsuccessful writ application in the High Court and hence this appeal.

4. The first point that arises for consideration is whether any appeal lay under Section 64 of the Act to the State Transport Appellate Tri-

bunal against the issue of a permit in pursuance of an earlier resolution of the Regional Transport Authority granting the permit. It is only necessary to read Section 64 (1) (a) which is material for the purpose of this appeal:

64 (1) (a): "Any person aggrieved by the refusal of the State or a Regional Transport Authority to grant a permit or by any condition attached to a permit granted to him... may within the prescribed time and in the prescribed manner, appeal to the State Transport Appellate Tribunal constituted under sub-section (2), who shall, after giving such person and the original authority an opportunity of being heard, give a decision thereon which shall be final".

We are not required to consider the other clauses of Section 64 (1) which are admittedly not relevant. Sec. 64 has to be read with Rule 178 of the Rules which prescribes the procedure for appeal to the various authorities.

5. Appeal is a creature of the statute. There is no dispute that Section 64 of the Act is the only section creating rights of appeal against the grant of permit and other matters with which we are not concerned here. There is no appeal provided for under Section 64 against an order issuing a permit in pursuance of the order granting the permit. Issuance of the permit is only a ministerial act necessarily following the grant of the permit. The appeals before the State Transport Appellate Tribunal and the further appeal to the Mysore Revenue Appellate Tribunal are, therefore, not competent under Section 64 of the Act and both the Tribunals had no jurisdiction to entertain the appeals and to interfere with the order of the Regional Transport Authority granting the permit which had already been affirmed in appeal by the State Transport Appellate Tribunal and further in second appeal by the Mysore Revenue Appellate Tribunal. There was, therefore, a clear error of jurisdiction on the part of both the Tribunals in interfering with the grant of the permit to the appellant. The High Court was, therefore, not right in dismissing the writ application of the appellant, which ought to have been allowed.

6. Although arguments were addressed by counsel with regard to old Rule 151 and Rule 119 of the Mysore Motor Vehicles Rules, 1963, we do not feel called upon to pronounce upon the legal effect of these rules in this appeal.

7. In the result the appeal is allowed. The order of the High Court is set aside and necessarily the order of the State Transport Appellate Tribunal of January 29, 1969 and the order of the Mysore Revenue Appellate Tribunal of May 8, 1970, also fall. The order granting the permit to the appellant stands restored. There will be no order as to costs.

Appeal allowed.

AIR 1975 SUPREME COURT 1807

**N. L. UNTWALIA AND
S. MURTAZA FAZL ALI, JJ.**

Gopal Mondal, Petitioner v. The State of West Bengal, Respondent.

Writ Petn. No. 23 of 1975, D/- 9-4-1975.

(A) Maintenance of Internal Security Act (1971), S. 3 (3) — "Forthwith" — Meaning of — The word means "as soon as possible; without any delay". If there is some delay which is reasonably explained, there is no violation of the mandatory requirement of the law. (Words and Phrases — "Forthwith").

Held on the facts stated in the counter affidavit, that the apparent delay (of three days) had been satisfactorily explained. (Para 3)

Judgment of the Court was delivered by

UNTWALIA, J.:— The petitioner has challenged his detention made against him by the District Magistrate, 24 Parganas under Section 3 (1) (2) of the Maintenance of Internal Security Act, 1971. The order of detention was made on August 23, 1973. The petitioner was arrested on 24th August, 1973. Grounds of detention were served on him and a report was made to the State Government by the District Magistrate on August 27,

1973. Other formalities under the law were complied with thereafter. Learned counsel for the petitioner who assisted the Court as amicus curiae submitted two points: (i) that according to the statement of the petitioner in his petition sent from jail, the grounds of detention served on him in Bengali language were materially different from those written originally in English; and (ii) that the District Magistrate reported the matter to the State Government on August 27, 1973, three days later and not 'forthwith' as required by Section 3 (3) of the Act.

2. We do not find any substance in either of the points urged on behalf of the petitioner. In the counter affidavit it is stated that there was not difference in the grounds served on the petitioner and the grounds which were the basis of the order made by the District Magistrate. Further, the grounds were explained to the detenu in his language.

3. The word 'forthwith' has been interpreted to mean "as soon as possible; without any delay." If there is some delay which is reasonably explained, then there is no violation of the mandatory requirement of the law. In the counter it has been explained that as many as seven detention orders were made by the District Magistrate on 23rd August, 1973. Reports had to be typed in all those cases and they were typed on 24th and 25th August. 26th August was a Sunday and therefore the report could not be sent earlier than 27th. We are satisfied that, on the facts stated in the counter, the report was sent forthwith, as the apparent delay of three days has been satisfactorily explained.

4. We do not find any other infirmity in the detention of the petitioner. The application is therefore dismissed and the rule discharged.

Application dismissed.

AIR 1975 SUPREME COURT 1808

(From: Kerala)*

K. K. MATHEW, Y. V. CHANDRACHUD AND V. R. KRISHNA IYER, JJ.

Chellappan and others, Appellants v. The State of Kerala, Respondent.

Criminal Appeal No. 87 of 1971, D/- 1-4-1975.

(A) Criminal P. C. (1973), S. 378—
— Appeal against acquittal by Sessions Court — Re-appraisal of evidence by High Court in such appeal — Permissibility — Several accused — Desirability of considering evidence against each accused separately — (Constitution of India, Art. 134 — Penal Code (1860), Section 149.

A number of accused persons charged and tried together before the Sessions Court were acquitted by such Court. On appeal by the State against such acquittal, the High Court set aside the acquittal and convicted the accused under Section 302 read with S. 149 of the Penal Code, and sentenced each of them to imprisonment for life.

In an appeal to the Supreme Court against the order of the High Court, it was contended that the High Court was in error in disregarding the reasons given by the Trial Court for its order of acquittal of the accused. Reliance was placed by the appellants' Counsel on the decision of the Supreme Court in AIR 1974 SC 606, in support of his contention.

Held: The contention was not acceptable. The High Court was justified in re-appraising the evidence and holding that the reasons given by the Trial Court were far too slender for acquitting the accused. (Para 4)

The Supreme Court, however, remarked that "unfortunately, neither the Sessions Court nor the High Court considered the evidence separately as against each of the accused." (Para 7)

Cases Referred: Chronological Paras
 AIR 1974 SC 606 = 1974 Cri LJ 479 3

*(Cri. Appeal No. 361 of 1970, D/- 1-3-1975 Ker.)

GS/FS/B320/75/SAR

Mr. D. Mukherjee, Sr. Advocate, (Mr. A. S. Nambiar, Advocate, with him), for Appellant; Mr. K. T. Harindranath Sr. Advocate (Mr. A. G. Pudissery, Advocate, with him), for Respondent.

Judgment of the Court was delivered by

CHANDRACHUD, J.:— This is an appeal from the judgment of the High Court of Kerala setting aside an order of acquittal passed by the learned Sessions Judge, Kottayam, and convicting the appellants under S. 302 read with Section 149 of the Penal Code. The High Court has sentenced each of the eight appellants to imprisonment for life.

2. The incident out of which the prosecution arises happened at about 9 p.m. on December 25, 1969 in Baisson Valley of Rajakkadu Village. It is alleged that the appellants formed themselves into an unlawful assembly on the road in front of the ration shop of appellant No. 1 and in prosecution of the common object of the assembly they committed the murder of one Kunjukunju. Kunjukunju received 19 injuries and died on the spot. The First Information Report about the incident was lodged next afternoon by P.W. 1 at the Udumbanchola police station, which is at a distance of about 35 miles from the scene of occurrence.

3. Relying on the decision of this Court in Ram Jag v. State of U. P., AIR 1974 SC 606 = (1974 Cri LJ 479) learned counsel for the appellants contends that the High Court was in error in disregarding the cogent reasons given by the trial court in support of the order of acquittal. Even assuming that two views of the evidence are reasonably possible the High Court, it is urged, ought not to have substituted its own view for that of the trial court.

4. We are unable to accept this submission. The High Court, in our opinion, was justified in holding that the reasons given by the learned Sessions Judge were far too slender to justify the acquittal of the appellants. The principal reason given by the learned Sessions Judge for acquitting the appellants is that the evidence of the eye-witnesses is "patent-

ly artificial". Considering the evidence in the case, it seems to us impossible to say that the evidence led by the prosecution is in any sense artificial. The Sessions Judge thought it unnatural that the appellants should commit the murder of the deceased in front of the shop of appellant No. 1 and that after the murder they should permit the dead body to lie at the scene of occurrence. He also felt that if the appellants were acting in prosecution of a common object, appellant No. 2, instead of pushing the victim from behind, would have straightway stabbed him on the chest. The eye-witnesses, according to the learned Judge, could not have seen the incident closely as the victim must have been surrounded by the assailants. This seems to us a very unrealistic view to take as it overlooks the background and some of the basic facts of the case. There is fair reason to believe that on the Christmas night, the appellants had helped themselves to a rather generous dose of alcohol. There is evidence showing that they had purchased four or five bottles of Arrack. They had enmity of a sort with the deceased and on seeing him passing by, they started assaulting him in a vainglorious way. It does not appear that the attack was premeditated, in the sense that the appellants were lying in wait for the deceased. An assault on a so-called enemy in the vicinity of one's own dwelling or allowing the victim to lie where he was slain are not of uncommon occurrence so as to infuse into the case an air of unreality. Nor indeed could the eye-witnesses have failed to notice what happened under their very nose. The trial Judge more or less imagined that these features were patently artificial. The High Court was therefore justified in re-appreciating the evidence in order to determine whether the charge of murder was brought home to the appellants.

5. The evidence of P.Ws. 1, 2, 5 and 6 to which counsel for the appellants has drawn our attention is clear and consistent. It establishes that the appellants participated in the attack on the deceased, though in an unequal measure. The High Court has considered fully the evidence of these

witnesses and we see no reason to take a different view of that evidence.

6. Appellants 1 to 4 and 8 took a leading part in the assault on the deceased and the evidence leaves no doubt that their common object was to commit the murder of the deceased. While the deceased was passing by the shop of appellant No. 1, appellant No. 2 shouted: "See, he is going. Catch him. Don't let him go". Appellant No. 8 came out of the shop and held the deceased. Appellant No. 2 caused two stab injuries to the deceased immediately thereafter. Appellants 1, 2 and 8 then dragged the deceased to the shop of appellant No. 1. Appellant No. 8 hit the deceased with a stone and appellant No. 3 followed suit. Appellant No. 4 hit the deceased with an iron rod.

7. It is, however, doubtful whether appellants 5, 6 and 7 shared the common object of the unlawful assembly to commit the murder of the deceased. Appellants 6 and 7 assaulted the deceased with kicks and that was almost after the deceased fell down motionless. Appellant No. 5 also did not take any part in the earlier stage of the incident. He hit the deceased with a piece of firewood. Considering the various facts and circumstances we are of the opinion that these three appellants could only be convicted of lesser offences. Unfortunately, neither the Sessions Court nor the High Court considered the evidence separately as against each of the accused.

8. In the result, we confirm the order of conviction and sentence passed by the High Court on appellants 1, 2, 3, 4 and 8 and dismiss their appeal. The order of conviction and sentence passed by the High Court on appellants 5, 6 and 7 is set aside and their appeal is partly allowed. We convict appellant No. 5 under Section 324 of the Penal Code and sentence him to suffer rigorous imprisonment for three years. We convict appellants 6 and 7 under Section 323, Penal Code, and sentence each of them to suffer rigorous imprisonment for one year.

Order accordingly.

AIR 1975 SUPREME COURT 1810

(From: Madhya Pradesh)*

M. H. BEG AND A. C. GUPTA, JJ.

M/s. Supreme General Films Exchange Ltd. (In Appeal and Spl. Leave Petns.), Appellant v. 1. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar and others (in Civil Appeal No. 1041 of 1968); 2. Her Highness Tej Suryawanshi and another (in both the Spl. Leave Petns.), Respondents.

Civil Appeal No. 1041 of 1968 and Spl. Leave Petns. (Civil) Nos. 2494 and 2533 of 1974, D/- 4-8-1975.

(A) Specific Relief Act (1877), S. 42 — Declaratory relief under — Scope of — Discretion of Court — Court can grant declaration according to circumstances of case independently of the requirements of the section. AIR 1952 Punj 387, held impliedly overruled by AIR 1967 SC 436.

Section 42 merely gives statutory recognition to a well-recognised type of declaratory relief and subjects it to a limitation, but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of Courts to give declarations of right in appropriate cases falling outside Section 42. The circumstances in which a declaratory decree under Section 42 should be awarded is a matter of discretion depending upon the facts of each case. No doubt a complete stranger whose interest is not affected by another's legal character or who has no interest in another's property could not get a declaration under Section 42 with reference to the legal character or the property involved. (Case law discussed). AIR 1967 SC 436, Foll; AIR 1952 Punj 387, held impliedly overruled by AIR 1967 SC 436. (Paras 15, 16)

The theatre in question was mortgaged in favour of the plaintiff. The plaintiff, unable to recover the amount due, brought a suit in 1954 in which a compromise decree was passed on 7-5-1960 in terms of an agreement between the parties that amount due will be realised by the sale of the Theatre. Another creditor, a Bank, had also obtained a decree against the owner of the theatre on 29-4-1952. Rights under that decree were assigned in favour of the plaintiff. The theatre was attached on 4-5-1955 in execution of that decree. The plaintiff filed a suit for declaration that the lease executed in favour of the defendant in 1956 in respect of that theatre is void and ineffective against the plaintiffs' rights under the two decrees in execution of which the theatre had been attached. The

plaintiff wanted the declaration also to make it clear that an auction purchaser purchasing the theatre in execution of either of the two decrees, gets rights free from any obligation towards the defendant under the void lease.

Held that in the circumstances of the case, the declaration sought for could not be reasonably denied. The plaintiff had not only the rights of a mortgagee decree-holder with regard to the property involved, but he was also the assignee of the rights of the Bank which had got the property in question attached in execution of its decree. Although, the mere possibility of future rights of an intending purchaser could not, by itself, be enough to entitle him to get a declaration relating to a purported lease affecting the right to possess and enjoy the property, yet, the plaintiff possessed sufficient legal interest in the theatre, as a mortgagee as well as an assignee of a decree-holder who had got the property attached before he filed his suit, so as to enable him to sue for the declarations he sought. He was not seeking a merely whimsical or eccentric or an unreasonable declaration of a right in property with no enforceable legal claims over it which could remain unaffected by the defendant's claims as a lessee. (Paras 16, 17)

(B) Transfer of Property Act (1882), Section 52 — Lease pendente lite — Theatre in question attached in execution of a decree against the owner of theatre — Lease of theatre executed in favour of a company during the attachment, held, was struck by the doctrine of lis pendens and also by provisions of S. 64, Civil P. C. AIR 1973 SC 569, Foll. (Civil P. C. (1908), S. 64). (Paras 18, 20)

Cases Referred: Chronological Paras
 AIR 1973 SC 569 = (1973) 1 SCR 139 18
 AIR 1967 SC 436 = (1966) Supp SCR 270 14
 AIR 1958 SC 838 = 1959 SCR 878 18
 AIR 1952 Punj 387 = 54 Pun LR 426 8, 14
 AIR 1951 Assam 101 17
 AIR 1916 PC 78 = 43 Ind App 91 8, 12
 (1912) ILR 39 Cal 704 = 16 Cal WN 838 8, 9, 10, 11, 12
 (1910) ILR 34 Bom 676 = 12 Bom LR 697 8, 13

Mr. D. V. Patel, Sr. Advocate, (M/s. P. R. Naolekar, H. K. Puri and K. K. Mohan, Advocates with him), for Appellant In C. A. No. 1041 of 1968; Mr. A. K. Sen, Sr. Advocate, (M/s. S. K. Gambhir and K. P. Gupta, Advocates with him) for Respondents 1 (V) and 2; In C. A. No. 1041 of 1968: Mr. T. V. S. N. Chari and Mrs. Urmila Sirur Advocates, for L. Rs. of Respondent 3 (In Civil Appeal No. 1041 of 1968), Mr. D. V. Patel, Sr. Advocate, (M/s. N. M. Ghatate, S. Balakrishnan and P. R. Naolekar Advocates

* (F. A. No. 8 of 1966, D/- 30-8-1967 and Civil Review No. 456 of 1974, D/- 30-9-1974—Madh. Pra.).

with him), for Petitioners (In S. L. Ps.); Mr. A. K. Sen Sr. Advocate (M/s. S. K. Mukherjee, K. P. Gupta and S. K. Gambhir Advocates with him), for Respondent No. 1 (In both the Spl. Leave Petns.); Mr. T. V. S. N. Chari and Mrs. Urmila Sirur, Advocates, for Respondent No. 2 (In both the Spl. Leave Petns.).

Judgment of the Court was delivered by

BEG, J.:— The plaintiff-respondent had filed a suit in the District Judge's Court at Jabalpur claiming a declaration that a lease executed in favour of the Defendant-Appellant, M/s. Supreme General Films Exchange Ltd., (hereinafter referred to as 'the Company'), in respect of Sunder Vilas Theatre (now known as Plaza Talkies) by its former owners, Jiwan Das Bhatia and his sons (hereinafter referred to as 'the Bhatias'), is void and ineffective against the plaintiff's rights under decrees obtained in Civil Suit No. 15-A of 1954 dated 7-5-1960 and in Civil Suit No. 3-B of 1952 dated 20-4-1954 in execution of which the Theatre had been attached. The plaintiff wanted the declaration also to make it clear that an auction purchaser, purchasing the theatre in execution of either of the two decrees, gets rights free from any obligation towards the Defendant-Appellant under the void lease.

2. The former owners of the theatre, the Bhatias, had borrowed Rupees 2,50,000/- from the Plaintiff-Respondent, a Maharaja, against the security of bales of cotton. On 29-12-1951, they executed a registered mortgage deed in respect of the Plaza Theatre in favour of the plaintiff as the price of pledged goods was insufficient to satisfy the dues. The plaintiff, unable to recover the amount due, had brought Civil Suit No. 15-A of 1954 in which a compromise decree was passed on 7-5-1960, in terms of an agreement between the parties that amounts due will be realised by the sale of Plaza theatre.

3. The Central Bank of India, another creditor of Bhatias, had brought Civil Suit No. 3-B of 1952 and obtained a decree for Rs. 1,24,000/- on 29-4-1952. Rights under this decree were assigned in favour of the plaintiff-respondent. The Plaza theatre, together with other properties of Bhatias, was attached on 4-5-1955 in the course of execution of that decree.

4. The appellant company claimed to be a lessee in occupation of the theatre where it had carried on the business of running a Cinema under an unregistered lease obtained on 27-2-1940. The lease of 1940 had expired on 10-4-1946. The company continued as a tenant holding over until the impugned lease deed of 30-3-1956 was executed. If this was a valid lease, it would have conferred upon the

company the right to be a tenant of the property under the lease for eight years, from 10-2-1956 to 10-2-1964, with an option for a renewal until 10-2-1970. This lease was executed after the company had filed a suit (No. 16-A of 1954) on 20-11-1954 for the specific performance of an agreement to lease contained in a letter dated 19-7-1948. A compromise decree was passed on 24-3-1956 in this suit also. The lease deed of 30-3-1956 purported to carry out the terms of that compromise decree passed in a suit in which the plaintiff was not impleaded at all.

5. The plaintiff's case was that the lease of 30-3-1956 was void as it was struck by three statutory provisions, namely, Section 52 of the Transfer of Property Act, Section 65-A of the Transfer of Property Act, and Section 64 of the Civil Procedure Code. The defendant-appellant company, in addition to denying the alleged rights of the plaintiff to the benefits of these provisions, pleaded that a suit of the nature filed by the plaintiff did not lie at all as it fell outside the purview of Section 42 of the Specific Relief Act, 1877, altogether.

6. The trial Court and the High Court, after having overruled the pleas of the defendant-appellant, had decreed the plaintiff's suit. The defendant company obtained special leave to appeal to this Court under Article 136 of the Constitution.

7. Learned counsel for the appellant company tried to persuade us to hold that the plaintiff had neither a legal character nor any such present right in any property for which a declaration could be granted under Section 42 of the Specific Relief Act, 1877 (re-enacted as Section 34 of the Specific Relief Act of 1963). Furthermore, he contended that the defendant-company had never denied any of the rights of the plaintiff. Finally, he submitted that, in any case, no declaration at all was needed by the plaintiff if the lease of 1956, executed by the former owners of the theatre in favour of the defendant-appellant, was void. These arguments rest on the assumption that no declaratory relief can be granted outside the ambit of Section 42 of the Specific Relief Act, 1877, which read as follows:

"42. Discretion of Court as to declarations of status or right. — Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Bar to such declaration. — Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation. — A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

8. Learned Counsel for the appellant sought to support his arguments by citing: *Deokali Koer v. Kedar Nath*, (1912) ILR 39 Cal 704 at p. 707; *Sheoparsan Singh v. Ramnandan Singh*, 43 Ind App 91 = (AIR 1916 PC 78); *Bai Shri Vaktuba v. Agarsinji*, (1910) ILR 34 Bom 676 at p. 680; *Kishori Lal v. Beg Raj*, AIR 1952 Punj 387.

9. *Deokali Koer's case* (supra) arose out of a dispute on the amount of court-fee payable. It was observed there that the history of "decrees merely declaratory" indicated that these were innovations given authoritative sanction in England by Section 50 of the Chancery Procedure Act, 1852. It was pointed out that Section 15 of the Civil Procedure Code of 1859 extended this recognition to decrees in suits in this country by enacting that "no suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief". This provision was repealed by Act 10 of 1877 as this form of relief was recognised by Section 42 of Specific Relief Act 1 of 1877 subject to the limitation indicated there. *Jenkins, C. J.*, explained the new provision as follows (at p. 709):

"The terms of the section are not a precise reproduction of the provision contained in the Act of 1859 and the English Law; in one direction they are more comprehensive, in another more limited. It is common tradition that the section was designed to be a substantial reproduction of the Scotch action of declarator, but whether this be so or not is of no great moment. We have to be guided by its provisions as they are expressed. The section does not sanction every form of declaration, but only a declaration that the plaintiff is 'entitled to any legal character or to any right as to any property'; it is the disregard of this that accounts for the multiform and, at times, eccentric declarations which find a place in Indian plaints".

10. In *Deokali's case* (supra), the learned Chief Justice pointed out that one declaration sought by the plaintiff there seemed designed to get round the need to set aside a decree on grounds of fraud

and collusion. He held two other declarations sought to be vague. He, however, explained (at p. 710):

"I would only add this that the limit imposed by Section 42 is on decrees which are merely declaratory, and does not expressly extend to decree in which relief is administered, and declarations are embodied as introductory to that relief. For such declarations legislative sanction is not required: they rest on long established practice. But for all that the Court should be circumspect and even chary as to the declarations it makes: it is ordinarily enough that relief should be granted without the declaration".

11. In *Deokali's case* (supra), the plaintiff's suit was not thrown out on a preliminary ground, but the plaintiff was given an opportunity to amend the plaint by asking for a consequential relief for setting aside the impugned decree and paying an additional court-fee. The case could have only an indirect bearing on the case now before us where no question of a payment of any additional court-fee after adding a consequential relief involved arises. The observations made in *Deokali's case* must be read in the context of what arose for decision there.

12. In *Sheoparsan Singh case* (AIR 1916 PC 78) (supra), what was really held by the Privy Council was that a grant of probate under the probate and Administration Act (V of 1881), which operated as a judgment in rem, could not be collaterally assailed by a suit for a declaration brought by reversioners seeking to question the will. *Sir Lawrence Jenkins* who had, incidentally, decided *Deokali Koer's case* (supra) too, said (at p. 97):

"It is not suggested that in this litigation the testamentary jurisdiction is, or can be, invoked, and yet there can be no doubt that this suit is an attempt to evade or annul the adjudication in the testamentary suit, and nothing more."

We think that the decision in this case also does not assist the appellant much.

13. In *Bai Shri Vaktuba's case* (supra), the Bombay High Court held that a Talukdar plaintiff could bring a suit for a declaration and an injunction to restrain the defendant from claiming that he was the plaintiff's son. Learned Counsel for the appellant, however, relies upon the following passage from it (at p. 680):

"It has long been established that the general power vested in the Courts in India under the Civil Procedure Code to entertain all suits of a civil nature excepting suits of which cognizance is barred by any enactment for the time being in force, does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute."

14. Kishori Lal's case (AIR 1952 Punj 387) (supra) was cited to show that declaratory decrees falling outside S. 42 of the Specific Relief Act are not permissible because Section 42, Specific Relief Act is exhaustive on this subject. This view must be held to have been rejected by this Court when it declared in *Venareddi Ramaraghava Reddy v. Konduru Seshu Reddy*, 1966 Supp SCR 270 = (AIR 1967 SC 436) (at p. 277 of SCR) = (at p. 440 of AIR):

"In our opinion, Section 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the Courts have power to grant such a decree independently of the requirements of the section. It follows, therefore, in the present case that the suit of the plaintiff for a declaration that the compromise decree is not binding on the debt is maintainable as falling outside the purview of Section 42 of the Specific Relief Act."

15. The result is that Section 42 merely gives statutory recognition to a well-recognised type of declaratory relief and subject it to a limitation, but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of Courts to give declarations of right in appropriate cases falling outside Section 42.

16. We think that the circumstances in which a declaratory decree under Section 42 should be awarded is a matter of discretion depending upon the facts of each case. No doubt a complete stranger whose interest is not affected by another's legal character or who has no interest in another's property could not get a declaration under Section 42, Specific Relief Act with reference to the legal character or the property involved. Such, however, is not the case before us. The plaintiff-respondent, in the case before us, had not only the rights of a mortgagee decree-holder with regard to the property involved, but he was also the assignee of the rights of the Bank which had got the property in question attached in execution of its decree. We find, from connected special leave petitions against orders under Order 21, Rule 95, Civil Procedure Code that the plaintiff's wife became the auction purchaser of this property during the pendency of the litigation now before us. At the time when he filed the suit the plaintiff may have been looking forward to purchasing the property. Although, the mere possibility of future rights of an intending purchaser could not, by itself, be enough to entitle him to get a declaration relating to a purported lease affecting the right to possess and enjoy the property, yet, we think that the plaintiff possessed sufficient legal

interest in the theatre, as a mortgagee as well as an assignee of a decree holder who had got the property attached before he filed his suit, so as to enable him to sue for the declarations he sought. He was not seeking a merely whimsical or eccentric or an unreasonable declaration of a right in property with no enforceable legal claims over it which could remain unaffected by the defendant-appellant's claims as a lessee.

17. *Surjya Kumar v. Girish Chandra*, AIR 1951 Assam 101, was cited to contend that the declaration sought by the plaintiff was unnecessary if the lease of the defendant-appellant was void. We find, from the pleadings in the case before us, that the defendant-appellant had actually denied the plaintiff's rights as a mortgagee and also the validity of the compromise decree in suit No. 15-A of 1954. No doubt the plaintiff had not sought a decree for possession as that could not be granted at the time when the suit was filed. Nevertheless, he had reasonable grounds to apprehend that the defendant-appellant company will rely upon its alleged lease, as it did, in the course of execution proceedings, to resist delivery of actual possession to an auction purchaser. The existence of lessee rights would certainly affect the price an auction purchaser would be prepared to pay for the property, or, in other words, what a mortgagee or one who had got the property attached could realize for the property to satisfy his dues. Thus, the plaintiff needed the declaration; and, in the circumstances of the case, the declarations sought for could not be reasonably denied to him.

18. The contention that the case fell outside the purview of Section 52 of the Transfer of Property Act as the lease was executed in purported satisfaction of an antecedent claim rests upon the terms of an agreement of 1948, embodied in a letter, on the strength of which the defendant-appellant had filed his suit for specific performance. We find that the terms of the compromise decree in that suit and lease-deed of 1956 purported to confer upon the defendant-appellant new rights. Indeed, there are good grounds for suspecting that the compromise in the suit for specific performance was adopted as a device to get round legal difficulties in the execution of the lease of 1956 in favour of the defendant-company. We are unable to accept the argument, sought to be supported by the citation of *Bishan Singh v. Khazan Singh*, 1959 SCR 878 = (AIR 1958 SC 838) that the lease was merely an enforcement of an antecedent or pre-existing right. We think that it purported to create entirely new rights pendente lite. It was, therefore, struck by the doctrine of *lis-pendens*, as ex-

plained by this Court in *Jayaram Mudaliar v. Ayyaswami*, (1973) 1 SCR 139 = (AIR 1973 SC 569), embodied in Section 52 of the Transfer of Property Act.

19. An alternative argument of the appellant was that a case falling within Section 65-A (2) (e) of the Transfer of Property Act, confining the duration of a lease by a mortgagor to three years, being a special provision, displaces the provisions of Section 52 of the Transfer of Property Act. This argument overlooks the special objects of the doctrine of *lis-pendens* which applies to a case in which litigation, relating to property in which rights are sought to be created *pendente lite* by acts of parties, is pending. Moreover, for the purposes of this argument, the defendant-appellant assumes that the provisions of Section 65-A (2) (e), Transfer of Property Act are applicable. If that was so, it would make no substantial difference to the rights of the defendant-appellant, which would vanish before the suit was filed if Section 65-A applies. We, however, think that, as the special doctrine of *lis pendens* is applicable here, the purported lease of 1956 was invalid from the outset. In this view of the matter, it is not necessary to consider the applicability of Section 65-A (2) (e), which the defendant-appellant denies, to the facts of this case.

20. As regards the applicability of Section 64, Civil Procedure Code, we find that parties disagree on the question whether the attachment made by the Central Bank on 20-4-1955, in execution of the decree of which the plaintiff-respondent was the assignee, existed on the date of the impugned lease of 30-3-1956. Learned Counsel for the appellant relied upon the terms of an order recorded on the order sheet, in the Court of Additional District Judge, Jabalpur, in Civil Suit No. 3-B of 1952, on 25-1-1956, showing that, in view of the stay order received from the High Court, execution could not proceed. The order sheet, however, also contains the enigmatic statement that execution was dismissed as infructuous but the attachment was to continue for six months. The High Court had treated the last part of the statement in the order sheet as void and ineffective presumably on the ground that the Additional District Judge had no jurisdiction either to lift the attachment or to dismiss the execution proceedings after the High Court had given its order staying all further action in execution proceedings. The terms of the High Court's order are not evident from anything placed before us. On the other hand, learned Counsel for the plaintiff-respondent relies upon a subsequent order of the same Court, passed on 30-4-1960, in the same suit. This order shows that a compromise had been arrived at be-

tween the decree holder and the judgment-debtor under which the decree holder had agreed to lift attachment of property except with regard to Plaza Talkies which was to continue. We are, therefore, unable to hold that the concurrent findings of the trial Court and the High Court, that the Plaza Talkies was attached in execution of decree in suit No. 3-B of 1952 on 4-5-1955 and that this attachment was in existence when the impugned lease was executed on 30-3-1956, are erroneous. On these findings, the lease of 1956 was certainly struck by the provisions of Section 64, Civil Procedure Code also. Section 64, Civil Procedure Code, in fact, constitutes an application of the doctrine of *lis pendens* in the circumstances specified there.

21. For the reasons given above, we dismiss this appeal with costs.

Special Leave Petition (Civil) No. 2494 of 1974 and Special Leave Petition (Civil) No. 2533 of 1974.

22. In view of our judgment in Civil Appeal No. 1041 of 1968, delivered today, we think that these Special Leave Petitions (Civil) must be and are hereby dismissed.

Order accordingly.

AIR 1975 SUPREME COURT 1814

(From: Jammu & Kashmir)*

Y. V. CHANDRACHUD, P. N. BHAGWATI AND R. S. SARKARIA, JJ.

Harbhajan Singh, Appellant v. The State of J. & K., Respondent.

Criminal Appeal No. 227 of 1974, D/- 22-7-1975.

(A) Evidence Act (1872), S. 9 — Murder case — Failure of Investigation Officer to hold identification parade — Absence of test identification is not necessarily fatal — AIR 1971 SC 363 Followed. (Para 4)

(B) Evidence Act (1872), S. 8 Expln. 1 — Failure of eye witness to mention names of accused to neighbours soon after occurrence — Effect. (Penal Code (1860), S. 302).

Where in prosecution of accused for murder of a girl by rifle it is found that the only eye-witness (the girl's father) failed to mention the names of accused to the neighbours

*(Cri. Appeal No. 8 of 1973 and Cri. Ref. No. 79 of 1973, D/- 6-5-1974 — J. & K.)

GS/HS/C730/75/SSG

who came to the scene soon after the occurrence, that will only show that the accused is not known to the witness, but that by itself will not render the prosecution story untrue when prosecution case does not rest on the evidence of that witness alone and there are other corroborative circumstances lending enough support to the involvement of accused in the crime.

(Para 4)

Cases Referred: Chronological Paras
AIR 1971 SC 363 = (1971) 2 SCR 917
= 1971 Cri LJ 305 4

M/s. V. S. Sawhne, U. P. Singh and Balbir Singh Chauhan, Advocates for Appellant; Mr. H. S. Marwaha, for Respondent.

Judgment of the Court was delivered by

Y. V. CHANDRACHUD, J.:— The appellant Harbajan Singh and one Gurmukh Singh were tried by the learned Sessions Judge, Poonch under Section 302 of the Ranbir Penal Code on the charge that they had committed the murder of a girl called Kamla Devi. Gurmukh Singh was acquitted by the learned Judge but the appellant was convicted of murder and was sentenced to death. The State Government did not challenge the acquittal of Gurmukh Singh and that order has become final. The High Court of Jammu and Kashmir has confirmed the conviction and sentence of the appellant. This appeal by special leave is directed against the judgment of the High Court.

2. The appellant Harbajan Singh and his co-accused Gurmukh Singh were members of the Border Security Force and were posted at the material time at Paripattan near a village called Kangri, situated in Tehsil Nowshera. On December 16, 1971 they absented themselves from evening parade without obtaining leave and sauntered into Kangri, armed with two rifles which were issued to them for the performance of their official duties. They went to the house of one Kashu Ram, demanded eggs from his wife and helped themselves to a bottle of Rum. Thereafter they went to the house of the complainant Munshi Ram. Gurmukh Singh mounted guard at the door of his house while the appellant went inside.

The appellant caught hold of Munshi Ram's daughter, Kamli Devi, and begun to drag her out of the house. Munshi Ram entreated the two intruders to be merciful but Gurmukh Singh fired a shot at him which fortunately missed its target. In the confusion that followed Kamli Devi managed to rescue herself and started running back to her house. Thereupon the appellant fired a shot from his rifle at her as a result of which she died instantaneously.

3. The evidence of Munshi Ram (PW 1), the father of the girl, Mulkh Raj (P.W. 2) a neighbour, and of Saro Devi (P.W. 18) the mother of the girl, shows that the appellant dragged Kamli Devi from her house, that Gurmukh Singh fired a shot at Munshi Ram but missed and that the shot fired by the appellant caused the death of Kamli Devi. The evidence of these witnesses finds ample corroboration in the circumstances that on the evening of the 16th December, 1971, the appellant and Gurmukh Singh were absent at the time of the roll call, that on the night of the 16th when they were arrested their rifles smelt of fresh gun powder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed Kamli Devi was fired from the rifle of the appellant. The evidence of Kesu Ram (P.W. 3) also shows that after the appellant and Gurmukh Singh drank liquor at his house they went to the house of Munshi Ram.

4. In view of this corroborative evidence we find no substance in the arguments urged on behalf of the appellant that the Investigating Officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in *Jadunath Singh v. State of U. P.*, (1971) 2 SCR 917 = (AIR 1971 SC 363 = 1971 Cri LJ 305) absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villagers only

shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication to the appellant. Gurmukh Singh's acquittal errs in its generosity but that order has become final.

5. We therefore, confirm the judgment of the High Court and dismiss Harbajan Singh's appeal.

Appeal dismissed.

AIR 1975 SUPREME COURT 1816

(From: Allahabad)*

V. R. KRISHNA IYER, R. S. SARKARIA AND A. C. GUPTA, JJ.

Raja Jagdambika Pratap Narain Singh, Appellant v. Central Board of Direct Taxes and others, Respondents.

Civil Appeal No. 2166 of 1970, D/- 17-7-1975.

(A) Constitution of India Articles 226 and 133 (1) (a) — Illegal assessment — Income from mango grove assessed to income tax — High Court holding that such income was agricultural and not liable to be taxed — Petition for refund — High Court dismissing petition on ground of laches — Interference by S C in appeal — (Income-tax Act (1922), S. 4 (3) (viii).)

The petitioner appellant was the owner of a mango grove from which he had been deriving income by way of fruits and fallen trees. Way back in 1939-40 he claimed this income to be agricultural and therefore immune to Income-tax. His objection was overruled and the income was taxed under the Income-tax Act. Year after year he was similarly assessed and he carried the matter to High Court. The final pronouncement came from the High Court in 1963 holding that it was agricultural income

and not liable to tax under Sec. 4 (3) of the Income Tax Act. He applied to the Central Board of direct taxes for refund which was dismissed in 1968 and thereafter he applied to the High Court under Art. 226 for relief of refund of taxes paid. The High Court dismissed the petition on two grounds: (a) that the assessment orders for the relevant years had become final, the assessee not having taken advantage of his remedy provided for in the statute; (b) that several years had lapsed between the last impugned order which related to the assessment year 1961-62 and the writ petition which was filed in September 1968. However, the Court made an observation that if so advised, the petitioner may file appeals under Section 30 of the Income-tax Act, 1922 and pray for condonation of delay under S. 30 (2) of the said Act. Against the order of the High Court the assessee came in appeal under Art. 133 (1) (a).

Held, that Art. 226 was not a blanket power, regardless of temporal and discretionary restraints. If a party is inexplicably insouciant and unduly belated due to laches, the court may ordinarily deny redress. And if the High Court has exercised its discretion to refuse, the Supreme Court declines to disturb such exercise unless the ground is too untenable. To awaken the Supreme Court's special power gross injustice and grievous departure from well-established criteria in this jurisdiction, have to be made out. In the case in question, long years had elapsed not only after the impugned orders but even after the High Court held the taxed income agricultural. The reason for the inaction was stated to be an illusory expectation of suo motu modification of assessment orders on representation by the party. The High Court examined and dismissed the plea and consequentially refused relief. It should not be held that in so refusing relief on ground of laches the High Court exercised its discretion arbitrarily or improperly. (Para 13)

Cases Referred: Chronological Paras
AIR 1948 PC 102 = 16 ITR 214 10

*(W.P. No. 3233 of 1968, D/- 31-10-1968 — All.)

vate, with him), for Appellant; Mr. T. A. Ramachandran, Advocate, for Respondent.

Judgment of the Court was delivered by

KRISHNA IYER, J.:— The freak but few facts of this appeal appear to highlight an issue of morality versus legality. But a closer scrutiny whittles down this conflict and induces us to dismiss the appeal, subject to certain observations warranted by the circumstances of the case. We may proceed straight to a miniaturised statement of the circumstances giving rise to the controversy before us.

2. The appellant has been the owner of a mango grove of long ago from which he has been deriving income by way of fruits and fallen trees. Way back in 1939-40 he claimed this income to be agricultural and therefore immune to Central income-tax. His plea was overruled by the Income-tax Officer, but adverse orders notwithstanding, the assessee reached the High Court undaunted by the disappointment he met with as he steered through the statutory spiral of authorities. Unfortunately, on account of the zigzag course of this litigation which had its deck-by-deck slow motion, more than two decades passed before the High Court could pronounce at long last in favour of the appellant holding that the income in dispute was agricultural income and therefore could not be taxed.

3. The State did not carry the case further to this Court and thus the decision of the Allahabad High Court rendered on March 21, 1963 became final. As a proposition of law, on the facts of the case, the ruling was that such income as arose from mango fruits and fallen trees was agricultural income and therefore outside the pale of the Income-tax Act (vide S. 4 (3) of the Income-tax Act). We have no reason to disagree with this view and proceed to dispose of this writ appeal which has come to us by certificate under Art. 133 (1) (a) of the Constitution on the footing that for all the assessment years with which we are concerned — as will be explained presently — what has been taxed and is in dispute is agricultural income.

4. Some more facts are necessary to bring out the real grievance of the appellant. We have already mentioned that although the first assessment related to the year 1939-40, the final pronouncement by the High Court came only in 1963. During this protracted pendency, years rolled on and, at the base, the tax officer was busy ritually repeating annually, by his orders, the tax impost on similar income accruing year after year, treating it as non agricultural income. Indeed, the assessee had been assessed to tax for 21 years on this assumption but he filed appeals only for 8 years, and even that only upto the Appellate Assistant Commissioner's level where he left it off apparently in the hope that if ultimately the High Court upheld his contention for one year, the tax authorities would give effect to that holding for all the years — not a fantastic assumption if Government were a virtuous litigant.

5. At this stage we may state that for the years 1940-41, 1941-42, 1947-48, 1949-50, 1950-51 and 1958-59 to 1961-62 appeals had been preferred most of which were dismissed although in one year or so the appellate authority gave relief accepting the plea of agricultural income. So far as the Income-tax Officer was concerned, he uniformly adopted the hostile line of treating the income as non-agricultural and, except for the years referred to above, the assessee did not think it necessary — was it wise or otherwise the sequel proves — to challenge these assessment orders. But when the High Court held in his favour in 1963 for the assessment year 1939-40, he applied for refund to the Central Board of Direct Taxes for the tax paid by him for the other years on the glib ground that, limitation apart, the income having been found by the High Court to be agricultural, had to be excluded from the tax. The Central Board of Revenue, however, declined to oblige him and when on May 11, 1968 his petition was rejected, the assessee moved the High Court under Art. 226 seeking many reliefs including a direction to the Central Board to issue 'necessary instructions to the Income-tax Officer, Faizabad, for the purpose of passing final assessment orders for

the assessment years 1940-41 to 1961-62 and for another writ 'quashing the order of the Central Board of Direct Taxes dated 11-5-1968 wherein the Board declined to interfere in the matter in dispute'. A Division Bench of that Court dismissed the writ petition on two grounds: (a) that the assessment orders for the relevant years had become final, the assessee not having taken advantage of his remedy provided for in the statute; (b) that several years had lapsed between the last impugned order which related to the assessment year 1961-62 and the writ petition which was filed in September 1968. However, the Court made an observation that if so advised, the petitioner may file appeals under Section 30 of the Indian Income-tax Act, 1922 and pray for condonation of delay under S. 30 (2) of the said Act. Sorely discomfited, the assessee has come up to this Court hopefully and urged that the various assessment orders were void, that the State was bound to refund what had been illegally levied, that the Central Board should have exercised its power to give proper directions for refund and that in any case justice should be done to the party who should not be penalised for not having filed appeals and second appeals and references to the High Court year after year — a repeat performance which would add to the totality of avoidable litigation since the High Court was seised of the identical point between the same parties.

6. At the first flush it may seem that the assessee's agricultural income having been taxed illegally, a refund was obligatory and the fanatical insistence on the legal 'pound of flesh' based on limitation and finality was not to be expected from a party like the State. Indeed, one might go to the extent of quoting the cynical words of the ancient legal wit: "Law and equity are two things which God hath joined, but which Man has put asunder". We have to examine the merits of the case in the light of the facts we have set out above and of the principles settled by this Court in regard to the exercise of the writ jurisdiction of the High Court.

7. Shri Manchanda, alive to the spinal weakness of his case in law

in that his client had, by option for inaction, permitted the impugned order to become final and listless by lapse of limitation period, played upon judicial sensitivity to justice, equity and good conscience. He argued that regardless of statutory remedies and rules of limitation, the High Court had power under Article 226 to quash orders loudly illegal, deprivatory of property and promoting unjust enrichment by the State. He also urged that the assessment orders were void and the routine challenges through prescribed channels could be by-passed and frontal attack made under Art. 226 in such extraordinary situations. Sri Ramachandran, appearing for the Revenue, scouted the supplicant plea for equity as unavailable in a court of law. He also insisted that the orders of assessment having become conclusive could not be invaded by the back-door, that the orders were not nullities but good until set aside through the regular statutory processes and that the alleged jab on the face of justice is imaginary, the party himself having been guilty of gross laches. We will examine these pleas, not in the general terms set out but within the confines of the particular facts of the present case.

8. We must pause to state one important aspect of the assessment orders since that oxygenates Sri Manchanda's submission on equity. The income-tax Officer, aware of the pendency in the High Court of the precise question confronting him about the agricultural character of the income, had in some years (e.g. 1952-53) recited in his order under S. 23 (3) of the Act, words which kindled hope in the assessee somewhat in the following terms:

"Income from Mango gul Mahuwa and Kathal have been excluded from the total income and treated as agricultural income by the learned appellate Asstt. Commissioner of Income Tax Banaras in this very case but this very point is already under consideration before the Hon'ble High Court of Judicature at Allahabad. However with respects to the learned A.A.C. and pending the decision of the Hon'ble High Court on this point the sum of Rs. 7,960/- is being added back."

But the palliative is absent in the orders relating to many other years and, above all, the orders are all made under Section 23 (3), which means final assessments — neither provisional assessments being under Section 23 (3) nor conditional assessments, such orders being unknown to the scheme of the Act.

9. The points in controversy may be briefly formulated:

(1) Are the orders of assessment, which have not been assailed, amenable to challenge under Art. 226 of the Constitution, or is such jurisdiction inhibited because the regular statutory remedies have not been pursued?

(2) Is the appellant guilty of laches to such an extent that the extra-ordinary remedy in writ jurisdiction should not be exercised in his favour?

(3) Are the orders of assessments nullities since they are taxes levied on agricultural income, and if so, is the appellant entitled to claim a refund?

(4) Is the Central Board of Direct Taxes charged with any statutory duty to grant refunds even in cases where orders of assessment, though illegal, have been allowed to become final by the wilful default of the assessee?

(5) If justice is on the side of the assessee but law against him, can he seek redressal in a Court on that footing?

We may deal with these points more or less as a package submission but not in the order in which they have been itemised.

10. Counsel has placed considerable stress on the last point which we deal with first. It is true that two stark facts generate some considerations of conscience in favour of the assessee. The High Court having declared this kind of income which was taxed by the Income-tax Officer, 'agricultural income', it is not liable to tax under the Income-tax Act (Section 4 (3)). In any case, after the Constitution of India came into force, the Union List in the Seventh Schedule expressly excluded agricultural income as forbidden zone for the Centre, so much so it would be an unconstitu-

tional levy if a taxing authority imposed tax on agricultural income purporting to act under the Income-tax Act. It may, therefore, well be argued that all the assessments, notwithstanding that no appeals were filed, were void being beyond the jurisdiction of the officer to tax. There is a basic difference between the decision in *Commr. of IT v. Tribune Trust Lahore*, 16 ITR 214, 223 = (AIR 1948 FC 102 at p. 106) cited by Sri Ramachandran and the present case. There, one of the exemptions statutorily provided in favour of income derived from property held under trust wholly for religious or charitable purposes, fell for consideration. The Judicial Committee held that such assessments, regularly made, which failed to give the exemption claimed, were not nullities:

"The assessments were duly made, as they were bound to be made, by the Income-tax Officer in the proper exercise of his duty... It does not appear to their Lordships that they were a 'nullity' in any other sense than that if they had been challenged in due time they might have been set aside."

True, mere exemptions from taxation of income otherwise competently taxable fell wholly within the jurisdiction of the officer for determination. There is a fundamental difference where the claim is that agricultural income is beyond the legislative competence of Parliament to enact and altogether outside the jurisdiction of the Income-tax Officer. It may well be contended that the impost is ultra vires his powers and therefore a nullity. Merely because an order has been passed by the Officer and has not been appealed against, it does not become legal and final if otherwise it is void; for instance, if there is a flagrant violation of natural justice, the order by a Tribunal may be a nullity. However, we need not explore this penumbral area because we are satisfied, for reasons to be set out below, that the writ petition itself is misconceived and is bad for unexplained delay. Even so we may state that the levies for the various years would have undoubtedly been set aside and refund ordered if only the assessee had been diligent enough to

make annual appeals to higher authorities. In that sense there is some justice on his side. What is more, in some of the orders, as earlier indicated, the Income-tax Officer himself has stated that he is making the assessments finally but he takes note of the pendency of the identical question before the High Court. He has vaguely quickened wishful thinking in the assessee that in the event of his winning in the High Court he may somehow get a refund. We have set out what Mr. Manchanda has pressed before us as the 'justice' of his case. Assuming for a moment that 'justice' is on his side, law is against him because the assessment orders are now unassailable except perhaps under Article 226 or Article 32 with which we will deal separately. Can a court over-ride law to effectuate what it conceives to be justice?

11. Any legal system, especially one evolving in a developing country, may permit judges to play a creative role and innovate to ensure justice without doing violence to the norms set by legislation. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities. So viewed, the appeal of Sri Manchanda, for relief in the name of justice must fail. If the statute speaks on the subject the judge has to be silent and stop. In a contest between morality and legality, the court, in clear cases has no option. Here, both sides agree that the assessments are final, that limitation has long ago run out, that the Central Board has no judicial power to upset what has been decided by lesser tribunals. Not being a fringe area for judicial activism to play the submission must suffer rejection.

12. The surviving issue of some moment is whether the writ jurisdiction is muzzled by statutory finality to orders regardless of their illegality. We think not. If the levy is illegal, the constitutional remedy goes into action. The Privy Council ruling does not contradict this rule of law because for one thing there the case was income taxable but for a statutory exemption; here the income is agricultural and beyond the orbit of the Income-tax Act. For another,

the judicial Committee was not considering the sweep of the constitutional remedy de hors statutory challenges but was construing the plea of 'nullity' with reference to an order passed, erroneously may be, but within jurisdiction and impugned before the statutory tribunals.

13. Even so, the journey of the appellant is beset with insurmountable hurdles. Article 226 is not a blanket power, regardless of temporal and discretionary restraints. If a party is inexplicably insouciant and unduly belated due to laches, the court may ordinarily deny redress. And if the High Court has exercised its discretion to refuse, this Court declines to disturb such exercise unless the ground is too untenable. To awaken this Court's special power gross injustice and grievous departure from well-established criteria in this jurisdiction, have to be made out. In the present case, long years have elapsed not only after the impugned orders but even after the High Court held the taxed income agricultural. The reason for the inaction is stated to be an illusory expectation of suo motu modification of assessment orders on representation by the party. The High Court has examined and dismissed the plea and consequentially refused relief. We do not think that in so refusing relief on ground of laches the High Court exercised its discretion arbitrarily or improperly. And the sorry story must thus close.

14. When at the end of the legal tether, the appellant made a plaintive plea for considerateness based on good conscience. No doubt, we feel this is a case where, had the party not been optimistically asleep but had diligently appealed, the tax could not have been recovered by the State. We equally see some compassionate merit in his complaint that a few of the assessment orders made misleading reference to the pendency of the High Court being seised of the identical legal issue. But it is no good alibi in expiation of the sin of gross delay in coming to the High Court. It is doubtful if the Central Board can exercise any judicial power and direct refund. Nor is there a statutory duty

cast on it to consider applications for refund and so a writ of mandamus could not issue from the Court. Even so, it is always open to the State, where the justice of the case warrants reconsideration of the levy of a tax illegally imposed, to view the situation from an equitable standpoint and direct refund, wholly or in part. This, perhaps, is a case where a liberal approach may well be justified. The Court has, however, jurisdiction only when there is a statutory duty. There being none, the issuance of a writ hardly arises. We endorse the observations of the High Court that, despite inordinate delay, the appellate authority, if moved under Section 30 (2), will give due regard to the happenings in between, in exercising its power of condonation of delay in filing appeals. We also make it clear that no observation made in this judgment with regard to delay on the part of the assessee in moving the High Court under Art. 226 shall be taken into account to the prejudice of the assessee while considering the condonation of the delay on his part in preferring the appeal/appeals, if any, filed by him to the appropriate authority under the Act.

15. The appeal fails and is dismissed. The circumstances are such that the parties may appropriately be directed to bear their respective costs. We direct accordingly.

Appeal dismissed.

AIR. 1975 SUPREME COURT 1821

(Note: The judgments are printed in the order in which they are given in the certified copy. The first judgment is not, therefore, necessarily the leading judgment.)

Where, however, the Judges differ in their views, the majority view is given first irrespective of the order in which the judgments appear in the certified copy.—Ed.)

(From: Allahabad)*

K. K. MATHEW, V. R. KRISHNA
IYER AND A. C. GUPTA, JJ.

*(Spl. Appeal No. 165 of 1967 D/- 25-7-1967 — (All)).

GS/GS/A979/75/SAR

The Gandhi Faiz-e-am College, Shahjahanpur, Appellant v. University of Agra and others, Respondents.

Civil Appeal No. 1611 of 1969,
D/- 3-3-1975.

(A) Constitution of India, Art. 30 — Right to administer minority educational institution — Infringement of right, what constitutes — University Statute requiring that the Managing Committee of minority educational institution (College) shall include the principal of the College and the seniormost member of the teaching staff — Validity of provision, (Agra University Statutes, Statute 14A).

Per Majority (Krishna Iyer and A. C. Gupta JJ.)—

Such a provision is valid. Article 30 does not invalidate provisions of a regulatory character which are intended to secure the better administration of an institution. The principal and the seniormost teacher of the College are not outsiders, but "insiders" already appointed by the Governing Body, and their presence on the Managing Committee can only ensure the better administration of the College. AIR 1974 SC 1389 Distinguished. (Paras 22 and 30)

Per Minority (Mathew, J.): The determination of the composition of the body to administer the educational institution must be left to the minority as that is the core of the right to administer. Regulations to prevent mal administration by that body are permissible. (Para 41)

Hence Statute 14A of the Agra University is not valid as it violates the fundamental right under Art. 30 of the Constitution. (Para 41)

Cases Referred: Chronological Paras

AIR 1974 SC 1389 = (1974) 1 SCC 717
9, 10, 19, 20,
23, 25, 35, 42, 43
AIR 1971 SC 1737 = (1971) Supp SCR 688
25, 26, 38
AIR 1970 SC 2079 = (1971) 1 SCR 734
23, 25, 28, 29,
38, 40
AIR 1970 SC 259 = (1970) 1 SCR 172
= (1969) 1 SCC 863 23, 38, 40
AIR 1969 SC 465 = (1969) 2 SCR 73
23, 40
AIR 1963 SC 540 = (1963) 3 SCR 837
12

AIR 1958 SC 956 = 1959 SCR 995 9, 10
(1816-19) 4 Wheat 316 = 4 L ed 579 1

Mr. Frank Anthony, Sr. Advocate (on 3-2-1975) (M/s. K. L. Hathi and P. C. Kapur, Advocates, with him), for Appellant; Mr. Santosh Chatterjee, Advocate (on 3-2-1975) Mr. G. S. Chatterjee, Advocate for Mr. G. Banerjee, for Respondents.

Judgments of the Court were delivered by

KRISHNA IYER, J.: (For himself and on behalf of A. C. Gupta, J.) (Majority view):— Our essay in this appeal is to interpret and apply Art. 30 of the Constitution, illumined by the ratio of the recent leading case on the constitutional rights of minorities vis a vis educational institutions where a Bench of 11 Judges handed down six opinions on the thorny issue. As we proceed to judgment, we are reminded of two famous American observations. Chief Justice Marshall, while deciding the celebrated *McCulloch v. Maryland* case, (1816-19) 4 Wheat 316 at p. 407, made the pregnant remark: 'We must never forget that it is the constitution we are expounding'. Governor Hughes, soon to ascend the U. S. Supreme Court, said: 'We are under a Constitution, but the Constitution is what the Judges say it is'. Reverentially guided and bound by great precedents but mindful of the luminous texts and goals of the Constitution itself, we have to attempt the task.

2. The facts of the present case are virtually admitted, the precedent that binds us is of fresh vintage but the legal test when applied to this concrete case-situation is fine, if not baffling. Of course, the only area for judicial exploration is to decoct the rule from the ruling and fit it to the admitted facts.

3. The appellant is a registered society formed by the members of the Muslim community at Shahjahanpur. Indubitably, the community ranks as a minority in the country and the educational institution run by it has been found to be what may loosely be called a 'minority institution', within the constitutional compass of Art. 30. The earlier history of the institution need not detain us and a rapid glance at its evolution is enough.

The A. V. Middle School was the offspring of the effort of the Muslim minority resident in Shahjahanpur District. It later became a High School and afterwards attained the status of an Intermediate College. Eventually it blossomed into a degree college affiliated to the University of Agra. In 1948, on the assassination of the Father of the Nation, this college was commemoratively renamed as Gandhi Faiz-e-am College. In August 1964, an application was made on behalf of the college management to the University for permission to start teaching in courses of study including sociology, Sanskrit, Arabic, military studies, drawing and painting. The University entertained the thought that a new organisational discipline must be brought into the institution and insisted, as a condition of recognition of these additional subjects as course of study, on certain mutations in the administrative body of the college. The bone of contention before us, as was before the High Court, is that this prescription by the University, in tune with Statute 14-A framed by it, is an invasion of the fundamental right guaranteed to the minority community under Art. 30 of the Constitution of India. The High Court has negatived the plea of the management and the appeal issues from that decision.

4. What is the core of the restriction clamped down by Statute 14-A? What is the conscience and tongue of Art. 30? If the former is incongruous with the latter, it withers as void; otherwise, it prevails and binds. That is the crux of the controversy.

5. The minority college is administered by a three-tier body organised intra-murally by the Society. No outsider has entered the precincts of management which has all along remained with the members only. The General Council with plenary powers, the Governing body more circumscribed yet effective as policy-maker and the Managing Committee, the day-to-day administrative sub-agency — these are the organs vested with controlling power, under the relevant rules of the Society. The essential point is that the Society is autonomous and its organs administer the institution.

6. The University directive, backed by Statute 14-A, it is contended, forces two persons on the area of administration. This is argued to be a serious erosion of the great right guaranteed to cultural and religious minorities. Statute 14-A may, at the outset, be reproduced:

"14-A. Each college, already affiliated or when affiliated, which is not maintained exclusively by Government must be under the Management of a regular constituted Governing body (which term includes Managing Committee) on which the staff of the college shall be represented by the Principal of the college and at least one representative of the teachers of the college to be appointed by rotation in order of seniority determined by length of service in the college, who shall hold office for one academic year."

Emboldened by this provision, the Registrar of the Agra University has made the impugned demand which runs thus:

" Agra University

From

Sri R. N. Pathak,
Asst. Registrar (Affiliation),
Agra University, Agra.

To

The Principal,
G. F. College,
Shahjahanpur.

No Affl/7965

Dated Agra,
24 Apr. 1965

Sir,

With reference to your application dated December 1, 1964 recognition in certain subjects upto the B.A. standard, I am to inform you that the Executive Council at its meeting held on 10-4-1965 after considering the report of the Inspectors on the inspection of your college and the recommendations of the relevant committee thereon decided that recognition applied for upto the B.A. standard be not granted to the college unless provision is made in the constitution for representation of the Principal and one Head of Department to be chosen in order of seniority every year on the Managing Committee of the college and other conditions have been fulfilled. I am therefore to request you to take immediate steps to implement the aforesaid decision of

the Council and let me know that you have done so. On receipt of your reply the matter will be further considered.

Yours Faithfully,

Sd/- R. N. Pathak
Asst. Registrar (Affl)."

7. Maybe, we may as well mention the stand taken by the Management of the College in the correspondence with the Registrar. In one reply it was represented:

"From

The President,
Managing Committee,
G. F. College,
Shahjahanpur.

To

The Deputy Registrar (Affl),
Agra University.

No. 660

Dated, Shahjahanpur,
Nov. 22, 1965

Sir,

With reference to your letter No. Affl/1338, dated August 31, 1965 and subsequent reminder dated October 20, 1965, I have the honour to say that we are very grateful to the University for its acceptance of the minority status of our college.

While mentioning that the university has no legal power to interfere in our right to administer the institution, we are willing to make the inclusion of the Principal and one Head of Department by rotation obligatory in the Governing Body as proposed in the written legal opinion of our counsel, (relevant extract of which has been forwarded to us along with your letter under reference), simply for the reason that we are very anxious to keep up smooth and cordial relations with the University.

The learned vice-chancellor is therefore, requested to grant us affiliation in all the new subjects in respect of which our application is pending, at a very early date, to enable us to make the necessary preparations, which are likely to take sufficient time, to start the classes in those subjects from the beginning of the next session.

We undertake to amend our constitution suitably to give the proposal a practical shape within three months after the receipt of your kind reply.

An early disposal of this letter is solicited.

Yours faithfully,

Sd/-

President,

Managing Committee, G. F. College,
Shahjahanpur."

The concession was retracted allegedly because the University took no steps accepting it and a writ petition was filed challenging the vires of Statute 14-A and legality of the directive.

8. If reliance had been placed by the University on this concession of the Management as amounting to a waiver of the fundamental right, thereby making short shrift of the dispute, it would have been difficult for us to accede to the plea. Indeed, wisely no plea of waiver of the fundamental right has been put forward and perhaps none can be, in this branch of constitutional jurisprudence. We are therefore concerned with discerning the parameter of 'minority' right in Art. 30.

9. A stream of Supreme Court rulings commencing with the Kerala Education Bill case, 1959 SCR 995 = (AIR 1958 SC 956) and climaxed by St. Xavier's College case, AIR 1974 SC 1389 has settled the law for the present, and the last refers to the precedential past. We will confine ourselves largely to the currently final pronouncement; but where did the Court draw the delicate line between unconstitutional conditions and constitutional-regulations? A certain thread of unanimity exists among the many opinions and that common ground — not individual deviations and differences — must be the basis of our judgment. Right at the beginning we must observe that the whole edifice of case law on Article 30 has been bed-rocked on the Kerala Education Bill case.

10. The greatest common measure of agreement among the various opinions in that case, AIR 1974 SC 1389 will have to be ascertained. Ray, C. J., following Das C. J. (in the first Kerala Case (AIR 1958 SC 956), has taken middle view, if one may say so with great respect. 'Hands-off Administration altogether' is a tall call today; but 'hand-cuff managements into uniformity' is also not the cor-

rect rule. A benignantly regulated liberty which neither abridges nor exaggerates autonomy but promotes better performance is the right construction of the constitutional provision. Such an approach enables the fundamental right meaningfully to fulfil its tryst with the minorities' destiny in a pluralist polity. That is the authentic voice of Indian democracy. To regulate, be it noted, is not to restrict, but to facilitate effective exercise of the very right. The constitutional estate of the minorities should not be encroached upon, neither allowed to be neglected nor mal-administered. This quintessence of the decision may now be aptly borne out by pertinent excerpts from the various judgments.

"The right to administer is to be tempered with regulatory measures to facilitate smooth administration. The best administration will reveal no trace or colour of minority. A minority institution should shine in exemplary eclecticism in the administration of the institution" (AIR 1974 SC 1389 at p. 1398) "Regulations which will serve the interests of the students, regulations which will serve the interests of the teachers are of paramount importance in good administration. Regulations in the interest of efficiency of teachers, discipline and fairness in administration are necessary for preserving harmony among affiliated institutions." (at p. 1398).

"Autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. . . The university will always have a right to see that there is no mal-administration. If there is mal-administration, the university will take steps to cure the same. There may be control and check on administration in order to find out whether the minority institutions are engaged in activities which are not conducive to the interest of the minority or to the requirements of the teachers and the students." (p. 1399).

The 'inner voice' of the whole pronouncement should not be muffled while reading the particular result in the case and that is happily expressed thus:

"The right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right. This right is not free from regulation. Just as regulatory measures are necessary for maintaining the educational character and context of minority institutions similarly regulatory measures are necessary for ensuring orderly, efficient and sound administration. Das, C. J., in the Kerala Education Bill case (AIR 1958 SC 956) (supra) summed up in one sentence the true meaning of the right to administer by saying that the right to administer is not the right to mal-administer." (at p. 1396).

11. Mr. Justice Jaganmohan Reddy summed up the law at the threshold:

"The right of a linguistic or religious minority to administer educational institutions of their choice, though couched in absolute terms had been held by this Court to be subject to regulatory measures which the State might impose for furthering the excellence of the standards of education." (at p. 1401).

12. Mr. Justice Khanna stressed what is sometimes ill-remembered:

"The idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give the minorities a sense of security and a feeling of confidence." (at p. 1415). The learned Judge, after visualising the abundant catholicity of the guarantee in favour of minorities in our multi-cultural country, insisted that regulations for the welfare of the institution were not constitutional anathema:

"It is, in my opinion, permissible to make regulations for ensuring the regular payment of salaries before a particular date of the month. Regulations may well provide that the funds of the institution should be spent for the purposes of education or for the betterment of the institution and not for extraneous purposes." (at p. 1422). And, after itemising, illustratively, other permissible constraints, observed:

"A regulation which is designed to prevent maladministration of an educational institution cannot be said to offend clause (1) of Article 30. At

the same time it has to be ensured that under the power of making regulations nothing is done as would detract from the character of the institution as a minority educational institution or which would impinge upon the rights of the minorities to establish and administer educational institutions of their choice." (at p. 1422).

"As observed by this Court in the case of Rev. Sidhrajibhai Sabhai, (1963) 3 SCR 837 = (AIR 1963 SC 540), regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as minority institution effective as an educational institution. Such regulation must satisfy a dual test — the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it." (at p. 1422). In the context of affiliation of colleges, the learned Judge concretised the law thus:

"The said authority can always prescribe regulations and insist that they should be complied with before it would grant affiliation or recognition to an educational institution. To deny the power of making regulations to the authority concerned would result in robbing the concept of affiliation or recognition of its real essence." (at p. 1423).

"It would be wrong to assume that an unrestricted right as in Article 30 postulates absence of regulations. Regulations can be prescribed in spite of the unrestricted nature of the right." (at p. 1423).

13. In short, the view which appealed to Khanna J. shows that the law, to be constitutional, should not impair the minorities' right but may be promotional in the sense of making the purpose of the institution more productive.

14. One of us, sitting on that Bench (Mr. Justice Mathew) has illumined the amplitude of the right under Article 30 but has not dissented from the validity of putting on that right regulatory harness. In a pithy

statement, this point has been made by the learned Judge 'No right, however absolute, can be free from regulation' (at p. 1441). The spiritual seed of this thought is found in the Holmesian observation extracted by him:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighbourhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." (at p. 1441). With specific reference to 'affiliation' these guidelines fell from the learned Judge:

"Recognition or affiliation creates an interest in the university to ensure that the educational institution is maintained for the purpose intended and any regulation which will subserve or advance that purpose will be reasonable and no educational institution established and administered by a religious or linguistic minority can claim recognition or affiliation without submitting to those regulations. That is the price of recognition or affiliation. . . . In other words, recognition or affiliation is a facility which the university grants to an educational institution. . ." (at p. 1442).

15. Justices Beg and Dwivedi have stretched the regulatory power further than the majority, holding that it is an illusion for a minority to claim absolute immunity. The thrust of the case is that real regulations are desirable, necessary and constitutional but, when they operate on the 'administration' part of the right, must be confined to chiselling into shape, not cutting down out of shape, the individual personality of the minority.

16. The discussion throws us back to a closer study of Statute 14-A to see if it cuts into the flesh of the Managements' right or merely tones up its health and habits. The two requirements the University asks for are that the Managing Body (whatever its name) must take in (a) the Principal of the College; (b) its senior-most teacher. Is this desideratum dismissible as biting into the autonomy of management or tenable as ensuring the excellence of the institution with-

out injuring the essence of the right? On a careful reflection and conscious of the constitutional dilemma, we are inclined to the view that this case falls on the valid side of the delicate line. Regulation which restricts is bad; but regulation which facilitates is good. Where does this fine distinction lie? No rigid formula is possible but a flexible test is feasible. Where the object and effect is to improve the tone and temper of the administration without forcing on it a stranger, however superb his virtues be, where the directive is not to restructure the governing body but to better its performance by a marginal catalytic induction, where no external authority's fiat or approval or outside nominee is made compulsory to validate the Management Board but inclusion of an internal key functionary appointed by the autonomous Management alone is asked for, the provision is salutary and saved, being not a diktat eroding the freedom of the freedom.

17. A dichotomy is sometimes drawn in this branch of juridical discussion. More plainly, the difference drawn is between creating a Managing body by the minority community and regulation of the manner of its functioning to obviate maladministration. The former is ordinarily beyond the pale of legislative proscription while the latter is permissible as a preservative. Broadly, this is sound, but as a rigid logical formula, it breaks down. For, some regulations may impinge marginally upon the composition of the administrative organ though manifestly meant to save the institution from mismanagement. Just one or two examples. If the law says that a person sentenced for a prescribed period of imprisonment for breach of trust or an undischarged insolvent would be disqualified to be the treasurer or one who has been removed from public office for moral delinquency or has been punished for outraging the religious feelings of the very minority under S. 295-A, I. P. C. should not hold office on the governing body, such a regulation affects the structure of the governing body but is indubitably a protection against likely maladministration. Likewise, supposing the

management has to award scholarships to students of merit, decide on courses of study to be undertaken, regulate teacher-students comity and discipline, who but the Principal chosen by the minority itself will be better on the Committee to guide it in these vital affairs? These fine but real lines cannot be obfuscated by excessive emphasis on the character of the organ as against its method of working. Men matter in extreme situations.

18. This perspective helps us discern the points made by either side.

19. The pith of Shri. Frank Anthony's submission is that the command of the University to include even the Principal, the head appointed by that very Management to be in plenary charge of the education imparted in the college, is an invasion of the minority right. Freedom from any form of external pressure, however well-meant and beneficent, is the soul of the right to administer, if one may paraphrase his contention. This is simply countered by the words of Khanna J:

"It would be wrong to assume that an unrestricted right as in Article 30 postulates absence of regulations. Regulations can be prescribed in spirit of the unrestricted nature of the right." (At p. 1423)

All the other learned Judges who are party to St. Xavier, AIR 1974 SC 1389 and all the earlier rulings have negatived the untouchable absoluteness urged by the managements. Equally fallacious is the simplistic submission which appears to have appealed to the High Court that Art. 30 is disturbed only when the right is destroyed, not when it is damaged. St. Xavier has dispelled doubts in this behalf. Abridgement of the constitutional right is as obnoxious as annihilation. To cripple is to kill.

20. Steering clear of these unconstitutional shoals let us again feel our way through the controversy. First, the principal. In the eloquent words of one of the learned Judges (Mathew J.) in St. Xavier's case AIR 1974 SC 1389:

"It is upon the principal and teachers of a college that the tone and temper of an educational institution

depend. On them would depend its reputation, the maintenance of discipline and its efficiency in teaching. The right to choose the principal and to have the teaching conducted by teachers appointed by the management after an overall assessment of their outlook and philosophy is perhaps the most important facet of the right to administer an educational institution." (emphasis, ours).

This strategic appointee must be chosen by the management with sedulous care and his choice should not be 'externalised' by regulations. All right. But for the excellent reason that the principal is the vital, vibrant and luscious presence within the educational campus, no administration can bring out its best in the service of the institution sans the principal. To alienate him is to self-inflict wounds; to associate him is to integrate the academic head into the administrative body for the obvious betterment of managerial insight and proficiency. He is no stranger to the college but the commander appointed by the management itself. A regulation which requires his inclusion in the Governing council imposes no external element nor exposes the college to the espionage of one with dual loyalties. His membership on the Board is a blessing in many ways and not a curse in any conceivable way. After all, the functions of the Managing Committee, as set down in bye-law 15, are:

"15. The Managing Committee shall —

(a) Dispose of applications for scholarships and concession etc., received by the Secretary or any other person.

(b) Check and pass account kept by the treasurer, Secretary or Principal.

(c) Have powers to appoint, suspend, remove or otherwise punish or dismiss any servant of the school or college or give them promotion or make reductions in their salaries and grant them leave in accordance with the Agra University Rules as the case may be:

Provided that in case of dismissal or removal or fine exceeding one month's pay or suspension for a period exceeding one month, an appeal shall lie to the Governing Body whose decision shall be final. The period for

filing the appeal shall be 15 days from the receipt of the order against which the appeal is to be preferred.

(d) See that the property of the institution, whether movable or immovable, is properly managed and kept.

(e) Generally supervise the work of all the office-bearers

(f) To pass the annual budget, annual report and dispose of the audit note.

(g) To sanction expenditure upto Rs. 25,000/- in the course of one year, irrespective of the budget provisions.

(h) To acquire by purchase, mortgage or otherwise immovable or movable property for the institution and to sell or otherwise dispose of movable property."

21. An activist principal is an asset in discharging these duties which are inextricably interlaced with academic functions. The principal is an invaluable insider — the Management's own choice — not an outsider answerable to the Vice-Chancellor. He brings into the work of the Managing Committee that intimate acquaintance with educational operations and that necessary expression of student-teacher aspirations and complaints which are so essential for the minority institution to achieve a happy marriage between individuality and excellence. And the role of the senior-most teacher, less striking may be and more unobtrusive, is a useful input into managerial skills, representing as he does the teachers and being only a seasoned minion chosen by the management itself. After all, two creatures of the Society on a 16-member Managing Committee can bring light, not tilt scales. Moreover, the Managing Committee itself is subject to the hierarchical control of the Governing Body and the General Council.

22. We see no force in the objection to the two innocuous insiders being seated on the Managing Committee.

23. The various decisions of this Court where legislative fetters have been struck down are cases in contrast. There the rules maim; here they improve. There the input upsets the balance; here the addition is minimal and strengthens from within. There, are external mandates to ap-

prove; here an internal principal is proposed to be dovetailed to make administration more proficient without injury to independent action. In the Kerala University Act case (1971) 1 SCR 734 = (AIR 1970 SC 2079) the vice of Sections 48 and 49, summarised by Ray C. J., in *St. Xavier*, AIR 1974 SC 1389 was stated thus:

"Those sections were found by this Court to have effect of displacing the administration of the college and giving it to a distinct corporate body which was in no way answerable to the institution. The minority community was found to lose the right to administer the institution it founded. The governing body contemplated in those sections was to administer the colleges in accordance with the provisions of the Act, statutes, ordinances, regulations, bye-laws and orders made thereunder. The powers and functions of the governing body, the removal of the members and the procedure to be followed by it were all to be prescribed by the statutes. These provisions amounted to vesting the management and administration of the institution in the hands of bodies with mandates from the University." (at page 1397)

Likewise in *Rev. Fr. W. Proost*, (1969) 2 SCR 73 = (AIR 1969 SC 465), the mischief was summed up in the latest case AIR 1974 SC 1389 by Ray C. J. in these words:

"This Court in *Rev. Fr. W. Proost* case, held that S. 48-A of the Bihar Universities Act which came into force from 1st March 1962, completely took away the autonomy of the governing body of St. Xavier's College established by the Jesuits of Ranchi. Section 48-A of the said Act provided inter alia that appointments, dismissals, removals, termination of service by the governing body of the College were to be made on the recommendation of the University Service Commission and subject to the approval of the University. There were other provisions in that section, viz., that the Commission would recommend to the governing body names of persons in order of preference and in no case could the governing body appoint a person who was not recommended by the University Service Commission." (at p. 1397)

Again, the same judgment pinpoints in these brief words, the unconstitutional sting in the Bihar case viz. Rt. Rev. Bishop Patro, (1970) 1 SCR 172 = (AIR 1970 SC 259):

"In Rt. Rev. Bishop S. K. Patro v. State of Bihar, (1970) 1 SCR 172 = (AIR 1970 SC 259) the State of Bihar requested the Church Missionary Society School, Bhagalpur to constitute a managing committee of the school in accordance with an order of the State. This Court held that the State authorities could not require the school to constitute a managing committee in accordance with their order." (at p. 1397)

The Gujarat case of St. Xavier, AIR 1974 SC 1389 is a study in contrast, as stated earlier. Sections 40 and 41 and Section 38 shackled the management, trenching seriously upon the right to administer. The law, as now (Contd. on Col. 2)

expounded, regards this excess as unconstitutional.

24. In all these cases administrative autonomy is imperilled transgressing purely regulatory limits. In our case autonomy is virtually left intact and refurbishing, not restructuring, is prescribed. The core of the right is not gouged out at all and the regulation is at once reasonable and calculated to promote excellence of the institution — a text book instance of constitutional conditions.

25. To project in bold relief the intrusion into the administration of the provisions in the 2nd Kerala case (AIR 1970 SC 2079), the D. A. V. College case, (1971) Supp SCR 688 = (AIR 1971 SC 1737) and St. Xavier's case AIR 1974 SC 1389 as against the innocuous prescriptions bearing on management in the present case, we may make a vivid comparison of the clauses. A chart may speak with eloquent clarity:

Kerala University Act	Guru Nanak University Statutes (D.A.V.) College	Gujarat University Act (St. Xavier's College Case)	Statute 14-A (impugned in the instant case)
1	2	3	4
S. 48.—Governing body for private college not under corporate management— (1) The educational agency of a private college, other than a private college under a corporate management, shall constitute in accordance with the provisions of the statutes a governing body consisting of following members, namely; (a) the principal of the private college; (b) the manager of the private college; (c) a person nominated by the university in accordance with the provisions in that behalf contained in the statutes; (d) a person nominated by the Government; (e) a person elected in accordance with such procedure as may be prescribed by the Statutes from among themselves by the permanent teachers of the private college; and (f) not more than six persons nominated by the educational agency. (2) The governing body shall be a body corporate having perpetual succession and a common seal. (3) The manager of the private college shall be the Chairman of the governing body. (4) A member of the governing body shall hold office for a period of four years from the date of its constitution. (5) It shall be the duty of the governing body to administer the private college in accordance with the provisions of this Act and the Statutes, Ordinances, Regulations, Rules, Bye-laws and Orders made thereunder. (6) The powers and functions of the governing body, the removal of members thereof and the procedure to be followed by	Statute 2 (1) (a). A college applying for admission to the privileges of the University shall send a letter of application to the Registrar and shall satisfy the Senate: (a) That the College shall have a regularly constituted governing body consisting of not more than 20 persons approved by the Senate and including, among others, 2 representatives of the University and the Principal of the College as <i>officio</i>.	23-A. (1) Every college (other than a Government college or college maintained by the Government) affiliated before the commencement of the Gujarat University (Amendment) Act, 1972 (hereinafter in this section referred to as 'such commencement')— (a) Shall be under the management of a governing body which shall include amongst its members the Principal of the college, a representative of the University nominated by the Vice-Chancellor and three representatives of the teachers of the College and at least one representative each of the members of the non-teaching staff and the students of the college, to be elected respectively from amongst such teachers, members of the non-teaching staff and students; and (b) that for recruitment of the Principal and members of the teaching staff of a college there is a selection committee of the college which shall include— (1) in the case of recruitment of the Principal, a representative of the University nominated by the Vice-	14.A. Each college, already affiliated or when affiliated, which is not maintained exclusively by Government must be under the Management of a regular constituted Governing body (which term includes Managing Committee) on which the staff of the college shall be represented by the Principal of the college and at least one representative of the teachers of the college to be appointed by rotation in order of seniority determined by length of service in

it, including the delegation of its powers, shall be prescribed by the Statutes.

(7) Notwithstanding anything contained in sub-section (6), decisions of the governing body shall be taken at meetings on the basis of simple majority of the members present and voting.

5 49 —Managing council for private colleges under corporate management—

(a) one principal by rotation in such manner as may be prescribed by the Statutes;

(b) the manager of the private college;

(c) a person nominated by the University in accordance with the provisions in that behalf contained in the Statutes;

(d) a person nominated by the Government;

(e) two persons elected in accordance with such procedure as may be prescribed by the Statutes from among themselves by the permanent teachers of all the private colleges; and

(f) not more than fifteen persons nominated by the educational agency.

(2) The managing council shall be a body corporate having perpetual succession and a common seal.

(3) The manager of the private colleges shall be the chairman of the managing council.

(4) A member of the managing council shall hold office for a period of four years from the date of its Constitution.

(5) It shall be the duty of the managing council to administer all the private colleges under the corporate management in accordance with the provisions of this Act and the Statutes, Ordinances, Regulations, Bye-laws and Orders made thereunder.

(6) The powers and functions of the managing council, the removal of members thereof and the procedure to be followed by it, including the delegation of its powers, shall be prescribed by the Statutes.

(7) Notwithstanding anything contained in sub-section (6), decisions of the managing council shall be taken at meetings on the basis of simple majority of the members present and voting.

5 63 —Power to regulate the management of private colleges—

(4) If the governing body or managing council, as the case may be, disapproves any decision taken by the University in connection with the management of the private college the matter shall be referred by the governing body or managing council, as the case may be to the Government, within one month of the date of receipt of the report under sub-section (3) who shall thereupon pass such order thereon as they think fit and communicate the same to the governing body or managing council and also to the University.

(5) The manager appointed under sub-section (1) of section 50 shall be bound to give effect to the decisions of the University and if at any time, it appears to the University that the manager is not carrying out its decisions, it may, for reasons to be recorded in writing and after giving the manager an opportunity of being heard, by order remove him from office and appoint another person to be the manager after consulting the educational agency;

Chancellor, and

(2) in the case of recruitment of a member of the teaching staff of the college, a representative of the University nominated by the Vice-Chancellor and the Head of the Department, if any, concerned with the subject to be taught by such member.

(3) Every college referred to in sub-section (1) shall,—

(a) within a period of six months after such commencement, constitute or reconstitute its governing body in conformity with sub-section (1), and

(b) as and when occasion first arises after such commencement, for recruitment of the Principal and teachers of the College, constitute or reconstitute its selection committee so as to be in conformity with sub-section (1).

(3) The provisions of sub-section (1) shall be deemed to be a condition of affiliation of every college referred to in sub-section (1).

the college, who shall hold office for one academic year.

In the chart aforesaid, we have confined our attention to the 'management' facet of the case but may mention that while in the earlier cases even the power to appoint the principal and staff was controlled, in the instant case it is a refreshing contrast.

26 First the D.A.V. College. He who runs and reads will discover that Statute 2 (1) (a) insists upon (a) a limit to the strength of the governing body; (b) the approval of the Senate of the University for the constitution of the governing body; and (c) the inclusion of two representatives of the University as also the Principal of the college ex officio. To legislate for the governing body a rigid restriction on its numbers is to deprive the minority of its free play in organising its management. To compel approval by the Senate — an outside instrumentality — before the governing body can have legal status, is a violent violation of Art. 30. To foist two representatives of the University — rank outsiders — is again an infringement of the autonomy of the minority institution. The Court, in that case (AIR 1971 SC 1737), upheld the complaint of the college authorities thus:

"In our view there is no possible justification for the provisions contained in Clauses 2 (1) (a) and 17 of Chap. V of the statutes which decidedly interfere with the rights of management of the Petitioners Colleges. These provisions cannot therefore be made as conditions of affiliation, the non-compliance of which would involve disaffiliation and consequently they will have to be struck down as offending Article 30 (1)."

27. It is impossible to predicate from the above observations that this Court regarded as obnoxious the inclusion of the Principal of the very college. On the other hand, the more serious encroachment which caved into the independent management of the College consists in the first three provisions which are deprivatory in character. The present case is a graphic contrast. No ceiling on membership; no unbidden guests, nominees of the University, fobbed off on the Managing Committee. The solitary but inconsequential similarity of cir-

cumstance that there is reference to the Principal, there and here, cannot approximate the two cases from the constitutional angle at all, what with complete hold on staff appointment in the former and none in the latter.

28. The Kerala case (AIR 1970 SC 2079); as the table above shows, insists on the appointment of the Principal himself being controlled, displaces the minority's Managing Committee by imposing an admixed governing agency of statutory concoction wresting authority from the minority. A different entity with legislatively limited functions robs the religious group of its right of administration. The distance between the Kerala University Act provisions and those of the Agra University Act is considerable and the constitutional import too obvious for argument.

29. The manacle regulations of the Gujarat University Act are also tell-tale. Its metamorphic impact is best summed up in the terse words of Ray, C. J. The minority character of the college is lost. Minority institutions became part and parcel of the University. Why? Because:

"The provisions contained in Section 33-A (1) (a) of the Act state that every college shall be under the management of a governing body which shall include amongst its members, a representative of the university nominated by the Vice-Chancellor and representatives of teachers, non-teaching staff and students of the college. ..."

"In (1971) 1 SCR 734 = (AIR 1970 SC 2079) (supra) this Court said that if the administration goes to a body in the selection of whom the founders have no say, the administration would be displaced. This Court also said that situations might be conceived when they might have a preponderating voice. That would also affect the autonomy in administration. The provisions contained in Section 33-A (1) (a) of the Act have the effect of displacing the management and entrusting it to a different agency. The autonomy in administration is lost. New elements in the shape of representatives of different types are brought in. The calm waters of an institution will not only be disturbed but also mixed.

These provisions in Section 33-A (1) (a) cannot therefore apply to minority institutions." (at p. 1399)

The features of the Agra University Act vis-a-vis the minority institutions are conspicuously different and leave almost unaffected the total integrity of the administration by the religious group, save in the minimal inclusion of two internal entities, namely the Principal of their own choice and the seniormost lecturer independently appointed by them.

30. We are satisfied that the regulatory clauses challenged before us improve the administration and do not inhibit its autonomy and are therefore good and valid.

31. We therefore hold that the statute impugned is not vulnerable nor void. The appeal has to be and is dismissed, but without costs in the circumstances of this case.

MATHEW, J. (Minority view):—

32. The question is whether Statute 14A framed by the University of Agra abridges the fundamental right guaranteed under Article 30 (1) of the Constitution of the Muslim community of Saharanpur (Shahjahanpur), a religious minority, to administer the Gandhi Faizem College, Saharanpur, established by it.

33. In August, 1964, an application was made on behalf of the college management to the University for permission to start teaching in courses of study including Sociology, Sanskrit, Arabic, Military Studies, Drawing and Painting. The University insisted that as condition for recognition of these additional subjects as courses of study, the managing committee of the college must be reconstituted in conformity with Statute 14A by including the Principal and the senior-most member of the staff in it. Statute 14A provides:

"14-A. Each college, already affiliated or when affiliated, which is not maintained exclusively by Government must be under the Management of a regular constituted Governing Body (which term includes Managing Committee) on which the staff of the college shall be represented by the Principal of the College and at least one representative of the teachers of the college to be appointed by rotation in order of seniority determined

by length of service in the college, who shall hold office for one academic year."

34. In the writ petition filed before the High Court, the appellant contended that Statute 14A abridged its fundamental right under Art. 30 (1). But the High Court negated the contention holding that even if Statute 14A is implemented by the religious minority, the right of the minority to administer the educational institution would not be taken away or destroyed and dismissed the writ petition.

35. I should have thought that the matter was concluded by the decision of this Court in *Ahmedabad St. Xavier's College Society v. State of Gujarat*, (1974) 1 SCC 717 = (AIR 1974 SC 1389). Section 33A (1) (a) of the Gujarat University Act, 1949, which fell for consideration in that case, among other matters, read:

"33A (1) Every college (other than a Government college or a college maintained by the Government) affiliated before the commencement of the Gujarat University (Amendment) Act, 1972 (hereinafter in this section referred to as 'such commencement')—

(a) shall be under the management of a governing body which shall include amongst its members the Principal of the College, a representative of the University nominated by the Vice-Chancellor, and three representatives of the teachers of the college and at least one representative each of the members of the non-teaching staff and the students of the college, to be elected respectively from amongst such teachers, members of the non-teaching staff and students." This provision was challenged in that case as violating the fundamental right under Article 30 (1) of the minority community in question there. This Court held by a majority that the provision was bad as it offended the fundamental right of the religious minority under Article 30 (1) to administer its educational institution. The reason was that the provision required the inclusion, in the governing body of the college, of persons whom the religious minority did not want to include. When Article 30 (1) speaks that a religious or linguistic minority

has the right to administer educational institutions of its choice, it means that the right to carry on the administration of the institution must be left to the managing body consisting of persons in whom the religious or linguistic minority has faith and confidence.

36. The learned Chief Justice, speaking for himself and Palekar, J., after referring to the provisions of Section 33A (1) (a) said in the case that the right to administer is the right to conduct and manage the affairs of the institution and that this right is exercised "through a body of persons in whom the founders of the institution have faith and confidence and who have full autonomy in that sphere". He further said that the right to administer is subject to permissible regulatory measures and that permissible regulatory measures are those which do not restrict the right of administration but facilitate it and ensure better and more effective exercise of the right for the benefit of the institution and through the instrumentality of the management of the institution and without displacing the management. He was of the view that if the administration has to be improved, it should be done through the agency or the instrumentality of the existing management and not by displacing it. The learned Chief Justice further observed that autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions, that the right of administration means day to day administration and that the choice in the personnel of management is a part of the administration. He concluded by saying:

"The provisions contained in section 33A (1) (a) of the Act have the effect of displacing the management and entrusting it to a different agency. The autonomy in administration is lost. New elements in the shape of representatives of different types are brought in. The calm waters of an institution will not only be disturbed but also mixed. These provisions in Section 33A (1) (a) cannot therefore apply to minority institutions."

37. Jaganmohon Reddy, J. speaking for himself and Alagiriswami, J. agreed with the view ex-

pressed by the learned Chief Justice on the question of the validity of Section 33A (1) (a) in its application to the minority.

38. Khanna, J. in his concurring judgment said that the argument that a law or regulation could not be deemed unreasonable unless it was totally destructive of the right of the minority to administer educational institutions was fallacious and was negatived by this Court by its previous decisions and that a law which

"... interferes with the minorities choice of a governing body or management council would be violative of the right guaranteed by Article 30 (1). This view has been consistently taken by this Court in the cases of Rt. Rev. S. K. Patro, (AIR 1970 SC 259), Rev. Mother Provincial, AIR 1970 SC 2079) and D. A. V. College (affiliated to the Guru Nanak University) (AIR 1971 SC 1737) (supra).

"Section 33-A which provides for a new governing body for the management of the college and also for selection committees as well as the constitution thereof would consequently have to be quashed so far as the minority educational institutions are concerned because of the contravention of Article 30 (1)."

39. On behalf of Chandrachud, J. and myself, I said:

"The requirement that the college should have a governing body which shall include persons other than those who are members of the governing body of the Society of Jesus would take away the management of the college from the governing body constituted by the Society of Jesus and vest it in a different body. The right to administer the educational institution established by a religious minority is vested in it. It is in the governing body of the society of Jesus that the religious minority which established the college has vested the right to administer the institution and that body alone has the right to administer the same. The requirement that the college should have a governing body including persons other than those who constitute the governing body of the Society of Jesus has the effect of divesting that body of its exclusive right to manage

the educational institution. That it is desirable in the opinion of the legislature to associate the Principal of the college or the other persons referred to in S. 33A (1) (a) in the management of the college is not a relevant consideration. The question is whether the provision has the effect of divesting the governing body as constituted by the religious minority of its exclusive right to administer the institution. Under the guise of preventing maladministration, the right of the governing body of the college constituted by the religious minority to administer the institution cannot be taken away."

40. In (1971) 1 SCR 734 = (AIR 1970 SC 2079) this Court said that "Administration means 'management of the affairs' of the institution, that the management must be free of control so that the founders or their nominees can mould the institution according to their way of thinking and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served and that no part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right." Sections 48 and 49 of the Kerala University Act, 1969 which came up for consideration in that case respectively dealt with the governing body for private colleges not under corporate management and the managing council for private colleges under corporate management. Under the provisions of these sections, the educational agency or the corporate management was to establish a governing body or a managing council respectively. The sections provided for the composition of the two bodies. It was held that the sections had the effect of abridging the right to administer the educational institution of the religious minority in question there. One of the grounds given in the judgment for upholding the decision of the High Court striking down the sections is that these bodies had a legal personality distinct from governing bodies set up by the educational agency or the corporate management and that they were not answerable to the founders in the matter of administration of the educational institution. The Court said

that a law which interferes with the composition of the governing body or the managing council as constituted by the religious or linguistic minority is an abridgment of the right of the religious minorities to administer the educational institution established by it (see also (1969) 2 SCR 73 at pp. 77-78 = (AIR 1969 SC 465 at p. 467) and (1969) 1 SCC 863 = (AIR 1970 SC 259)).

41. The determination of the composition of the body to administer the educational institution established by a religious minority must be left to the minority as that is the core of the right to administer. Regulations to prevent maladministration by that body are permissible. As the right to determine the composition of the body which will administer the educational institution is the very essence of the right to administer guaranteed to the religious or linguistic minority under Article 30 (1), any interference in that area by an outside authority cannot be anything but an abridgment of that right. The religious or linguistic minority must be given the freedom to constitute the agency through which it proposes to administer the educational institution established by it as that is what Article 30 (1) guarantees. The right to shape its creation is one thing; the right to regulate the manner in which it would function after it has come into being is another. Regulations are permissible to prevent maladministration but they can only relate to the manner of administration after the body which is to administer has come into being.

42. The provisions of statute 14A are in pari materia with those of Section 33A (1) (a) of the Act which fell for consideration in Ahmedabad St. Xavier's College case, AIR 1974 SC 1389 (supra) except that only the principal and the senior-most member of the staff alone are required to be included in the managing committee of the college in question here. But, in principle, that makes no difference. The principle, as I said, is that the minority community has the exclusive right to vest the administration of the college in a body of its own choice, and any compulsion from an outside authority to include any other

person in that body is an abridgment of its fundamental right to administer the educational institution.

43. It is, no doubt, true that it is upon the principal and the teachers that the whole temper and the tone of a college depend. But that does not mean that the principal and the teachers should be members of the governing council of a college. It was only in the context of the right of the religious or linguistic minority to appoint the principal and teachers of the college established by it that we said in Ahmedabad St. Xavier's College case, AIR 1974 SC 1389 (supra):

"It is upon the principal and teachers of a college that the tone and temper of an educational institution depend. On them would depend its reputation, the maintenance of discipline and its efficiency in teaching. The right to choose the principal and to have the teaching conducted by teachers appointed by the management after an overall assessment of their outlook and philosophy is perhaps the most important facet of the right to administer an educational institution. We can perceive no reason why a representative of the University nominated by the Vice-Chancellor should be on the Selection Committee for recruiting the Principal or for the insistence of head of the department besides the representative of the University being on the Selection Committee for recruiting the members of the teaching staff. So long as the persons chosen have the qualifications prescribed by the University, the choice must be left to the management. That is part of the fundamental right of the minorities to administer the educational institution established by them."

44. While affirming the correctness of the observation in the context in which it was made, I think it necessary to repudiate its relevance and application here.

45. I would therefore, allow the appeal without any order as to costs.

ORDER

46. In accordance with the opinion of the majority, the appeal is

dismissed without any order as to costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 1835

(From: Madhya Pradesh)*

N. L. UNTWALLIA AND S. M. FAZL

ALI JJ.

The State of Madhya Pradesh, Appellant v. M. V. Narasimhan, Respondent.

Criminal Appeal No. 284 of 1974, D/- 15-7-1975.

(A) Interpretation of Statutes — Legislation by incorporation — Subsequent Act incorporating provisions of previous Act — Amendment in previous Act — Effect on subsequent Act — General rule and exceptions.

Where a subsequent Act incorporates provisions of a previous Act, then the borrowed provisions become an integral and independent part of the subsequent Act and are totally unaffected by any repeal or amendment in the previous Act. This principle, however, will not apply in the following cases: (a) where the subsequent Act and the previous Act are supplemental to each other; (b) where the two Acts are in pari materia; (c) where the amendment in the previous Act if not imported into the subsequent Act also, would render the subsequent Act wholly unworkable and ineffectual; and (d) where the amendment of the previous Act, either expressly or by necessary intendment, applies the said provisions to the subsequent Act: (1881) 8 QBD 63; AIR 1963 SC 553; (1886) 31 Ch. D. 607; AIR 1931 PC 149, AIR 1958 SC 61, AIR 1959 SC 1310, AIR 1963 SC 1116 Referred. [for illustration, see pt. (B).]

(Para 16)

(B) Prevention of Corruption Act (1947), S. 2 — Penal Code (1860), Section 21 — Incorporation of definition of 'public servant' contained in S. 21 of Penal Code, in Section 2 — Amendments of S. 21 of Penal Code in 1958 and 1964 — Amendments have to be read in Section 2 of 1947 Act—

*(Criminal Appeal No. 43 of 1971, D/- 12-4-1973 — Madh. Pra.)

GS/HS/C621/75/VBB

Employee of Heavy Electricals, Bhopal, held public servant' within S. 2 — Cri Appeal 43 of 1971, D/- 12-4-1973 (Madh Pra) Reversed.

Having regard to the preamble and the object of the 1947 Act and the Penal Code, there can be no doubt that the Act was a statute supplemental to the Penal Code. Therefore, the definition of 'public servant' borrowed from S. 21 of the Penal Code must be read into Section 2 of the Act not only at the time when it was borrowed (i.e. 1947) but even at the material date when the offence is committed. This being the position, it is manifest that, by virtue of the amendments of 1958 and 1964 which inserted twelfth clause to S. 21 of the Penal Code, an employee of the Heavy Electricals (India) Ltd., Bhopal, committing an offence under the 1947 Act after 1964, clearly comes within the meaning of "public servant". Further, the Prevention of Corruption Act, being a social legislation, its provisions must be liberally construed so as to advance the object of the Act. This can only be done if an extended meaning is given to the term "public servant" as referred to in Section 2 of the Act by applying the enlarged definition contained in clause 12 inserted in the Penal Code by the two amendments referred to above. Cri Appeal No. 43 of 1971, D/- 12-4-1973 (Madh Pra.) Reversed; Case law referred.

(Paras 12, 14, 17)

However, it cannot be held that the Act and the Penal Code were statutes in pari materia and form part of one system. The Act is a completely self-contained statute with its own provisions and has created a specific offence of criminal misconduct which is quite different from the offence of bribery as defined in the Penal Code. Both these statutes have different objects and create offences with separate ingredients. (Para 10)

Cases Referred: Chronological Paras
AIR 1963 SC 553 = (1963) 3 SCR 858

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AIR 1963 SC 1116 = (1963) Supp (2)

SCR 724 = (1963) 2 Cri LJ 186 14

AIR 1959 SC 1310 = (1960) 1 SCR

290 = 1959 Cri LJ 1497 13

AIR 1958 SC 61 = 1958 Cri LJ 232 11

AIR 1931 PC 149 = 58 Ind App 259

8. 15

(1886) 31 Ch D 607 = 55 LJ Ch 488 6
(1881) 8 QBD 63 = 51 LJ QB 1 5

Mr. F. S. Nariman, Addl. Solicitor General. (M/s. P. P. Rao and R. N. Sachthey, Advocates, with him), for Appellant. Respondent in Person.

Judgment of the Court was delivered by

FAZL ALI, J.:— This is an appeal by State of M. P. by certificate granted by the High Court of Madhya Pradesh under Art. 134 (1) (c) of the Constitution against its judgment and order dated April 12, 1973 by which the respondent, who was convicted by the Special Judge, Indore, under Section 420 I.P.C. and Section 5 (2) read with Section 5 (1) (d) of the Prevention of Corruption Act, 1947 and sentenced to one year rigorous imprisonment on each count, was acquitted by the High Court. Briefly put, the prosecution case against the respondent was that he was an employee in the Heavy Electricals (India) Ltd, Bhopal, which is a Government company and was working at the relevant time as Personal Assistant to Shri K. C. Rae, Manager, Purchasing & Main Stores of the Company. Mr. Rae was allotted a new Fiat Car at Bombay on priority basis and the respondent and Mr. Rae had arrived at Bombay to take delivery of the car on March 10, 1965 and they stayed there till March 13, 1965. Mr. Rae, however, left on the morning of March 13, 1965 directing the respondent to obtain delivery of the Fiat Car on March 14, 1965 and then proceed to Indore. Ultimately the car was brought to Bhopal on March 16, 1965 at about 2-30 P.M. On March 23, 1965 the respondent submitted his T.A. bill Ext. P-21 showing his departure from Bombay on March 16, 1965 by car at 2-00 P.M. and arrival at Bhopal on March 17, 1965 at 6-30 P.M. and claimed daily allowance at the rate of Rs. 12/- per day for halt at Bombay. The respondent accordingly received the full amount of the T.A. Bill on April 3, 1965. The allegation against the respondent was that he had prepared a false T.A. Bill and had cheated the Government Company and was guilty of serious criminal misconduct as envisaged by the Prevention of Corruption Act. The learned Special Judge, Indore, accepted the prosecu-

tion case and convicted the respondent as indicated above. The respondent then filed an appeal before the High Court of Madhya Pradesh which allowed the appeal, mainly on the ground that as the respondent was not a public servant as contemplated by the provisions of the Prevention of Corruption Act, his trial under the said Act was without jurisdiction. The High Court, however, left it open to the Government to prosecute the respondent under the relevant law, if necessary. It is against this order of the High Court that the State of M.P. has filed this appeal before us after obtaining certificate of fitness from the High Court.

2. The short point taken by the respondent before the High Court was that as the word "public servant" has not been expressly defined in the Prevention of Corruption Act, 1947, it has borrowed the definition from Section 21 of the Indian Penal Code, such a definition amounts to legislation by incorporation, and therefore any subsequent amendment, addition or alteration in the Indian Penal Code would not at all affect the incorporated provision in the Prevention of Corruption Act. The High Court seems to have readily accepted this contention and has accordingly held that as the various amendments to Section 21 of the Indian Penal Code cannot apply to the provisions of the Prevention of Corruption Act, and therefore the respondent being only an employee of the Government Company does not fall within the ambit of public servant as defined in Section 21 of the Indian Penal Code prior to the amendment. In order to appreciate this point, it may be necessary to set out the scheme of the Prevention of Corruption Act—hereinafter referred to as 'the Act'—with particular reference to Section 21 of the Indian Penal Code—hereinafter referred to as 'the Penal Code'—which has been incorporated in the Act. To begin with, the preamble to the Act clearly shows that the Act has been passed for more effective prevention of bribery and corruption, bribery being a form of corruption. Section 2 of the Act runs thus:

"For the purposes of this Act "public servant" means a public ser-

vant as defined in Section 21 of the Indian Penal Code."

It would be seen that Section 2 of the Act completely incorporates the provision of Section 21 of the Penal Code in order to define a "public servant". The Legislature in its wisdom did not think it necessary to give a separate definition of "public servant" in the Act, but in order to achieve brevity in legislation it incorporated the provision of Section 21 of the Penal Code into it. Before the Criminal Law (Amendment) Act, 1958 (Act No. II of 1958) was passed Section 21 of the Penal Code consisted only of eleven clauses and an employee under the Corporation or a Government Company did not fall within the purview of any of the clauses of S. 21 of the Penal Code. Thus when the Legislature incorporated the provisions of Section 21 of the Penal Code in the Act in the year 1947, clause 12 was not there at all on the statute book of the Penal Code. The High Court took the view that as the Act had incorporated the definition of the Penal Code prior to its amendment, therefore, it became an integral and independent part of the Act and would remain unaffected by any repeal or change in the previous Act, namely the Penal Code. It appears, however, that by virtue of the Criminal Law (Amendment) Act, 1958, twelfth clause was inserted in S. 21 of the Penal Code, which runs as follows:

"Twelfth.—Every officer in the service or pay of a local authority or of a corporation engaged in any trade or industry which is established by a Central, Provincial or State Act or of a Government company as defined in Section 617 of the Companies Act, 1956."

This Act also amended certain provisions of the Prevention of Corruption Act, 1947 in enlarging the concept of criminal misconduct but it did not at all amend any portion of Section 2 of the Act, perhaps the reason being that in view of the enlargement of the definition of "public servant" in Section 21 of the Penal Code express amendment of S. 2 of the Act was not necessary.

3. By virtue of the Anti-Corruption Laws (Amendment) Act, 1964

(Act No. XL of 1964) clause 12 of Section 21 of the Penal Code was substituted as follows:

"Twelfth.—Every person —

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;

(b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in Section 617 of the Companies Act, 1956."

4. It would thus appear that by virtue of these two amendments the Parliament sought to enlarge the definition of "public servant" so as to include even an employee of a Government company or a corporation with the avowed object of stamping out corruption at various levels prevailing in the country.

5. The question that arises for consideration is whether the subsequent amendments to Section 21 of the Penal Code after its incorporation in the Act would have to be read into the Act or not. It is true that if the doctrine of legislation by incorporation is strictly applied in this case, then the definition of S. 21 of the Penal Code prior to its amendment by Act II of 1953 and Act XL of 1964 would alone stand and, if this is so, the respondent would not be a public servant within the meaning of S. 21 of the Penal Code. It is well settled that where the subsequent Act incorporates a provision of the previous Act, the position is that the borrowed provision is bodily lifted from the previous Act and placed in the subsequent Act and becomes an integral and independent part of it so as to remain unaffected by any repeal, change or amendment in the previous Act. In *Clarke v. Bradlaugh*, (1881) 8 QBD 63 at p. 62 Brett, L.J., observed as follows:

"... but there is a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second." These observations were noticed and approved by this Court in *Ram Sarup v. Munshi*, (1963) 3 SCR 858 at pp. 868-869 (AIR 1963 SC 553 at p. 558)

where this Court made the following observations:

"Where the provisions of an Act are incorporated by reference in a later Act the repeal of the earlier Act has, in general, no effect upon the construction or effect of the Act in which its provisions have been incorporated. The effect of incorporation is stated by Brett, L. J., in *Clarke v. Bradlaugh*:

"where a statute is incorporated, by reference into a second statute the repeal of the first statute by a third does not affect the second."

In the circumstances, therefore, the repeal of the Punjab Alienation of Land Act of 1900 has no effect on the continued operation of the Pre-emption Act and the expression 'agricultural land' in the later Act has to be read as if the definition in the Alienation of Land Act had been bodily transposed into it."

6. The doctrine of incorporation by reference to earlier legislation has been very aptly described by Lord Esher, M.R., in *In re Wood's Estate*, Ex parte Her Majesty's Commissioners of Works and Buildings, (1886) 31 Ch. D 607 at pp. 615-616 where he observed as follows:

"If a subsequent Act brings into itself by reference some of the clauses of a former Act the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical purposes, therefore, those sections of the Act of 1840 are to be dealt with as if they were actually in the Act of 1855."

7. *Craies on Statute Law*, (7th Edition), while referring to the observations of Brett, L.J., observed at p. 361 as follows:

"There is a rule of construction that where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second, as the incorporated provisions have become part of the second statute."

8. The Privy Council in *Secy. of State for India in Council v. Hin-*

dusthan Co-operative Insurance Society Ltd., 58 Ind App. 259 at pp. 266-267 = (AIR 1931 PC 149 at p. 152) while amplifying this doctrine observed as follows:

"Their Lordships regard the local Act as doing nothing more than incorporating certain provisions from an existing Act, and for convenience of drafting doing so by reference to that Act, instead of setting out for itself at length the provisions which it was desired to adopt.....The independent existence of the two Acts is therefore recognized; despite the death of the parent Act, its offspring survives in the incorporating Act. Though no such saving clause appears in the General Clauses Act, their Lordships think that the principle involved is as applicable in India as it is in this country."

9. Thus, the position is that after the provision of the previous Act is incorporated in the subsequent Act, the off-spring, namely the incorporated provision, survives even if the previous Act is repealed, amended, declared a nullity or erased from the statute book. The High Court appears to have relied on all these decisions in order to come to its conclusion that as the Act has incorporated the provisions of Section 21 of the Penal Code in Section 2 thereof, any amendment in the previous Act, namely the Penal Code, will not affect the subsequent Act, namely the Prevention of Corruption Act.

10. It was argued before the High Court as also before us that the Act and the Penal Code are statutes in *pari materia* and form part of one system and they should, therefore, be interpreted as enforcing each other. Thus any change in the definition of Section 21 of the Penal Code would have to be implicitly read into Section 2 of the Act. The Additional Solicitor General Mr. Nariman appearing for the State, however, conceded later on, and in our opinion rightly, that it may not be possible to hold that the Act and the Penal Code were statutes in *pari materia*. It would appear that the Act is a completely self-contained statute with its own provisions and has created a specific offence of criminal misconduct which is quite different from the offence of bribery as defin-

ed in the Penal Code. Both these statutes have different objects and create offences with separate ingredients. No authority has been cited before us in support of the proposition that the Act, namely, the Prevention of Corruption Act, and the Penal Code are statutes in *pari materia* so as to form one system.

11. In the State of Madras v. Vaidyanath Iyer, AIR 1958 SC 61 = (1958 Cri LJ 232) this Court while construing the meaning of the phrase 'it shall be presumed' appearing in Section 4 of the Act utilised the construction placed on the phrase 'shall presume' in the Evidence Act by holding that the Evidence Act was a statute in *pari materia* with the Prevention of Corruption Act. There can be no doubt that the Evidence Act and the Prevention of Corruption Act form part of one system, because the rules of the Evidence Act, with minor exceptions, apply to trials of offences created under the Act. This principle, however, cannot apply to the present case, where, as we have already stated the areas of the two statutes, namely, the Act and the Penal Code are entirely different. Secondly, while the Indian Penal Code is essentially a penal statute of a much wider scope than the Act, the Act no doubt contains a penal flavour but it is in effect a piece of social legislation directed towards eradication of the evil of corruption amongst the services alone. In other words, public servants alone fall within the mischief of the Act, i.e. the Prevention of Corruption Act, and no one else.

12. Mr. Nariman then argued that having regard to the preamble and the object of the Act and the Penal Code there can be no doubt that the Act was undoubtedly a statute supplemental to the Penal Code and that being the position any amendment in the definition of Section 21 of the Penal Code would have to be read into Section 2 of the Act, because once the definition of Section 21 of the Penal Code was incorporated in the Act it had to be imported into the other Act and considered *pari passu* the Penal Code. In our opinion, this argument is well founded and must prevail. We have already indicated that the object of the Act was to era-

dicating corruption from various levels either in Government services or in services under the Corporations or Government companies. The Penal Code no doubt creates offences like those mentioned in Sections 161 and 165 of the Code but they were not found sufficient to cope with the present situation and the expanding needs of the nation. In these circumstances, it was considered necessary to evolve a quick expeditious and effective machinery to destroy the evil of corruption existing in any form. If, therefore, the Penal Code with the same object enlarged the definition of Section 21 by adding the twelfth clause by virtue of the Criminal Law (Amendment) Act, 1958 and the Anti-corruption Laws (Amendment) Act, 1964, there is no reason why the extended meaning to the provision of Section 2 of the Act as borrowed from S. 21 of the Penal Code be not given to that section.

13. This Court in *S. Gangoli v. The State of Uttar Pradesh*, (1960) 1 SCR 290 = (AIR 1959 SC 1310 = 1959 Cri LJ 1497) while interpreting Section 2 of the Prevention of Corruption Act, that the accused were public servants within the meaning of the Act, being employee of the East Indian Railway, which was managed and owned by the Government of India, observed as follows:

"The East Indian Railway which has employed the appellants was at the material time owned by the Government of India and managed and run by it, and so if the status of the appellants had to be judged at the material date solely by reference to S. 21 of the Code there would be no difficulty in holding that they are public servants as defined by the said section."

14. Even while discussing the exact ambit and scope of the Prevention of Corruption Act, this Court observed in *M. Narayanan Nambiar v. State of Kerala* (1963) Supp (2) SCR 724 = (AIR 1963 SC 1116 = (1963) 2 Cri LJ 186) as follows:

"The preamble indicates that the Act was passed as it was expedient to make more effective provision for the prevention of bribery and corruption. The long title as well as the preamble indicate that the Act was pass-

ed to put down the said social evil i.e. bribery and corruption by public servant.....It also aims to protect honest public servants from harassment by prescribing that the investigation against them could be made only by police officials of particular status and by making the sanction of the Government or other appropriate officer a pre-condition for their prosecution. As it is a socially useful measure conceived in public interest, it should be liberally construed so as to bring about the desired object, i.e. to prevent corruption among public servants and to prevent harassment of the honest among them."

These observations regarding the object of the Act obviously were based on the footing that the Act must be read as supplemental to the Penal Code, and therefore the definition borrowed from the Penal Code must be read into Section 2 of the Act not only at the time when it was borrowed but even at the material date when the offence is committed. This being the position it is manifest that by virtue of the amendments referred to above in the Penal Code which inserted twelfth clause to Section 21 of the Penal Code the respondent clearly comes within the meaning of "public servant" and the High Court was in error in taking a view to the contrary. Further the Prevention of Corruption Act being a social legislation its provisions must be liberally construed so as to advance the object of the Act. This can only be done if we give an extended meaning to the term "public servant" as referred to in Section 2 of the Act by applying the enlarged definition contained in clause 12 inserted in the Penal Code by the two amendments referred to above.

15. There is yet another aspect of the matter which is spelt out from the decision of the Privy Council in the *Hindusthan Co-operative Insurance Society's case* (supra) which has been relied upon by the High Court itself. While reiterating the principle that after certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act can be made, their Lordships of the Privy Council made it clear that this

principle would not apply where the subsequent Act is rendered unworkable or is not able to function effectually. In this connection their Lordships observed as follows:

"It seems to be no less logical to hold that where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act, which is not expressly made applicable to the subsequent Act, can be deemed to be incorporated in it, at all events if it is possible for the subsequent Act to function effectually without the addition."

16. On a consideration of these authorities, therefore, it seems that the following proposition emerges:

Where a subsequent Act incorporates provisions of a previous Act then the borrowed provisions become an integral and independent part of the subsequent Act and are totally unaffected by any repeal or amendment in the previous Act. This principle, however, will not apply in the following cases:

(a) where the subsequent Act and the previous Act are supplemental to each other;

(b) where the two Acts are in *pari materia*;

(c) where the amendment in the previous Act, if not imported into the subsequent Act also, would render the subsequent Act wholly unworkable and ineffectual; and

(d) where the amendment of the previous Act, either expressly or by necessary intendment, applies the said provisions to the subsequent Act.

17. The Additional Solicitor General vehemently contended that if the enlarged definition by the insertion of clause 12 in S. 21 of the Penal Code is not imported into Section 2 of the Act, then the Act would become wholly unworkable. For instance, if two persons are serving under a Government company and have committed an offence of accepting illegal gratification, and if one is prosecuted under Section 161 of the Penal Code and the other under the Act, it is obvious that the prosecution against the employee under the Penal Code would succeed on proof of facts, whereas the employee of the same company

who is prosecuted under the Act will fail because such an employee will not be a public servant, according to the extended meaning given by the amendments to Section 21 of the Penal Code. This will, therefore, defeat and frustrate not only the object of the Act but will render it absolutely unworkable. In view of these circumstances, therefore, we are inclined to hold that in the facts and circumstances of the present case and having regard to the nature and scope of the Prevention of Corruption Act, the extended definition of Section 21 of the Penal Code would have to be imported into Section 2 of the Act. That being the position there can be no doubt that the respondent was a public servant within the meaning of Section 2 of the Act and his conviction by the learned Special Judge, Indore, did not suffer from any legal infirmity.

18. There is yet another aspect of the matter. It seems to us that even if Section 2 of the Act had not applied the provisions of the Penal Code and had not defined public servant, then the provisions of the Penal Code would have come into operation by implied reference because the Act was a supplemental Act to the Penal Code. It was only by way of abundant caution that Section 2 of the Act incorporated the definition of "public servant" as mentioned in Section 21 of the Penal Code and in that sense alone the Act can be treated as being *pari materia* with the Penal Code. For these reasons, therefore, we are clearly of the opinion that the judgment of the High Court holding that the respondent was not a public servant is legally erroneous and cannot be allowed to stand.

19. The other point is regarding the question of sentence. The High Court has itself pointed out that the respondent had been forced under duress exercised by his superior officer in drawing the inflated travelling allowance. The High Court has also expressed the view that having regard to the fact that as the accused had to face a trial for a number of years, the Government will consider the desirability of not prosecuting him again. In view of these circumstances, therefore, we feel that the respondent has

committed only a technical offence and a token sentence is called for.

20. We, therefore, allow the appeal, set aside the judgment of the High Court dated April 12, 1973, acquitting the respondent. We convict the respondent under S. 420 I.P.C. and S. 5 (2) read with S. 5 (1) (d) of the Prevention of Corruption Act but reduce his sentence to the imprisonment already served.

Appeal allowed.

AIR 1975 SUPREME COURT 1842

(From: Delhi)*

A. ALAGIRISWAMI AND N. L. UNTWALIA, JJ.

Mohanlal Anand, Appellant v. Delhi Administration, Respondent.

Criminal Appeal No. 25 of 1971 D/- 10-3-1975.

(A) Constitution of India, Art. 136 — Conviction and sentence under Ss. 467, 471 Penal Code— Appeal by special leave — Evidence reconsidered and conviction and sentence set aside — Criminal Revn. No. 110 of 1967 D/- 1-5-1970 (Delhi) Reversed — (Penal Code (1860), Ss. 467, 471).

The accused was convicted under Sections 467, 471 Penal Code for an alleged issue of a cheque engrossed on a leaf from another's cheque book. The body of the cheque was proved to be in the hand-writing of the accused but not the signature.

The Supreme Court set aside the conviction and sentence on consideration of the evidence in the case, holding that the whole story about the giving of the cheque by the accused was so unnatural and improbable that conviction could not be based on such evidence. Criminal Revn. No. 110 of 1967 D/- 1-5-1970 (Delhi) Reversed. (Para 2)

Mr. Frank Anthony Sr. Advocate, (Mr. K. B. Rohtagi Advocate with him for Appellant; M/s. S. N. Anand and Girish Chandra, Advocates, for Respondent.

*(Criminal Revn. No. 110 of 1967, D/- 1-5-1970 — Delhi).

GS/HS/B12/75/MVJ

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— The appellant has been convicted under Sections 467 and 471 of the Indian Penal Code by the learned Assistant Sessions Judge of Delhi and his conviction has been upheld by the Addl. Sessions Judge of Delhi. The criminal revision petition against the judgment of the Addl. Sessions Judge has been dismissed by the High Court of Delhi.

2. The prosecution case was that the appellant gave a cheque for Rs. 325.40 P. dated 26-7-64 to P.W. 8, Padam Sain, for the balance of amount due on certain goods he purchased from him. This cheque was later presented at the Punjab National Bank by P.W. 4, Surrinder Kumar, and it was found that it was engrossed on a cheque leaf from a cheque book issued to Roop Narain Inder Narain. The handwriting expert has given evidence that the body of the cheque is in the handwriting of the appellant but he is not able to say whether the signature that the cheque bears is in the handwriting of the appellant. It is, therefore, not possible to say that the appellant must have forged the cheque. It should be mentioned that the appellant has been acquitted of the charge of theft of cheque leaves. The giving of the cheque was sought to be established, among other things, by producing the account book of Padam Sain. No reliance can be placed on this book. The relevant page from the account book purports to be the account of the accused but it has many entries in the name of other parties. All of them are of the same date. The account book gives the folio page for the appellant's transaction alone but not for the transactions of the other parties. It may be a day-book but if that is so it need not bear the appellant's name at the top. It is also difficult to understand why the appellant should have carried a cheque with him for the exact amount of Rs. 325.40. He is purported to have purchased goods for Rupees 345.72 and paid Rs. 20.32 in cash. One can understand if the cheque were for a round sum. It does not appear that the rubber stamp, which the cheque bears, is the name of the firm of the appellant. It is difficult to under-

stand how exactly P.W. 8 accepted this cheque and that too when it was a post-dated one. What is more curious is that he sent it to the bank nearly a month later through witness Surrinder Kumar, P.W. 4. Curiously enough there is a document which purports to be a confession by both Surrinder Kumar and the appellant admitting that they gave a cheque to P.W. 8 and gave the goods to Roop Narain. As Surrinder Kumar is the person who presented the cheque at the bank it may be that Surrinder Kumar himself might have brought the cheque into existence. In any case the whole story about the giving of the cheque by the appellant to P.W. 8 is so unnatural and improbable that it would be dangerous to base any conviction on such evidence. The so-called extra-judicial confession is fatal to the prosecution case. The conviction under Section 471 cannot also therefore be sustained.

3. The appeal is, therefore, allowed and the sentence imposed on the appellant by the Assistant Sessions Judge and confirmed by the Addl. Sessions Judge is set aside.

Appeal allowed.

AIR 1975 SUPREME COURT 1843

(From: Goa, Daman and Diu, J.C.'s Court)*

V. R. KRISHNA IYER, R. S. SARKARIA AND A. C. GUPTA, JJ.

Jose Da Costa and another, Appellants v. Bascora Sadashiva Sinai Narcornin and others, Respondents.

Civil Appeal No. 1521 of 1968, D/-1-8-1975.

(A) Constitution of India, Articles 136, 1 (c) (3), 239 and 240—Goa, Daman and Diu (Extension of Code of Civil Procedure and Arbitration Act) Act (1965), S. 4 (1) (c), Proviso—Applicability — Appeal to Supreme Court — Judgment of Judicial Commissioner dated 20-1-68 — Plea of prescription rejected — Omission to file Reclamacao before Judicial Commissioner —

*(Civil Appeal No. 213 of 1966, D/-20-1-1968, Goa, Daman and Diu)

HS/HS/C871/75/GGM

Appellants not debarred from raising a plea of prescription. (Portuguese Civil Code, Art. 669).

Where judgment in an appeal preferred before the Judicial Commissioner was delivered on 20-1-68 long after the extension of Articles 132, 133 and 134 of the Constitution, Rules framed under Article 145 of the Constitution and Sections 109 and 110 of the Code of Civil Procedure to Goa, Daman and Diu and the appellants preferred appeal under Article 136 of the Constitution before the Supreme Court agitating the plea of prescription, on a contention by the respondent that the appellants having failed to file reclamacao before the Judicial Commissioner, held that consequent on the application of the Goa, Daman and Diu (Extension of the Code of Civil Procedure and the Arbitration Act) Act 1965 with effect from 15-6-1966 vide notification No. S.O. 1597 dated 24-5-1966, the Portuguese law relating to Reclamacao stood repealed and no substantive right or obligation had been acquired or incurred under that repealed law within the meaning of 1st proviso to Section 4. Consequently in an appeal filed before the Supreme Court the appellants, who failed to file any reclamacao in the Judicial Commissioner's Court regarding a plea of prescription raised by them in lower Courts, cannot be debarred from canvassing the plea of prescription. The procedural provisions of the Portuguese Code relating to Reclamacao, and appeal from a decision on Reclamacao from the High Court in Goa, Daman and Diu stood repealed and superseded by the extended Indian laws when the judgment now under appeal was rendered. AIR 1954 SC 520 Ref.

(Paras 31 & 36)

On 15-6-1966, there was in relation to Reclamacao no "accrued" right or "incurred" obligation or liability within the contemplation cl. (c) of the Proviso to S. 4 in respect of which any investigation, proceeding or remedy could be instituted, continued or enforced according to the repealed law. Thus considered, it is clear that the procedural provisions of the Portuguese Civil Code were no longer applicable with effect from 15-6-1966. (Para 33)

(B) Interpretation of Statutes — Retrospective operation of statute — Procedural statute — Appeal — Effect on — Abolition of Court of appeal.

While provisions of statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of statute are not to be applied retrospectively, in the absence of express enactment or necessary intendment. The right of appeal being a substantive right, the institution of a suit carries with it the implication that all successive appeals available under the law then in force would be preserved to the parties to the suit throughout the rest of the career of the suit. There are, however, two exceptions to this rule. viz. (1) when by competent enactment such right of appeal is taken away expressly or impliedly with retrospective effect and (2) when the Court to which appeal lay at the commencement of the suit stands abolished. AIR 1927 PC 242, AIR 1957 SC 540, and 1905 A.C. 369 Rel. on. (Para 28)

(C) Portuguese Civil Code, Article 669 — Reclamacao, right to file— Nature of — Right is procedural and not a vested right.

The right to file 'Reclamacao' is not a substantive right. The provisions of the Portuguese Civil Code relating to Reclamacao lay down only a procedure, which has to be gone through before a litigant is entitled to raise in appeal a material point left by the lower Court. The requirement or obligation to file a reclamacao is not an obligation in esse or/and from the institution of the suit. Nor is the procedural right to file 'Reclamacao' a vested right existing from the date of the suit. The filing of the Reclamacao is dependent upon the happening of an uncertain event. It arises only when a judgment suffering from a nullity is passed. Such a contingency may or may not arise. On the other hand in the case of a suit it can be predicated that it would normally result in a decree entitling the aggrieved party to have the suit re-heard and re-decided in a higher forum by filing an appeal provided that such a

right is available under the law prevailing at the institution of the suit. (Para 30)

(D) Portuguese Civil Code, Articles 677, 669 and 722 — Nullity in judgment — Right of aggrieved person.

Under the Portuguese law, a person aggrieved by a "nullity" in a judgment of the Court of Second instance is not entitled to get it redressed directly by filing a further appeal against such a judgment to the Portuguese Supreme Court. His remedy was to approach the same Court under Article 669 for rectification of the 'nullity', and if he still felt aggrieved by the decision rendered in 'reclamacao', he could go in further appeal (aggravo) under Article 722 against such a judgment to the Portuguese Supreme Court at Lisbon. (Para 22)

Cases Referred: Chronological Paras

AIR 1957 SC 540 = 1957 SCR 488 28

AIR 1954 SC 520 = (1955) 1 SCR 267 35

AIR 1927 PC 242 = 54 Ind App 421 28

1905 AC 369 = 74 LJ PC 77 28

Mr. M. C. Bhandare, Sr. Advocate. (M/s. De Costa & K. Rajendra Choudhury, Advocates with him), for Appellants; Mr. V. M. Tarkunde, Sr. Advocate. (M/s. V. N. Ganpule & A. C. Ratnaparkhi, Advocates with him), for Respondents.

Judgment of the Court was delivered by

SARKARIA, J.:— This appeal by special leave is directed against a judgment, dated January 20, 1968, of the Additional Judicial Commissioner, Goa, Daman and Diu.

2. The defendants, Jose Da Costa and his wife, Isabela Braganca, are the appellants, and the plaintiffs, Bascora Sadasiva Sinai Narcornim and his wife, Dungabai Narcornim, the respondents. The suit property is known as "Deulacodil-Tucdo". It is a plot of land with a building on it and is situated in the town of Sanguem, District Goa.

3. The plaintiffs instituted a suit on February 27, 1961 in the Court of Judge of Quepem Comarca in accordance with the Portuguese Law then in force in these territories for

ejection of the defendants from the suit property. It was alleged that on the death of Sadasiva, father of the plaintiff, Bascora, in partition proceedings with minors (inventario), this plot was assigned to Bascora's mother. Sitabai towards her moiety in the estate. On Sitabai's death, the property devolved on the plaintiffs-Bascora and his six sisters. Before the partition of the property among the legal heirs of Sitabai, Bascora acquired the rights from some of his sisters and became the owner of the suit property with other heirs. Bascora's parents had inherited this property from their ancestors. The father of Bascora had permitted the ancestors of the defendants to build a house for their residence on a part of the property subject to the condition that they shall have to vacate the plot when called upon to do so. In the latter event, they shall be entitled to remove the super-structures of the building raised by them.

4. Notwithstanding the condition, Caetana Esperanca Fernandes, the mother of the appellant, Jose da Costa, executed a deed on November 16, 1920 before the notary public of Comarca, which indicated that she and her family members were owners of the plot. On the basis of this deed, the defendants asserted ownership of that part of the plot on which stands the house built by their ancestors.

5. On the preceding allegations, the plaintiffs prayed for a declaration to the effect that the plaintiff, Bascora, and the other heirs of his mother, Sitabai, are the only owners of the plot in dispute and that the house in the occupation of the defendants on a part of that plot was constructed in the circumstances and subject to the terms aforesaid. They further prayed that the defendants be directed to vacate the plot after removing the materials of their house.

6. The defendants traversed the plaintiffs' allegations and pleaded that it was Visnu Bascora Sinai Narcornim, an ancestor of the plaintiffs, who had given the suit property on perpetual lease to Pascoal da Costa, an ancestor of the defendants, in the year 1875 at an annual rent of Rupees 2/4/-. It was stated further that no such rent has been paid for over forty

years before the suit nor has any rent ever been claimed by the family of the plaintiffs for such a long time. It was Pascoal da Costa, who possessed the plot as his own and originally built one house on it, but subsequently, his descendants constructed more houses so that at present there are three houses and one stable on the plot in dispute. On Pascoal da Costa's death, in inventario proceedings, this property on 16-11-1920, was "consolidated in full ownership in the patrimony of the descendants of the said Pascoal da Costa".

7. The defendants further averred that the suit property has been in their "public, peaceful and continuous" possession including that of their predecessors-in-interest, as owners for a period of more than 50 years and that they had acquired title by prescription.

8. The plaintiffs in their replication denied the grant of any perpetual lease as also the fact that Visnu Sinai Narcornim was their ancestor. It was stated that Visnu was only a brother of the father of the plaintiff. They further asserted that the document purporting to be a copy of the perpetual lease executed by the said Visnu was fake and forged.

9. By its judgment dated 30-4-1966, the trial court held that "the plot of land in question belonged to the household of the parents of the plaintiffs and their sisters" and "brothers-in-law". It further held that the defendants had failed to prove any perpetual lease in their favour, that since the defendants did not pay any rent, to the owners who were residing in the vicinity for the plot of land, it is to be "necessarily inferred that the house was built with the consent of the then owner of the plot". In its view the situation was "similar to that foreseen in Sec. 2308 of the Code: the landlord of the plot of land can take over the house on paying its value to the respective owner". The trial court accordingly passed a decree of ejection directing the defendants to remove their super-structures or in the alternative, to receive from the plaintiffs Rs. 1084/- which was found to be the value of the material of the house in question.

10. Aggrieved, the defendants preferred an appeal. The learned Additional Judicial Commissioner after reviewing the evidence found "no scope for doubt on the point that "the plot was once the ownership of Sadasiva, the father of the male plaintiff, that on the death of Sadasiva, the plot was allotted to his widow Sitabai, and that on Sitabai's death the plot has been inherited by her children including the male plaintiff". He further found "no escape from the conclusion that the plaintiffs have failed to prove that the defendants are entitled only to remove the superstructures while vacating the plot". It was further held that the defendants had miserably failed to establish that they had taken the plot on perpetual lease from Visnu. The documentary evidence produced by the defendants to substantiate their plea was considered to be unreliable. It was added that Visnu was never the owner of the plot in dispute and had no right to lease it out. In the result, he dismissed the appeal and affirmed the decree of the trial Court. Hence this appeal.

11. Mr. Bhandare, learned Counsel for the appellants contends that notwithstanding the fact that a plea of acquisition of title by prescription was specifically raised in the pleadings, the grounds of appeal, and was also put in issue, (No. 3), the court below has failed to give a finding on the same. This being a pivotal point going to the root of the matter, proceeds the argument, the case should be remitted to the court below for rededecision.

12. As against this, Mr. Tar-kunde, learned Counsel for the respondents submits that the appellant is now precluded from agitating the plea of prescription, because he had not filed a review application (reclamacao) in the appropriate court to get that nullity i.e. omission to decide this plea, rectified within limitation in accordance with Articles 668, 669 and 717 of the Portuguese Civil Code. It is maintained that these are substantive provisions inasmuch as they regulate and affect a litigant's right of appeal. Since the suit was filed before the extension of the Code of Civil Procedure, 1908 to Goa, Daman and Diu, the Portuguese Civil Code

will continue to govern the rights of the parties in the matter of appeal.

13. It is not disputed that the plea of prescription was set up by the defendants in their pleadings. The defendants' case, as already noticed was that they and their predecessors-in-title were in continuous possession of the suit property for a period of more than 40 years, as owners, openly and peacefully. No rent was either paid by the defendants or their predecessors, nor claimed by the plaintiffs or their ancestors for such a long time. It was then specifically alleged:

"Thus with that long possession by the defendants and their ancestors there ought also to have operated the prescription which is expressly invoked, *ex abundantia*" (vide the written statement and rejoinder of the defendants).

14. In their replication, the plaintiffs had traversed these allegations. In addition to two separate issues regarding non-payment and non-claim of rent for over 40 years, the trial court framed a distinct issue with regard to the plea of prescription. It was Issue 3. It reads:

"Is it true that the property is in the possession of the defendants and their ancestors for over a half century publicly, peacefully and continuously".

15. The trial court did advert to this issue. Although there is no specific and elaborate discussion of all the points of fact or law having a bearing on the matter, it seems to have negatived this issue on the short ground that the plot of land having been given on perpetual lease to the ancestor of the defendants, the possession exercised by him and his descendants, being in the name of another, can never lead to prescription", adding "It is true that the defendants state that the rent ceased to be paid for over 40 years. and since then their ancestors came to possess the plot of land in their own name. But that statement is opposed by the circumstance that the plaintiffs have their own house in the same plot of land for over 40 years. If the owner of the plot of land himself stays in it, for such a long time, how can the defendants say that they are posses-

sing the same in their own name and as their own plot of land?"

16. In the memorandum of appeal filed in the court of the Judicial Commissioner, after reiterating the allegations *inter alia* as to continuous possession since 1875, and non-payment of rent for over 40 years, the appellant stated: "... and so the defendants invoke also the prescription in their favour". In ground no. 8, it was repeated that "the reasoning of the learned trial judge about the prescription, is baseless, considering the circumstances in which the house was constructed by the plaintiff".

16A. Again in the application filed before the Judicial Commissioner for leave to appeal to this Court, it was stated — "that the learned Trial Court and Appeal Court have erred in law by misconstruing the provisions and principles of prescription of the Portuguese Civil Code, namely, that of Arts. 510 and 529 of the Portuguese Code".

17. The learned Additional Judicial Commissioner appears to have overlooked the grounds of appeal filed in his Court wherein the defendant-appellant had clearly reiterated the plea of prescription. His observation in his order, dated 3-4-1968, whereby he refused leave to appeal, to the effect, that this plea cannot be availed of by the applicants because it was not "adopted in the grounds of Appeal filed by them in this Court as admitted by Shri Sonak" is not factually correct.

18. The second reason given by the learned Additional Judicial Commissioner (*vide* his order, dated 3-4-1968), for not dealing with the Issue relating to prescription was "No *reclamacao* having been filed in the instant case, the point of prescription is now beyond challenge". Precisely, the same stand has been taken by Mr. Tarkunde before us. To test this argument, it will be appropriate at this stage to notice the Portuguese law on the point.

19. According to Article 668 of the Portuguese Civil Code, the decision is 'null'.... "when the Judge abstains from adjudicating which he ought to do or when he entertains an issue he ought not to do". The proce-

cedure to be adopted by the aggrieved party in such a situation" is indicated in Article 669, thus: "Where a decision contains any of the nullities mentioned in the preceding Article, any of the party can apply for being rectified the nullity or omission (silence) within the time limit fixed for the appeal. The opposite party will be heard on the said application and he can file his returns within 3 days, and thereafter the case shall be decided". Such a review application under the Portuguese law is called *reclamacao*. Article 686 provides that "the time limit for filing the appeals is of 8 days computed from the date of notification of the orders of judgment". Thus the limitation prescribed for filing a *reclamacao* was also 8 days from such notification. Article 715 makes it clear that the procedure prescribed with regard to the rectification of "nullities" in Articles 660 to 667, 669 etc. is applicable "to the second instance" (that is, to the Court of the Judicial Commissioner), also.

20. Bearing the above provisions in mind, the first question to be determined is whether it was imperative for the defendants to file a "*reclamacao*" under Art. 669 in regard to Issue No. 3 in the Court of first instance? Answer to this question depends on whether the judgment of the trial court suffered from a "nullity" as defined in Article 668. That is to say: Had the trial judge "abstained from adjudicating" the issue as to prescription within the contemplation of Article 669? We think not. As noticed already, he dealt with this issue and negatived it, though on a short and summary ground. His judgment was not altogether silent on the plea of prescription and did not with regard to this issue suffer from any "nullity" or "omission" which would be required to be rectified in review (*reclamacao*) under Art. 669. Thus considered, Article 669 was not applicable at the stage of "first instance".

21. This takes us to the Court of "the Second instance". At this stage, it will be appropriate to notice two other Articles of the Portuguese Civil Code. Article 722 provided:

"The ground of appeal to the Supreme Court can be the infringe-

ment of substantive law either by error of interpretation or by error of application; but a plea founded on any of the nullities contemplated in the Articles 668 and 717 can be secondarily raised provided that the Court of the 1st instance or the High Court has given decision on the point of such nullity.

If the appellant desires to impugn the decision of the Court of 1st instance or of the High Court on the ground of the nullities laid down in the Articles 668 and 717 he shall file an appeal (agravo) against the decision given on the question of nullity. In this case if the decision of the Court of 1st instance or of the High Court is declared as null an appeal shall be to the Supreme Court on the ground of the infringement of the substantive law against the order whereby the said decision is reformed."

Article 677 laid down:

"The judicial decisions can be impugned by way of appeals. The appeals are ordinary or extraordinary. The ordinary appeals are of "apoloacao", "Revista", "agravo", quaxa and appeal to the Tribunal pleno. The extraordinary appeals are "obosicao de terceiro" and revision.

Para — unico — The decision is considered as forming res judicata whenever an appeal does not lie against it or as soon as the ordinary appeals are exhausted."

22. It will be seen that under the Portuguese law, a person aggrieved by a 'nullity' in a judgment of the court of second instance, was not entitled to get it redressed by directly filing a further appeal against such a judgment to the Portuguese Supreme Court. His remedy was to approach the same court under Article 669 for rectification of the 'nullity', and if he still felt aggrieved by the decision rendered in reclamacao, he could go in further appeal (agravo) under Article 722 against such a decision to the Portuguese Supreme Court at Lisbon.

23. The next question to be considered is, when and to what extent, did these provisions of Portuguese Civil Code cease to be applicable to this case?

24. The territories of Goa, Daman and Diu were made part of the territory of India with effect from 20-12-1961 by virtue of Article 1 (c) (3) of the Constitution of India, and were being administered as a Union Territory by the President through an Administrator in accordance with Article 239 of the Constitution. Section 5 of the Goa, Daman and Diu (Administration) Act No. I of 1962 (which replaced Ordinance No. 2 of 1962) provided for continuance of all laws in force in these territories immediately before the appointed day (20-12-1961) until amended or repealed by a competent Legislature or other competent authority. Sub-section (2) gave power to the Central Government to adapt or modify by order such existing law within two years from the appointed day. Section 6 empowered the Central Government to extend by notification with restrictions or modifications "as it thinks fit", laws in force in a State to Goa, Daman and Diu. The Goa, Daman and Diu (Judicial Commissioners Court) Regulation 1962, was promulgated by the President under Art. 240 of the Constitution. It came into force on 16-12-1963 and constituted for this Union Territory a Court of Judicial Commissioner. It is the highest Court of Appeal replacing the former Court of Appeal (Tribunal de Relacao) in that territory.

25. In exercise of its powers under Article 241 (1) of the Constitution the Parliament enacted Central Act 16 of 1964. The Act took effect from 16-12-1963. It declares the Judicial Commissioner's Court for Goa, Daman and Diu to be a High Court for the purposes of Articles 132, 133 and 134 of the Constitution (vide Section 3). Section 5 provides:

"Subject to any rules made under Article 145 or by any other law as to the time within which appeals to the Supreme Court are to be entertained, appeal shall lie to that Court from a Judgment, decree or final order of the Judicial Commissioner's Court, under the provisions of Article 132 or Article 133 or from a judgment, final order or sentence of such Court under the provisions of Article 134:

Provided that an appeal may be preferred within ninety days from the date of passing of this Act from a judgment, decree, final order or sentence passed or made by the Judicial Commissioner's Court before that date."

Section 7 is also significant. It provided:

"Any person aggrieved—

(a) by any judgment, decree or order or sentence of Tribunal de Relacao passed or made before the 20th December, 1961, against which an appeal would lie to a superior court in Portugal in accordance with law but could not be preferred by reason of Goa, Daman and Diu becoming part of the territory of India, or against which an appeal having been preferred to a superior court in Portugal in accordance with law had not been disposed of before the said date; or

(b) by any judgment, decree or order or sentence of the Tribunal de Relacao passed or made on or after the 20th December 1961,

may within ninety days from the date of passing of this Act (16-5-1964) prefer an appeal from such judgment, decree, order or sentence to the Supreme Court as if such judgment, decree, order or sentence had been passed or made by the Judicial Commissioner's Court."

26. The next enactment which may be noticed is the Goa, Daman and Diu (Extension of the Code of Civil Procedure and the Arbitration Act) Act, 30 of 1965. It received the assent of the President on September 25, 1965. Section 3 of the Act extended the Code of Civil Procedure V of 1908 and the Arbitration Act X of 1940 to Goa, Daman and Diu. Section 4 is important. So far as it is material for our purpose, it reads:

"4(1) So much of any law in force in Goa, Daman and Diu as corresponds to the Code of Civil Procedure V of 1908. . . shall stand repealed as from the coming into force of this Act in Goa, Daman and Diu:

Provided that the repeal shall not affect—

(a) the previous operation of any law so repealed or anything duly done or suffered thereunder, or

(b) any right, privilege, obligation or liability acquired, accrued

or incurred under any law so repealed, or

(c) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation or liability as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced as if this Act had not been passed:

Provided further that, subject to the preceding proviso notifications published, declarations and rules made, places appointed, agreements filed, awards made or filed, scales prescribed, forms framed, appointments made and powers conferred under any law so repealed shall, so far as they are consistent with the said Code or as the case may be, the said Act have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under the said Code or the said Act and by the authority empowered thereby in such behalf.

(2) In every law or notification passed or issued before the commencement of this Act in which reference is made to or to any Chapter or section or provision of any law hereby repealed, such reference shall, so far as may be practicable, be taken to be made to the said Code, or, as the case may be, to the said Act, or its corresponding Part, order, section or rule."

27. Sub-section (1) of Section 1 provides that the Act shall come into force on such date as the Central Government may by notification in the official Gazette appoint. Accordingly, by notification No. S. O. 1597 dated May 24, 1966 published in the Gazette of India, dated June 10, 1966, the Central Government has appointed the 15th June, 1966 as the date on and from which Act 30 of 1965, came into force in this Union territory.

28. Before ascertaining the effect of the enactments aforesaid passed by the Central Legislature on pending suits or appeals, it would be appropriate to bear in mind two well-established principles. The first is that "while provisions of a statute dealing merely with matters of proce-

cedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment" (see *Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commr.*, 54 Ind App. 421 = (AIR 1927 PC 242). The second is that a right of appeal being a substantive right the institution of a suit carries with it the implication that all successive appeals available under the law then in force would be preserved to the parties to the suit throughout the rest of the career of the suit. There are two exceptions to the application of this rule, viz, (1) when by competent enactment such right of appeal is taken away expressly or impliedly with retrospective effect and (2) when the court to which appeal lay at the commencement of the suit stands abolished (see *Garikapatti Veeraya v. N. Subbiah Choudhry* 1957 SCR 488 = (AIR 1957 SC 540) and *Colonial Sugar Refining Co. Ltd. v. Irving*, 1905 AC 369).

29. In the light of the above principles, these points arise for consideration: Are the provisions of the Portuguese Civil Code relating to Reclamacao merely matters of procedure? Or, do they create or affect vested rights and remedies? That is to say, does a Reclamacao have all the attributes of a substantive right of appeal existing at the commencement of the suit? Did the superior Court of Appeal at Lisbon stand abolished as an appellate forum in relation to Goa, Daman and Diu from 20-12-1962? If so, what is its effect on the right of appeal given by Articles 677 and 722 of the Portuguese Civil Code and their application to the present case? Was the Portuguese Supreme Court at Lisbon succeeded by the Supreme Court of India for the purpose of the aforesaid Articles 677 and 722 of the Portuguese Code? If so, did this position hold good after 15-6-1966? Does the Central Act 30 of 1965 read with Notification No. S.O. 1597, issued thereunder, expressly or impliedly, make inapplicable the provisions of the Portuguese Civil Code in the matter of Reclamacao in respect of a

decision or judgment rendered by the Court of Judicial Commissioner after 15-6-1966? That is to say, have the rights, remedies or obligations arising out of the Portuguese Law relating to Reclamacao saved by any of the clauses (a), (b) or (c) of the first Proviso to Section 4 (1) of Act 30 of 1965?

30. It may be noted that while a right of appeal from court to court is a substantive right which under the then law, exists on and from the date of the institution of the suit, the same cannot be said with regard to Reclamacao. The provisions of the Portuguese Civil Code relating to Reclamacao lay down only special rules of procedure which have to be gone through before a litigant is entitled to raise in appeal a material point left undecided by the lower court. The object of requiring a party aggrieved by a 'nullity' is to save the time of the appellate Court by precluding a party to reargue in appeal pleas that had been left undecided by the lower court. It also minimises the necessity of remands to the lower court for trial of particular issues and thus shortens litigation. The requirement or obligation to file a Reclamacao is not an obligation in esse or/and from the institution of the suit. Nor is the procedural right to file Reclamacao — if at all it can be called a 'right' — a vested right existing from the date of the suit. The filing of a Reclamacao is dependent upon the happening of an uncertain event. It arises only when a judgment suffering from a 'nullity' is passed. Such a contingency may or may not arise. On the other hand in the case of a suit it can be predicated that it would normally result in a decree entitling the aggrieved party to have the suit reheard and redecided in a higher forum by filing an appeal provided of course such a right is available under the law prevailing at the institution of the suit.

31. In the present case, the judgment of the Additional Judicial Commissioner in which the alleged "nullity" or "omission to adjudicate" on the point of prescription occurs was delivered on 20-1-1968, that is, long after the extension of Articles 132, 133 and 134 of the Constitution, Rules framed under Article 145 of the Con-

stitution and Sections 109 and 110 of the Code of Civil Procedure to Goa, Daman and Diu. The procedural provisions of the Portuguese Code relating to Reclamacao, and appeal from a decision on Reclamacao, from the High Court in Goa, Daman and Diu stood repealed and superseded by the extended Indian laws when the judgment now under appeal was rendered.

32. This takes us to the next point. The appellate forum at Lisbon stood abolished, so far as this Union Territory is concerned with effect from 20-12-1962. Thereafter sec. 7 of the Central Act 16 of 1964 (which came into force with effect from 16-12-1963) constituted this Court as the appellate forum in place of the superior court in Portugal in the case of judgments, decrees or orders passed by the Tribunal de Relacao before or after 20-12-1961. This position as to the Supreme Court of India being the successor court of the Portuguese Court at Lisbon continued till the Central Act 30 of 1965 came into force on 15-6-1966. Thereafter this Court ceased to be such a successor court except to the extent the repeal of the Portuguese Code was saved by any of the clauses (a), (b) and (c) of the 1st proviso to Section 4 (1) of that Act. Clause (a) of the Proviso has obviously no application. Nothing concerning the previous operation of the repealed law is involved in this case. Clauses (b) and (c) will not cover this case because a right, obligation or liability to file Reclamacao in respect of a judgment of the Additional Judicial Commissioner could not, by any stretch of imagination be called a right, obligation or liability that had been "acquired" or "incurred" before 15-6-1966, that is, before the repeal of the Portuguese Civil Code.

33. On 15-6-1966, there was in relation to Reclamacao no "accrued" right or "incurred" obligation or liability within the contemplation of clause (c) of the Proviso in respect of which any investigation, proceeding or remedy could be instituted, continued or enforced according to the repealed law. Thus considered, it is clear that the procedural provisions of the Portuguese Civil Code were no longer applicable to this case with effect from 15-6-1966. If that be the

correct position, there is no legal hurdle in the way of the appellant to the reargitation in this Court of the issue as to prescription left undecided by the court below.

34. The problem can be viewed yet from another angle. The defendants have come in appeal to this Court by special leave under Art. 136 of the Constitution and not by virtue of anything in the Portuguese law. The discretionary jurisdiction exercised by this Court under Article 136 read with Article 142 is of the widest amplitude. Article 136 vests in this Court plenary jurisdiction in the matter of entertaining and hearing appeals by granting special leave against any kind of judgment or order made by a court or tribunal in any case or matter and the power cannot be taken away expressly or impliedly by any ordinary legislation short of Constitutional amendment. Article 142 gives very wide powers to this Court to make any order as may be necessary for doing complete justice in any matter before it.

35. As pointed out in *Durga Shankar v. Raghuraj Singh*, (1955) 1 SCR 267 = (AIR 1954 SC 520) the power vested in this Court under Article 136 is wider even than the prerogative right of entertaining an appeal exercised by the Judicial Committee of the Privy Council in England inasmuch as the powers under this Article cannot be curtailed or taken away by any Parliamentary legislation, the Constitution being the Supreme law of the land which overrides ordinary laws, and no presumption can arise from provisions in ordinary laws declaring an adjudication of a particular tribunal to be final and conclusive that there was an intention to exclude the exercise of the special power.

36. To sum up, since on and from 15-6-1966 the Portuguese law relating to Reclamacao stood repealed and no substantive right or obligation had been acquired or incurred under that repealed law within the meaning of the first proviso to S. 4 (1) of Act 30 of 1965, the appellants cannot be debarred from canvassing in this appeal under Article 136, the plea of prescription notwithstanding.

the fact that they did not file any Reclamacao in the Court of the Judicial Commissioner. We therefore negative the preliminary objection raised by the respondents.

37. The plea of prescription goes to the root of the matter. It was raised by the defendants in their pleadings and the matter was put in issue. It was again taken up in the grounds of appeal filed in the Court of the Judicial Commissioner, but was left undecided. For the purpose of doing complete justice in the case, we think it necessary to have the advantage of the finding of the court below on this issue. Accordingly, we remit this case to the Court of the Judicial Commissioner, Goa, Daman and Diu with the direction that it should after rehearing the parties record a specific finding on the issue as to whether the defendants had acquired full title to the suit property by prescription under the law in force at the relevant time. The Judicial Commissioner shall submit his report with reasons therefor to this Court within four months from the date on which the records are received in his court. In the meantime the appeal shall remain pending in this Court.

Case remitted.

AIR 1975 SUPREME COURT 1852

(From: AIR 1974 Madh Pra 40)

A. ALAGIRISWAMI AND N. L. UNTWALIA. JJ.

Dr. Ram Singh Saini, Appellant
v. Dr. H. N. Bhargava, Respondent.
Civil Appeal No. 1588 of 1974, D/-
28-7-1975.

(A) Saugar University Act (16 of 1946), S. 31 (aa)—Statute 21-AA — Statute is mandatory and not ultra vires — Appointment made in contravention of Statute 21-AA (2) is invalid — (Interpretation of Statutes).

Statute 21-AA is mandatory and not merely directory. The requirement of Statute 21-AA (2) is that if the post is not filled within a year from the date of the nomination by the Selection Committee the post should be readvertised. So unless the post is

readvertised and an appointment is made from among those persons who apply in response to the readvertisement the appointment cannot be said to be valid. Since the Statute certainly relates to the mode of appointment it is not beyond the rule-making power under Section 31 (aa). AIR 1974 Madh Pra 40 Affirmed. (Para 4)

(B) Constitution of India, Art. 136 — New ground — Ground neither raised or argued before High Court nor raised in special leave petition, cannot be entertained.

Where the High Court had issued a writ of certiorari quashing the resolution of the Executive Council and although one of the reliefs prayed for was the issue of a writ of quo warranto, the question whether a writ of quo warranto could issue in the circumstances of the case and whether the office was a public office was not raised or argued before the High Court and was not even raised in the special leave petition filed by the appellant, the Supreme Court cannot decide the appeal on the basis that what was issued was a writ of quo warranto. (Para 5)

Cases Referred: Chronological Paras
(1968) 72 Cal WN 50 = ILR (1969) 1
Cal 1 15
AIR 1964 Mys 159 5

Dr. L. M. Singhvi Sr. Advocate
(Mr. S. K. Dhingra, Advocate with
him), for Appellant; Mr. S. C. Man-
chanda Sr. Advocate (Mrs. Urmila
Kapoor & Miss. Kamlesh Bensal;
Advocates with him), for Respondent.

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— This appeal raises the question of the validity of the appointment of the appellant as a Professor of Zoology in the University of Saugar.

2. In pursuance of an advertisement dated 31-5-1971 by the University calling for applications for the post of Professor of Zoology five persons including the appellant and the respondent applied. A Committee of Selection was constituted in accordance with Section 47-A of the Saugar University Act 1946 to consider these applications. On 4-12-1971 the

Selection Committee recommended the name of the appellant to the Executive Council, which was competent to make the appointment. Under the provisions of S. 47-A the Executive Council has to make the final selection from among persons recommended by the Selection Committee. But where the Executive Council proposes to make appointment otherwise in accordance with the order of merit arranged by the committee the Executive Council should record its reasons in writing and submit its proposal for the sanction of the Chancellor. In the present case the appellant being the only person whose name had been recommended had ordinarily to be appointed. The Executive Council, however, refused to accept the recommendation of the Selection Committee on the ground that it would lead to administrative and disciplinary complications. Thereupon the appellant filed a writ petition for quashing the resolution of the Executive Council and it was quashed by the High Court of Madhya Pradesh. Thereafter on 18-2-1973 the Executive Council appointed the appellant as Professor of Zoology. On 9-7-1973 the respondent filed a writ petition for quashing the appellant's appointment. The High Court of Madhya Pradesh quashed the resolution dated 18-2-1973 appointing the appellant as Professor of Zoology and indicated that the University may advertise the post afresh if they desire to fill in the vacancy. The ground on which the resolution was quashed was that the appointment was made more than a year after the recommendation of the Selection Committee was made and this was not permissible. The High Court relied upon the statute 21-AA of the Statutes of the University made under Section 31 (aa) of the Act for this conclusion. This section enables statutes to be made, among other things, for the mode of appointment of teachers of the University paid by the University. The statute in question reads as follows:

"Statute No. 21-AA"

(1) All vacancies in teaching posts of the University (except those to be filled by promotion as provided for under sub-section (aaa) of Sec. 31) shall be duly advertised and all ap-

plications will be placed before the Committee of Selection as provided for under sub-section (2) of S. 47-A of the University of Saugar Amendment Act, 1965.

(2) If no appointment is made to a post within one year from the date of the nomination by the Selection Committee then the post shall be readvertised before making an appointment as provided for under (1) above."

3. Quite clearly the appointment made more than a year after the date of nomination by the Selection Committee is not in accordance with the statute 21-AA. The requirement of the statute is that the post should be readvertised before making an appointment if the appointment is not made within a year of the Selection Committee's recommendation.

4. On behalf of the appellant it was argued that the statute is directory and not mandatory, that in any case the statute is beyond the rule making power conferred by Sec. 31 (aa). A number of decisions were relied upon in support of the submission that where a provision of law lays down a period within which a public body should perform any function, that provision is merely directory and not mandatory. The question whether a particular provision of a statute is directory or mandatory might well arise in a case where merely a period is specified for performing a duty but the consequences of not performing the duty within that period are not mentioned. In this case clearly the statute provides for the contingency of the duty not being performed within the period fixed by the statute and the consequence thereof. This proceeds on the basis that if the post is not filled within a year from the date of the nomination by the Selection Committee the post should be readvertised. So unless the post is readvertised and an appointment is made from among those persons who apply in response to the readvertisement the appointment cannot be said to be valid. Though the reason for the delay in making the appointment was the wrongful refusal of the Executive Council to act in pursuance of the recommendation

of the Selection Committee and the pendency of the writ petition filed by the appellant in the High Court, that does not in any way minimise the effect of sub-rule (2) of statute No. 21-AA. The position may well have been otherwise if there had been a stay or direction prohibiting the Executive Council from making the appointment. Such is not the case here. We do not therefore think it necessary to discuss the various decisions relied upon by the appellant. Nor can we agree that the statute in question is beyond the rule making power. Under Section 31 (aa) statutes can be made with regard to the mode of appointment of teachers of the University. The statute provides that the appointment should be made after the post is advertised and the applications received considered by a committee of selection. It also provides that if no appointment is made to the post within one year from the date of nomination by the selection committee the post shall be readvertised. The rule therefore certainly relates to the mode of appointment. It cannot be said to be unrelated to the mode of appointment. It apparently proceeds on the basis that after the lapse of a year there may be more men to choose from. Unless it could be said that the rule has no relation to the power conferred by the rule-making power it cannot be said to be beyond the rule-making power. Such is not the position here. We are also unable to agree that the statute is in conflict with or in derogation of the provisions of the statute.

5. It was then argued on behalf of the appellant that the post of the Professor of Zoology is not a public office and therefore a writ of quo warranto cannot be issued. The decisions in *Dr. P. S. Venkataswamy v. University of Mysore* (AIR 1964 Mys 159) and *S. B. Ray v. P. N. Banerjee*, (1968) 72 Cal WN 50 were relied upon to contend that the post in question is not a public office and therefore no writ of quo warranto can issue. But it should be noticed that no writ of quo warranto was issued in this case. What was issued was a writ of certiorari as the order of the High Court only quashed the resolution of the Executive Council

dated 18-2-1973. In his petition the respondent had asked for (1) a writ of certiorari, (2) a writ of mandamus, and (3) a writ of quo warranto. What was issued was a writ of certiorari. The question whether a writ of quo warranto could issue in the circumstances of this case and whether the office was a public office was not raised or argued before the High Court. Indeed it was not even raised in the special leave petition filed by the appellant. We cannot therefore decide the present appeal on the basis that what was issued was a writ of quo warranto.

6. It should also be noticed that the post has since been readvertised and it is open to the appellant to apply again.

7. We see no merits in this appeal and it is accordingly dismissed. But in the circumstances of the case there will be no order as to costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 1854

(From: Andhra Pradesh)*

Y. V. CHANDRACHUD, P. N.
BHAGWATI AND R. S. SAR-
KARIA, JJ.

Pakalapati Narayana Gajapathi Raju and others, Appellants v. Bonapalli Peda Appadu and another, Respondents.

Criminal Appeal No. 360 of 1974,
D/- 25-7-1975.

(A) Criminal P.C. (1898), S. 439—
Revisional jurisdiction — Scope —
Application by private party against
order of acquittal — High Court when
can interfere — In circumstances of
case interference held was not called
for. *Cri. Revn. Case No. 163 of 1973*,
D/-28-3-1974 (Andh Pra), Reversed.

The revisional jurisdiction, when
invoked by a private complainant
against an order of acquittal, can be
exercised only in exceptional cases
where the interests of public justice
require interference for the correc-
tion of a manifest illegality or the

*(*Cri. Revn. Case No. 163 of 1973*, D/-
28-3-1974 — Andh Pra)

HS/HS/C739/75/GMJ

prevention of a gross miscarriage of justice. The revisional jurisdiction cannot be invoked merely because the lower court has not appreciated the evidence properly. AIR 1975 SC 580; AIR 1973 SC 2145 and AIR 1973 SC 1274 Rel. on. (Para 4)

As against the order of acquittal by the Sessions Judge, in a murder case a brother of the deceased filed a revision application in the High Court. The application was in a case which was not instituted upon a complaint. Taking the view that the Sessions Judge had wholly overlooked the evidence of witnesses and that he had wrongly treated the First Information Report as a piece of substantive evidence in the case, the High Court set aside the acquittal and directed a re-trial of the accused.

(Para 2)

Held that it may be that the evidence of witnesses may bear a closer scrutiny in the facts of the case but it was far from saying that the Sessions Court had wholly overlooked that evidence. It was also incorrect to say that the FIR was used as substantive evidence. Though the Sessions Judge had referred to the contents of the FIR at more than one place in his judgment, it was clear that the references to the FIR were directed mainly towards pointing out the inconsistencies in the prosecution case. Interference with the order of acquittal was, therefore, not called for. Criminal Revn. Case No. 163 of 1973, D/-28-3-1974 (Andh Pra) Reversed.

(Paras 3, 4 & 5)

Cases Referred: Chronological Paras

AIR 1975 SC 580 = (1975) 3 SCC 398
= 1975 Cri LJ 577 3

AIR 1973 SC 1274 = (1973) 3 SCR
867 = 1973 Cri LJ 978 3

AIR 1973 SC 2145 = (1974) 1 SCR 130
= 1973 Cri LJ 1404 3

Mr. B. P. Singh, Advocate, for Appellants Mr. B. Parthasarathi Advocate (for No. 1) and Mr. P. P. Rao (for No. 2), for Respondents.

Judgment of the Court was delivered by

CHANDRACHUD, J.:— The narrow question for consideration in this appeal by special leave is whether in the exercise of its revisional powers under Section 439 of the Code of Criminal Procedure, the High Court of

Andhra Pradesh was justified in ordering a re-trial of the appellants. The revision application before the High Court was filed by a private party in a case which was not instituted upon a complaint.

2. It is alleged that on the night of June 26, 1972 the appellants committed the murder of one Tata and caused grievous injuries to seven others. The Learned First Addl. Sessions Judge, Visakhapatnam, acquitted the appellants of all the charges levelled against them. As against the order of acquittal, Peda Appadu, a brother of the deceased filed a revision application in the High Court. Taking the view that the learned Sessions Judge had wholly overlooked the evidence of P. Ws. 5, 7, 8 and 12 to 15 and that he had wrongly treated the First Information Report as a piece of substantive evidence in the case, the High Court set aside the acquittal and directed a retrial of the appellants.

3. Section 439 (1) of the Code of Criminal Procedure provides that in exercise of revisional jurisdiction, the High Court may exercise any of the powers conferred on a court of appeal. This provision is made expressly subject to sub-section (4) of Section 439 under which nothing contained in the section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction. Section 439 has been interpreted in several decisions of this Court which have taken the view that the revisional jurisdiction, when invoked by a private complainant against an order of acquittal, ought not to be exercised lightly and that it can be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality or the prevention of a gross miscarriage of justice. (See Satyendra Nath Dutta v. Ram Narain, (1975) 3 SCC 398 = (AIR 1975 SC 580 = 1975 Cri LJ 577), Akalu Ahir v. Ramdeo Ram, (1974) 1 SCR 130 = (AIR 1973 SC 2145 = 1973 Cri LJ 1404), Changanti Kotaiah v. Goginoni Venkateshwara Rao, (1973) 3 SCR 867 = (AIR 1973 SC 1274 = 1973 Cri LJ 978)). It is clear from these decisions that the revisional jurisdiction cannot be invoked

merely because the lower court has not appreciated the evidence properly. The High Court has in its judgment referred to the decisions of this Court but in applying those decisions it has transgressed the limits of its revisional powers.

4. The first reason given by the High Court for ordering a re-trial of the appellants is that the Sessions Court had wholly overlooked the evidence of P.Ws. 5, 7, 8 and 12 to 15. This is factually incorrect. After setting out the salient features of the evidence of these witnesses, the Sessions Court has analysed and discussed that evidence in paragraphs 37, 41 and 46 of its judgment. It held that these witnesses, on their own showing, had not seen the occurrence and therefore their evidence could not assist the prosecution in proving the charges against the accused. The learned Sessions Judge further held that the injuries alleged to have been received by these witnesses during the course of the incident were simple in nature and therefore it was surprising that they were not examined by the Investigating Officer at the time when the Inquest Panchnama was made. The learned Judge was influenced by the consideration that the injured witnesses were themselves arraigned as accused in a counter case which rendered their evidence suspect. It may perhaps be that the evidence of these witnesses may bear a closer scrutiny but that is a far cry from saying, as the High Court has done, that the Sessions Court had wholly overlooked that evidence.

5. The High Court is also incorrect in the second reason which it has given for ordering a re-trial of the appellants. The High Court thought that the Sessions Court had used the FIR as a substantive piece of evidence. We have been taken through the best part of the judgment of the Sessions Court which occupies over 50 cyclostyled pages of the paper book, but we are unable to agree that any portion of the FIR has been treated by the Sessions Court as if it constituted substantive evidence in the case. Though the learned Sessions Judge has referred to the contents of the FIR at more than one place in his judgment and though he could have

expressed himself differently, it is clear that the references to the FIR are directed mainly towards pointing out the inconsistencies in the prosecution case.

6. Apart therefore from the circumstances that interference with the order of acquittal passed by the trial Court was not called for in the exercise of the revisional jurisdiction of the High Court, the two reasons given by the High Court in support of its order are misconceived.

7. Accordingly, we allow the appeal, quash the judgment of the High Court and confirm that of the Sessions Court.

Appeal allowed.

AIR 1975 SUPREME COURT 1856

(From: Industrial Tribunal, Gauhati)*

A. N. RAY, C. J., K. K. MATHEW,
V. R. KRISHNA IYER AND
S. MURTAZA FAZL ALI, JJ.

The Management of Indian Oil Corporation Ltd., Appellant v. Its Workmen, Respondents.

Civil Appeal No. 377 of 1970, D/- 24-7-1975.

(A) Industrial Disputes Act (1947), S. 9-A — Service conditions — Assam Oil Refineries, Gauhati — Voluntary decision of management to grant Assam compensatory allowance, granted to Central Government employees, to Refinery employees — Allowance not binding on management — Grant of allowance whether part of service conditions of Refinery employees — Unilateral decision of management to withdraw such compensatory allowance and instead pay house rent — Decision to withdraw, whether attracts S. 9-A.

The management of Assam Oil Refineries, Gauhati, took an independent and voluntary decision on their own in September 1959 to grant to

*(From the Award D/- 22-10-1969, of the Industrial Tribunal, Gauhati in Ref. No. 16 of 1965.)

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all its employees, Assam Compensatory Allowance, on the basis of the Central Government Circular dated 3-9-1957 which granted such allowance to all Central Government employees posted in Assam, although the circulars of the Central Government were not binding on the management. The allowance was not granted through any standing order or circular. There was nothing to show that the allowance was granted only by way of an interim measure which could be withdrawn at the will of the employer. Thereafter there was another notification by the Central Government dated December 8, 1960 by which it was provided that the employees in receipt of the Assam Compensatory Allowance would be given the option to choose the house rent allowance or compensatory allowance but would not be entitled to draw both. This order was to remain in force for five years. By virtue of another notification dated August 9, 1965 the Central Government made it further clear that the employees of the Central Government would have to draw either compensatory allowance at the existing rates or the house rent allowance but not both. In view of the notification dated December 8, 1960, the management thought that the contents of the circular were binding on the Company and, therefore, they unilaterally, without giving any notice to the workers, withdrew the concession of the compensatory allowance which had been granted to the workers in September 1959. This concession was withdrawn with effect from July 1960. The workers moved the Government for making a reference to the Tribunal because a dispute arose between the parties regarding the competency of the appellant to withdraw the concession granted by it unilaterally:

Held (1) that the grant of the Assam compensatory allowance was an implied condition of service; and (2) that by withdrawing this allowance, the employer sought to effect a substantial change which adversely and materially affected the service conditions of the workmen for all time to come. In those circumstances, therefore, Section 9A of the Act was clearly applicable. As Section 9-A had not been complied with the withdraw-

wal of the concession of the compensatory allowance was clearly illegal: (1961) 2 Lab LJ 526 (Andh Pra), (1969) 2 Lab LJ 739 (SC), AIR 1973 SC 968, AIR 1972 SC 1917. Disting; AIR 1972 SC 1917, Rel. on.

(Para 10)

Compensatory allowance and housing subsidy are two different and separate categories of the terms of service conditions and they cannot be clubbed together, nor can the one be made dependent on the other. The object of these two concessions is quite different and both of them serve quite different purposes. (Para 11)

Cases Referred: Chronological Paras

AIR 1973 SC 968 = (1973) 2 SCR 482	
= 1973 Lab IC 233.	8
AIR 1973 SC 1156 = (1973) 4 SCC 141	
= 1973 Lab IC 784	9
AIR 1972 SC 1917 = (1972) 2 SCC	
383 = 1972 Lab IC 1128	10
AIR 1969 NSC 33 = (1969) 2 Lab LJ	
739	7
(1961) 2 Lab LJ 526 = 1961 Andh	
LT 873	3

Dr. Anand Prakash, Sr. Advocate, (Mr. D. N. Mishra, Advocate, with him), for Appellant; M/s. D. L. Sen Gupta and S. K. Nandy, Advocates, for Respondents.

Judgment of the Court was delivered by

FAZL ALI, J.:— This is an appeal by special leave against the award dated October 22, 1969 by Mr. R. Medhi, Presiding Officer, Industrial Tribunal, Gauhati on a reference made to the Tribunal by the Government of Assam by virtue of its notification No. FLR. 46/61/194 dated July 14, 1965, in view of an industrial dispute having existed between the parties. The appellant is the management of the Indian Oil Corporation Ltd. which has undertaken what is known as the Assam Oil Refineries situated at Gauhati. The reference to the Tribunal was made by the Government in the following circumstances:

By virtue of a notification dated September 3, 1957, the Central Government granted compensatory allowance according to certain rates to all Central Government employees posted throughout Assam. The appellant set

up the refinery some time in the year 1959 and in view of the circular of the Central Government referred to above the management thought it fit in the circumstances to grant compensatory allowance to all its employees some time in September 1959. The grant of compensatory allowance was not made through any standing order or circular but it is alleged to have been given as an implied condition of service. Thereafter there was another notification by the Central Government dated December 8, 1960 by which it was provided that the employees in receipt of the compensatory allowance would be given the option to choose the house rent allowance or compensatory allowance but will not be entitled to draw both. This order was to remain in force for five years. By virtue of another notification dated August 9, 1965 the Central Government made it further clear that the employees of the Central Government would have to draw either compensatory allowance at the existing rates or the house rent allowance but not both. In view, however, of the notification dated December 8, 1960, alluded to above, the management thought that the contents of the circular were binding on the Company and, therefore, they unilaterally, without giving any notice to the workers, withdrew the concession of the compensatory allowance which had been granted to the workers in September 1959. This concession was withdrawn with effect from July 1960. The workers moved the Government for making a reference to the Tribunal because a dispute arose between the parties regarding the competency of the appellant to withdraw the concession granted by it unilaterally. The Government made a reference to the Industrial Tribunal which has held that there was a dispute between the parties and as Section 9A of the Industrial Disputes Act, 1947 — hereinafter referred to as 'the Act' — has not been complied with by the Company the management was not legally entitled to withdraw the concession of the Assam Compensatory Allowance granted to the employees. The award of the Industrial Tribunal was published by the Government of Assam in the Gazette dated July 14, 1965.

2-3. Dr. Anand Prakash, counsel for the appellant, made the following three contentions before us:

(1) that the compensatory allowance was given purely on the basis of the Central Government circular dated September 3, 1957, on the distinct understanding that it was a temporary measure which could be withdrawn at the will of the employer and did not amount to a condition of service at all;

(2) that even if the provisions of Section 9A of the Act applied, since the management had substituted the house rent allowance for compensatory allowance the workers were not adversely affected and, therefore, it was not necessary to give any notice to them before withdrawing the concession of the compensatory allowance; and

(3) that even if the provisions of Section 9A of the Act were not complied with, the Tribunal should have at least gone into the question on merits instead of basing its award on the question of applicability of Section 9A of the Act.

4. Before, however, dealing with the contentions raised before us, it may be necessary to mention a few admitted facts. In the first place it is the admitted case of the parties that the circulars of the Central Government were not binding on the appellant Corporation, but the Corporation chose to follow them in its own wisdom. Secondly it is also admitted that at the time when the concession of compensatory allowance was granted to the employees of the Corporation, there was nothing to show that it was given only by way of an interim measure which could be withdrawn at the will of the employer. Thirdly it is also not disputed that before withdrawing the concession of compensatory allowance in August 1960 the appellant gave any notice to the workers, nor did it consult them in any way before depriving them of the concession originally granted by the employer. In fact the Tribunal has found very clearly that the act of the Corporation in granting the Assam Compensatory Allowance was an independent one and made out of their own volition, though the circulars of the Central Government may have

been one of the factors that swayed the decision of the management. It is against the background of these admitted facts and circumstances that we have to examine the contentions raised by counsel for the appellant in this appeal.

5. As regards the first contention that the concession of the compensatory allowance was granted to the workers by way of a temporary measure and would not amount to a condition of service, we find absolutely no material on the record to support the same. There is no evidence to show that the management before granting the concession of the compensatory allowance had in any way indicated to the workers that this was only a stop-gap arrangement which could be withdrawn after the housing subsidy was granted. Even before the unilateral withdrawal of the concession granted by the appellant no notice was given to the workers nor were they taken into confidence, nor any attempt was made to open a dialogue with them on this question. Indeed if the circulars of the Central Government are admittedly not binding on the Corporation, then we are unable to appreciate the stand taken by the appellant that the management unilaterally withdrew the concession merely because of the Central Government circulars. So far as the compensatory allowance is concerned it was given in order to enable the workers to meet the high cost of living in a far-fetched and backward area like Assam. It had absolutely no causal connection with the housing subsidy or house rent allowance which was a different type of concession. Furthermore, the grant of compensatory allowance by the appellant was indeed a very charitable act which showed that the employers were extremely sympathetic towards the needs of their workers. In these circumstances we have no hesitation in holding that the grant of compensatory allowance was undoubtedly an implied condition of service so as to attract the mandatory provisions of S. 9A of the Act which runs thus:

"No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the

Fourth Schedule, shall effect such change. —

(a) without giving to the workmen likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or

(b) within twenty-one days of giving such notice:

Provided....."

An analysis of Section 9A of the Act clearly shows that this provision comes into operation the moment the employer proposes to change any condition of service applicable to any workman, and once this is done twenty-one days notice has to be given to the workmen. This admittedly was not done in this case. By withdrawing the Assam Compensatory Allowance the employers undoubtedly effected substantial change in the conditions of service, because the workmen were deprived of the compensatory allowance for all times to come.

6. Dr. Anand Prakash however relied on a few decisions in support of the fact that such a change in the conditions of service does not amount to any change as contemplated by Section 9A of the Act. Reliance was placed on a decision of the Andhra Pradesh High Court in *Workmen of Hindustan Shipyard (Pvt.) Ltd. v. Industrial Tribunal, Hyderabad*, (1961) 2 Lab LJ 526 (Andh Pra). In our opinion the facts of that case are clearly distinguishable from the facts in the present case. In that case a concession was granted to the employees to attend the office half an hour late due to war time emergency, but this concession was conditional on the reservation of the right to change the office hours and it was open to the employer to take a different decision. Secondly the working hours being fixed at 6 1/2 hours were below the maximum prescribed by the Factories Act which were 8 hours and, therefore, there was no adverse change in the conditions of service. Finally in this case there was a clear finding given by the learned Judge that the concession would not amount to a condition of service. In this connection, Jaganmohan Reddy, J., observed as follows:

"In this case as it cannot be said that the concession which they were enjoying in the winter month was a privilege to which they were entitled before the Act came into force in February 1948. I have already stated that the concession was subject to the condition of its withdrawal unilaterally and cannot, therefore, be said to have conferred any right on the employees to enjoy it as such.

..... further that Section 9-A came into play only when the conditions of service were altered, but the workmen having agreed to the reservation of the employer to alter it, they have made the right to alter it also a condition of service and therefore the action in accordance with the said right can give no cause for complaint."

In the instant case we have already held that the grant of compensatory allowance cannot be construed to be merely an interim measure, but having regard to the circumstances in which this concession was given will amount to an implied condition of service,

7. Reliance was also placed on a decision by this Court in *Bhiwani Textile Mills v. Their Workmen*, (1969) 2 Lab LJ 739 (SC) where this Court observed as follows:

"Sri G. B. Pai, on behalf of the mills, and Sri M. S. M. Sastri and Y. Kumar for the two unions representing the workmen, stated before us that the parties are agreed that this direction given in the award may be deleted as no party objects to its deletion. Consequently, we need not go into the question whether the tribunal was in law competent to make such a direction in the award or not....."

In view of this agreement between the parties, the only question that remains for decision by us is whether the tribunal was right in directing that workmen, who do duty on any Sunday, will be entitled to an extra payment of 20 per cent of their consolidated wages for that Sunday." A perusal of the observations made by this Court would clearly show that the case before this Court proceeded on the basis of a consent order as agreed to by counsel for the parties. Secondly the question for decision was

whether the workmen were entitled to additional payment for working on Sundays even if they were given another off day as a substitute for Sunday. The Court pointed out that this could not be treated as a condition of service because all that the workmen were entitled to was that they should take at least one day off in a week and this facility was not disturbed but instead of giving Sunday off they were given some other day as weekly off. In these circumstances this case also does not assist the appellant.

8. Dr. Anand Prakash also cited a decision in *Oil & Natural Gas Commission v. The Workmen*, (1973) 2 SCR 482 = (AIR 1973 SC 968 = 1973 Lab IC 233). In this case also there was a finding of fact by this Court that there was nothing to show that 6 1/2 hours per day was a condition of service. In this connection, the Court observed as follows:

"In our opinion, on the facts and circumstances of this case it cannot be said that 6 1/2 working hours a day was a term of service, for the simple reason that it was only during a period of the first six months, when the factory was being constructed at the site of the workshop that, due to shortage of accommodation, the administrative office was, as an interim arrangement, temporarily located in tents at a place about 2 k.m. away, that the staff in this office was not required to work for more than 6 1/2 hours per day. There is no evidence that 6 1/2 hours per day was a condition of service; neither is there any such term of service in their letters of appointment, nor is such a term of service otherwise discernible from other material on the record."

In view of our finding, however, that the grant of the Assam Compensatory Allowance was undoubtedly a condition of service this case has absolutely no application.

9. Reliance was placed on a decision of this Court in *Hindustan Lever Ltd. v. Ram Mohan Ray*, (1973) 4 SCC 141 = (AIR 1973 SC 1156 = 1973 Lab IC 784) for the proposition that withdrawal of the concession of the compensatory allowance did not adversely affect the service conditions of

the workmen. In this case, this Court observed as follows:

"As regards item 11 it was urged that as one department out of three has been abolished, this item applies. Though to bring the matter under this item the workmen are not required to show that there is increase in the work-load, it must be remembered that the 4th Schedule relates to conditions of service for change of which notice is to be given and Section 9-A requires the employer to give notice under that section to the workmen likely to be affected by such change. The word 'affected' in the circumstances could only refer to the workers being adversely affected and unless it could be shown that the abolition of one department has adversely affected the workers it cannot be brought under item 11. The same consideration applies to the question of change in usage under item 8."

It is true that this Court held on the facts of that case that the Company had abolished one department, but as the work-load was not increased the workers were not adversely affected and the abolition of one department could not be brought under item 11. The contingency contemplated in the aforesaid case, however, cannot be equated with the present case by virtue of the unilateral deprivation of the compensatory allowance which was received by the employees by the withdrawal of which they were undoubtedly prejudiced. It cannot be contended that the sudden withdrawal of a substantial concession in the conditions of service would not materially or adversely affect the workmen. We are, therefore, of opinion that the aforesaid case also does not support the contention of the learned counsel for the appellant.

10. On the other hand Mr. Sen Gupta appearing for the respondents drew our attention to the decision of this Court in *M/s Tata Iron and Steel Co. Ltd. v. The Workmen*, (1972) 2 SCC 383 = (AIR 1972 SC 1917 = 1972 Lab IC 1128) where this Court, while pointing out the object of S. 9A, observed as follows:

"The real object and purpose of enacting Section 9-A seems to be to afford an opportunity to the workmen

to consider the effect of the proposed change and, if necessary, to represent their point of view on the proposal. Such consultation further serves to stimulate a feeling of common joint interest of the management and workmen in the industrial progress and increased productivity. This approach on the part of the industrial employer would reflect his harmonious and sympathetic co-operation in improving the status and dignity of the industrial employee in accordance with the egalitarian and progressive trend of our industrial jurisprudence, which strives to treat the capital and labour as co-sharers and to break away from the tradition of labour's subservience to capital."

The observations made by this Court lay down the real test as to the circumstances in which Section 9A would apply. In the instant case, however, we are satisfied — (1) that the grant of the compensatory allowance was an implied condition of service; and (2) that by withdrawing this allowance the employer sought to effect a change which adversely and materially affected the service conditions of the workmen. In these circumstances, therefore, Section 9A of the Act was clearly applicable and the non-compliance with the provisions of this section would undoubtedly raise a serious dispute between the parties so as to give jurisdiction to the Tribunal to give the award. If the appellant wanted to withdraw the Assam Compensatory Allowance it should have given notice to the workmen, negotiated the matter with them and arrived at some settlement instead of withdrawing the compensatory allowance overnight.

11. It was also contended that the compensatory allowance was only an allowance given in substitution for housing subsidy. We are, however, unable to agree with this contention. Mr. Sen Gupta appearing for the respondents rightly pointed out that there is a well-knit and a clear distinction between the compensatory allowance and a housing subsidy or house-rent allowance. This distinction is clearly brought out by the Second Pay Commission's Report (1957-59) in which the Commission observed as follows:

"The compensatory allowances considered here fall into three broad groups: (i) allowances to meet the high cost of living in certain specially costly cities and other local areas, including hill stations where special requirements such as additional warm clothing and fuel etc., add to the cost of living; (ii) those to compensate for the hardship of service in certain areas, e.g. areas which have a bad climate, or are remote and difficult of access; and (iii) allowances granted in areas, e.g. field service areas, where because of special conditions of living or service, an employee cannot, besides other disadvantages, have his family with him. There are cases in which more than one of these conditions for grant of a compensatory allowance are fulfilled."

The Second Pay Commission also observed:

"The rent concessions dealt with here are of two kinds: (i) provision of rent free quarters, or grant of a house rent allowance in lieu thereof; and (ii) grant of a house rent allowance in certain classes of cities to compensate the employees concerned for the specially high rents that have to be paid in those cities. The former is allowed only to such staff as are required to reside on the premises where they have to work, and is thus intended to be a facility necessary to enable an employee to discharge his duties. In some cases, it is a supplement to pay, or substitute for special pay etc., which would have been granted but for the existing of that concession. In either case, it is not related to the expensiveness of a locality. The latter, on the other hand, is a compensatory or a sort of a dearness allowance, intended to cover not the high cost of living as a whole but the prevailing high cost of residential accommodation; and it has no relationship to the nature of an employee's duties."

The observations made by the Second Pay Commission throw light on this question. In fact the compensatory allowance and housing subsidy are two different and separate categories of the terms of service conditions and they cannot be clubbed together, nor can the one be made dependent on the other. The object of these two

concessions is quite different and both of them serve quite different purposes.

12. It was next contended that even if Section 9A of the Act applied, the Tribunal should have gone into the question on merits instead of giving the award on the basis of non-compliance with the provisions of Section 9A. This argument also appears to us to be equally untenable. On the facts and circumstances of the present case the only point that fell for determination was whether there was any change in the conditions of service of the workmen and, if so, whether the provisions of Sec. 9A of the Act were duly complied with. We cannot conceive of any other point that could have fallen for determination on merits, after the Tribunal held that S. 9A of the Act applied and had not been complied with by the appellant.

13. It was also faintly suggested that there was no question of a customary claim or usage because the period during which the compensatory allowance was granted and withdrawn was too short. It is, however, not necessary to take any notice of this argument, because counsel for the respondents Mr. Sen Gupta fairly conceded that he had not based his claim on any customary claim at all. It was argued by Mr. Sen Gupta that after the Central Government notification of September 3, 1957, the appellant took an independent and voluntary decision on their own to give the facility of the Assam Compensatory Allowance as an implied term of the contract and having done so they could not wriggle out from the provisions of Section 9A of the Act.

14. Thus all the contentions raised by the appellant fail and the appeal is dismissed, but in the circumstances of this case we leave the parties to bear their own costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 1863

(From: Orissa)*

Y. V. CHANDRACHUD, P. N. BHAGWATI AND R. S. SARKARIA, JJ.

Banamali Das. Appellant v. Rajendra Chandra Mardaraj Harichandan and others, Respondents.

Civil Appeal No. 576 of 1975, D/- 1-8-1975.

(A) Representation of the People Act (1951), S. 100 (1) (d) (iv) — Conduct of Election Rules (1961), R. 56 (7) — Petition challenging election on ground of error in entering results of counting in form No. 20 — Counting on one Table omitted and another repeated — Election set aside and election petitioner declared elected.

The election of the returned candidate was challenged on the ground, mainly, that through an error the Returning Officer did not enter the results of the second round of counting on Table No. 13 in Form No. 20, as prescribed by Rule 56 (7) of the Conduct of Election Rules, 1961. The allegation was that the results of the second round of counting on Table No. 14 were erroneously entered twice in Form No. 20, once as against the second round of Table No. 14 and once as against the second round of Table No. 13. The finding of the trial Court was that the result of the second round of 14th Table came to be recorded twice and that the true result of the second round of counting on Table No. 13 was entirely omitted while making entries in form No. 20.

Held, that the finding of the trial Court was to be upheld and as a result the election petitioner had secured the maximum number of valid votes and was therefore entitled to be declared as the successful candidate. (Para 14)

However, it was held that the trial judge was in error in directing, merely because his suggestion was accepted by the parties appearing before him, that the court should take a recount of all the ballot papers. He widened unduly the scope of the election petition and landed himself into

an unforeseen difficulty of having to decide points on which there was neither a pleading nor an issue. And the Supreme Court had to countenance an argument based on no pleadings, arising out of no issues and founded solely on errors, real or supposed, which were said to have happened to see the light of the day as a result of the recount and the re-recount. Even election petitions must end at some stage and they cannot, for the reason that elections are democratic venture, be permitted to procreate points during the course of their pendency.

(Para 15)

(B) Representation of the People Act (1951), Ss. 100 and 86 — Election petition — Evidence — Check Memo — Certified copy of check memo — Admissibility — (Evidence Act (1872), Ss. 74, 76, 77).

The Check Memo which is required to be maintained by the officer in charge of the counting table is a document forming record of the acts of a public officer and therefore, a certified copy thereof given by the Collector in whose custody the document is kept, can be admitted in evidence in proof of the contents of the original document. (Para 12)

Mr. Somnath Chatterjee, Sr Advocate, (Mr. Ratn Das Advocate with him), for Appellant; Mr. Vinoo Bhagat, Advocate, for Respondents.

Judgment of the Court was delivered by

CHANDRACHUD, J.:— Six candidates contested the mid-term election to the Orissa Legislative Assembly from the Nilgiri constituency. The polling was held on February 26, 1974 and on March 1 the result of the election was declared. The appellant who contested the election on the ticket of the Communist Party of India (Marxists) was declared as the successful candidate. According to the results declared on March 1, the appellant secured 14346 votes while respondent 1 who contested the election on the ticket of the Bhartiya Lok Dal secured 14297 votes. The other contestants, respondents 2 to 5, secured votes ranging between 12,312 and 5961. Respondent 6 is the Returning Officer.

* (Ele. Petn. No. 3 of 1974, D/- 6-3 1975 — Orissa)

2. On April 13, 1974 respondent 1 filed an election petition under Section 81 of Representation of the People Act, 1951 (hereinafter called "the Act") challenging the election of the appellant and praying that, instead, he himself should be declared as the successful candidate. The appellant's election was challenged by respondent 1 on the ground, mainly, that through an error the Returning Officer did not enter the results of the second round of counting on Table No. 13 in Form No. 20, as prescribed by Rule 56 (7) of the Conduct of Election Rules, 1961. It was alleged that instead of incorporating the results of the second round of counting on Table No. 13 in Form No. 20, the Returning Officer wrongly incorporated the results of the second round of counting on Table No. 14 in the column meant for the corresponding count of Table No. 13. In other words, the allegation was that the results of the second round of counting on Table No. 14 were erroneously entered twice in Form No. 20, once as against the second round of Table No. 14 and once as against the second round of Table No. 13.

3. The appellant denied this allegation contending that he had secured the largest number of votes and that there was a clear difference of 49 votes between him and respondent No. 1. The appellant also raised several other contentions touching the maintainability of the election petition on the ground of noncompliance with statutory requirements.

4. On these pleadings, the learned Judge of the High Court of Orissa, Cuttack, who tried the election petition framed 8 issues but they were re-cast after the evidence was recorded. Issues Nos. 1 to 5 pertained to the maintainability of the election petition and on these issues the learned Judge found in favour of respondent 1. Those findings are not challenged before us and, therefore, we must proceed on the basis that the election petition as presented did not suffer from any illegality.

5. Issues Nos. 6 to 8 are the ones with which alone we are concerned in this appeal and those issues arise out of the contentions in regard to the entries made by the Returning

Officer in Form No. 20. The ninth issue is consequential.

6. Respondent 1 examined himself and one Khagendranath Naik who was his Counting Supervisor on Table No. 13. On behalf of the appellant, an election agent and a counting agent of his were examined as witnesses. Neither party examined the Returning Officer nor indeed did the Returning Officer who was respondent 6 to the petition offer to give evidence on the question as to whether the results of the second round of counting of Table No. 14 were erroneously entered as against the corresponding column of Table No. 13.

7. During the hearing of the petition, the learned Judge inquired of the parties whether they were agreeable to a recount being taken of all the ballot papers. Counsel appearing for the appellant and respondents 1 and 2 agreed to the course suggested by the learned Judge. Respondents 3 to 5 who had contested the election but were defeated did not appear at the trial nor indeed did the Returning Officer. On February 3, 1975 the learned Judge passed an order directing that "the entire ballot papers should be recounted".

8. The ballot papers were accordingly sent for. Twenty-one sealed trunks were received by the court and the recounting was done by the Deputy Registrar of the High Court in the presence of the counsel for the contending parties. After the recount was taken, the Deputy Registrar submitted a detailed report which was made a part of the record under an order passed by the learned Judge on February 21, 1975.

9. In view of the fact that the findings recorded by the learned Judge in favour of respondent 1 on issues 1 to 5 are not challenged before us, the only question for decision is whether respondent 1 has discharged the onus of proving that the result of the second round of counting on the 13th Table was not at all recorded in Form No. 20 and whether the result of the second round of counting on Table No. 14 was erroneously entered as against the second round of Table No. 13.

10. Section 64 of the Act provides that at every election where a

poll is taken, votes shall be counted by or under the supervision and direction of the returning officer and each contesting candidate, his election agent and his counting agents, shall have a right to be present at the time of counting. Section 169 of the Act which empowers the Central Government after consultation with the Election Commission to make rules for carrying out the purposes of the Act provides by sub-section (2) (g) that such rules may provide for the scrutiny and counting of votes. Rule 56 (7) of the Conduct of Election Rules, 1961 provides that after the counting of all ballot papers contained in all the ballot boxes used in a constituency has been completed, the returning officer shall make the entries in a result sheet in Form 20 and announce the particulars. Form 20 called the "Final Result Sheet" requires the returning officer to enter therein the total number of valid votes recorded for the various candidates as also the total number of rejected ballot papers, at each round separately.

11. In order to avoid errors in counting of votes, the Election Commission has compiled a hand-book for the use of returning officers containing instructions for their guidance at various stages of the elections. Before the results of the election are entered in Form No. 20, it is necessary that a record be maintained of the result of counting of each round. Paragraph 14-B in Chapter VIII of the hand-book directs that the officer-in-charge of distribution of the ballot papers for counting should take out a sufficient number of bundles from the drum so as to make up 1000 ballot papers and distribute them to each table for counting at each round. After the counting of every such thousand ballot papers is over, the bundles are given back to the supervisor of the counting table, with the "Check Memo" duly filled in and signed by the assistant. The Check Memo shows the votes polled by the various candidates in the particular round as also the total number of rejected votes. When the distribution and counting of bundles is thus completed on all the counting tables, one round of counting is said to be over. The next round of counting will then

begin. The same procedure is required to be followed for every round of counting so that the result of each round of counting on each table is reflected in the Check Memo relating to each round. As many Check-Memos as many rounds of counting. The form of the Check Memo is at annexure XII-A and a sample form duly filled in is at annexure XII-B of the hand-book. These forms are not prescribed by the Act or the rules made thereunder but the directions in regard thereto have to be carried out on the instructions of the Election Commission in which the over-all control and supervision of elections is vested. The directions and forms contained in the hand-book for the use of returning officers are intended to facilitate the holding of fair and error-free elections and no objection can be taken to either.

12. The original Check Memo of the 13th Table in which results of the second round were entered was not produced during the trial but a certified copy thereof was admitted in evidence as Ex. 1, subject to the objection raised by the appellant as to its admissibility. There is no substance in that objection. Section 74 of the Evidence Act provides that documents forming the acts or records of the acts of public officers are public documents. Section 76 provides that every public officer having the custody of a public document which any person has a right to inspect shall give that person a copy of it together with the certificate that it is a true copy of the document. By Section 77, such certified copies may be produced in proof of the contents of the documents of which they purport to be copies. The Check Memo which is required to be maintained by the officer in charge of the counting table is a document forming record of the acts of a public officer and therefore, a certified copy thereof given by the Collector in whose custody the document is kept, can be admitted in evidence in proof of the contents of the original document.

13. The certified copy (Ex. 1) of the Check Memo concerning the second round of counting on Table No. 13 shows that 40 bundles each containing 25 ballot papers (i.e. 1000

ballot papers), were distributed for counting in the second round. Part I of Ex. 1 contains these details. Part II of Ex. 1 shows the result of counting at the second round. According to the entries contained therein, the appellant secured 21 valid votes, respondent 1 secured 86, while respondents 2 to 5 secured 304, 7, 15 and 524 votes respectively. Forty-two ballot papers were rejected, thus making up a total of 999 ballot papers. Evidently, there was an error regarding one ballot paper either at the stage of distribution or at the stage of counting. What is relevant is not that there was an error in the counting of one ballot paper but that the result of counting which is entered in the Check Memo ought to have been incorporated in Form No. 20 in the appropriate column. Surprisingly, in Form No. 20, the votes secured by the various candidates in the second round of counting on Table No. 13 were shown as: the appellant — 144 votes instead of 21; respondent 1—109 votes instead of 86; respondent No. 2 — 360 votes instead of 304; respondent No. 3 — 19 votes instead of 7; respondent No. 4 — 74 votes instead of 15, and respondent No. 5—225 votes instead of 524. In short, whereas the appellant had truly secured 21 votes only in the second round of counting on Table No. 13, the Final Result Sheet, Form No. 20 showed that he had secured 144 votes; and whereas respondent No. 1 had secured 86 votes, he was shown to have secured 109 votes. The error was favourable to both the parties but whereas the error in favour of the appellant was to the extent of 123 votes, that in favour of respondent 1 was to the extent of 23 votes only. As the appellant was declared to have won the election by a margin of 49 votes only over respondent 1, it is plain that respondent 1 and not the appellant had polled the largest number of votes.

14. A mere look at the entries in Form No. 20 relating to the second round of counting on Tables Nos. 13 and 14 would disclose the error committed in making the entries therein. The entries made in respect of Table No. 14 were accurate, but precisely those very figures were through some error carried to the second round

of Table No. 13. It can seldom happen that five contesting candidates would secure precisely the same number of votes in the same round of counting on two different tables, when a thousand ballot papers are distributed to the two tables by picking them up at random from a common drum or receptacle. It is, however, unnecessary to speculate about any such possibility because it is incontrovertible that entries in the Check Memo relating to the second round of counting on Table No. 13 were not transferred to the appropriate column of Form No. 20. We therefore uphold the finding of the learned Judge that the result of the second round of the 14th Table came to be recorded twice and that the true result of the second round of counting on Table No. 13 was entirely omitted while making entries in Form No. 20. It must follow that respondent 1 has secured the maximum number of valid votes and is therefore entitled to be declared as the successful candidate.

15. This really should be an end of the matter because the only ground on which respondent 1 had challenged the appellant's election was that the relevant entries in Form No. 20 did not reflect the true picture. But the order passed by the learned Judge that a recount shall be taken of all the ballot papers has furnished to the appellant an opportunity to raise a doubt here and a doubt there regarding the manner in which the votes were counted and the ballot papers preserved. In our opinion the learned Judge was in error in directing, merely because his suggestion was accepted by the parties appearing before him, that the court should take a recount of all the ballot papers. Respondent 1 who filed the election petition had not asked for such a recount and the defence of the appellant to the petition was that the entries in Form No. 20 reflected a true picture and contained no error. The consent to the recount was given only by the appellant and respondents 1 and 2. The other respondents who had contested the election did not appear at the trial of the election petition but they certainly had no notice that a recount would be suggested or

accepted when there was no plea about it in the pleadings of the parties. The learned Judge widened unduly the scope of the election petition and landed himself into an unforeseen difficulty of having to decide points on which there was neither a pleading nor an issue. After the Deputy Registrar submitted his report, the learned Judge felt "serious doubts about the correctness of the recount" but all that he did in order to allay those doubts was to take a re-recount of a packet of votes where he thought the error of the recount could with assurance be located. And so we have to countenance an argument based on no pleadings, arising out of no issues and founded solely on errors, real or supposed, which are said to have happened to see the light of the day as a result of the recount and the re-recount. Even election petitions must end at some stage and they cannot, for the reason that elections are a democratic venture, be permitted to procreate points during the course of their pendency. As we were listening to the appellant's argument, we thought we were hearing an independent election petition filed by the appellant in order to challenge the result of the recount.

Mr. Somnath Chatterjee, appearing for the appellant, argued that the facts which have emerged out of the recount throw considerable doubt on the manner in which the election was held and therefore instead of declaring respondent No. 1 as the successful candidate we should order that a fresh election be held. Elections, says the learned counsel, are not a matter of technicalities and the court must satisfy its conscience that the election before it was free and fair. Justice may be a matter of the Judge's conscience but even a strong and sensitive conscience must not brook an endless litigation in which parties will fish for new challenges based on accidental discoveries of no more than plausible points to ponder. The new errors on which the appellant now relies have an air of plausibility and no more. The new argument founded on those errors must therefore fail.

16. As respondent 1 truly secured the maximum number of votes and as the appellant was, through an

error, shown to have secured the maximum number of votes, we must uphold the judgment of the Orissa High Court setting aside the appellant's election and declaring respondent 1 as the successful candidate.

17. The appeal is accordingly dismissed with costs in favour of respondent 1.

Appeal dismissed.

AIR 1975 SUPREME COURT 1867

(From: Madras)*

A. N. RAY, C. J., K. K. MATHEW,

V. R. KRISHNA IYER AND

S. MURTAZA FAZL ALI, JJ.

M. Naina Mohammed, Appellant v.
K. A. Natarajan and others, Respondents.
Civil Appeal No. 98 of 1975. D/- 23-7-1975.

(A) Constitution of India, Art. 226 — Jurisdiction under — Nature of — Writ petition against Tribunal's decision — Errors of law vitiating Tribunal's finding — Case must go back to Tribunal for fresh consideration.

The boundaries of the High Court's jurisdiction under Article 226 are clearly and strongly built and cannot be breached without risking jurisprudential confusion. The power is supervisory and not appellate in nature. When in writ petition against decision of State Transport Appellate Tribunal in respect of grant of permit to ply bus on a particular route, a single Judge of the High Court undertook an evaluation of the merits on his own, that was beyond his jurisdiction. Even if there were errors of law vitiating the Tribunal's finding, the same could not be finally decided by the High Court itself. The case must go back to the Tribunal for fresh consideration as a matter of law and in the interests of justice. AIR 1965 SC 107. Followed: Writ Appeal No. 519 of 1968, D/- 25-7-1974 (Mad). Affirmed.

(Paras 1, 2, 3)

(B) Letters Patent (Madras), Cl. 15 — Appeal under — Order appealed against, wrong and unsustainable — While reversing it, reasons must be given — Appellate judgment taking into consideration that what was not pertinent — Appellate judgment not sustainable in appeal by special leave. Writ Appeal No. 519 of 1968, D/- 25-7-1974 (Mad), Reversed — (Constitution of India, Art. 136).

(Para 4)

*(Writ Appeal No. 519 of 1968, D/- 25-7-1974—Mad.).

HS/HS/C742/75/SSG

Cases Referred: Chronological Paras
AIR 1965 SC 107 = (1964) 5 SCR 869 2

Mr. K. S. Ramamurthi, Sr. Advocate. (Mr. A. T. M. Sampath, Advocate, with him), for Appellant; Mr. M. K. Ramamurthi, Sr. Advocate. (Mr. Vineet Kumar, Advocate, with him), for Respondent No. 1.

Judgment of the Court was delivered by

V. R. KRISHNA IYER, J.:— A spiral of reversals is the fate of this litigative battle between the appellant and the first respondent over a permit to ply a bus on the route between Madurai and Paramakkudi, in Tamil Nadu. While its admission into this Court was by special leave, the first round of the contest was fought before the R. T. A. (Regional Transport Authority) which, on an evaluation of the relative merits and demerits of the rivals, granted the permit to the present appellant, but this victory was short-lived because, at the second stage of the legal bout, the S.T.A.T. (State Transport Appellate Tribunal) held that the respondent before us had better claims. The worsted appellant invoked the writ jurisdiction of the High Court under Article 226 and the learned Single Judge, who heard the petition, rejudged the relevance and weight of the points, pro and con, and as a result of this adjudicatory exercise on facts, demolished the order of the S.T.A.T. The learned Judge disagreed with the conclusion of the S.T.A.T. but, instead of sending the case back for a fresh look at the merits of the matter, set aside the permit granted to the respondent and affirmed the award in favour of the appellant. Thereupon, the respondent moved a Division Bench of that Court which felt that a full-scale re-appraisal of the points for and against each claimant was in excess of the jurisdiction of the Single Judge under Article 226, although it noticed that certain factors not relevant to the adjudication had been taken into consideration by the S.T.A.T. Consequently, the order of the learned Judge was set aside, the result being that the respondent's permit was restored. The appellant urged that the decision of the Division Bench of the High Court was utterly wrong and somewhat casual, while that of the learned Single Judge was careful, elaborate and correct. Of course, this view of the matter was hotly controverted by counsel for the 1st respondent but, after having heard both Shri K. S. Ramamurthy, for the appellant, and Shri M. K. Ramamurthy, for the respondent, we are satisfied that the reluctant course of remitting the whole case to the S.T.A.T. for a de novo disposal is called for as a matter of law and in the interests of justice.

2. The boundaries of the High Court's jurisdiction under Article 226 are clearly and strongly built and cannot be breached without risking jurisprudential confusion (*Sri Rama Vilas Service (P.) Ltd. v. C. Chandrasekharan*, (1964) 5 SCR 869 = (AIR 1965 SC 107)). The power is supervisory in nature, although the Judges at both the tiers, in the instant case, have unwittingly slipped into the subtle, but fatal, error of exercising a kind of appellate review.

3. Shri M. K. Ramamurthy, for the respondent, was right in pointing out that the learned Single Judge went into the factum and weight of the claims which could be put in the scales in choosing the better of the two applicants for the permit. However, the Court rightly pointed out that some relevant factors had been ignored by the S.T.A.T. (for example, 'that the first respondent's history sheet was not clean') and included in the judicial verdict factors which were extraneous, such as 'that the bus of the petitioner did not, in fact, ply from 2-9-1965 to 4-12-1965', this being attributable to non-payment of surcharge rather than operational inefficiency. A reading of the learned Single Judge's judgment leaves us in no doubt that he had undertaken an evaluation of the merits on his own. This, undoubtedly, was beyond the jurisdiction of the High Court. Nor is it possible to support the direction that if there were errors of law vitiating that S.T.A.T.'s finding, the case need not go back for fresh consideration but could be finally decided by the High Court itself.

4. In Writ Appeal, the learned Chief Justice, speaking for the Division Bench of the High Court, disposed of the case in a short paragraph which hardly did justice to the order appealed against. Maybe that order was wrong and unsustainable, but while reversing it valid reasons had to be adduced. All that we find in the appellate judgment is a partial admission that extraneous considerations were inputs of the order of the S.T.A.T. and a brief disposal of the whole matter in a single sentence, as it were — "Even so, there is nothing in the order of the Tribunal to support it." While the Division Bench was perhaps justified in observing that while sitting on the writ side, judicial review should have been more restricted than while sitting on the appellate side, its own judgment was vulnerable because of the plain finding that what was not pertinent was taken into consideration by the S.T.A.T. For instance, the learned Chief Justice observed: 'It is no doubt true that the non-performance of service after the grant was made, cannot go into the computation and the reference relating to night-halt

might well have been avoided in its discussion'. 'The non-performance of service', is slightly obscure, but we read it in the context as meaning the failure to ply the bus on the route in question subsequent to the grant of the permit. We express no opinion on the soundness of the observation but it is clear that the Division Bench itself has plainly accepted the position that what was not, according to it, relevant had gone into the reckoning when the S. T. A. T. awarded the permit to the appellant. In this view, this judgment cannot also be sustained.

5. The fair course would, therefore, be to set aside the judgment under appeal and send the whole case back to the S. T. A. T. to hear the case afresh, consider relevant factors bearing upon 'public interest' as high-lighted in S. 47 of the Motor Vehicles Act and dispose of the appeal before it in accordance with law, guided by the decisions of this Court and untrammelled by any observations made either by the Single Judge or by the Division Bench.

6. Currently, the respondent is plying his bus on the route and we direct that the status quo be maintained and he will continue to operate on the route until the appeal is disposed of by the S. T. A. T. Of course, the R. T. A. passed its orders as early as 1966 November and if it thinks that public interest demands the need for an extra bus to ply on the route to cope with the traffic, it will be open to the R. T. A. to grant a permit, pending disposal of the appeal, to the present appellant.

7. The fluctuating fortunes of the combatants for the permit have been such that it is appropriate to direct both parties to bear their costs throughout.

Order accordingly.

AIR 1975 SUPREME COURT 1869

(From: Punjab & Haryana)*

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALLA, JJ.

Rikhi Ram and another, Appellants v.
Ram Kumar and others, Respondents.

Civil Appeal No. 1642 of 1974. D/-
21-7-1975.

(A) Punjab Pre-emption Act (1 of 1913), Section 15 (1) (a) Fourthly — Pre-emption — Right of tenant — He must continue to possess that right till date of decree — (Pre-emption — Right of).

*(Second Appeal No. 781 of 1968. D/-
17-3-1973—(Punj. & Har.)).

GS/HS/C728/75/MVJ

Under the general law of pre-emption it is firmly established that the decisive date as regards the right of pre-emptor to pre-empt the sale was the date of the decree. In other words the pre-emptor who claims the right to pre-empt the sale on the date of the sale must continue to possess that right till the date of the decree. If he loses that right before the passing of the decree, decree for pre-emption cannot be granted even though he may have had such right on the date of the suit. The same rule applies to a person who claims to pre-empt the sale under Section 15 (1) (a) Fourthly of the Act. AIR 1971 SC 369. Followed.

(Para 4)

Thus where during the pendency of a suit for pre-emption the vendee obtains an order of eviction of the tenant the tenant loses his right to pre-empt and he cannot obtain a decree for pre-emption.

(Para 4)

Cases Referred: Chronological Paras
AIR 1971 SC 369 = (1971) 2 SCR 640

1. 3. 5

(1970) 72 Pun LR 325 = 1970 Cur LJ 181
4

Mr. S. C. Agarwala, Advocate, for
Appellants; Mr. B. Dutta, Advocate, for
Respondents Nos. 1 and 2.

Judgment of the Court was delivered
by

UNTWALLA, J.:— This appeal by special leave arises out of a suit for pre-emption filed by the appellants under Section 15 of the Punjab Pre-emption Act, 1913 — hereinafter called — the Pre-emption Act. The suit land is situated in the State of Haryana to which the provisions of the Act aforesaid are still applicable. The land belonged to Smt. Shanti, respondent No. 3. The appellants were the tenants of the disputed land under her. She sold the land to respondents 1 and 2 on the 21st June, 1965. The land sold measured 176 kanals 4 marlas. The plaintiffs claimed the right of pre-emption in respect of the agricultural land in suit in accordance with clause 'Fourthly' of Section 15 (1) (a) of the Pre-emption Act. The suit was resisted by the vendee-respondents on several grounds. It was decreed by the trial Court on the 20th June, 1967 in respect of a portion of the land, measuring 157 kanals 2 marlas. The vendees' appeal in the First Appellate Court failed on the 20th April, 1968. They succeeded, however, in the High Court of Punjab & Haryana on the basis of the decision of this Court in Bhagwan Das v. Chet Ram, (1971) 2 SCR 640 = (AIR 1971 SC 369). A learned single Judge of the High Court allowed the second appeal filed by respondents 1 and 2 and dismissed the plaintiffs' suit.

2. We may state a few more facts before noting down the points urged on

behalf of the appellants. In the appellants' suit an order of injunction was made on 11-7-1966 restraining the defendants from dispossessing the plaintiffs from any portion of the suit land. But before the order of injunction was passed respondents 1 and 2 has filed an application before the Revenue Authorities under Section 9 of the Punjab Security of Land Tenures Act, 1953 — hereinafter called the Land Tenures Act — for ejectment of the appellants. An order of eviction was passed by the first authority on 22-5-1967; that is to say, about a month prior to the passing of the decree by the trial Court. The appellants' appeal from that order of the Assistant Collector was dismissed by the Collector on 14-9-1967. The High Court took the view that since the appellants had ceased to be the tenants of the land prior to the passing of the decree of pre-emption by the trial Court, they were no longer qualified to get such a decree.

3. Mr. S. C. Agarwal, learned counsel for the appellants made the following submissions:

(1) That the decision of this Court in Bhagwan Das's case (1971) 2 SCR 640 = (AIR 1971 SC 369) is distinguishable or in any view of the matter requires reconsideration by a larger bench.

(2) That the High Court committed errors of record and law in relying upon the order of eviction without bringing the copy of the order on record.

(3) That the order of eviction was in respect of about 3 standard acres of land only and a decree for pre-emption in any event ought to have been made in respect of the remaining portion of the land measuring about 9 standard acres.

4. Section 15 (1) of the Pre-emption Act says:

"The right of pre-emption in respect of agricultural land and village immovable property shall vest—

(a) where the sale is by a sole owner Fourthly, in the tenant who holds under tenancy of the vendor the land or property sold or a part thereof."

Under the general law of pre-emption it is firmly established that the decisive date as regards the right of pre-emptor to pre-empt the sale was the date of the decree. In other words the pre-emptor who claims the right to pre-empt the sale on the date of the sale must continue to possess that right till the date of the decree. If he loses that right before the passing of the decree, decree for pre-emption cannot be granted even though he may have had such right on the date of the suit. In several cases coming up before the Punjab and Haryana High Court a question arose whether the same rule applies to a

person who claims to pre-empt the sale under Section 15 (1) (a). Fourthly of the Pre-emption Act. In quite a large number of cases the answer given by the High Court was that it does not, while in a few, a contrary view was expressed. One of such cases from the majority line, viz. Kashmiri Lal v. Chuhar Ram, (1970) 72 Pun LR 325 was expressly overruled by this Court in Bhagwan Das's case (AIR 1971 SC 369). The facts of Bhagwan Das's case are somewhat different. Yet the ratio is aptly applicable to the facts of the instant case also. In the former case the pre-emptor had been evicted in pursuance of the decree of eviction prior to the institution of a suit for pre-emption. But the decision of this Court was not given treating this as a decisive factor. The firm rule of the general law of pre-emption was applied thus:

"In the presence of the above principle which is firmly entrenched in the law of pre-emption it is difficult to conceive that the legislature intended to depart from it in Section 15 (1) (a). Fourthly nor has any reason been suggested for doing so. The language employed is not very happy but the clear requirement is that the tenant must hold the land as such." And finally it was said at p. 643 (of SCR) = (at p. 371 of AIR):

"It must be remembered that sale alone does not and cannot divest the tenant of his right to hold the land of which he is in possession by virtue of his tenancy under the vendor. But if his tenancy is determined by a decree for eviction he loses his status of a tenant. He then does not satisfy the first requirement of Section 15 (1). Fourthly that he is a tenant who holds the land. In that situation he cannot succeed in a pre-emption suit if the decree for eviction has been passed after the sale but before the institution of the suit or during its pendency and before the date of the decree. This would be so by applying the well-established rule which, as stated earlier, has become a part of the law relating to pre-emption."

5. Mr. Agarwal suggested a reason to depart from the general principle of the law of pre-emption in Section 15 (1) (a). Fourthly. Counsel submitted that under the general law of pre-emption the qualification of the pre-emptor cannot be lost at the instance of the vendee whereas in the case of a tenant claiming pre-emption under Section 15 (1) (a). Fourthly of the Pre-emption Act the vendee can defeat the tenant's right of pre-emption by his own action. The reason suggested for making a distinction appears to be attractive but was not forceful enough to persuade us to take the view that the decision of this Court in Bhagwan Das's case

(AIR 1971, SC 369) requires reconsideration. The landlord could not determine the tenancy by his unilateral action under the Land Tenures Act. An order of eviction was necessary to be obtained under Section 9. The relationship of the landlord and the tenant ceases to exist between the parties after the passing of an order of ejectment against the tenant. Dispossession in execution of the order is not necessary for determination of the tenancy. In the instant case the appellants did not obtain an order of injunction in their suit to restrain the defendants from proceeding with their application for eviction. The order of injunction was confined to a restraint on dispossession. In a given case the landlord may be prevented from obtaining an order of ejectment against the tenant so that the latter's right to pre-empt the sale made in favour of the former may not be defeated. We think two views of the law may be reasonably possible on the point at issue. It is, therefore, not expedient or advisable to send this case to a larger bench for reconsideration of the view expressed in Bhagwan Das's case nor is that case distinguishable.

6. The second grievance of the appellant is to some extent justified but the submission does not stand final scrutiny. Respondents 1 and 2 had filed an application in the First Appellate Court under Order 41, Rule 27 of the Code of Civil Procedure for admitting the order of eviction dated 22-5-1967 as an additional evidence in the case. That Court rejected that application. The proper course for the High Court, therefore, was to admit the order as an additional evidence if it thought it fit in law to do so. But then, the fact that there was an eviction order was not disputed before the High Court as it appears from its judgment. Of course, the High Court was not right when it said that on the date when the land was sold a decree for ejectment against the tenant had been passed and this decree had become final in appeal. The decree was not passed on the date of sale but surely it was passed before the decree for pre-emption was made by the First Court. In the circumstances of this case therefore we are not inclined to accept the second submission made on behalf of the appellants.

7. The third point urged on behalf of the appellants is also not fit to succeed. A copy of the order of eviction passed by the Assistant Collector was incorporated in the Supplementary paper book and placed before us. The order shows that eviction was allowed from the entire land. The appellants were directed to be ejected forthwith from a portion and their actual eviction from the rest of the land

was deferred till the allotment of the surplus land. We are, therefore, of the view that the appellants did not continue to be tenants of any portion of the land sold to respondents 1 and 2 on the date the decree for pre-emption was passed in their favour. Hence the decree was not sustainable in respect of any portion of the land.

8. For the reasons stated above, we dismiss this appeal but without costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 1871

(From:— (1971) 28 STC 227 (Madras))

V. R. KRISHNA IYER, R. S. SARKARIA.
AND A. C. GUPTA, JJ.

The State of Tamil Nadu, Appellant
v. M. K. Kandaswami etc. etc., Respondents.

Civil Appeals Nos. 1040 to 1072 of 1973, D/- 15-7-1975.

(A) Tamil Nadu General Sales Tax Act (1 of 1959), Section 7-A (1) — Scope of — Ingredients of sub-section (1) — Purchase of arecanuts, turmeric, grams, gingelly and castor seeds, from agriculturists and butter from house-holders — Seeds crushed into oil and butter converted into ghee — Transport of goods outside State for sale — Goods whether liable to purchase tax under Section 7-A — (Interpretation of Statutes — Harmonious construction) — (1971) 28 STC 227 (Mad), Reversed.

Section 7-A by itself is a charging section. It is not subject to Section 3. Besides a charging section, it is a remedial provision as well. Its main object is to plug leakage and prevent evasion of tax. In interpreting such a provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute book, should be eschewed. If more than one construction is possible, that which preserves its workability and efficacy is to be preferred to the one which would render it otiose or sterile.

(Paras 26, 34)

On analysis, sub-section (1) of Section 7 breaks up into these ingredients:

(1) The person who purchases the goods is a dealer;

(2) The purchase is made by him in the course of his business;

(3) Such purchase is either from "a registered dealer or from any other person."

(4) The goods purchased are "goods the sale or purchase of which is liable to tax under this Act."

HS/HS/C838/75/VBB

(5) Such purchase is "in circumstances in which no tax is payable under Sections 3, 4 or 5 as the case may be", and

(6) The dealer either

(a) consumes such goods in the manufacture of other goods for sale or otherwise, or

(b) despatches all such goods in any manner other than by way of sale in the State, or

(c) despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce.

Section 7-A (1) can be invoked if the above ingredients are cumulatively satisfied. (Paras 14, 15)

There is no contradiction in terms between the expression "goods the sale or purchase of which is liable to tax under this Act" and the phrase "purchases in circumstances in which no tax is payable under Sections 3, 4 or 5". Such an interpretation would render Section 7-A (1) wholly nugatory. (Paras 16, 17)

Ingredients (4) and (5) are not mutually exclusive and the existence of one does not necessarily negate the other. Both can co-exist and in harmony. Ingredient (4) would be satisfied if it is shown that the particular goods were 'taxable goods', i. e., the goods the sale or purchase of which is generally taxable under the Act. Notwithstanding the goods being 'taxable goods', there may be circumstances in a given case, by reason of which the particular sale or purchase does not attract tax under Sections 3, 4 or 5. Section 7-A provides for such a situation and makes the purchase of such goods taxable in the hands of the purchasing dealer on his purchase turnover if any of the conditions (a), (b) and (c) of sub-section (1) of Section 7-A is satisfied. (Para 22)

Some of the assessee respondents (dealers) purchased arecanuts, turmeric and grams from agriculturists, and thereafter transported those goods outside the State for sale on consignment basis. Other assessee respondents purchased gingelly seeds from agriculturists and castor seeds from unregistered dealers and crushed the seeds into oil. Still other assessee respondents purchased butter from house holders and converted it into ghee. Pre-assessment proceedings were initiated or assessments were made against all the assessee dealers under Section 7-A on the purchase turnover of those goods. The pre-assessment proceedings, assessments and demand notices were challenged by the assessee under Article 226 of the Constitution.

Held that in all the cases under consideration the goods in question, namely, arecanuts, Gingelly Seeds, turmeric,

grams, castor seeds and butter are "goods, the sale or purchase of which is generally taxable under the Act." That is to say, they are 'taxable goods'. The sales of arecanuts, Gingelly seeds, turmeric and gram were not liable to tax in the hands of the sellers as they were agriculturists and the goods were the produce of the crops raised by them. Similarly, butter was purchased by the assessee concerned directly from the house-holders whose sales were not liable to tax under the Act. Castor-seeds were said to have been purchased by the assessee concerned from unregistered dealers under bought-notes. If this was a fact, then such sales might not be liable to tax under the Act. (Para 24)

Thus in all those cases, the purchases had been made by the dealers, of "goods, the sale or purchase of which is generally liable to tax under the Act", but because of the circumstances aforesaid no tax was suffered in respect of the sale of those goods by the sellers. If it was a fact that the Gingelly seeds and Caster seeds were crushed into oil and the butter was converted into Ghee by the purchaser-dealers concerned, the condition in clause (a) of sub-section (1) of Section 7-A would be satisfied and Section 7-A would be attracted. If in the case of arecanuts, turmeric and gram the purchasing dealers transported those goods outside the State for sale on consignment basis, their case would also be covered by clause (b) or (c) of Section 7-A (1) and such dealers would be liable to tax on the purchase turnover of these goods. AIR 1969 SC 1276; 1974 Tax LR 1730 (Ker). (Affirming 1972 Tax LR 2202 (Ker)). Rel. on; (1971) 28 STC 227 (Mad). Reversed. (Para 25)

Cases Referred: Chronological Paras

1974 Tax LR 1730 = 32 STC 359 (Ker) 33

1972 Tax LR 2202 = 30 STC 537 (Ker) 31

AIR 1969 SC 1276 = (1969) 3 SCR 490 27, 29

Mr. S. Govind Swaminathan, Advt. Gen., for the State of Tamil Nadu, (M/s. A. V. Rangam, Miss A. Subhashini, K. Venkataswami and N. S. Sivam, Advocates with him), for Appellant; M/s. Sen and Y. S. Chitlay, Senior Advocates, (M/s. C. Natarajan and Mrs. S. Gopalakrishnan, Advocates with them). (In C. As. Nos. 1043, 1046-1048, 1062-1064, 1068-1070, 1049-1050, 1054, 1057-1058, 1061, 1067, 1056, 1065 and 1059/73); Mr. T. A. Ramachandran, Advocate (in C. As. 1060-1061 and 1066/73), for Respondents.

Judgment of the Court was delivered by

SARKARIA, J.:— These appeals by the State of Tamil Nadu on a certificate

granted by the High Court under Article 133 (1) (c) of the Constitution raise a question as to the interpretation and scope of Section 7-A of the Madras General Sales Tax Act, 1959. (hereinafter called, the Madras Act).

2. All the respondents are dealers against whom either pre-assessment proceedings have been initiated or assessments have been made under Section 7-A of the Act on the purchase turnover of certain goods.

3. The assessee-respondents in Civil Appeals Nos. 1040, 1041, 1042 and 1044 of 1973 are said to have purchased arecanuts from agriculturists, and thereafter transported those goods outside the State for sale on consignment basis.

4. The twenty assessees in Civil Appeals Nos. 1046-48, 1054-1057, 1059-1060, 1061 to 1066, 1068 to 1072 of 1973 are alleged to have purchased Gingelly seeds from agriculturists. Gingelly seeds so purchased were crushed into oil by them.

5. The four respondents in Civil Appeals Nos. 1045, 1050, 1058 and 1067 of 1973 are alleged to have purchased butter from house-holders and then converted it into Ghee.

6. The three assessees in Civil Appeals Nos. 1051, 1052 and 1053 of 1973 purchased turmeric and grams from agriculturists and then transported those goods outside the State for sale on consignment basis.

7. The assessees in Civil Appeal No. 1043 of 1973 are alleged to have purchased castor seeds from (unregistered?) dealers on bought notes and thereafter crushed them into oil.

8. It will be convenient to take the last mentioned case as a model. Therein, the Joint Commercial Tax Officer, Leigh Bazar, and Gugai Division, Salem issued a notice dated 11-2-1970 to the assessee in these terms:

"You are liable to pay purchase tax under Section 7-A of the T. N. G. S. T. Act, 1959, on the purchase price of the Castor Seeds purchased and which was consumed in the manufacture of other goods for sales or disposed of otherwise.

The turnover of such purchases made from 27-11-1969 to 31-1-1970 amounts to Rs. 33,03,323.67 and the tax due works out to Rs. 9,099-69.

You are hereby requested to pay the amount as stated above within 10 days of the receipt of this notice."

9. This was followed by a Memorandum dated 5-3-1970 in which it was *inter alia* stated:

"Admittedly you have purchased the castor seeds through your own bought

notes from registered dealers whose transactions are not verifiable. As per Section 10 the burden of proof that any dealer or any of his transactions is not liable to tax under this Act shall lie on such dealer. Therefore, the purchases effected by you have suffered tax already, should be proved by you."

10. All the aforesaid dealers (hereafter referred to as the assessees) filed writ petitions under Article 226 of the Constitution in the High Court of Madras challenging the validity of the pre-assessment proceedings/assessments and the demand notices. The High Court accepted the contention of the assessees that "the circumstances contemplated by that provision (Section 7-A) did not include the possibility or impossibility of verifiability of the transactions with the dealers from whom the petitioner had purchased." and further observed:

".....that if the purpose of Section 7-A is as obviously it is, to check evasion, the phraseology has fallen short of achieving that purpose. Section 7-A could have detailed the circumstances in which the tax liability under Section 7-A would arise. But, instead, the circumstances have been related by the section to sales or purchases which are liable to tax under the Act, but for some reason no tax is payable in respect of them. It appears to be a contradiction in terms, and we are unable to visualise the circumstances except what we have noticed above in which Section 7-A could be applied. In fact, we are unable to visualise the circumstances in which the two-fold requirement of the sale being liable to tax but for some reason no tax is payable under Sections 3, 4 or 5 can arise, except in cases of exemption. Even there the difficulty arises whether one can say that the sale which is exempted is liable to tax, and then assume that because of exemption, the tax is not payable. To our minds the language of Section 7-A is far from clear as to its intention, and we think that the Joint Commercial Tax Officer was not justified in invoking S. 7-A."

11. With regard to the purchases of butter, the learned Judges said:

"We fail to see how this could be done under Section 7-A. Butter is taxable to multi-point tax and is levied on the sales. That being the case, we do not understand how purchase tax can also be levied at the purchase point of the sales which were also the subject-matter of charge. If the purchases were made from householders or other persons who are not dealers, even so, inasmuch as the transactions were not liable to tax at all under the Act, on that ground, S. 7-A could not be invoked."

12. On the above reasoning, the High Court by a common judgment, dated 27-5-1971, allowed all the writ petitions and quashed the impugned proceedings and assessments. Hence these appeals by the State.

13. Section 7-A was inserted by the Tamil Nadu Amendment Act 2 of 1970 with effect from 27-11-1969. At the relevant time the material part of S. 7-A read as under:

"(1) Every dealer who in the course of his business purchases from a registered dealer or from any other person, any goods (the sale or purchase of which is liable to tax under this Act) in circumstances in which no tax is payable under Sections 3, 4 or 5, as the case may be, and either,—

(a) consumes such goods in the manufacture of other goods for sale or otherwise; or

(b) disposes of such goods in any manner other than by way of sale in the State; or

(c) despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State, trade or commerce,

shall pay tax on the turnover relating to the purchase aforesaid at the rate mentioned in Sections 3, 4 or 5 as the case may be whatever be the quantum of such turnover in a year:

Provided that a dealer (other than a casual trader or agent of a non-resident dealer) purchasing goods (the sale of which is liable to tax under sub-sec. (1) of Section 3 shall not be liable to pay tax under this sub-section, if his total turnover for a year is less than twentyfive thousand rupees.

(2)

(3)

14. On analysis, sub-section (1) breaks up into these ingredients:

(1) The person who purchases the goods is a dealer;

(2) The purchase is made by him in the course of his business;

(3) Such purchase is either from "a registered dealer or from any other person,

(4) The goods purchased are, goods the sale or purchase of which is liable to tax under this Act."

(5) Such purchase is "in circumstances in which no tax is payable under Sections 3, 4 or 5 as the case may be," and

(6) The dealer either

(a) consumes such goods in the manufacture of other goods for sale or otherwise or

(b) despatches all such goods in any manner other than by way of sale in the State or

(c) despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce.

15. Section 7-A (1) can be invoked if the above ingredients are cumulatively satisfied. The Proviso to the sub-section exempts a dealer (other than a casual trader or agent of a non-resident dealer), if his turnover for a year is less than Rs. 25,000/- (which by a subsequent amendment was raised to Rs. 50,000/-).

16. The assesses prima facie fall within the definition of 'dealer' in Section 2 (g) which includes not only a person who carries on the business of "selling, supplying or distributing" goods but also the one who carries on the business of "buying" only. Difficulty in interpretation has been experienced only with regard to that part of the sub-section which relates to ingredients (4) and (5). The High Court has taken the view that the expression "goods the sale or purchase of which is liable to tax under this Act" and the phrase "purchases in circumstances in which no tax is payable under Sections 3, 4 or 5," are "a contradiction in terms".

17. We are unable to accept this interpretation which would render Section 7-A (1) wholly nugatory. With due respect, it seems to us that in arriving at this erroneous interpretation, the learned Judges mixed up concept of goods liable to tax with the transactions liable to tax under the Act. The scheme of the Act involves three inter-related but distinct concepts which may conveniently be described as 'taxable person', 'taxable goods' and 'taxable event'. All the three must be satisfied before a person can be saddled with liability under the Act. Nevertheless, the distinction between them, if overlooked, may lead to serious error in the construction and application of the Act. 'Goods' is defined in S. 2 (f) as:

"all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities) and includes all materials, commodities, and articles (including those to be used in the fitting out, improvement or repair of movable property); and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale".

18. "Taxable person" is a 'dealer' as defined in S. 2 (g). "Taxable event" is the 'sale or purchase of goods' effected during the accounting period although the tax liability is enforced only after quantification is effected by assessment proceedings. 'Sale' is defined in S. 2 (n) as:

"every transfer of the property in goods by one person to another in the course of

business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge."

19. Section 3 (2) which is the main charging provision, enjoins that in the case of goods mentioned in the First Schedule, the tax under this Act shall be payable by a dealer, at the rate and only at the point specified therein on the turnover in each year relating to such goods whatever be the quantum of turnover in that year.

20. The focal point in the expression, "goods the sale or purchase of which is liable to tax under the Act," is the character and class of goods in relation to their exigibility. In a way this expression contains a definition of 'taxable goods', that is, goods mentioned in the First Schedule of the Act, the sale or purchase of which is liable to tax at the rate and at the point specified in the Schedule. The words, "the sale or purchase of which is liable to tax under the Act" qualify the term "goods", and exclude by necessary implication goods the sale or purchase of which is totally exempted from tax at all points, under Section 8 or Section 17 (1) of the Act. The goods so exempted — not being "taxable goods" — cannot be brought to charge under Section 7-A.

21. The words "under the Act" will evidently include a charge created by Section 7-A, also. It is to be noted that Section 7-A is not subject to Section 3; it is by itself a charging provision. Section 7-A brings to tax goods the sale of which would normally have been taxed at some point in the State, subsequent to their purchase by the dealer if those goods are not available for taxation, owing to the act of the dealer in (a) consuming them in the manufacture of other goods or sale or otherwise, or (b) despatching them in any manner other than by way of sale in the State, or (c) despatching them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce.

22. Ingredients (4) and (5) are not mutually exclusive and the existence of one does not necessarily negate the other. Both can co-exist in harmony. Ingredient (4) would be satisfied if it is shown that the particular goods were 'taxable goods', i.e., the goods the sale or purchase of which is generally taxable under the Act. Notwithstanding the goods being 'taxable goods', there may be circumstances in a given case, by reason of which the particular sale or purchase does not attract tax under Sections 3, 4 or 5. Section 7-A provides for such a situation and makes the purchase of such

goods taxable in the hands of the purchasing dealer on his purchase turnover if any of the conditions (a), (b) and (c) of sub-section (1) of Section 7-A is satisfied.

23. The meaning and scope of the phrase "purchases.....in circumstances in which no tax is payable under Sections 3, 4 or 5" and its co-existence with ingredient (4) can be best understood by applying it to the cases in hand.

24. In all the forty appeals under consideration, the goods in question, namely, arecanuts, Gingelly Seeds, turmeric, grams, castor-seeds and butter are "goods, the sale or purchase of which is generally taxable under the Act." That is to say, they are 'taxable goods'. The sales of arecanuts, Gingelly seeds, turmeric and gram were not liable to tax in the hands of the sellers as they were agriculturists and the goods were the produce of the crops raised by them. Similarly, butter was purchased by the assessee concerned directly from the house-holders whose sales are not liable to tax under the Act. Castor-seeds are said to have been purchased by the assessee concerned from unregistered dealers under bought-notes. If this is a fact, then such sales may not be liable to tax under the Act.

25. Thus in all these cases, the purchases have been made by the dealers, of "goods, the sale or purchase of which is generally liable to tax under the Act", but because of the circumstances aforesaid no tax was suffered in respect of the sale of these goods by the sellers. If it is a fact that the Gingelly seeds (vide, Civil Appeals Nos. 1046 to 1048, 1054 to 1057, 1059 to 1069/1973) and Castor-seeds (vide Civil Appeal 1043/73) were crushed into oil and the butter (vide Civil Appeals Nos. 1049, 1050, 1058, 1067/73) was converted into Ghee by the purchasers-dealers concerned, the condition in clause (a) of sub-section (1) of Section 7-A would be satisfied and Section 7-A would be attracted. If in the case of arecanuts (vide Civil Appeals Nos. 1040 to 1044/73), turmeric and gram (vide Civil Appeals Nos. 1051 to 1953/73), the purchasing dealers transported these goods outside the State for sale on consignment basis, their case would also be covered by clause (b) or (c) of Section 7-A (1) and such dealers would be liable to tax on the purchase-turnover of these goods.

26. It may be remembered that Section 7-A is a charging as well as a remedial provision. Its main object is to plug leakage and prevent evasion of tax. In interpreting such a provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute book, should be eschewed. If more than one construction is possible, that which preserves its workability, and

efficacy is to be preferred to the one which would render it otiose or sterile. The view taken by the High Court is repugnant to this cardinal canon of interpretation.

27. In *Ganesh Prasad Dixit v. Commr. of Sales Tax*, (1969) 3 SCR 490 = (AIR 1969 SC 1276), Section 7 of the Madhya Pradesh General Sales Tax Act, 1959 (for short, Madhya Pradesh Act) was under challenge. That section was as follows:

"Every dealer who in the course of his business purchases any taxable goods, in circumstances in which no tax under Section 6 is payable on the sale price of such goods and either consumes such goods in the manufacture of other goods for sale or otherwise or disposes of such goods in any manner other than by way of sale in the State or despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce, shall be liable to pay tax on the purchase price of such goods at the same rate at which it would have been leviable on the sale price of such goods under Section 6:

Provided"

28. The assessee therein was a firm of building contractors and were registered as a dealer under the Madhya Pradesh Act. The firm were purchasing building materials which were taxable under the Act and were using them in the course of their business. The Sales Tax Officer served a notice upon them to show cause why 'best-judgment assessment' should not be made against them. The assessee did not offer any explanation. The Sales Tax Officer assessed the turnover in respect of the sales as 'nil' and assessed the firm to purchase tax under Section 7 on the purchase turnover. One of the questions that fell for decision was, whether in the facts and circumstances of the case the applicant was a dealer during the assessment period under the Act and the imposition of purchase tax on him under Section 7 of the Act was in order. Answering the question in the affirmative, this Court observed:

"The phraseology used in that section is somewhat involved, but the meaning of the section is fairly plain. Where no sales tax is payable under Section 6 on the sale price of the goods, purchase tax is payable by the dealer who buys taxable goods in the course of his business, and (1) either consumes such goods in the manufacture of other goods for sale, or (2) consumes such goods otherwise; or (3) disposes of such goods in any manner other than by way of sale in the State; or (4) despatches them to a place outside the State except as a direct result of sale or

purchase in the course of inter-State trade or commerce. The assessee is registered as a dealer and they have purchased building materials in the course of their business; the building materials are taxable under the Act, and the appellants have consumed the materials otherwise than in the manufacture of goods for sale and for a profit motive. On the plain words of Section 7 the purchase price is taxable."

29. The impugned Section 7-A is based on Section 7 of the Madhya Pradesh Act. Although the language of these two provisions is not completely identical, yet their substance and object are the same. Instead of the longish phrase, "the goods, the sale or purchase of which is liable to tax under this Act" employed in Section 7-A of the Madras Act, Section 7 of the Madhya Pradesh Act conveys the very connotation by using the convenient, terse expression, "taxable goods". The ratio decidendi of *Ganesh Prasad*, (1969) 3 SLR 490 = (AIR 1969 SC 1276) (supra) is therefore, an apposite guide for construing Section 7-A. Unfortunately, that decision, it seems, was not brought to the notice of the learned Judges of the High Court.

30. Section 5-A of the Kerala General Sales Tax Act, 1963 (for short, the Kerala Act) which is identical with the impugned provision, runs thus:

"5-A. Levy of purchase tax—

(1) Every dealer who in the course of his business purchases from a registered dealer or from any other person any goods, the sale or purchase of which is liable to tax under this Act, in circumstances in which no tax is payable under Section 5, and either—

(a) consumes such goods in the manufacture of other goods for sale or otherwise; or

(b) disposes of such goods in any manner other than by way of sale in the State; or

(c) despatches them to any place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce."

31. The validity of Section 5-A was challenged by a writ petition before a learned Judge (Subramaniam Poti, J.) of the Kerala High Court in *Malabar Fruit Products Company, Bharananganam Kottayam v. The Sales Tax Officer, Palai*, 30 STC 537 = (1972 Tax LR 2202) (Ker). It was contended, inter alia:

(1) The object sought to be achieved by the introduction of Section 5-A of the Act had not been accomplished because the section is vague;

(2) Assuming that the section is clear enough and can be treated as a charging

section, the section imposes tax not on the sale or purchase of goods but on its use or consumption;

(3) That the State Legislature had no competency to impose tax on the use and consumption of goods and so section is ineffective;

32. Holding that Section 5-A was valid and intra vires the State Legislature, the learned Judge explained the scheme of the section, thus:

"Though normally a sale by a registered dealer or by a dealer attracts tax, there may be circumstances under which the seller may not be liable as, for example, when his turnover is below the specified minimum. In such cases the 'goods' are liable to be taxed, but the sales take place in circumstances in which no tax is payable at the point at which tax is levied under the Act. If the goods are not available in the State for subsequent taxation by reason of one or other of the circumstances mentioned in clauses (a), (b) and (c) of Section 5-A (1) of the Act then the purchaser is sought to be made liable under Section 5-A."

... ..
 "Another instance I can conceive of is a case of a dealer selling agricultural or horticultural produce grown by him or grown in any land in which he has interest, whether as owner, usufructuary mortgagee, tenant or otherwise. From the definition of 'turnover' in Section 2 (xxvii) of the Act it is evident that the proceeds of such sale would be excluded from the turnover of a person who sells goods produced by him by manufacture, agriculture, horticulture or otherwise, though merely by such sales he satisfies the definition of a 'dealer' in the Act. Thus, such a person selling such produce is treated as a dealer within the meaning of the Act and the sales are of goods which are taxable under the Act but when he sells these goods, it is not part of his turnover. Therefore, it is a case of a dealer selling goods liable to tax under the Act in circumstances in which no tax is payable under the Act. In such a case, the purchaser is sought to be taxed under Section 5-A provided the conditions are satisfied. The case of growers selling goods to persons to whom Section 5-A thus applies is covered by this example."

33. The judgment of the learned Judge was affirmed in appeal by a Division Bench of the same High Court (vide, Yusuf Shabeer v. State of Kerala, 32 STC 359 = (1974 Tax LR 1730) (Ker). The Bench expressly dissented from the view taken by the Madras High Court in the judgment now under appeal.

34. In our opinion, the Kerala High Court has correctly construed Section 5-A of the Kerala Act which is in

pari materia with the impugned S. 7-A of the Madras Act. "Goods the sale or purchase of which is liable to tax under this Act in Section 7-A (1)" means 'taxable goods', that is, the kind of goods, the sale of which by a particular person or dealer may not be taxable in the hands of seller but the purchase of the same by a dealer in the course of his business may subsequently become taxable. We have pointed out and it needs to be emphasised again that Section 7-A itself is a charging section. It creates a liability against a dealer on his purchase turnover with regard to goods, the sale or purchase of which though generally liable to tax under the Act, have not due to the circumstances of particular sales, suffered tax under Sections 3, 4 or 5, and which after the purchase, have been dealt by him in any of the modes indicated in clauses (a), (b) and (c) of Section 7-A (1).

35. For the foregoing reasons, we allow these appeals, set aside the judgment of the High Court and dismiss the writ petitions. In the circumstances, we would leave the parties to bear their own costs. All the cases will now go back to the taxing authority concerned for such further investigation, proceedings or action as may be necessary in the particular case, in accordance with law as clarified above.

Appeals allowed.

AIR 1975-SUPREME COURT 1877

N. L. UNTWALIA AND

S. MURTAZA FAZL ALI, JJ.

Krishna Murari Aggarwala, Petitioner v. The Union of India and others, Respondents.

Writ Petn. No. 84 of 1975 D/- 15-7-1975.

(A) Supreme Court Rules (1966), O. 21. R. 5 — Affidavits filed by Government — Duty of officers.

The Government Officers should be careful to see that incorrect affidavits are not filed before Supreme Court, which may create unnecessary confusion and controversy and make a simple issue so very much involved. (Para 2)

(B) Maintenance of Internal Security Act (1971), Section 3 (1) (a) (iii) — Mere stocking of huge quantity of light diesel oil without licence — No disruption of distribution of essential supplies — Mere commission of offence will not attract the Act.

Mere allegation in grounds of detention that the detenu has stocked huge quantity of light diesel oil without wait-

HS/HS/C743/75/SSG

ing for the licence to be cleared by the Chief Controller of Explosives will not by itself show that there is any disruption of distribution of the essential supplies to the community, when there is nothing to show that the detenu has refused to sell light diesel oil to any body who requires it. Mere commission of an offence at a private place or a violation of a provision of law by itself does not attract the Act unless by the act committed by the detenu the essential supplies to the community are disrupted or even flow of the life of the community is disrupted. Thus, such grounds are not in any way germane or relevant to the disruption of maintenance of essential supplies to the community. AIR 1973 SC 295. Followed.

(Para 3)

(C) Maintenance of Internal Security Act (1971), Section 3 (1) (a) (iii) — Detenu, dealer in diesel oil — Cash memos for sale of huge quantity of light diesel oil not disclosing names and addresses of customers — Sales held to be fictitious with a view to hoard diesel oil — By conduct of detenu, persons in genuine need of such oil were deprived of the same.

(Para 4)

(D) Maintenance of Internal Security Act (1971), Section 3 — Detention order — Out of two grounds, one is vague and irrelevant — Entire order suffers from serious infirmity and must be quashed.

(Para 4)

(E) Constitution of India, Article 32 — Maintenance of Internal Security Act (1971), Section 3 — Detention under — Subjective satisfaction of detaining authority — Supreme Court cannot go behind it — Exception. (Maintenance of Internal Security Act (1971), S. 3).

It is true that the Court cannot go behind the subjective satisfaction of the detaining authority, but such satisfaction does not confer blanket power which may authorise the detaining authority to act in a ruthless or arbitrary fashion and the subjective satisfaction of the detaining authority can be tested on the touchstone of objectivity. It is obvious that the subjective satisfaction of the detaining authority is a *sine qua non* for the exercise of power of detention and it has got to be exercised properly and discretely. So, the Supreme Court can always examine whether the requisite satisfaction is arrived at by the authority; if it is not, the condition precedent to the exercise of the power will not be fulfilled and the exercise of the power will be bad. AIR 1975 SC 550. Followed. (Para 6)

Where in case of detention of a dealer of light diesel oil it was not clear at all as to who out of the two detaining authorities passed the detention order and who was satisfied regarding the sufficiency of

the grounds, it was not possible to determine as to who in fact made the order of detention. In such circumstances, the exercise of jurisdiction to detain the detenu had not been made with due care and caution or in a proper and fair manner and the detention order as such was vitiated. Hence, it must be quashed.

(Para 6)

(F) Maintenance of Internal Security Act (1971), Section 3 — Detention under — Exercise of power — Mode.

The words "make an order directing that such person be detained" clearly postulate three conditions— (i) that the order must be made by the authority mentioned in Section 3; (ii) that the order must be duly signed by the said authority; and (iii) that only one authority and one authority alone can pass such order of detention. The statute does not contemplate a sort of composite or a joint order passed by several authorities. Unless the order made and the grounds prepared are signed by the authority concerned, the order is not made as contemplated by Section 3 of the Act. Furthermore, since the order is based on grounds to be served on the detenu, the order of detention can be passed only if the grounds are in existence and are prepared contemporaneously, otherwise the order of detention becomes purely illusory.

(Para 7)

Cases Referred: Chronological Paras
AIR 1975 SC 550 = 1975 Cri LJ 446 6
AIR 1973 SC 295 = 1973 Cri LJ 401 3

Mr. A. K. Sen, Sr. Advocate (M/s. D. N. Mukherjee, Narayan Gupta and G. S. Chatterjee, Advocates, with him), for Petitioners; Mr. Girish Chandra, Advocate (for No. 1) and Mr. D. P. Uniyal, Sr. Advocate (Mr. O. P. Rana, Advocate with him) (for Nos. 2-5), for Respondents.

Judgment of the Court was delivered by

S. M. FAZL ALI, J.:— By an order dated November 8, 1974 passed by the District Magistrate, Badaun, the petitioner was detained under Section 3 (1) (a) (iii) of the Maintenance of Internal Security Act, 1971 — hereinafter referred to as 'the Act' — because the allegations made in the grounds of detention disclosed that he had committed acts prejudicial to the maintenance of supplies and services essential to the community. The grounds of the order of detention were served on the petitioner by the District Magistrate, Badaun, on November 13, 1974. The State Government approved the order of detention on November 19, 1974 and made a report to the Government of India on November 22, 1974. According to the respondents, the Government of U. P. had made a reference to the Advisory Board

constituted under the Act on November 22, 1974 but as it had not received the representation from the petitioner, the same was forwarded later. The representation, according to the respondents, was received on November 28, 1974 which was rejected on December 6, 1974. The representation was sent to the Advisory Board on December 18, 1974 which gave its report holding that the grounds were sufficient for detention of the petitioner and after receipt of the opinion of the Advisory Board on January 7, 1975 the order of detention was finally confirmed by the Government on January 17, 1975.

2. We might mention at the very outset that there was some controversy on two points before us. In the first place the petitioner did not accept the stand of the Government that the reference to the Advisory Board was made on November 22, 1974, but relied on a counter-affidavit filed by Mr. S. K. D. Mathur, the then District Magistrate of Badaun, in this Court to support his plea that the reference to the Advisory Board was made on December 20, 1974 vide para. 2 (vi) of the counter-affidavit appearing at page 118 of the Paper Book. It was therefore contended by the learned counsel for the petitioner that as the reference was made to the Advisory Board beyond the period mentioned in Section 10 of the Act, there being a violation of the mandatory provision of the statute, the order of detention fell on this ground alone. We gave an opportunity to the Government to produce before us materials to show the exact position and from the original file produced before us we find that the counter-affidavit filed by Mr. S. K. D. Mathur in this Court to the effect that the reference was made to the Advisory Board on December 20, 1974 was factually incorrect and that the reference was really made on November 22, 1974 by the Government by virtue of letter No. 107/2/48/74. The file also contains a letter of the Registrar dated January 7, 1975 forwarding the opinion of the Advisory Board wherein also it was mentioned that the reference was made on November 22, 1974. In view of these cogent materials Mr. Sen learned counsel for the petitioner did not choose to press this point. We cannot, however, leave this matter without expressing our strong disapprobation on the careless and irresponsible manner in which the counter-affidavit has been filed by the respondents, particularly by Mr. S. K. D. Mathur who happened to be the then District Magistrate, Badaun. We hope the Government will be careful in future and see that such incorrect affidavits are not filed before this Court, which may create unnecessary confusion and controversy and make a simple issue so very much involved.

3. The petitioner was admittedly a partner of the firm called Bharat Oil Company which was dealing in the storage and sale of high speed diesel oil since 1965. According to the petitioner the business was started at Badaun and Ujhani but later a branch was opened at Bareilly and the firm transferred its headquarters to Bareilly in 1971. We are not, however, concerned with the business at Bareilly in this case. Under the Petroleum Act, 1934, the petitioner could have carried on his business only after obtaining a licence from the prescribed authority. The District Authorities could grant licence only to the extent of 22,000 litres but if the dealer wanted to store high speed diesel oil to the extent of more than 22,000 litres he had to get a licence from the Chief Controller of Explosives, Nagpur. The petitioner's further case is that as high speed diesel oil ran in short supply, the Indian Oil Corporation and the District authorities impressed on the dealers the necessity of keeping light diesel oil which was available in sufficient quantities and was necessary for running crushers and pumps in the rural areas. The petitioner had undoubtedly secured a licence for storage of light diesel oil which was valid upto March 31, 1975 and had applied for renewal of the licence thereafter and had also complied with all the necessary formalities about no objection and the safety certificate to be given by the District Authorities. But on the date in question the licence of the petitioner had not been renewed so far. We might mention in this connection that the stand taken by the respondents is that although the petitioner had a licence to store light diesel oil to the extent of 22,000 litres he did not possess any licence for storing it at Ujhani. It appears that the godown of the petitioner was searched by the excise authorities on October 17, 1974 and November 5, 1974 and on inspection of the godown about 1.64 lakhs litres of light diesel oil was found stored at Ujhani. The stock register was produced by the petitioner before the authorities which appeared to be in order and there is no allegation that there was any manipulation or interpolation in the stock register. Thus the simple allegation against the petitioner is that he had stocked huge quantity of light diesel oil without waiting for the licence to be cleared by the Chief Controller of Explosives at Nagpur. This forms the subject-matter of the allegations mentioned in grounds (1) (a) and (b) of the grounds of detention served on the petitioner. The sheet-anchor of the argument of Mr. Sen learned counsel for the petitioner was that in so far as ground No. (1) was concerned it was wholly irrelevant and totally unconnected with the nexus of the Act, because even if the

grounds be taken at their face value they did not disrupt or disturb the essential supplies to the community. Before dealing with this contention it may be necessary to quote in extenso the grounds mentioned in (1) (a) and (b) of the detention order:

"(1) That you a partner in the firm named Bharat Oil Company, Mohalla Ayodhya Nagar, Ujhani District Badaun, on Bareilly-Mathura Road, authorised only to deal in High Speed Diesel and Motor Spirit were found hoarding Light Diesel Oil, without having obtained a licence for the same from the Chief Controller of Explosives, Nagpur as is evident from the following:—

(a) On 17-10-1974 at about 4 P. M. the premises of your aforesaid firm was inspected by Sri S. N. Pandey, District Excise Officer, Badaun and it was found that in the underground tanks within the premises mentioned aforesaid 96,000 litres of Light Diesel Oil was stored, for which no licence could be produced on demand by the District Excise Officer aforesaid and thereafter a complaint has also been lodged in the Court of the Chief Judicial Magistrate, Badaun by the District Excise Officer on 8-11-1974.

(b) On 5-11-1974 the premises of your aforesaid firm Bharat Oil Company, Ujhani, was again inspected at about 4.15 P. M. by Sri N. N. Verma S. D. M. Badaun accompanied by District Excise Officer Badaun and Sri Fateh Singh, Dy. S. P. Badaun and it was found that 68,000 litres of Light Diesel Oil had during 17th October 1974 to the time of this inspection been added to the store kept by you of the said Light Diesel Oil of 96,000 litres, in three underground tanks within the premises mentioned aforesaid and no licence could be produced on demand by the S. D. M. Badaun. For this also, a complaint has been lodged by the S. D. M. Badaun in the Court of Judicial Magistrate II, Badaun on 8-11-1974."

Analysing these grounds it would appear that there is no allegation by the detaining authority that by storing the huge quantity of light diesel oil the petitioner had in any way affected the distribution or sale of that commodity, nor is there any allegation to show that the petitioner had refused to sell light diesel oil to anybody who required it. The High Court who was moved in the first instance for a writ of habeas corpus appears to have drawn an inference based purely on speculation that the petitioner had transferred huge quantities of light diesel oil from his depot at Badaun to his godown at Ujhani. There is, however, no material on the basis of which the High Court could have drawn such an inference.

There is, however, no suggestion, far less any allegation, in these grounds that the petitioner had tried to divert his stocks of light diesel oil from Badaun to Ujhani and thereby deprived the people of Badaun of their share of the light diesel oil. In these circumstances, therefore, we are satisfied that there is absolutely no correlation between the act of the petitioner and the disruption of distribution of the essential supplies to the community. The learned counsel appearing for the respondents submitted that by storing such huge quantities of light diesel oil in Ujhani the petitioner has committed a clear violation of the mandatory provisions of the Petroleum Act and the Rules made thereunder and must be presumed to have disrupted the essential supplies because light diesel oil had been declared by the order of the Government of U. P. to be an essential commodity. We are, however, unable to agree with this argument. Mr. Sen appearing for the petitioner does not dispute that the light diesel oil was an essential commodity, but his argument was that he has in no way tried to disrupt the essential supplies of this commodity and he merely committed a technical offence in storing the quantities of light diesel oil in anticipation of the licence which had been cleared by the District Authorities and which awaited the sanction of the Chief Controller of Explosives, Nagpur and which would have in normal routine been granted. It is also admitted in the ground itself that a complaint had been lodged in the Court of the Chief Judicial Magistrate against the petitioner for the storage. We have already held in several cases that the commission of an offence at a private place or a violation of a provision of law by itself does not attract the Act unless by the act committed by the petitioner the essential supplies to the community are disrupted or even flow of the life of the community is disrupted. Reading grounds (1) (a) and (b) we are unable to hold that they are in any way germane or relevant to the disruption of maintenance of essential supplies to the community. In *Manu Bhusan Roy Prodhon v. State of West Bengal*, AIR 1973 SC 295 = (1973 Cri LJ 401) this Court observed as follows:

"This kind of a solitary assault on one individual, which may well be equated with an ordinary murder which is not an uncommon occurrence, can hardly be said to disturb public peace or place public order in jeopardy, so as to bring the case within the purview of the Act. It can only raise a law and order problem and no more; its impact on the society as a whole cannot be considered to be so extensive, widespread and forceful as to disturb the normal life of the community

thereby rudely shaking the balanced tempo of the orderly life of the general public. This ground is, therefore, not at all relevant for sustaining the order of detention for preventing the petitioner from acting in a manner prejudicial to the maintenance of public order."

The ratio of this case fully tallies with the facts of the present case where also grounds (1) (a) and (b) taken at their face value appear to be irrelevant and do not disclose any causal connection with the disruption of the essential supplies to the community.

4. We now take up the other ground, namely, ground No. (2), which is as follows:

"(2) That you as partner of the firm M/s. Bharat Oil Company located at Badaun licensed at Badaun to deal with Light Diesel Oil and required by Rule 9 (1) of the U. P. Essential Commodities (Price Display and Control of Supply and Distribution) Order, 1971, as amended by Second Amendment dated June 13, 1973 framed under Rule 114 (2) of the Defence of India Rules, 1971 to issue to every purchaser a correct receipt showing, inter alia, the name and address of the customer were found to have sold Light Diesel Oil repeatedly without complying with the said requirement and with the object made fictitious sale of the Light Diesel Oil a scheduled commodity within the meaning of the said order, as is evident from the following:

- | | |
|--|---|
| (i) Cash Memo No. 62
dated 8-8-1974 | |
| (ii) Cash Memo No. 63
dated 14-8-1974 | |
| (iii) Cash Memo No. 134
dated 7-10-1974 | |
| (iv) Cash Memo No. 135
dated 7-10-1974 | Name and
address
of the
customer |
| (v) Cash Memo No. 145
dated 7-11-1974 | not
given." |
| (vi) Cash Memo No. 146
dated 7-11-1974 | |

This ground no doubt discloses a clear overt act on the part of the petitioner from which an inference can be drawn that the petitioner had made a number of fictitious sales. The details of the cash memos by which the sales had been made have also been given but the cash memos do not disclose the names and addresses of the customers, as required by the rules. The petitioner has himself admitted in paragraph 13 of his petition filed in this Court that there had been a violation of the U. P. Sale of Motor Spirit Taxation Act and the Rules made thereunder but he sought to explain the omission on the ground that it was due to the mistake of the Munim and the quantities alleged to have been sold were actually purchased by the petitioner himself for the use of

the pumps in his own agricultural farm. This explanation does not appear to be convincing at all. From the file produced before us by the respondents it appears that the total amount of sale of light diesel oil under these cash memos mentioned in the ground comes to 21,500 litres. We find it impossible to believe that the petitioner would consume such a huge quantity of light diesel oil for his personal agricultural farms particularly when the petitioner had given no details of the number of farms and other machines for which this oil was said to be used. In these circumstances there can be no doubt that these were fictitious sales made by the petitioner with a view to hoard light diesel oil and by his conduct the persons who were in genuine need of light diesel oil were deprived of the same. Ground No. 2, therefore, is quite specific, but the difficulty is that in view of our finding that ground No. (1) is irrelevant it is not possible to determine as to what extent the subjective satisfaction of the detaining authority was influenced or affected by Ground No. (1) which has been found by us to be extraneous and irrelevant. It has been held by us in several cases that where out of two grounds one ground is vague or irrelevant, then the entire order of detention falls to the ground. In this view of the matter the order of detention suffers from this serious infirmity and must be quashed.

5. Secondly it was argued by the learned counsel for the petitioner that on the materials produced before us the subjective satisfaction of the detaining authority has also not been established. To begin with it is not clear at all as to who passed the order of detention and who was satisfied regarding the sufficiency of the grounds. In the second place the grounds appear to have been served by Mr. R. C. Arora the permanent District Magistrate of Badaun who has also signed the same which shows that he was the detaining authority also. On a consideration of these two points we are of the opinion that the contention of the learned counsel for the petitioner is well founded and must prevail. Coming to the first point we find that Mr. S. K. D. Mathur has clearly alleged in his counter-affidavit that Mr. R. C. Arora the permanent District Magistrate of Badaun had proceeded on leave from October 21, 1974 to November 11, 1974 and during his absence the deponent S. K. D. Mathur was acting as the District Magistrate of Badaun. It is further stated in the affidavit that Mr. R. C. Arora rejoined his duty on November 12, 1974 and took charge of his office. The order of detention, however, appears to have been passed while Mr. S. K. D. Mathur was officiating as District Magis-

trate of Badaun and Mr. Mathur makes no secret of the fact that the order of detention was passed by him after being satisfied of the grounds of detention. In the counter-affidavit submitted by Mr. S. K. D. Mathur before the High Court, which is Annexure D at p. 66 of the Paper Book Mr. Mathur categorically stated that he himself had passed the detention order after recording his satisfaction. In this connection paragraph 1 of the counter-affidavit before the High Court is as follows:

"That the deponent was District Magistrate, Badaun on 8-11-1974, and he has passed the detention order against the petitioner after being fully satisfied that the petitioner was acting in a manner prejudicial to the maintenance of supplies and services essential to the community and as such he is well acquainted with the facts deposed to below."

This allegation is reiterated and over-emphasised in paragraph 34 of the same affidavit wherein Mr. Mathur makes a categorical averment which is as follows:

"..... the deponent submits that in his capacity as the District Magistrate he was fully competent to make the impugned order of detention. The deponent further submits that on the basis of the evidence and the material placed before him, to which he has referred above he was personally and fully satisfied as to the existence of sufficient basis to make the impugned order with a view to prevent the petitioner from indulging in activities prejudicial to the maintenance of essential services and supplies."

In this very affidavit Mr. Mathur goes on to state that he had also framed draft of the grounds on November 8, 1974 and that Shri R. C. Arora who took over on November 12, 1974 served these grounds on the petitioner which were drawn by the deponent Mr. S. K. D. Mathur. In this connection the averment runs as follows:

"Sri R. C. Arora took over charge on November 12, 1974 and under his signature Sri Arora served these same grounds which the deponent had earlier drawn upon the petitioner."

According to the clear and categorical averments made by Mr. S. K. D. Mathur in his affidavit before the High Court the only role which was assigned to Mr. R. C. Arora the permanent District Magistrate was that he signed the grounds and served them on the detenu. In other words, according to Mr. S. K. D. Mathur Mr. R. C. Arora was merely the serving officer and did not perform any other function in so far as the order of detention passed against the petitioner was concerned and yet this officer is imprudent enough to allege in paragraph 25 of the counter-

affidavit filed in this Court that the order of detention was passed not only by him but by the two detaining authorities, namely, Mr. R. C. Arora and Mr. S. K. D. Mathur. In this connection Mr. Mathur averred as follows:

"That the order of detention was passed by the detaining authorities after they had fully satisfied themselves about the existence of the grounds."

It would thus appear from this averment that the order of detention was not passed by one single person but by more than one person and taking the facts mentioned by the deponent it would appear that the order of detention appears to have been passed in two stages — in the first instance by Mr. S. K. D. Mathur who was full-fledged District Magistrate on November 8, 1974 when the order of detention was passed, but who according to his own statement had first prepared a draft of the grounds. The order of detention was then signed by Mr. R. C. Arora on November 13, 1974 and served on the detenu. While Mr. S. K. D. Mathur took the clearest possible stand before the High Court that he alone had made the order of detention and he alone was satisfied about the sufficiency of the grounds, but in his affidavit before this Court he seems to suggest that there were two detaining authorities both of whom were satisfied. This shows the casual and cavalier manner in which the order of detention against the petitioner appears to have been passed in this case. Even if the order had been made by Mr. S. K. D. Mathur and signed by him, there could have been no objection in Mr. R. C. Arora serving the grounds on the petitioner, because the law does not require that the person who actually signs the order or the grounds must also serve the same on the detenu. But in this case it is not possible to determine as to who in fact made the order of detention.

6. It is true that the Court cannot go behind the subjective satisfaction of the detaining authority, but such satisfaction does not confer a blanket power which may authorise the detaining authority to act in a ruthless or arbitrary fashion and the judicial decisions have undoubtedly carved out an area, though limited, within which the subjective satisfaction of the detaining authority can be tested on the touchstone of objectivity. It is obvious that the subjective satisfaction of the detaining authority is a sine qua non for the exercise of power of detention and it has got to be exercised properly and discreetly. In *Khudiram Das v. State of West Bengal*, AIR 1975 SC 550 = (1975 Cri LJ 446) this Court made the following observations:

"The basic postulate on which the Courts have proceeded is that the subjective satisfaction being a condition precedent for the exercise of the power conferred on the executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority; if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad."

In the instant case, in view of the contradictory stand taken by the detaining authorities, we are satisfied that the exercise of jurisdiction to detain the petitioner has not been made with due care and caution or in a proper and fair manner. On this ground also the order of detention stands vitiated.

7. Section 3(1) of the Act runs thus:

"3. (1) The Central Government or the State Government may,—

(a) if satisfied with respect to any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to—

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India;

it is necessary so to do, make an order directing that such person be detained." This power can also be exercised by the officers mentioned in sub-section (2), and in the instant case we are concerned with the District Magistrate. The words "make an order directing that such person be detained" clearly postulate three conditions— (i) that the order must be made by the authority mentioned in Section 3; (ii) the order must be duly signed by the said authority; and (iii) that only one authority and one authority alone can pass such order of detention. The statute does not contemplate a sort of composite or a joint order passed by several authorities. In the instant case the original order of detention passed by Mr. S. K. D. Mathur bears his signature and even the grounds mentioned bear his signature. In these circumstances we are unable to accept the affidavit of Mr. S. K. D. Mathur that the grounds framed by him were merely draft grounds prepared by him which were signed by the permanent District Magistrate later. It is obvious that unless the order made and the grounds prepared are signed by the authority con-

cerned, the order is not made as contemplated by Section 3 of the Act. Furthermore, since the order is based on grounds to be served on the detenu, the order of detention could be passed only if the grounds are in existence and are prepared contemporaneously; otherwise the order of detention becomes purely illusory. In view, however, of the contradictory affidavits given by Mr. S. K. D. Mathur, it is difficult to determine whether Mr. S. K. D. Mathur or Mr. R. C. Arora passed the order of detention and as to who among them was satisfied regarding the grounds of detention. This is also a very serious infirmity from which the order of detention suffers and as a result of which the order has to be set aside. There appears to us to be a clear violation of the provisions of Section 3 of the Act in this case.

8. Lastly we may mention that although the petitioner has pleaded the question of mala fides in the instant case, it is not necessary for us to decide the same in the view we take in this case, and that is why it was not seriously pressed by Mr. Asoke Sen in the course of his arguments before us.

9. For the reasons given above, we allow the petition and quash the order of detention passed against the petitioner on November 8, 1974 and direct the petitioner to be released forthwith.

Petition allowed.

AIR 1975 SUPREME COURT 1883

(From: Allahabad)

N. L. UNTWALIA AND
MURTAZA FAZL ALI, JJ.

Shamim Rahmani etc., Appellants v.
State of U. P., Respondent.

Criminal Appeals Nos. 121-123 of
1973, D/- 28-4-1975.*

(A) Penal Code (1860), Section 302—
Murder — Evidence and proof — High
Court affirming conviction and sentence of
life imprisonment on proper consideration
of evidence — Interference in Special Ap-
peal by Supreme Court — (Constitution of
India, Art. 136).

The accused a young college girl fell
in love with a Doctor, a married man
with three children. The Doctor was a
free lancer and a licentious man and was
always after pastures new. In due course
he began to avoid her and this frustrated

* (Against Judgment and Order in Cri.
App. Nos. 2224 and 2228 of 1968 and
Cri. M. P. No. 1547 of 1973, D/- 10-4-
1973).

HS/HS/C744/75/MVJ

the accused. The result was that she invited him to her house on one night and shot him dead with a DBBL gun the licence of which was in the name of her mother. The trial Court convicted her under Section 302 and sentenced her to life imprisonment. The same was affirmed by the High Court.

Held, that the concurrent findings of facts, recorded by the two Courts below with which but for very strong reasons the Supreme Court is loathe to interfere, were absolutely correct. Further from the view point of common ethics or morality one may say that the accused committed no sin in shooting dead a man like the deceased, although she was contributory in the act of his lust for her. But in the eye of law, she committed the crime of murder punishable under Section 302 of the Penal Code. Even if the Court wished, it could not reduce the sentence of life imprisonment imposed on her as that is the minimum sentence provided under Section 302 of the Penal Code. Her mercy appeal for remission of any part of her sentence lay elsewhere. (Para 22)

(B) Penal Code (1860), Section 201 — False information to screen offender — Benefit of doubt. Cr. App. No. 2224 of 1968, D/- 10-4-1973 (All), Reversed.

The accused was convicted under Section 201 for giving false information to screen to offender his own sister and sentenced to 3 years' R. I. The High Court affirmed the conviction but reduced the sentence to 1 year R. I. In appeal by special leave the Supreme Court held that the accused, may have known or may have reason to believe that an offence of murder had been committed by his sister. But the other possibility that he may not have known or may not have reason to believe he may have only suspected that the offence of murder had been committed by her, cannot be ruled out. That being so, the benefit of doubt must go to the accused. Cr. App. No. 2224 of 1968, D/- 10-4-1973 (All), Reversed. (Para 28)

Yogeshwar Prasad, Keshava Sahai, S. K. Bagga and Mrs. S. Bagga, Miss Rani Arora and Miss Meena Bhatia, for Appellants; D. P. Uniyal (O. P. Rana with him); for Respondent.

Judgment of the Court was delivered by

UNTWALIA, J.:— These are three appeals by special leave. One of them was directed from some interlocutory order of the High Court and had become infructuous. Mr. Yogeshwar Prasad, learned counsel for the appellants asked us to dismiss that appeal as being infructuous. We accordingly do so. In one of the remaining two appeals the appellant is Kumari Shamim Rahmani. She has been convicted under

Section 302, Indian Penal Code for committing the murder of Dr. Hari Om Gautam. A sentence of life imprisonment has been awarded to her. In the other appeal the appellant is Shri Amir Ahmad Rahmani, elder brother of Shamim. He is said to have lodged a false information at the Police Station in connection with the said murder with the intention of screening his sister from legal punishment. He has been convicted under Section 201 of the Penal Code. The trial Judge imposed a sentence of three years' rigorous imprisonment on him but the High Court has reduced it to one year.

2. The murder of the Doctor was the culmination of the wrong and vicious path of love and lust between him and appellant Shamim. As is not uncommon in such type of love affairs, the girl found the arms of her lover getting loose and cold. It resulted in her frustration. In a jealous and revengeful attitude she used her arms on a gun and shot her lover dead. Thus she landed herself in the long arms of law and suffered the conviction for murder. We may observe at the outset that in the conduct of the case on behalf of the appellants in the trial Court as also in the High Court there has been over-doing and too much hair-splitting but all in vain. On reading the two judgments of the Courts below and on perusal of the relevant materials and pieces of evidence in the case and after hearing the fair and able argument of Mr. Yogeshwar Prasad we have come to the conclusion that not only Shamim's appeal is concluded by the concurrent findings of fact recorded by the two Courts below with which, but for very strong reasons, this Court is loathe to interfere, the findings in our opinion, are absolutely correct. The exhaustive criticism of the prosecution case and the evidence adduced by it has been fully dealt with by the High Court as also by the trial Court. The appeal of appellant Amir Ahmad, for the reasons to be stated hereinafter, is fit to succeed.

3. We proceed to state the facts of the case very briefly. We also do not think it necessary to deal with, in any detail, all the points urged on behalf of appellant Shamim as almost all of them were repetitions of the arguments advanced in the High Court and rightly rejected by it. It will be hardly of any use to paraphrase the judgment of the High Court for the purpose of affirming it.

4. The appellants' father was one Azizur Rahman Khan since deceased. Mostly he lived at a place outside the City of Lucknow. In a rented house at 23, Kandhari Lane, Police Station Kaiserbagh, Lucknow lived Smt. Sikander Jahan, mother of the appellants, appellant.

Shamim, her elder sister Km. Naseem Rahmani and her younger brother — a boy of tender age — named Mohammad Ahmad Rahmani alias Sheikhu. The appellants have another brother named F. A. A. Rahmani who at the relevant time was Personal Assistant to a Minister of the Central Government and was living in Delhi. Appellant Amir Ahmad was living in another house in the City of Lucknow at No. 24, New Berry Road, Police Station Hazratganj, Lucknow. He had a shop where he dealt in spare parts of tractors.

5. At the time of the occurrence which took place at about 11.00 or 11.15 p.m. on the 11th July, 1968 appellant Shamim was a College going girl and was about 22 years of age. Shortly before in the year 1967 she had passed her B.Sc. examination. Dr. Gautam was about 35 years of age at the time of occurrence. He was a married man and had his wife living. There were three children born of their wedlock. Dr. Gautam was attached to Balrampur Hospital, Lucknow in the year 1966. Azizur Rahman had a paralytic attack and was admitted in Balrampur Hospital on 7-5-1966. He was treated as an indoor patient in a special ward of the hospital for about 20 days by Gautam under the supervision of senior Doctors. The family members including Shamim were visiting Azizur Rahman in the hospital and the love episode started there between the voluptuous Doctor and the unscrupulous Shamim. Azizur Rahman after being discharged from the hospital lived in the Kandhari Lane House with his family members namely his wife, the two daughters and the young boy, for sometime. Dr. Gautam used to visit and look after Azizur Rahman at the house also. The love affair of Gautam and Shamim went on progressing and reached a scandalous height. Gautam started visiting Shamim at her house too frequently — almost daily — and sometimes more than once in a day. He used to take her for joy rides on his Scooter. Records of this case do not disclose any resentment or protest on the part of the family members of Shamim although being unmarried she was carrying on almost openly with an elderly married person. But the mohalla people did not like this drama of love affair being enacted in their locality without any sense of shame or scruples. The various love letters written by Gautam to Shamim and some chits written by the latter, which were recovered from her possession after the occurrence showed that their love had reached the low level of sexual lust also. It appears Gautam was a handsome looking man and Shamim was infatuated in her love with him. She wanted his exclusive attention. And what a curious manifestation of

human psychology and selfishness it was, that though Shamim had encroached on the exclusive region of Gautam's wife, she was not prepared to tolerate any encroachment in the realm of her love by any other girl. Materials in this case do indicate that the Doctor was a free-lancer and a licentious man. He often used to visit cinemas, theatres, restaurants and was always after pastures new. At times Shamim used to resent and feel highly disgusted with the free landing habits of Gautam so much so that on one occasion in January, 1968 it is said that she slapped Gautam in front of Kwalitv Restaurant situated at Hazratganj. For sometime before the occurrence Gautam endeavoured to be treacherous and wriggle out of his affairs with Shamim. She wanted to keep him tightly in her clutches. Gautam was feeling it difficult to get himself released from her clutches as she was in possession of his love letters. The frequency of his visits to her house, however, lessened. On the 9th of July, 1968 he was found going on a scooter with another girl riding on its pillion. The fact was reported to Shamim by Ganesh — a servant of appellant Amir Ahmad. This added sufficient quantity of fuel to the fire of jealousy and hatred which was already burning in the heart of Shamim.

6. There were frequent quarrels between Shamim and Gautam. On the 10th July, 1968 Gautam visited Shamim's house in the evening, although for 10 or 12 days before the occurrence, the frequency of his visits had diminished. In that visit there was a quarrel between them. On the 11th July, 1968 Gautam visited Shamim again in her house at about 3.00 p.m. There was an altercation between them. When the Doctor was leaving the house, Shamim asked him to come for the last time in the evening under the pretext of helping her in filling up her admission form.

7. In the evening of the 11th July Dr. Gautam first went with his wife to the house of a Principal of a College for a social call. P. W. 17 Mohd. Sabir Khan was posted as Deputy Superintendent of Police, C. I. D. at Lucknow at the relevant time. He was a patient and a friend of Dr. Gautam. He was suffering from a severe headache and Dr. Gautam went to the house of the Dy. S. P. from the Principal's house. The Doctor gave him some medicine and had a cup of tea at his place. He left his house on the pretext of going to the Civil hospital to which he had been transferred from Balrampur hospital; but instead he went to the house of Shamim at about 10.30 p.m. He rang call-bell. Shamim came out and opened the western door of the drawing room. It had three doors. The central and the

eastern doors were closed. To the east of the drawing room was a room in which Shamim used to sleep. There is another room to the west of the drawing room.

8. Gautam and Shamim talked about for 20 minutes in the drawing room. The former came out, went to the Scooter for going away. But Shamim called him back. As soon as he stepped back and reached inside the western door of the drawing room Shamim who had by then brought a DBBL gun fired a shot at Gautam. It seems he crouched and the first shot missed. Shamim repeated the second shot instantaneously and hit Gautam on the right side of his forehead. He fell down. The lower half of the body was inside the drawing room and the upper half was outside the door in the verandah. P. W. 15 Kalika Prasad — the most important witness in this case and an immediate neighbour of Shamim was lying on a cot outside his room. He has deposed to several facts to supply various links in the chain of the prosecution story. Apart from other facts stated by him in his deposition it is said that he and P. W. 18 Ram Krishna Tripathi saw Shamim immediately after the gun fire going with a gun in her right hand from the eastern side of the drawing room to the western room. They went near the dead body of Gautam, peeped into the drawing room but saw no one else there.

9. Sheikhu after the incident rushed to the house of appellant Amir Ahmad on a cycle. Amir Ahmad came to the house. He then went and lodged an information at Kaiserbagh Kotwali at 1.30 a. m. on the 12th July, 1968. In short his information to the police was that Sheikhu had told him that it was not known how Shamim brought out the gun and how it got fired but the shot hit Gautam who was lying bleeding in the verandah of the drawing room. In the meantime Kalika is said to have heard the extra-judicial confession made by Shamim before her mother sitting on a cot in the courtyard. Tripathi claimed to have heard a similar extra-judicial confession made by Shamim before her brother Amir Ahmad.

10. After receipt of the information at the Kotwali the first to arrive at the scene of occurrence was Sub-Inspector Dildar Raza, P. W. 28. The various steps taken by him, the recovery of the licenced gun (standing in the name of Sikander Jahan), the fired cartridges and certain live cartridges are all mentioned in the judgments of the Courts below. The case naturally required a very prompt, intensive and thorough investigation. Services of a Ballistic Expert, Handwriting Expert, Photographers be-

longing to the Criminal Investigation Department were requisitioned. Under orders of P. W. 17 Mohd. Sabir Khan later in the day the investigation was taken up by C. I. D. Inspector P. N. Singh from P. W. 28 Dildar Raza. After a few days the investigation was taken up by P. W. 31 K. P. Tiwari who eventually submitted the Charge-Sheet.

11. The defence of appellant Shamim was that she did not commit the murder. Eventually it was admitted on her behalf that she was in deep love with the Doctor. It was, however, denied that she had developed any jealousy or hatred or had any quarrel or difference with him. Like a drowning man catching at the straw, wild suggestions, were thrown that there was a possibility of the murder of the Doctor having been committed by her cousin Iqbal Uddin Khan, P. W. 24, any of his family members or somebody else. Appellant Amir Ahmad in his defence asserted that on receiving the information from Sheikhu he did not go to Shamim's residence, first went to Hazratgani Police Station and from there he went to Kaiserbagh Police Station. He denied to have lodged a written report Ext. Ka-12 or to have given deliberately any false information in order to screen his sister.

12. The trial Court believed the prosecution case and held it to have been established against both the accused and convicted them. The High Court affirming the findings of the trial Court has maintained their conviction. As already stated it has reduced the quantum of sentence imposed on appellant Amir Ahmad. The High Court has scanned the prosecution evidence very carefully. It has left out of consideration the evidence of P. W. 18 Tripathi as a matter of abundant caution only on the ground of his having been examined late by the Investigating Agency on 16-12-1966. Topic-wise it has discussed the evidence and has met the criticism of the defence witness-wise also. On consideration of the entire evidence it has recorded the following conclusions of facts:

"1. that there was love affair between Km. Shamim Rahmani and Dr. Hari Om Gautam.

2. that after being assured of the love professed by Dr. Gautam, Km. Shamim Rahmani behaved as a love-lorn girl.

3. that after seducing Km. Shamim, Dr. Gautam turned unfaithful to her and in spite of his written promises and the entreaties of Km. Shamim, he continued to be unfaithful.

4. that after Dr. Gautam had given written promises and had broken them, Km. Shamim slapped him openly and publicly in Kwality Restaurant.

5. that some 12-15 days before the murder Dr. Gautam had stopped visiting Km. Shamim so frequently as he had been doing earlier, and her entreaties had also failed to have any effect on Dr. Gautam.

6. that Dr. Gautam was threatened by Km. Shamim on occasions for being unfaithful.

7. that continuously for two days before the murder, there had been heated talks between the two.

8. that two days before the murder Km. Shamim had been informed by Ganesh that he had seen Dr. Gautam going on his scooter with another girl like her.

9. that this gave rise to the jealousy of Km. Shamim Rahmani to the extent that she made enquiries about the whereabouts of Dr. Gautam from his sister and called Dr. Gautam at her house and under the pretext of her illness.

10. that a few hours before the murder Km. Shamim Rahmani had told Dr. Gautam that he should come in the evening to get her form filled no matter whether he came afterwards or not.

11. that Dr. Gautam was found murdered at the house of Km. Shamim Rahmani.

12. that the gun with which the murder had been committed was fired from inside the drawing room.

13. that after the murder no one except Mohammad Ahmad Rahmani alias Sheikh was seen going out of the house.

14. that the gun with which the murder was committed belonged to Smt. Sikander Jahan and was recovered from the bed room of Km. Shamim Rahmani.

15. that Km. Shamim alone had a strong motive to commit the murder of Dr. Gautam to the exclusion of any other member of the family or outsider.

16. that, except Km. Shamim Rahmani there was no other person present in the drawing room shortly before and after the shooting.

17. that Km. Shamim Rahmani was seen going in the drawing room from east to west with the gun in her right hand soon after the murder.

18. that Km. Shamim Rahmani made an extra-judicial confession to her mother of her having shot at Dr. Gautam shortly after his murder."

It has also opined that even if the last two facts were left out of consideration the other sixteen were conclusive to irresistibly lead to the conclusion that it was Shamim and Shamim alone who was responsible for the murder of Gautam by gun fire. While endorsing the view of the High Court in this regard we find no justification for leaving the last two facts

out of consideration for finding the guilt of appellant Shamim.

13. We now proceed to briefly refer to the various topic-wise and witness-wise discussion of the case by the High Court. Since we find ourselves in complete agreement with the judgment of the High Court, we do not propose, as it is not necessary to do so, to mention or discuss the various aspects of the case in any detail. The High Court has first pinpointed its attention on the topography of the place of occurrence. Thereafter it has directed its attention to the evidence of Dr. Suri who had performed the autopsy on the dead body of Gautam. From the statement of Dildar Raza as well as from the copies of the various photographs exhibited in the case the position in which the dead body was found was fixed up. The various matters mentioned in the judgment of the High Court on the question "WHETHER THE SHOTS WERE FIRED FROM INSIDE THE DRAWING-ROOM OR FROM OUTSIDE" are so convincing that one could not but come to the conclusion that the shots were fired from inside the drawing room and not from outside. The various findings of bullet marks on the wall, the calendar, the door pane in the light of the evidence of the Ballistic Expert did not leave any scope for even a shadow of doubt that the Doctor was hit by a gun fired from inside the drawing room. The assailant at the time of firing was not and could not be visible to persons outside as the shots were fired from a place inside the drawing room which was south east of the western door. And that is the reason that Kalika did not say that he saw Shamim firing the shots at Gautam. He merely deposed to the fact of the former proceeding to the western room immediately after the firing. It may also be added that the fact that the shots were fired from inside the drawing room was neither disputed in the High Court nor before us.

14. For the reasons stated by the High Court in its judgment, we unhesitatingly endorse its view that the shots were fired from the 20 Bore DBBL gun which was recovered from the eastern room and the licence of which was in the name of Sikander Jahan. Stress was laid before us that P. W. 14 Siva Ram Gupta, the Ballistic Expert had deposed with reference to the two empty cartridges found at the spot that the shots could have been fired from the 200 Bore DBBL gun of Sikander Jahan; the expert was not definite about it. We find no force in this. Even the two fired empty cartridges were recovered from the eastern room and keeping in view the fact that Gupta's evidence was not a direct evidence but an opinion evidence of the Expert and on ap-

preciation of his evidence as a whole in the background of the other facts and circumstances there could not be any shadow of doubt that it was the DBBL gun of Sikander Jahan which was used in firing the shots at Gautam. Learned counsel for the appellant Shamim further submitted that Gupta had found some fingerprints of the gun but the prosecution suppressed the Expert's report presumably because it did not bear the finger prints of Shamim. We think it has rightly been pointed out by the High Court that the gun in all probability was handled by other members of the family and the prosecution could not be, therefore, certain about the fingerprints. Although we do not consider it necessary, as we have repeatedly said in this judgment, to repeat all that was argued before us, as it was a mere repetition of the argument before the High Court, out of deference to the pains-taking arguments of Mr. Yoghewar Prasad, just at times, we mention one or two matters. It was argued that in the recovery memo Exhibit Ka-239 Raza did not mention that from the smell of the barrels it appeared that the gun had been recently fired as deposed to by him in Court. He did say so with reference to the case diary. There was nothing shown either in the trial Court or the High Court to contradict the statement. The recovery memo of the two fired cartridges is Ext. Ka-240. They were of "twenty bore coloured brown Eley Kynoch which are giving the odour of freshly used gun-powder". We may in passing refer to the recovery memo Ext. Ka-241 which showed recovery of five numbers of live cartridges of "twenty bore coloured brown of Eley Kynoch". On consideration of the entire submissions made on behalf of the appellant, we are fully satisfied that the gun used in the occurrence was the gun the licence of which stood in the name of the mother of appellant Shamim.

15. The time and place of occurrence was not disputed. Nor was it disputed that "there was a love affair between Shamim and Dr. Gautam and that they had physical intimacy as well." One has simply to pity the lot of Shamim who surrendered to the Doctor her virginity and thereafter felt frustrated. It must have completely upset her mental balance. Relying on the evidence of P. W. 10 Gyani Mahendra Singh it has rightly been held by the High Court that the slapping incident in the Kwaliti Restaurant as deposed by him was true. There were several letters in the handwriting of Dr. Gautam Ext. Ka-21 is dated 17-1-1968 containing a show of promise by him that thenceforward he would not witness any cinema show or go to any restaurant, coffee house or club. Before that is a

letter Ext. Ka-20 dated 27-7-1967 containing promise of Gautam that he would not talk about any girl. All these letters were addressed to Shamim and were recovered from the eastern room in which she used to reside.

16. The High Court has rightly believed the evidence of P. W. 19 Ganesh Prasad. All criticisms levelled against his testimony were fruitless and rightly so. Shamim was so much infatuated in her love with the Doctor that at one time she told her mother when there was a talk of Dr. Gautam's transfer from Lucknow that she would embrace Hinduism and go with him to his place of transfer. The mother consoled her that attempts would be made to get his transfer cancelled. It appears that the attempts did succeed and Dr. Gautam was eventually transferred from one hospital to the other in the City of Lucknow. Ganesh deposed about the information given by him to Shamim on 9-7-1968 that he had seen the Doctor going on his scooter with a girl like Shamim. This incident seems to have completely unnerved the infatuated Shamim and put her out of gear.

17. The evidence of Dr. S. N. Roy, P. W. 20 — another close neighbour of Shamim, Shushila Kumari, P. W. 21 — a college friend of Shamim and Kumari Shashi Kanta Gautam, P. W. 23 — sister of Dr. Gautam amply proves some of the facts found by the High Court in its ultimate conclusions. Unnecessary and pointless criticism was made of their evidence in the High Court with no result. The appraisal of the evidence of these witnesses by the High Court was so very right that it was only hoping against hope to get a different result in this Court.

18. On the point of the breaches which had been caused by the Doctor in his affairs with his beloved the prosecution could place on record a letter Ext. Ka-29 deciphered with the help of an Expert. It does not bear any date. But it has been proved to be a writing of Shamim to Dr. Gautam. It reads thus:

"Do not commit fraud with the girl otherwise in your life too such a time could come sometimes."

19. To resume the story of the last two days of the tragic love drama, it may be pointed out that Kalika saw Dr. Gautam going to the house of Shamim on 10-7-1968. He heard their altercation. Again on 11-7-1968 Kalika saw the Doctor coming to Shamim's house at about 3.00 p.m. There was a heated altercation between the two but he could not catch the words as it was going on in the drawing room. After 15 minutes when both came out in the verandah then he could hear Shamim asking Gautam to get her work done. Gautam wanted to evade

but Shamim sternly told him "that she had already heard such provocative words but further requested him that her form be filled up that night and after that he might come or not."

20. Before we refer to the criticism levelled against the testimony of the most important prosecution witness Kalika, we may point out that Iqbal Uddin Khan was examined as a prosecution witness. He was in the house of Shamim for a few days prior to the occurrence but left the house at about 3.00 p.m. for going to Barielly by Punjab Mail. His evidence completely negatives the suggestion that he could have been responsible for the murder of the Doctor. We may also dispose of the point which was sought to be vehemently pressed before us that the police investigation in this case was not fair and proper. It was argued that P. W. 17 Mohammad Sabir Khan being a friend of the Doctor took an unusual interest in the investigation and he was responsible for asking P. N. Singh to take up the investigation from Dildar Raza. It was further submitted that crime number was given to the case after 4.00 p.m. on the 12th July although investigation started earlier. Then it was argued that Ext. Ka-230 the typed letter asking P. N. Singh to take up the investigation bore the crime number although P. N. Singh took up the investigation at about 3.00 p.m. on the 12th July. It was therefore submitted that the letter was a fabricated and anti-timed document. The learned Additional Sessions Judge and the learned Judges of the High Court have given a complete answer to all the criticism. The last point was repelled with reference to the handwritten letter Ext. Ka-254 which bore the endorsement of Dildar Raza also. We have no doubt that the investigation was conducted promptly and faithfully and could not be subjected to any undue criticism.

21. The High Court has excluded even the remote possibility of the murder having been committed by Sikander Jahan, Naseem, Sheikh or Sughara, their maid servant. In our opinion, hinting upon the possibility of the murder having been committed by any of them was an attempt in desperation to catch in air something to save Shamim.

22. Then comes the evidence of Kalika. As already stated his testimony is in support of many facts which make the cover of circumstances fool-proof against Shamim. Having considered his evidence in the light of the criticism, we see no justification to reject it in disagreement with the two Courts below. Apart from being a witness to the love affairs of the Doctor and Shamim the visits of the former to the latter, he was also a

witness to the fact that Gautam was not visiting Shamim's house so frequently as he had been doing earlier shortly before the occurrence. He was a direct witness to his visits to Shamim's house on the 10th and twice on the 11th. His evidence that he had seen Shamim going in the drawing room from east to west with the gun in her hand immediately after the shooting was quite trustworthy. Even though the eastern plank of the western room of the drawing room was shut, through the remaining open space of the western door Kalika could very well see Shamim passing in the drawing room with a gun in her hand. There was sufficient light. His evidence as to the extra-judicial confession made by Shamim to her mother seems to be quite natural and convincing. On query by the mother the reply given by Shamim was that she had done nothing wrong in shooting Dr. Gautam when he went back from his promises and was proving unfaithful. From the view point of common ethics or morality one may say that Shamim committed no sin in shooting dead a man like Gautam, although she was contributory in the act of Gautam's lust for her. But in the eye of law, she surely committed the crime of murder punishable under Section 302 of the Penal Code. Even if we wished, we could not reduce the sentence of life imprisonment imposed on her as that is the minimum sentence provided under Section 302 of the Penal Code. Her mercy appeal for remission of any part of her sentence lies elsewhere.

23. The criticism levelled against the prosecution witness Kalika are:

(1) That he was examined late by the police in the evening of the 12th July, 1968.

(2) That the parchas containing his statement were sent to the office of the Superintendent of Police on the 15th July.

(3) That there are material contradictions in his evidence.

(4) That there is an interpolation in the case diary where Kalika's statement has been recorded.

(5) That he was inimical to Shamim's family.

(6) That he deposed in Court as admitted by him from his fits of imagination and not on facts from his ocular observations.

(7) That he could not see Shamim passing in the drawing room with a gun in her hand.

(8) That his evidence as to the alleged extra-judicial confession made by Shamim before her mother is untrustworthy.

24. We find no substance in any of the criticisms made on behalf of appellant Shamim. Some of them have already

been alluded to. On the facts explained by him, his examination by the police was not late. High Court has found a plausible reason for the receipt of the parchas in the S. P.'s Office on the 15th. There is no such interpolation in his statement in the case diary which could cause any doubt in respect of it. He was not inimical to Shamim's family. His statement in the deposition at times that whatever came in his mind he had stated means in the context that whatever he could recollect he had stated. It is just a figment of imagination to suggest that his statements were the products of his imagination. We have already reiterated the view of the High Court that he could very well see Shamim going in the drawing room with a gun in her hand and that his evidence as respects her extra-judicial confession is trustworthy.

25. Although the learned Additional Sessions Judge was not unjustified in relying upon the evidence of P. W. 18 Tripathi, the High Court also seems to be justifiably cautious when it thought it proper to exclude his evidence from consideration. There was some justification for it because he was examined late by the police. The exclusion of his evidence from consideration, however, as we shall presently show, goes a long way to help appellant Amir Ahmad.

26. For the reasons stated above we see no substance in the appeal filed by appellant Shamim Rahmani and dismiss it.

27. Coming to the appeal of appellant Amir Ahmad we would first like to quote the translation of the written report given by him at the police station from the judgment of the trial Court. It reads as follows:

"Sir,

I beg to state that I reside along with my family in 24/1, New Berry Road. My mother along with two sisters reside in my younger brother's house No. 23, Kandhari Lane. Today at night about 11.30 my younger brother Mohammad Ahmad Rahmani came to my house and started knocking the main gate with great force on which I opened the door. Mohammad Ahmad told me that a strange thing has happened in the house. On my asking, he told that he did not know how his sister Shamim took his gun outside and somehow a fire was shot. The bullet hit Dr. Gautam and he has fallen and is bleeding. After writing my report the necessary action may be taken. Applicant Amir Rahmani s/o Azizur Rahman Khan resident of 24/1 New Beri Road, Lucknow 12th July, 1968."

28. We do not doubt in the least that this was the written report given by this appellant at Kaiserbagh Kotwali.

The attempt made on his behalf to show that he had not gone to the place of occurrence before going to the Thana or that he had not given this written report at 1.30 a.m. on the 12th of July has rightly failed in the Courts below. But the question for consideration is whether without the aid of the evidence of P. W. Tripathi it could be held that the requirements of Section 201 of the Penal Code have been fulfilled against him. The evidence of Tripathi was as respects the extra-judicial confession said to have been made by Shamim before this appellant. If that could be taken into consideration then one could say that he knew that the offence of murder had been committed by his sister. On that basis it could be held that the written report as given by him was with the intention of screening the offender from legal punishment and he knew the information to be false. But once that goes out then we are left with what he learnt from Sheikh and what was told to him by Kalika. We believe the testimony of Kalika to the effect that Amir Ahmad had gone to the place of occurrence on a motor-cycle or a scooter and he had told him everything. But then, what follows? Kalika had not stated that he had seen Shamim firing at the Doctor. The facts narrated by him must be, more or less, in brief those as told by him in Court. On those facts Amir Ahmad could neither know nor could have reason to believe that Shamim had committed the murder of the Doctor. More facts were yet to be known. He did nothing wrong in rushing to the Police Station and giving the barest information in writing. No other part of the statement is said to be false except the following:

"Mohammad Ahmad told me that a strange thing had happened in the house. On my asking, he told that he did not know how his sister Shamim took his gun outside and somehow a fire was shot. The bullet hit Dr. Gautam and he has fallen and is bleeding."

Prosecution could not unfold that Mohammad Ahmad alias Sheikh had told anything further to Amir Ahmad. The fact that his sister Shamim took out the gun was true. That shot was fired was also true. It was a fact that the bullet hit the Doctor. That he had fallen and was bleeding was not untrue. Amir Ahmad may not be sure whether the Doctor was dead or alive. It was not obligatory or necessary for him to probe the matter any further at the spot before rushing to the police station. In our judgment therefore, after exclusion of the evidence of P. W. Tripathi from consideration all the ingredients necessary to be established for bringing home the charge under Sec. 201 of the Penal Code to appellant Amir Ah-

mad were not proved beyond reasonable doubt. He may have known or may have reason to believe that an offence of murder had been committed by his sister Shamim. But the other possibility that he may not have known or may not have reason to believe he may have only suspected that the offence of murder had been committed by Shamim, cannot be ruled out. That being so, we think the benefit of doubt must go to appellant Amir Ahmad. We accordingly allow his appeal, set aside his conviction and sentence under Section 201 of the Penal Code and acquit him of that charge.

Order accordingly.

AIR 1975 SUPREME COURT 1891

(From: Punjab & Hariana)*

A. N. RAY, C. J., K. K. MATHEW, V. R. KRISHNA IYER AND S. MURTAZA FAZL ALI, JJ.

Punjab Wakf Board, Ambala Cantt., Appellant v. Capt. Mohar Singh and others, Respondents.

Civil Appeal No. 502 of 1971. D/- 13-8-1975.

(A) Administration of Evacuee Property Act (1950), S. 46 — Applicability.

Where in suit for possession of an open land (Idgah) by Wakf Board it was neither pleaded that there was any anterior wakf of the said land prior to declaration of the same by the Custodian to be an evacuee property, nor there was any evidence that the Custodian determined that the land was Wakf property, to such a suit filed after the transfer of that land by the Custodian to the Board S. 46 of the Act barring jurisdiction of Civil Court to go into title of the evacuee property would not apply. (Para 7)

(B) Wakf Act (1954), Ss. 3 (I), 15 — Administration of Evacuee Property Act (1950), Ss. 55 (2), 11 (1) — Governor's notification under S. 55 (2) delegating powers of Government under S. 11 (1) to Wakf Board in respect of Muslim evacuee property of religious nature — Absence of any indication in notification that certain open land (a Muslim evacuee property) was wakf property — Mere exercise of powers by Board under Wakf Act in respect of the said property would not establish that the property was wakf property. (Para 10)

(C) Administration of Evacuee Property (Central) Rules (1950), R. 33 — Suit by Wakf Board for possession of Muslim

*(Second Appeal No. 487 of 1968. D/- 29-3-1968—Punj. & Har.)

evacuee property — Suit property described as "Idgah" in "Rent Demand and Collection Register" — Register neither in Form 10 nor under R. 33 — Suit property cannot become wakf property by mere use of word "Idgah" in the Register — (Wakf Act (1954), S. 3 (1)).

(Para 11)

(D) Wakf Act (1954), S. 3 (I) — Absence of evidence that certain Muslim evacuee property was ever used as wakf property — No dedication of the property to be wakf property — No evidence that the property was determined to be wakf property by the Custodian — Held, there could never be a wakf attaching to such property. AIR 1948 PC 42, Ref.

(Paras 13, 14)

Cases Referred: Chronological Paras AIR 1948 PC 42 = (1948) 1 Mad LJ 259

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M/s. G. S. Pathak, V. A. Seyid Mohd., Sr. Advocates, (M/s. S. K. Mehta, M. Qamaruddin, Mohan Lal Gupta and Shaukat Hussain, with them), for Appellant; M/s. A. K. Sen and Hardayal Hardy, Sr. Advocates (Mr. S. K. Gambhir, Advocate, with them) (for Nos. 1, 3, 4, 6-10, 16-18, 20, 21, 23, 25, 29, 32 and 34), and Ex parte (for Nos. 2, 5, 11-15 and 22), for Respondents.

Judgment of the Court was delivered by

A. N. RAY, C. J.:— This appeal is by special leave from the judgment dated 29th March, 1968 of the Punjab and Hariana High Court.

2. The appellant brought this suit against the respondents for possession of a plot of open land. The land bears plot No. 32. The appellant alleged that plot No. 32 formed part of plot No. 116 and the land was Idgah. Idgah means a place of public worship. The appellant's case was that the land was wakf property and was transferred to the appellant by the Custodian of Jullundur. The respondents were alleged by the appellant to be in unlawful occupation of the plot of land after the partition of India.

3. The trial Court held that the land in dispute was not Idgah and there was no wakf. The suit was dismissed.

4. The Additional District Judge affirmed the decision of the trial Court.

5. The High Court did not admit the appeal.

6. The appellant raised two contentions. First, the Custodian of Punjab (Jullundur) declared the property forming the subject-matter of the suit to be evacuee property under the Administration of Evacuee Property Act, 1950 (hereinafter called the Act). The Custodian transferred the property to the appellant. The property was originally held on trust. When the property was declared to be evacuee property, it retained its charac-

teristics of trust. The declaration by the Custodian amounted to a finding that the property is trust property. Under Section 46 of the Act, the jurisdiction of Civil Courts is barred to go into the title of the property. Second, on the evidence in the suit, the only conclusion is that the property is wakf.

7. The first contention of the appellant is not supported by pleadings and proof at the trial. The appellant did not plead that there was any anterior wakf of the property prior to declaration of the same by the Custodian to be evacuee property. There is no evidence that the Custodian decided that the property was wakf property. Section 46 of the Act is not attracted.

8. The appellant relied on three documents marked Exhibits P-1, P-2 and P-3 in support of the contention that the property was wakf and the same property was transferred by the Custodian.

9. Exhibit P-1 is a Memorandum written by the Assistant Custodian to the Chairman of the appellant Board that the demand and collection registers of Ambala and Patiala Districts and one Survey Register of Patiala District have been sent. There is no reference in Exhibit P-1 that the property in suit is wakf property.

10. Exhibit P-2 is a notification dated 27th February, 1961 issued by the Home Secretary. The notification states that in exercise of the powers conferred by Section 55 (2) of the Act, the Governor of Punjab is pleased to direct that the powers under Section 11 (1) in respect of Muslim evacuee properties in trust for public or a religious or charitable nature in the Punjab State, exercisable by the Government of Punjab shall be exercisable by the Board of Wakfs established under Section 9 of the Muslim Wakfs Act, 1954. There is no intrinsic evidence in Exhibit P-2 to indicate that the property in suit is wakf property. The exercise of powers by the Board under the Muslim Wakfs Act in respect of Muslim evacuee properties in trust does not establish and identify the property in suit to be wakf property.

11. Exhibit P-3 is relied upon by the appellant to show that the property is wakf. The word "Idgah" appears in Exhibit P-3. The appellant contends that the property is, therefore, proved to be "Idgah". Exhibit P-3 is described as "Rent Demand and Collection Register". Rule 33 of the Administration of Evacuee Property (Central) Rules, 1950 speaks of record of property to be maintained in Form No. 10. Exhibit P-3 is neither in Form No. 10 nor is it under Rule 33. Form No. 10 has a specific column No. 5 which speaks of designation of property

by name, if any, and type of building for instance residential bungalow, shop, cinema, theatre, mosque, factory etc. Exhibit P-3 is not of the type contemplated by Rule 33. The suit property cannot become wakf property by the mere use of the word "Idgah" in Exhibit P-3.

12. The appellant relied on the decision in *Mazhar Husain v. Adiya Saran Singh* reported in AIR 1948 PC 42 in support of the proposition that where there is no evidence that a person ever executed a wakfnama and no direct evidence of any oral dedication by him is available the proper inference from the history of the matter, the dealings with the parties in dispute, the litigation that has affected it and the admissions and assertions made by the predecessors in title of the persons who dispute the wakf can be made about the valid creation of a wakf attaching to the properties.

13. The concurrent findings in the present case are these. There is no evidence that the property in question was used as wakf property. There is no dedication of the property to be wakf property. There is no evidence that the property was determined to be wakf property by the Custodian.

14. There is no merit in this appeal. The appeal is dismissed with costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 1892

(From: Industrial Tribunal, Delhi)*

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALLA, JJ.

Management of M/s. Eastern Electric and Trading Co., Appellant v. Baldev Lal, Respondent.

Civil Appeal No. 1642 of 1969, D/- 11-8-1975.

(A) Industrial Disputes Act (1947), S. 33 (2) (b) and Sch. 3, Item 8 — Dismissal on ground of misbehaviour with customer — Punishment, held, neither suggested victimisation nor disproportionate.

Where the charge that the workman behaved badly with the customer of the employer firm is proved the workman deserves no punishment short of dismissal. (Para 3)

No commercial firm can tolerate an employee who insults its customers be-

*(Ori. Petn. No. 5 of 1966 in Industrial Dispute No. 3 of 1964, D/- 13-11-1969 — Indl. Tri. — Delhi.)

HS/IS/D117/75/CWM

cause they do not make use of the services of that employee privately. The employer whose business with the customer is lost because of the behaviour of one of his employees can have no use for the services of that employee. The view of the Industrial Tribunal that the penalty is not in tune with the incidents and clearly showed mala fide intention of the company to victimise him is erroneous. AIR 1973 SC 1227 and AIR 1965 SC 917, Rel. on. (Para 3)

Cases Referred: Chronological Paras

AIR 1973 SC 1227 = (1973) 3 SCR 587 = 1973 Lab IC 851 4

AIR 1965 SC 917 = (1965) 1 Lab LJ 462 5

Mr. O. P. Malhotra, Sr. Advocate (M/s. O. C. Mathur and D. N. Mishra, Advocates with him), for Appellant; M/s. S. K. Mehta, K. R. Nagaraja and M. Qamaruddin, Advocates, for Respondent.

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— This is an appeal by special leave against the order of the Industrial Tribunal, Delhi in an application made under Section 33 (2) (b) of the Industrial Disputes Act by the appellant for approval of their action in dismissing the respondent.

2. The respondent was dismissed while an industrial dispute was pending before the Industrial Tribunal. Therefore, the appellant made the application. Four charge-sheets were served on the respondent on 15-12-1965, 31-12-1965, 1-1-1966 and 4-1-1966 containing in all eight charges. On 8th January, 1966 an enquiry officer proceeded to hold the enquiry. The respondent appeared before the enquiry officer and wanted to consult somebody outside. He came back after about an hour and 15 minutes and the enquiry was resumed. When he was asked to sign the first page of the enquiry proceedings the respondent refused to do so. He again left the enquiry saying that he would consult his companions outside. When one of the Management's witnesses, Mr. P. S. Bedi was about to give his evidence the respondent's brother entered the enquiry room and asked "who is Mr. Gulati. I want to see him and find out his office address and residential address". Mr. Gulati being the enquiry officer. He asked him who he was and he said that he was from the Labour Department. When he was told that he had no business to interfere in the enquiry he flared up. Mr. Motwane, one of the partners of the appellant firm telephoned to the police. The appellant's brother thereupon tried to run away after snatching some papers. Mr. Nanak Manager of the appellant com-

pany, tried to prevent him from running with the papers. There was a scuffle in which Mr. Nanak's finger got fractured and he also received some blows. The appellant's brother ran away after tearing the papers. The enquiry was adjourned to January 10 and a telegram was sent to the respondent. On the 10th January a telegram was received from respondent's wife saying that he was out of station and requesting postponement of the enquiry. The enquiry was however held and as a result of the enquiry the respondent was dismissed.

3. The Industrial Tribunal took the view that the enquiry was held without complying with the principles of natural justice and fair play. The Industrial Tribunal thereupon proceeded to examine witnesses and as a result of the assessment of the evidence adduced came to the conclusion that charge 1 and charge 3 read with charge 7 were proved but that the extreme penalty of dismissal was not in tune with those incidents and clearly showed the mala fide intention of the company to victimise the workmen, and refused to accord approval. The charges 1, 3 and 7 are as follows:

"(i) that on 6th December, 1965 he behaved badly with one customer Shri P. S. Bedi and shouted at him.

(iii) That he flouted the orders of the partner by not allowing the table of Shri Manohar Singh to be removed to another room and behaved in an insolent manner.

(vii) That he obstructed the peon in the performance of his duties."

Charges 3 and 7 are not serious ones and we would therefore confine ourselves to charge 1. The charge-sheet in relation to this is as follows:

"We produce below a letter received by us from one of our esteemed customers stating that you shouted at him and also misbehaved:

"I am sorry to bring to your notice the insulting attitude of one of your mechanic Shri Baldev towards me when I visited your showroom yesterday on the 6th December, '65. My two radios given for repair have totally been spoiled and when he was called to tell me the parts if any required, he shouted in an insulting tone and misbehaved. "This kind of attitude shown to your customers by your employees is definitely harmful to the interests of such standard company." I would therefore request you to return my other set immediately through bearer of this letter as I no longer want to deal with you.

Yours, Faithfully
Sd/- P. S. Bedi

You will notice that business with the customer is now lost because he insists

that he will not get any repair work done by us.

Let us have your explanation in regard to the above and also show cause why disciplinary action should not be taken against you."

In his evidence before the Industrial Tribunal Mr. Bedi who had made the above complaint, in addition to what is contained in his letter stated as follows:

"All this happened because I had refused to get the radios privately repaired through mechanics. In fact I actually received an advice to that effect from Shri Manohar Singh a co-mechanic in the same concern who both were indulging in this sort of practice jointly. I think it was further reason alone that I was harassed like this in the matter of repairs."

This was the answer given by him in the cross-examination. Now if this charge is held proved the respondent deserves no punishment short of dismissal. No commercial firm can tolerate an employee who insults its customers because they do not make use of the services of that employee privately. The employer whose business with the customer is lost because of the behaviour of one of his employees can have no use for the services of that employee. We are not therefore able to uphold the view of the Industrial Tribunal that the penalty is not in tune with the incidents and clearly showed the mala fide intention of the company to victimise him.

4. The question of punishment is essentially one for the management to decide. In *Workmen v. Firestone Tyre & Rubber Co.*, 1973 (3) SCR 587 = (AIR 1973 SC 1227 = 1973 Lab IC 851) this Court elaborately considered the various decisions of this Court regarding the principles governing the jurisdiction of the Tribunal when adjudicating disputes regarding dismissal and discharge. From those decisions they deduced ten broad principles of which the ninth is:

"(9) Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimisation."

We cannot certainly agree that in this case the punishment was so harsh as to suggest victimisation.

5. In *Hind Constrn. & Engng. Co. Ltd. v. Their Workmen*, (1965 (1) Lab LJ 462) = (AIR 1965 SC 917) this Court observed:

"It is now settled law that the Tribunal is not to examine the finding or the

quantum of punishment because the whole of the dispute is not really open before the tribunal as it is ordinarily before a Court of appeal. The tribunal's powers have been stated by this Court in a large number of cases and it has been ruled that the tribunal can only interfere if the conduct of the employer shows lack of bona fides or victimisation or employee or employees or unfair labour practice. The Tribunal may in a strong case interfere with the basic error on a point of fact or a perverse finding, but it cannot substitute its own appraisal of the evidence for that of the officer conducting the domestic enquiry though it may interfere where the principles of natural justice or fair play have not been followed or where the enquiry is so perverted in its procedure as to amount to no enquiry at all. In respect of punishment it has been ruled that the award of punishment for misconduct under the standing orders, if any, is a matter for the management to decide and if there is any justification for the punishment imposed, the tribunal should not interfere. The tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe. But where the punishment is shockingly disproportionate, regard being had to the particular conduct and the past record or is such, as no reasonable employer would ever impose in like circumstances, the tribunal may treat the imposition of such punishment as itself showing victimization or unfair labour practice."

We do not consider that the punishment is shockingly disproportionate.

6. In this view it is not necessary to go into the question whether the Tribunal's conclusion that the domestic enquiry was not a proper one is correct or not. Considering the incident on the 8th day of January, 1966 it would be difficult to say that if the enquiry officer took the view that the telegram sent by the respondent's wife was merely another instance of the unwillingness of the respondent to take part in the enquiry and was an attempt to avoid it and therefore the enquiry ought to be held even in the absence of the respondent, it is an unreasonable view.

7. The appeal is allowed and the order of the Industrial Tribunal set aside. The result would be that the respondent would be deemed to have been validly dismissed.

Appeal allowed.

AIR 1975 SUPREME COURT 1895

(From Orissa: ILR (1974) Cut 204)

**V. R. KRISHNA IYER. R. S. SARKARIA
AND A. C. GUPTA, JJ.**

Nayagarh Co-operative Central Bank Ltd., Appellant v. Narayana Rath and others, Respondents.

Civil Appeals Nos. 1151-1153 of 1974,
D/- 8-8-1975.

(A) Orissa Co-operative Societies Act (2 of 1963), S. 68. — Dispute touching business of society — Dispute between Co-operative Bank and Societies in respect of loan advanced by former — Allegation against Secretary of Bank that he abused his position and loss was caused—Proceedings under S. 68 held valid. ILR (1974) Cut 204, Reversed.

The appellant was a Co-operative Bank. It was registered as a Co-operative Society under the Act and had among its objects, raising funds for financial co-operative societies registered under the Act affiliated to it, besides carrying on the general business of a bank. Three such co-operative societies had applied to the appellant Bank for loans and on the recommendation of the first respondent who at the relevant time was employed as Secretary of the Bank, various sums were advanced to these co-operative societies. Attempts to recover the loan advanced to the aforesaid societies having failed, the appellant Bank referred the disputes concerning the said transactions to arbitration under Section 68 of the Act praying for an award in each case for the sum advanced with interest; the claim was made in each case, against the indebted society, its office-bearers and the first respondent jointly and severally.

Held, that the requirements of S. 68 (1) were satisfied; the reference was valid and the order of the High Court quashing the same was illegal. ILR (1974) Cut 204, Reversed. (Paras 4, 6)

(B) Orissa Co-operative Societies Act (2 of 1963), S. 68 (4) — Dispute referred to Registrar — Dispute whether was one contemplated by S. 68 — Matter to be decided by Registrar — Supreme Court refused to go into the merits of the matter. (Para 5)

Mr. Gobind Das, Sr. Advocate, (Mr. P. H. Parekh, Mrs. Sunanda Bhandare and Miss Uma Mehta, Advocates with him), for Appellant; M/s. Santosh Chatterjee and G. S. Chatterjee, Advocates, for Respondent No. 1.

Judgment of the Court was delivered by

GUPTA, J.:— These three appeals by special leave arise out of three pro-

ceedings under Section 68 of the Orissa Co-operative Societies Act, 1962 (hereinafter referred to as the Act).

2. The appellant in all these appeals, Nayagarh Co-operative Central Bank Ltd., is registered as a Co-operative Society under the Act and has among its objects, raising funds for financing co-operative societies registered under the Act affiliated to it, besides carrying on the general business of a bank. Three such co-operative societies had applied to the appellant Bank for loans and on the recommendation of the first respondent in these appeals, who at the relevant time was employed as Secretary of the Bank, various sums were advanced to these co-operative societies: Rs. 61,420 to Krishna Prasad Co-operative Society, Rs. 3,52,490 to Singhapara Co-operative Society, and Rs. 1,35,315 to Kaijhar Gram Panchayat Co-operative Grain Golla Credit and Thrift Society. Attempts to recover the loans advanced to the aforesaid societies having failed, the appellant Bank referred the disputes concerning the said transactions to arbitration under Section 68 of the Act praying for an award in each case for the sum advanced with interest; the claim was made in each case, against the indebted society, its office-bearers and the first respondent in the appeals before us, jointly and severally.

3. The allegations on which the first respondent was made a party to these proceedings under Section 68 of the Act are similar in all the three cases. It was said that:

"..... It was the responsibility of the Secretary to the Bank to examine the loan application and recommend to the committee for consideration. He has misutilised his power and position of his office and mischievously recommended for sanction of the loan applied by the recalcitrant office-bearers of..... (these societies). The plaintiff (appellant bank) has got sufficient reasons to believe that the first respondent has also connived with the management of the society in their irregularities and helped them in misappropriation of funds so as to achieve his selfish motive."

The first respondent filed three writ petitions before the Orissa High Court for quashing the proceedings against him on the ground that the appellant Bank had no jurisdiction to initiate disputes against him under Section 68 of the Act and also alleged that the said proceedings were mala fide. The High Court found that the allegations against the first respondent could not form the subject-matter of a dispute under Section 68 of the Act, and on this view, quashed the three disputes which were pending before the Assistant Registrar, Co-operative Societies, Khurda

Circle Khurda, in so far as they related to the first respondent. The validity of this decision is challenged before us by the appellant Bank.

4. Section 68 so far as it is relevant for the purpose of these appeals reads:

"68. Disputes which may be referred to arbitration:— (1) Notwithstanding anything contained in any law for the time being in force, any dispute touching the constitution, management or the business of society other than a dispute regarding disciplinary action taken by a society or its committee against paid servant of the society, shall be referred to the Registrar if the parties thereto are among the following namely:—

(a) the society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant of the nominee, their or legal representatives of any deceased officer, deceased agent or deceased servant of the society or the liquidator of the society; or

(b) a member, past member or a person claiming through a member, past member or a deceased member of the society or of a society which is a member of the society; or

(c) a surety of a member, past member or a deceased member whether such surety is or is not a member of the society; or

(d) any other society or the liquidator of such society.

Explanation 1.— A claim in respect of any sum payable to or by a society by or to a person or society or a liquidator mentioned in clauses (a) to (d) shall be a dispute touching the business even in case such claim is admitted and the only point in issue is the ability to pay and the manner of enforcement of payment.

x x x

For the present purpose, Section 68 requires two conditions to be satisfied. (i) that the dispute must be one touching the business of a society other than a dispute regarding disciplinary action taken by the society against a paid servant and (ii) that the dispute must be one involving parties who are among those mentioned in the section. Here the parties concerned are among those listed in this section, and the dispute also touches the business of the society, the nature of the dispute being as stated in explanation 1. Prima facie therefore the requirements of Section 68 (1) are satisfied in these cases.

5. The first respondent however contends that the disputes so far as he is concerned are not such as are contemplated in Section 68 (1). We do not propose to consider the merits of this con-

tention because of sub-section (4) of Section 68 which says:

"(4) If any question arises whether a dispute referred to the Registrar under this section is a dispute touching the constitution, management or the business of a society, the decision thereon of the Registrar shall be final and shall not be called in question in any court."

In view of the provisions of Section 68 (4) we think that this is a matter which the Registrar must decide before the writ jurisdiction of the High Court is allowed to be invoked.

6. Accordingly we allow the appeals and set aside the order quashing the disputes pending before the Assistant Registrar, Khurda Circle, Khurda. The Assistant Registrar will try to dispose of these proceedings within six months from the date when this order is communicated to him. In the circumstances we make no order as to costs.

Appeals allowed.

AIR 1975 SUPREME COURT 1896

(From:— 1969 MPLJ (Notes) 73)

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

Remington Rand of India Ltd., Appellant v. Tahir Ali Saifi and another, Respondents.

Civil Appeal No. 1704 of 1969. D/- 14-8-1975.

(A) Industrial Disputes Act (1947), Sch. 2; Item 3 — Dismissal of workmen — Mechanic in Typewriter Company — Charge of misconduct for engaging himself in work similar in nature to that of Company under Cl. 12-A (29) of Standing Order — Only a single act of sale of a second hand typewriter of another company and an undertaking to do its repairs for one year proved — Held did not amount to misconduct within Cl. 12-A (29).

Cl. 12-A (29) of the Standing Orders of the Company consists of two parts. (1) engaging in any work similar in nature to that of the company, and (2) engaging in any work in which he may for the time being be engaged by the company. A single act of sale of a typewriter by the workman could not be said to establish that he was engaging in the business of selling typewriters in which the Company was also engaged. Further it could not also be said that by undertaking to repair the typewriter sold, the workman was engaged in the business of typewriter repairs for which he was engaged by the Company, especially when the charge had made no mention about

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the undertaking for repairs given by him. The fact that the workman had admitted his guilt was besides the point and therefore the award of the Labour Court holding that the charge of misconduct was proved was rightly quashed by the High Court. 1969 MPLJ (Notes) 73, Affirmed.

(Para 4)

Mr. A. K. Sen, Sr. Advocate. (Mr. D. N. Gupta, Advocate with him), for Appellant; Mr. M. K. Ramamurti, Sr. Advocate, (Mr. Vineet Kumar, Advocate with him), for Respondent No. 1.

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— The 1st respondent was a mechanic in the appellant company. On 23rd September, 1965 a charge-sheet was served on him on the ground that he sold one second hand Godrej Standard typewriter to M/s. Jabalpur Enterprises. The charge-sheet mentioned that he had transacted the business in the name of his brother, that the machine actually belonged to him and that he had carried on negotiations and concluded the transaction with the party mentioned. He was, therefore, charged for grave and serious misconduct for engaging himself in work similar in nature to that of the company under clause 12-A (29) of the Company's Standing Orders. The 1st respondent denied the charge levelled against him and claimed that his brother had sold the typewriter and he had nothing to do with it and that the sale of one second hand typewriter by his brother did not and cannot amount to carrying on business of selling typewriters, that even on the allegations there was no basis for charging him with misconduct under clause 12-A (29) of the Standing Orders. Thereafter an enquiry was held and witnesses examined. Almost towards the end of the enquiry he was asked whether he would like to say anything and the 1st respondent requested to be allowed to admit his guilt and also requested the management to take a lenient view of his lapse and reinstate him and allow him to serve the company with all loyalty and sincerity. The enquiry officer held that the charge against the 1st respondent was made out and the regional manager of the appellant company thereafter dismissed him.

2. A reference was made by the Madhya Pradesh Government to the Labour Court at Jabalpur. The Labour Court held that as the statement of the workman was recorded and he was asked to explain the charges levelled against him before all the prosecution evidence had been completed, it was a serious infirmity and to that extent the domestic enquiry was vitiated. But on the basis of the evidence of witnesses produced by the em-

ployer the Labour Court held that the charge against the workman was proved. The Labour Court in particular stressed the fact that the 1st respondent not only sold the typewriter but also undertook to do service of the typewriter for one year, and it held that by selling a typewriter and undertaking to do service of that typewriter for one year the 1st respondent could be said to have engaged in work which was similar in nature to that of the company.

3. The 1st respondent filed a petition before the High Court for quashing the award of the Labour Court. The High Court held that "engaging in any business" meant a continuity of transactions and not a single casual or solitary transaction and that therefore the 1st respondent by selling one second hand typewriter could not be said to have contravened clause (29) of the Standing Orders or any of the terms of his employment. It was argued before the High Court that as the 1st respondent had undertaken to repair the typewriter for a period of one year he should be held to have engaged in business of repairing typewriters, which was also a business carried on by the company. This argument was rejected on the ground that it was not mentioned in the charge-sheet. In the result the award of the Labour Court was quashed.

4. We are of opinion that the High Court's conclusions were correct. The standing order in question which is alleged to have been contravened by the 1st respondent is as follows:

"12-A. Misconduct for commission of any of the following acts the punishment is summary dismissal.

.....
(29) Engaging in any work similar in nature to that of the Company and/or in which he may for the time being be engaged by the Company."

It would be noticed that the standing order consists of two parts, (1) engaging in any work similar in nature to that of the company, and (2) engaging in any work in which he may for the time being be engaged by the company. Admittedly the 1st respondent was a mechanic employed by the company. The company is not only engaged in the business of sale of typewriters but also in repairing typewriters. The fact of the 1st respondent having sold a second hand Godrej typewriter is established beyond doubt. But as rightly held by the High Court a single act of sale cannot be said to establish that the 1st respondent was engaging in the business of selling typewriters. Nor was it seriously argued on behalf of the appellant company that a single act of sale would amount to the 1st respondent engaging in the business

of typewriters. But it was said that he was engaging in the business of repairing typewriters thus engaging in work similar in nature to that of the company as also work in which he was engaged by the company. This was based on the fact that in the letter which the 1st respondent passed on to the buyer of the typewriter he undertook to do the repairs of the typewriter for one year. We do not think that it can be said that the 1st respondent by underaking to repair the typewriter which he had sold was engaging in the business of typewriter repairs. More important, that was not the charge against him. When in the charge-sheet served on the 1st respondent it was said that he had carried on negotiations and concluded the transaction, the transaction mentioned was the transaction of sale of the typewriter. There was nothing said about his having undertaken to repair the typewriter for a year. That the workman himself understood the charge-sheet as referring only to the transaction of sale is clear from the reply he gave in response to the charge-sheet served on him. In the circumstances, therefore, we agree with the High Court on this point also. The fact that the workman admitted his guilt is beside the point. He admitted his guilt only in the sense that he admitted having sold a second hand Godrej typewriter.

5. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 1898

(From:— Central Govt. Labour Court, Delhi)*

A. ALAGIRISWAMI, P. K. GOSWAMI AND N. L. UNTWALLA, JJ.

Punjab Co-operative Bank Ltd., Appellants v. R. S. Bhatia (dead) through L. Rs., Respondents.

Civil Appeal No. 1736 of 1969, D/- 13-8-1975.

(A) Civil P. C. (1908), S. 11 — Industrial Disputes Act (1947), Ss. 33-A, 33-C (2) and 2 (s) — Question whether respondent was a workman or not within the meaning of the Act — Decision in proceeding under S. 33-A given by competent Labour Court — Trial of same issue in proceeding under S. 33-C (2) between the same parties, held, barred on the principles of res judicata. (Para 5)

(B) Industrial Disputes Act (1947), S. 2 (s) (iii) — Accountant — Mere fact

*(L. C. A. No. 20 of 1968, D/- 1-4-1969, Central Govt. Labour Court—Delhi.)

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that he used to sign salary bills of staff, held, did not make him "employed mainly in a managerial or administrative capacity". AIR 1964 SC 1522, Rel. on. (Para 5)

(C) Industrial Disputes Act (1947), S. 33-C (2) — Claim of workman under— Plea of employer that it was barred by time or was not fit to be entertained on ground of delay — Held rightly rejected by Labour Court following AIR 1964 SC 752 and AIR 1968 SC 218. (Para 6)

(D) Industrial Disputes Act (1949), S. 33-C (1) and (2) — Claim under S. 33-C (2) for benefits arising out of award — Argument that claim ought to have been entertained by the Govt. under S. 33-C (1) — Not tenable. AIR 1968 SC 218, Rel. on. (Para 7)

Cases Referred: Chronological Paras
AIR 1968 SC 218 = (1968) 1 Lab LJ 6 =
1968 Lab IC 197 6, 7
AIR 1964 SC 752 = (1964) 3 SCR 709 6
AIR 1964 SC 1522 = (1964) 5 SCR 625 5

Mr. O. P. Gupta and Mr. R. P. Agarwala, Advocates, for Appellants; M/s. R. K. Garg, S. C. Agarwal and V. J. Francis, Advocates, for Respondents.

Judgment of the Court was delivered by

UNTWALLA, J.:— This is an appeal by special leave directed from the order dated 1-4-1969 of the Central Government Labour Court, Delhi passed under Section 33-C (2) of the Industrial Disputes Act, 1947 (for brevity—the Act). The workman concerned was Shri R. S. Bhatia who died during the pendency of the appeal in this Court. His legal representatives were substituted as respondents in his place. But hereinafter in this judgment by the respondent would be meant Shri R. S. Bhatia who was the original respondent and the applicant under Section 33-C (2).

2. The claim of the respondent was that he was employed in service of the appellant in the year 1928 and was promoted as an Accountant in the year 1938 on which post he worked upto 8-10-1958. On and from 9-10-1958 he was given the additional duty as an officiating Manager on temporary basis in the Delhi Branch of the appellant Bank. He was suspended on the 4th of April, 1961 and was dismissed from service on the 22nd June, 1961. He filed an application under Section 33-A of the Act challenging the order of his dismissal. The respondent's said application was registered as L. D. No. 66/1962. Shri Anand Narayan Kaul, Presiding Officer of the Labour Court, Delhi by his order dated the 23rd July, 1966 held in that case that the respondent who was applicant under Section 33-A of the Act was a workman. The appellant's contention in that behalf was

not accepted. Eventually, however, the complaint under Section 33-A was dismissed on 24th July, 1969 on merits.

3. The respondent in his application under Section 33-C (2) of the Act claimed that under the Shastry Award which was published by the Government of India on the 26th March, 1953 he was entitled to some benefits which the appellant failed to pay. A statement of claim computed in terms of money was attached as Annexure A to the application. The claim made by the respondent was for the period 1954 to 1961 and the application under Section 33-C (2) was filed on the 10th July, 1968. The total claim made in the application was to the tune of Rs. 10,237.64.

4. The appellant resisted the claim of the respondent on several grounds. The Labour Court rejected the pleas set up by the appellant, allowed the application in part and computed the benefits from 1-4-1954 to 8-10-1958 at Rs. 5,676.22, and, adding to that a sum of Rs. 347.61, certain amount for the period of the respondent's suspension in accordance with para. 557 of the Shastry Award, finally determined the amount payable to the respondent at Rs. 6,023.83. The appellant has preferred this appeal in this Court by special leave. Its learned counsel has pressed for our consideration only three points in support of the appeal. None of the points has got any substance. We shall state the points one by one and give our reasons very briefly for their rejection.

5. The first point urged on behalf of the appellant is that the respondent was not a workman within the meaning of the Act and that the Labour Court committed an error in saying that there was no evidence led on this issue and resting its judgment on the principles of res judicata on the basis of the decision of Shri Kaul in I. D. No. 66/1962. In our opinion, the Labour Court rightly applied the principles of res judicata to the issue whether the respondent was a workman or not within the meaning of the Act. The same parties in I. D. No. 66/1962 joined issue on the aforesaid question. A decision given by the competent Labour Court in that regard has rightly been held as a bar on the principles of res judicata in the trial of the same issue in the present proceeding. Moreover, we find that even apart from the previous order operating as res judicata, practically there was no evidence on behalf of the appellant in support of its case that the respondent was not a workman. The only evidence of M. W. 1 was that in his capacity as an Accountant the respondent used to sign the salary bills of the staff including himself. But

then he further stated that these bills used to be submitted to the Head Office of the Bank. The Accountant is supposed to sign the salary bills of the staff even while performing the duties of a clerk. That did not make the respondent "employed mainly in a managerial or administrative capacity", within the meaning of sub-clause (iii) of clause (s) of Section 2 of the Act. The witness further stated that during the period of his accountancy as well as the managership (meaning thereby the officiating managership) the respondent conducted himself as an officer and the Bank authorities also treated him as such. There was no paper produced to show any entrustment of managerial or administrative duty to the respondent while he was working as a mere Accountant. In *South Indian Bank Ltd. v. A. R. Chacko*, (1964) 5 SCR 625 = (AIR 1964 SC 1522) it has been pointed out at pages 631 and 632 that there are Accountants in Banks who are really officers and there are other types of Accountants who are merely senior clerks with supervisory duties. The respondent was merely a senior clerk doing mainly clerical duties and had no duty assigned to him of a managerial or administrative nature. It may further be added that relying upon the order of Shri Kaul the Labour Court held in the present proceeding that the respondent was an officiating Manager and hence not a workman from 9-10-1958 to 4-4-1961. The claim for that period has been disallowed on that ground alone.

6. The second plea on behalf of the appellant that the claim of the respondent under Section 33-C (2) of the Act was barred by limitation or was not fit to be entertained on the ground of undue delay or laches on the part of respondent No. 1 has rightly been rejected by the Labour Court following the decisions of this Court in *Bombay Gas Co. Ltd. v. Gopal Bhiya*, (1964) 3 SCR 709 = (AIR 1964 SC 752) and *East India Coal Co. Ltd. (by Chief Mining Engineer), Bararee Colliery, Dhanbad v. Rameshwar*, (1968) 1 Lab LJ 6 = (AIR 1968 SC 218 = 1968 Lab IC 197).

7. The third submission made on behalf of the appellant that the claim ought to have been entertained by the Government under Section 33-C (1) of the Act and it was not maintainable under sub-section (2) is stated merely to be rejected. It is completely devoid of substance. In the case of *East India Coal Co.* (supra) it has been said at page 9, column 2:

"The fact that the words of limitation used in Section 20 (2) of the Industrial Disputes (Appellate Tribunal) Act, 1950, are omitted in Section 33-C (2)

shows that the scope of Section 33-C (2) is wider than that of Section 33-C (1). Therefore, whereas sub-section (1) is confined to claims arising under an award or settlement or Chap. V-A, claims which can be entertained under sub-section (2) are not so confined to those under an award, settlement or Chap. V-A." The argument put forward on behalf of the appellant against a principle which is firmly established and beyond any doubt or dispute appeared to us an argument in desperation.

8. For the reasons stated above, we find no merit in this appeal. It is accordingly dismissed with costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 1900

(From: Labour Court, Kolhapur)*

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

The Cooper Engineering Ltd., Appellant
v. P. P. Mundhe, Respondent.

Civil Appeal No. 1716 of 1969. D/-
20-8-1975.

(A) Industrial Disputes Act (1947),
Section 15 — Industrial adjudication —
Absence of domestic enquiry or defective
enquiry — Controversy — Opportunity to
management to adduce evidence.

When a case of dismissal or discharge of an employee is referred for industrial adjudication the Labour Court should first decide as a preliminary issue whether the domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer, there will be no difficulty. But when the matter is in controversy between the parties that question must be decided as a preliminary issue. On that decision being pronounced it will be for the management to decide whether it will adduce any evidence before the Labour Court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue. There will be no justification for any party to stall the final adjudication of the dispute by the Labour Court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award. It will be also legitimate for the High Court to refuse to intervene at that stage. (Case law discussed). (Para 22)

*(Reference (I. D. A.) No. 5 of 1968. D/-
31-3-1969—Labour Court, Kolhapur—
Maha.).

It will be most unnatural and impractical to expect a party to take a definite stand when a decision of a jurisdictional fact has first to be reached by the Labour Court prior to embarking upon an enquiry to decide the dispute on its merits. The reference involves determination of the larger issue of discharge or dismissal and not merely whether a correct procedure had been followed by the management before passing the order of dismissal. Besides, even if the order of dismissal is set aside on the ground of defect of enquiry, a second enquiry after reinstatement is not ruled out nor in all probability a second reference. This is neither going to achieve the paramount object of the Act, namely, industrial peace, since the award in that case will not lead to a settlement of the dispute. The dispute, being eclipsed, *pro tempore*, as a result of such an award, will be revived and industrial peace will again be ruptured. Again another object of expeditious disposal of an industrial dispute will be clearly defeated resulting in duplication of proceedings. This position has to be avoided in the interest of labour as well as of the employer and in furtherance of the ultimate aim of the Act to foster industrial peace. (Para 21)

(B) Industrial Disputes Act (1947),
Schedule 2, Rule 3 — Dismissal of workman — Award giving relief of reinstatement — Relief converted to one of compensation by Supreme Court.

The Supreme Court in the circumstances of the case held that besides the long delay that has already taken place, since the law laid down by the Supreme Court was not very clear at the time of the award in casting a duty upon the Labour Court to decide the preliminary issue and also in view of the submission of the employer that it is prepared to pay the entire salary of the workman upto-date, it will meet the interest of justice if the order of reinstatement is converted to one of compensation in terms of his entire salary from the date of dismissal to the date of the Supreme Court decision except for what has already been paid to him instead of remitting the matter to the Labour Court for disposal in the light of the Supreme Court judgment by setting aside the award. (Para 23)

Cases Referred: Chronological Paras
AIR 1973 SC 1227 = (1973) 3 SCR 587 =
1973 Lab IC 851 19
AIR 1972 SC 136 = (1972) 1 SCR 755 =
1972 Lab IC 13 12, 16
AIR 1972 SC 1031 = (1972) 3 SCR 29 =
1972 Lab IC 573 16, 17, 18, 20
AIR 1967 SC 1182 = (1967) 2 SCR 476 3
AIR 1965 SC 1803 = (1965) 3 SCR 588 7
AIR 1963 SC 295 = (1963) 3 SCR 461

Mr. B. Sen, Sr. Advocate, (Mr. I. N. Shroff, Advocate with him), for Appellant; M/s. R. K. Garg, S. C. Agarwal and V. J. Francis, Advocates, for Respondent.

Judgment of the Court was delivered by

GOSWAMI, J.:— The important question which has been pinpointed in this appeal by special leave is whether when a domestic inquiry held by an employer is found by the Labour Court as violative of the principles of natural justice there is any duty cast upon that Court to give an opportunity to the employer to adduce evidence afresh before it and whether failure to do so would vitiate its award.

2. In the present case the workman concerned was charged under the standing orders of the company for soliciting or collecting from the employees contributions for some purpose (allegedly purchase of microphone and loud-speaker arrangements) within the factory premises. The workman denied the charge of soliciting or collecting contribution within the factory premises (for purchase of microphone and loud-speaker) but added that "for this purpose I collect the said contribution outside the gate of the Company and this being so, such erroneous information supplied to you by someone should not be considered acceptable."

3. After holding the domestic inquiry in which some witnesses were examined by the employer and cross-examined by the workman and questioning the workman at the outset as well as at the end of the inquiry, the Enquiry Officer submitted a very brief report to the Works Manager (hereinafter the Manager) holding that the charges were established. He did not give any detailed reasons for preferring the evidence of the six witnesses examined on behalf of the employer in the inquiry to the version of the workman. The Manager after perusal of the report of the Enquiry Officer passed the order of dismissal without adverting to the evidence in the inquiry. This was particularly necessary since the Enquiry Officer had not given his reasons for his finding. Another incident occurred during the inquiry before the Manager. The workman after answering the first question of the Manager, when another question was put, abruptly left the inquiry without paying any heed to the orders of the Manager, and to persuasion of other officers present asking him to wait. The dismissal order was passed the same afternoon.

4. In this appeal we will proceed on the assumption that the domestic inquiry was rightly found by the Labour Court to be defective. The Labour Court is aware of the legal position that it was competent in this case to take evidence

of the parties and come to its own conclusion on the merits of the case and to decide whether the order of dismissal was justified or not to enable it to consider about the relief, if any, to be awarded to the workman. The Labour Court, however, observed in its award that—

"In the instant case no evidence regarding merits is led by the Opponent before this Court It is open to the Labour Court to hold an enquiry itself. But the Opponent has chosen not to lead any evidence regarding the merits of the alleged misconduct. The natural result of vitiating the enquiry would therefore be to set aside the order of dismissal and to direct the reinstatement in service of the dismissed employee with all back wages."

5. The question posed at the commencement of our judgment is thus highlighted by the aforesaid observations of the Labour Court and we are required to consider whether after the Labour Court comes to a decision about the inquiry being defective it has any duty to announce its decision in that behalf to enable the employer an opportunity to adduce evidence before it to justify the order on the charge levelled against a workman. There is, however, no doubt that when the employer chooses to do so the workman will have his opportunity to rebut such evidence. There is also no doubt, whatsoever, that if the employer declines to avail of such an opportunity, it will be open to the Labour Court to make an appropriate award and the employer will thereafter be able to make no grievance on that score.

6. In dealing with a case of dismissal of an industrial employee, this Court has time and again adverted to various principles and it is not necessary to recount all those decisions. It will be sufficient to concentrate our attention only on a few of the decisions so far as material for our purpose and which are also rightly referred to at the bar.

7. The first case arising out of an award that has a material bearing on the question is that of Workmen of Motipur Sugar Factory (P.) Ltd. v. Motipur Sugar Factory, (1965) 3 SCR 588 = (AIR 1965 SC 1803) which is a decision of four learned Judges. Inter alia, the question that arose in that appeal was as to whether, since the management held no inquiry as required by the standing orders, it could not justify the discharge before the Tribunal. In Motipur Sugar Factory's case (supra), the Court observed at p. 597 of the report as follows:—

"If it is held that in cases where the employer dismisses his employee without holding an enquiry, the dismissal must be set aside by the industrial tribunal only on that ground, it would inevitably mean

that the employer will immediately proceed to hold the enquiry and pass an order dismissing the employee once again. In that case, another industrial dispute would arise and the employer would be entitled to rely upon the enquiry which he had held in the meantime. This course would mean delay and on the second occasion it will entitle the employer to claim the benefit of the domestic enquiry given. On the other hand, if in such cases the employer is given an opportunity to justify the impugned dismissal on the merits, the employee has the advantage of having the merits of his case being considered by the tribunal for itself and that clearly would be to the benefit of the employee. That is why this Court has consistently held that if the domestic enquiry is irregular, invalid or improper, the tribunal may give an opportunity to the employer to prove his case and in doing so the tribunal tries the merits itself. This view is consistent with the approach which industrial adjudication generally adopts with a view to do justice between the parties without relying too much on technical considerations and with the object of avoiding delay in the disposal of industrial disputes".

8. The consequence that can ensue from a contrary view, as noticed by the Court in Motipur Sugar Factory's case (supra), will appear from what took place in the Management of Northern Rly. Co-operative Credit Society Ltd. v. Industrial Tribunal, Rajasthan, Jaipur, (1967) 2 SCR 476 = (AIR 1967 SC 1182), where pursuant to the award after reinstating the employee the management drew a fresh proceedings and passed a fresh order of removal and the said order was again the subject matter of another reference to the industrial tribunal.

9. The pertinent question that arises for consideration is whether it is the duty of the tribunal to make known its decision to the parties on this jurisdictional aspect of the case so that the employer can avail of the opportunity to justify the dismissal based on the charge.

10. In Management of Ritz Theatre (P.) Ltd. v. Its Workmen, (1963) 3 SCR 461 = (AIR 1963 SC 295) this Court was required to deal with a rather ingenious argument. It was contended in that case by the workmen, in support of the tribunal's decision, that since the management at the very commencement of the trial before the Tribunal adduced evidence with regard to the merits of the case it should be held that it had given up its claim to the propriety or validity of the domestic enquiry. While repelling this argument this Court made some significant observations:

"In enquiries of this kind, the first question which the Tribunal has to con-

sider is whether a proper enquiry has been held or not. Logically, it is only where the Tribunal is satisfied that a proper enquiry has not been held or that the enquiry having been held properly the findings recorded at such an enquiry are perverse, that the Tribunal derives jurisdiction to deal with the merits of the dispute.....

If the view taken by the Tribunal was held to be correct, it would lead to this anomaly that the employer would be precluded from justifying the dismissal of his employee by leading additional evidence unless he takes the risk of inviting the Tribunal to deal with the merits for itself, because as soon as he asks for permission to lead additional evidence, it would follow that he gives up his stand based on the holding of the domestic enquiry. Otherwise, it may have to be held that in all such cases no evidence should be led on the merits unless the issue about the enquiry is tried as a preliminary issue. If the finding on that preliminary issue is in favour of the employer, then, no additional evidence need be cited by the employer; if the finding on the said issue is against him, permission will have to be given to the employer to cite additional evidence."

11. Although this Court in Ritz Theatre's case (supra) observed that such a procedure may be "elaborate and somewhat cumbersome" it was not held to be illegal nor had it been rejected out of hand.

12. In State Bank of India v. R. K. Jain, (1972) 1 SCR 755 = (AIR 1972 SC 136 = 1972 Lab IC 13) this Court had to deal with a similar question. The contention on behalf of the management in that case was that—

"Even assuming that the domestic inquiry conducted by the Bank was in any manner vitiated, the Industrial Tribunal erred in law in not giving an opportunity to the management to adduce evidence before it to establish the validity of the order of discharge."

13. In dealing with the above contention this Court observed as follows:—

"If the management defends its action solely on the basis that the domestic inquiry held by it is proper and valid and if the Tribunal holds against the management on that point, the management will fail

It is essentially a matter for the management to decide about the stand that it proposes to take before the Tribunal. It may be emphasised, that it is the right of the management to sustain its order by adducing also independent evidence before the Tribunal. It is a right given to the management and it is for the management to avail itself of the said opportunity".

14. On the facts of that case this Court held that the management, having made it clear to the Tribunal that it was resting its case solely on the domestic enquiry, had no right to make a grievance that it should have been given an opportunity to adduce evidence on facts before the Tribunal in justification of its order.

15. This Court further observed in that case that "no such opportunity was asked for by the appellant nor even availed of." This Court in that case took into account management's consistent stand throughout before the Tribunal as also that it made no grievance on the score of non-availability of opportunity to adduce evidence even in the special leave petition. The claim of the Bank in that case was rejected on the peculiar facts found by this Court.

16. Referring to the State Bank's case (supra) in Delhi Cloth and General Mills Co. v. Luth Budh Singh, (1972) 3 SCR 29 = (AIR 1972 SC 1031 = 1972 Lab IC 573) this Court observed that—

"the grievance of the management before this Court that the Tribunal should have given such an opportunity suo motu was not accepted in the circumstances of that case."

There was a further observation in the Delhi Cloth and General Mills' case (supra) to the following effect:

"It may be pointed out that the Delhi and Madhya Pradesh High Courts had held that it is the duty of the Tribunal to decide, in the first instance, the propriety of the domestic enquiry held by the management and if it records a finding against the management, it should suo motu provide an opportunity to the management to adduce additional evidence, even though the management had made no such request. This view was held to be erroneous by this Court, in State Bank of India v. R. K. Jain (supra)."

17. We may now refer to the propositions (4), (5) and (6) in the Delhi Cloth and General Mills' case (supra):

(4) "When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management. However elaborate and cumbersome the procedure may be, under such circumstances, it is open to the Tribunal to deal, in the first instance, as a preliminary issue the validity of the domestic enquiry. If its finding on the preliminary issue is in favour of the management, then no additional evidence need be cited by the

management. But, if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the Tribunal during the course of the proceedings and before the trial has come to an end....."

(5) "The management has got a right to attempt to sustain its order by adducing independent evidence before the Tribunal. But the management should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been availed of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the Tribunal did not provide such an opportunity. The Tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper."

(6) "If the employer relies only on the domestic enquiry and does not simultaneously lead additional evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide the matter. If the Tribunal decides that the domestic enquiry has not been held properly, it is not its function to invite suo motu the employer to adduce evidence before it to justify the action taken by it."

18. In the Delhi Cloth and General Mills' case (supra) dealing with the case of the management's application to adduce evidence after close of arguments, although on the same day after the Court reserved judgment, this Court observed as follows:—

"The appellant did not ask for an opportunity to adduce evidence when the proceedings were pending nor did it avail itself of the right given to it in law to adduce evidence before the Tribunal during the pendency of the proceedings."

19. In Workmen of M/s. Firestone Tyre & Rubber Co. of India (P.) Ltd. v. Management, (1973) 3 SCR 587 = (AIR 1973 SC 1227 = 1973 Lab IC 851) this Court stated the law laid down by this Court as on December 15, 1971. For our purpose we will extract from that decision only propositions 4, 6, 7 and 8:

(4) "Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about

the legality and validity of the order, has to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action."

(6) "The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only, if no enquiry has been held or after the enquiry conducted by an employer is found to be defective."

(7) "It has never been recognised that the Tribunal should straightway, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective."

(8) "An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct."

20. We are particularly concerned with proposition (8). What is the appropriate stage was specifically adverted to in the Delhi Cloth and General Mills' case (*supra*) which we are now required to seriously consider whether this conclusion is correct and ensures justice to all concerned in an industrial adjudication.

21. Propositions (4), (6) and (7) set out above are well-recognised. Is it, however, fair and in accordance with the principles of natural justice for the Labour Court to withhold its decision on a jurisdictional point at the appropriate stage and visit a party with evil consequences of a default on its part in not asking the Court to give an opportunity to adduce additional evidence at the commencement of the proceedings or, at any rate, in advance of the pronouncement of the order in that behalf? In our considered opinion it will be most unnatural and impractical to expect a party to take a definite stand when a decision of a jurisdictional fact has first to be reached by the Labour Court prior to embarking upon an enquiry to decide the dispute on its merits. The reference involves determination of the larger issue of discharge or dismissal and not merely whether a correct procedure had been followed by the management before passing the order of dismissal. Besides, even if the order of dismissal is set aside on the ground of

defect of enquiry, a second enquiry after reinstatement is not ruled out nor in all probability a second reference. Where will this lead to? This is neither going to achieve the paramount object of the Act, namely, industrial peace, since the award in that case will not lead to a settlement of the dispute. The dispute, being eclipsed, *pro tempore*, as a result of such an award, will be revived and industrial peace will again be ruptured. Again another object of expeditious disposal of an industrial dispute (see S. 15) will be clearly defeated resulting in duplication of proceedings. This position has to be avoided in the interest of labour as well as of the employer and in furtherance of the ultimate aim of the Act to foster industrial peace.

22. We are, therefore, clearly of opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication the Labour Court should first decide as a preliminary issue whether the domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer there will be no difficulty. But when the matter is in controversy between the parties that question must be decided as a preliminary issue. On that decision being pronounced it will be for the management to decide whether it will adduce any evidence before the Labour Court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue. We should also make it clear that there will be no justification for any party to stall the final adjudication of the dispute by the Labour Court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award. It will be also legitimate for the High Court to refuse to intervene at this stage. We are making these observations in our anxiety that there is no undue delay in industrial adjudication.

23. In the present case, however, besides the long delay that has already taken place, since the law laid down by this Court was not very clear at the time of the award in casting a duty upon the Labour Court to decide the preliminary issue and also in view of the submission of the appellant that it is prepared to pay the entire salary of the workman upto-date, it will meet the interest of justice if the order of reinstatement is converted to one of compensation in terms of his entire salary from the date of dismissal to the date of this decision except for what has already been paid to him instead of remitting the matter to the Labour Court for disposal in the light of this judgment by setting aside the award.

24. In the result the appeal is dismissed with the above modification of the relief. There will be, however, no order as to costs.

Order accordingly.

AIR 1975 SUPREME COURT 1905

(From: Assam and Nagaland)*

H. R. KHANNA, M. H. BEG AND
A. C. GUPTA, JJ.

The Collector of Kamrup, Appellant v. Raj Chandra Sarma and others (In C. A. No. 178 of 1968) and Surendra Nath Sarma, Respondents (In C. A. No. 179 of 1968).

Civil Appeals Nos. 178 and 179 of 1968, D/- 13-8-1975.

(A) Land Acquisition Act (1894), Section 23 — Agricultural lands and building sites — Assessment of compensation — Capitalisation — Report of Statistical Department — Evidentiary value — (Evidence Act (1872), S. 35).

Acquisition of rupit (cultivable) and basti lands (in Assam) — Value of land assessed by capitalizing income from rupit land for 25 years — Report of Statistical Department of Assam Government, prepared on sample survey basis — Not necessarily safe guide for assessing market value of rupit land — Rent receipts given by adhiars showing yield, in the absence of proof that they were incorrect, relied upon for assessment — Basti lands also treated as equal in value with rupit lands. (Paras 4, 6)

Mr. F. S. Nariman, Sr. Advocate (Naunit Lal and Miss Lalita Kohli, Advocates with him), for Appellant; M/s. B. P. Maheshwari, T. C. Dass and Suresh Sethi, Advocates, for Respondents.

Judgment of the Court was delivered by

GUPTA, J.:— These two appeals on certificate of fitness granted by the High Court of Assam and Nagaland under Article 133 (1) (c) of the Constitution arise out of land acquisition proceedings. A large area of land in village Cotanagar, Mouza Ramcharani was acquired for the Railways in 1950. The extent of the land acquired in the case of the first respondent in Civil Appeal No. 178 of 1968, Raj Chandra Sarma, was 11 bighas, 4 kathas and 10 lachhas of 'rupit' (cultivable) land, and in the case of Surendra Nath Sarma, sole respondent in Civil Appeal No. 179 of 1968, 67 bighas 1 katha and 10 lachhas of which 60 bighas were 'rupit' land, and 7 bighas, 1 katha and 16 lachhas were

'basti' land. The Collector awarded compensation at the rate of Rs. 350/- per bigha for rupit land and Rs. 300/- per bigha for basti land. Being dissatisfied the claimants applied for reference under Section 18 of the Land Acquisition Act. The Subordinate Judge who heard the reference felt that on the material before him the only possible way to assess the value of the land was by capitalizing the income from the land for 25 years. He referred to an application (Ext. A) made to the Collector by one of the claimants, Surendra Nath Sarma, which included a statement that the rupit land yielded 6 to 8 maunds of paddy per bigha per year. Proceeding on the basis that the average yield per bigha per year was 7 maunds of paddy, and deducting half of this amount on account of cost of cultivation and other incidental expenses, the net yield from one bigha of rupit land came to about 3½ maunds per year. In view of the statement in the application Ext. A, the Subordinate Judge declined to accept the oral evidence adduced on behalf of the claimants to prove that the yield was 10 to 12 maunds per bigha. The Subordinate Judge also referred to the rent receipts (Ext. I series) which showed that claimant Surendra Nath Sarma used to get 2-2/3 maunds of paddy for one bigha of land. The rent receipts disclosed that Surendra Nath Sarma had let out some of these lands on chukani basis for 8 puras of paddy per bigha per year, 3 puras being equivalent to one maund. On the basis of the application Ext. A and the rent receipts Ext. I series the Subordinate Judge held the average net yield per year from 1 bigha of rupit land was 3 maunds, and on the basis of the Government notification of the year in question fixed the price of paddy at Rs. 8/- per maund; thus the net income from 1 bigha of rupit land was fixed at Rs. 24/- per year. The capitalized value of the land on the basis of 25 years' income worked out at Rs. 600 and the Subordinate Judge allowed compensation at the aforesaid rate for the rupit lands. In arriving at this figure he declined to place any reliance on Ext. H which is a report of the Statistical Department of the Government of Assam on outturn of Winter Rice in Assam for 1950-51. As this report was prepared on sample survey basis, the Subordinate Judge felt it was not a reliable guide for assessing the value of the acquired land.

2. As regards the basti lands the Subordinate Judge found no material to induce him to arrive at a figure different from that awarded by the Collector, namely Rs. 300/- per bigha per year. (sic)

3. The High Court on appeal, preferred by the claimants, accepted the method of valuation adopted by the Sub-

* (First Appeals Nos. 1 and 10 of 1961, D/- 16-12-1966—Assam and Naga.).

ordinate Judge. The High Court however held that the yield for the rupit lands should be taken as 8 maunds of paddy per bigha per year, and deducting 3 maunds from this for the cost of production and incidental expenses, the net yield per bigha of rupit land was 5 maunds. As regards the price, the High Court accepted the rate adopted by the Subordinate Judge based on the Government notification which was Rs. 8/- per maund. Calculating on this basis the High Court fixed the amount of compensation for the rupit lands at Rs. 1,000/- per bigha.

4. The finding of the High Court is based on the report, Ext. H, and the evidence of the claimants who said that the rupit lands yielded 10 to 12 maunds of paddy per bigha per year. It seems to us that the High Court was in error in relying on Ext. H and the oral evidence of the claimants both of which the Subordinate Judge had found unreliable and, in our opinion, rightly. Ext. H as stated already is a report of the Statistical Department on outturn of winter rice in Assam for the year 1950-51 based on sample survey method. According to the High Court this was a scientific method and likely to be more accurate; it was overlooked however that a method which is appropriate for one purpose may not be so for another. The report based on sample survey is not necessarily a safe guide for ascertaining the market value of any particular plot or plots of land acquired under the Land Acquisition Act. It also appears that the High Court read the report incorrectly when it said that the report showed the yield to be 8.17 maunds per bigha; as a matter of fact, the report discloses that the yield was 8.17 maunds of rice per acre, which is equivalent to 3.3 bighas. Counsel for the claimants pointed out that Ext. H was a report on the outturn of rice and not paddy and that it disclosed that estimates of the yield of clean rice from paddy was based on the official conversion figure of 62.5 per cent. But even calculating on the basis of the official conversion rate, the yield of paddy per bigha would be nowhere near 8 maunds which was found by the High Court. As regards the rent receipts, the observation made by the High Court that the "receipts given to the adhiars are not certain proof of the amount of the yield" is difficult to follow. There is nothing on record to suggest that the amount of the yield appearing from the rent receipts was incorrect. Counsel for the claimants submitted before us that the rent receipts which related mostly to the years 1931-1932 should not be taken as indicative of the correct position in 1950 when the lands were acquired. But no documentary evidence was pro-

duced on behalf of the claimants to show that the position as regards the yield of paddy changed in 1950.

5. These rent receipts were the claimants' documents on which they apparently sought to rely. As regards the application made to the Collector by Surendra Nath Sarma (Ext. A) on which the Subordinate Judge relied, the High Court disregarded it by saying that there was "no reason to hold that this was an accurate statement". The question however is, was there any reason to hold that this was not an accurate statement. The claim in evidence that the yield from rupit lands was 10 to 12 maunds per bigha per year was considered by the Subordinate Judge as inflated having regard to the earlier statement in Ext. A. We find no valid reason why this finding should be disturbed. We therefore think that the Subordinate Judge was right in valuing the rupit lands at Rs. 600/- per bigha.

6. We are concerned with basti lands only in Civil Appeal No. 179 of 1968. With regard to the basti lands, the High Court observed: "The price of basti land can never be lower than that of rupit land in the same locality." No evidence seems to have been given which could be said to be directed towards proving this somewhat sweeping statement. Surendra Nath Sarma had, however, claimed, in the course of his evidence, a higher price for basti land than for rupit lands. Therefore the Subordinate Judge does not seem to be quite right in thinking that there was no evidence whatsoever questioning the Collector's valuation of the basti lands. We agree with the view taken by the High Court that the basti lands should be treated as equal in value with the rupit lands. We hold that both classes of lands, rupit and basti, should be valued at Rs. 600/- per bigha.

7. In the result Civil Appeal 178 of 1968 is allowed and Civil Appeal 179 of 1968 is allowed to the extent indicated above. In the circumstances of the case there will be no order as to costs.

Order accordingly.

AIR 1975 SUPREME COURT 1906

(From Orissa: (1973) 1 Cut WR 23)

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALLA, JJ.

The State of Orissa, Appellant v.
Khageswar Das and others, Respondents.
Civil Appeal No. 254 (N) of 1974. D/-
12-8-1975.

(A) Constitution of India, Art. 359 (1)
— Proclamation of emergency and suspen-

HS/IS/C969/75/KSB

sion of pending proceeding for enforcement of fundamental right — Service rule struck down by High Court as being violative of Articles 14 and 16 prior to proclamation — Appeal under Article 136 by State pending when emergency was declared — Proceeding is not for enforcement of rights under Articles 14 and 16 but for deletion of that enforcement and therefore not suspended. (Para 7)

(B) Constitution of India, Articles 14 and 16 — Violation of — Orissa Industries Service Rules (1971), Rule 3 (1) (ii) — Rule in so far as it excludes posts of Principals of Mining Engineering Schools from junior grade Class I is violative of Articles 14 and 16 of the Constitution.

Clause (ii) of Rule 3 (1) of the Rules when it says in the first part that the "junior grade shall include the posts of Deputy Directors, Senior Lecturers in Engineering Schools" it means clearly Senior Lecturers in Engineering Schools not excluding Mining Engineering School. But in the last part when in the junior grade were included the posts of Principals, Engineering Schools by the words "except Mining Engineering" given in the parenthesis, the post of the Principal of the Mining Engineering School was excluded. There was no justification for making the distinction in the junior grade of Class I service in the case of the Principal of Mining Engineering School. The rule in that regard has rightly been held to be violative of Articles 14 and 16 of the Constitution by the High Court. But striking down of the whole of clause (ii) of Rule 3 (1) of the Rules was not necessary. Only the words in parenthesis had to be deleted and struck down on that account. That would serve the purpose of making the posts of Principals of all Engineering Schools including the Mining Engineering School being the posts in the junior grade, Class I. (1973) 1 Cut WR 23 (Orissa), Modified. (Para 13)

Mr. Gobind Das, Sr. Advocate, (Mr. B. Parthasarathi, Advocate with him), for Appellant; M/s. B. P. Maheshwari and Suresh Sethi, Advocates, for Respondent No. 1.

Judgment of the Court was delivered by

UNTWALIA, J.:— The State of Orissa has preferred this appeal by special leave from the judgment and order of the High Court passed in a Writ Petition filed by respondent No. 1; Respondent No. 2 was appointed by promotion to the post of Joint Director of Industries, Government of Orissa in supersession of the claim of respondent No. 1. The High Court has quashed the said order and directed the appellant to consider the case of respondent No. 1 for promotion to the post of Joint Director according to his

seniority in the combined cadre formed by Resolution dated 2-10-1967. Rule 3 (1) (ii) of the Orissa Industries Service Rules, 1971 has been struck down as being violative of Article 16 of the Constitution of India.

2. Respondent No. 1 was appointed as a lecturer in Mining in the Orissa School of Mining Engineering, Keonjhar, on 6-2-1960. The said School was brought under the administrative control of the Industries Department of the Government of Orissa in pursuance of a Resolution dated 18-2-1960. The service of respondent No. 1 thereupon stood transferred under the administrative control of the Industries Department with effect from 21-3-1960. The post of the lecturer in the Mining Engineering School was upgraded by order of the State Government made in August, 1960. The petitioner was brought into the common cadre of the Industries Department of Government of Orissa and while he was so continuing, he was appointed as Principal of the Mining Engineering School. The provisional appointment made was regularized by the Industries Department by a notification dated 19-12-1962, a copy of which was Annexure D/2 to the writ application. This notification clearly shows that at that time respondent No. 1 was treated as an officer of the Industries Department.

3. Then came a Resolution of the Government dated 21-4-1964. The common cadre of the Industries Department was bifurcated into two. A separate cadre was created for teaching posts of Engineering Schools in Orissa including the Mining Engineering School. Respondent No. 1 exercised his option to remain in the teaching cadre of the Industries Department.

4. As per Resolution of the Government dated 2-10-1967 the two separate cadres in the Industries Department were again amalgamated and merged into one. Consequently, the cadre of the teaching staff of the Engineering Schools including the Mining Engineering School and that of the administrative staff became a single combined cadre. Even then respondent No. 1 was not considered for promotion to the post of Joint Director when respondent No. 2 who was junior to him was promoted to the post. Feeling aggrieved by the non-consideration of his case for promotion, respondent No. 1 filed the writ application in the year 1970. During the pendency of the writ application, the Governor of Orissa framed the Orissa Industries Service Rules, 1971 — hereinafter called the Rules — under proviso to Art. 309 of the Constitution. Respondent No. 1 amended his writ application, made out a case of discrimination in the framing of

the Rules and attacked them as being violative of Articles 14 and 16 of the Constitution.

5. In paragraph 5 of the counter filed by the appellant the formation of a combined cadre by Resolution dated 2-10-1967 was admitted. But it was asserted that in spite of the merger of the two cadres into one the intention of the Government was to treat the post of the Principal of a Mining Engineering School as an ex-cadre post under the Industries Department. The Mining Engineers were excluded from the junior grade of service under the Industries Department in accordance with the Rules of 1971. Earlier also, respondent No. 1 got class I post out of turn treating him as belonging to ex-cadre post.

6. The High Court has come to the conclusion that before 21-4-1964 there were no separate cadres for the teaching and the administrative staff of the Industries Department. The cadre was one. It was bifurcated in 1964 and the two bifurcated cadres were again united and merged into one on and from 2-10-1967. There was, therefore, no justification at all in not considering the case of respondent No. 1 for promotion to the post of Joint Director as all persons in the combined cadre eligible for promotion had to be considered. Respondent No. 1 was senior to respondent No. 2 in the combined cadre and yet his claim was ignored on a ground which was not substantiated. The relevant rule was discriminatory and had no reasonable nexus with the object of the Rules.

7. The judgment of the High Court was handed down on the 30th November, 1972 — long before the issuance of the notification dated 27th June, 1975 by the President of India under Article 359 (1) of the Constitution. The rule was declared ultra vires on the ground of violation of Articles 14 and 16. The State of Orissa was the appellant before us. It was, therefore, agreed on all hands that this appeal was not a proceeding pending in this Court for the enforcement of the right under Article 14 of the Constitution and was, therefore, not suspended. The enforcement of the right was made by the delivery of the High Court judgment and the State merely wanted in this appeal a deletion of that enforcement.

8. Mr. Gobind Das, learned counsel for the appellant, submitted that the posts of the teachers in the Mining Engineering School in Orissa including the posts of the Principal have always been treated as ex-cadre posts in the Industries Department. The teachers and the Principal of the Mining Engineering School were not considered for promotion to the posts of Administrative Department be-

cause few persons were available to man the posts in the Mining Engineering School. It was because of this reason that the case of respondent No. 1 was not considered and the Rules were also framed with that object in view. In any view of the matter, counsel submitted, that the whole of Rule 3 (1) (ii) ought not to have been declared as void and only the offending portion ought to have been struck down.

9. The main part of the argument put forward on behalf of the appellant does not stand scrutiny and must be rejected. It could not be seriously disputed that respondent No. 1 was an officer of the Industries Department and appointed to the post of the Principal of the Mining Engineering School in that Department. There is nothing to indicate that the post of the Principal or of the teacher of any Engineering School or of the Mining Engineering School was an ex-cadre post. Then came the Resolution Dt. 21st April, 1964. The new scales of pay were fixed for the teachers in Engineering in the Engineering Schools including the Mining Engineering School in the State of Orissa. The contention of Mr. Das that the fixation of scales was only for the Engineering Schools and not for Mining Engineering School is not correct. Clearly all Engineering Schools were placed on the same footing and paragraph 3 of this Resolution runs as follows:

"The teaching posts in Engineering Schools which till now were included in a common cadre with other posts in the Directorate of Industries will be placed in a separate cadre to which the above scale of pay will apply."

10. Then came the merger resolution after about three years on the 2nd October, 1967 a copy of which was Annexure I to the writ application. The subject of the notification, Annexure I, is "formation of a combined cadre for the officers of the Industries Department". It was clearly mentioned in this notification that after the teaching posts were placed in a separate cadre "it was felt that the promotion prospects would be bleak due to the formation of a separate cadre for teachers in view of the limited posts available for promotion." Hence formation of separate cadre for teachers was considered not to be beneficial to them. So the combined cadre was brought into force with effect from the date of the issue of the Resolution dated 2nd October, 1967 in supersession of the earlier decision to have a separate cadre for teachers. Lastly it was stated in this Resolution "The conditions of service of all the officers will be governed by a set of cadre rules to be framed later on." No rules were framed until the framing of the

Rules in 1971. As against a categorical statement in the Resolution dated 2-10-1967 there was nothing whatever to show that the post of a teacher or the Principal in the Mining Engineering School was treated as an ex-cadre post and on a separate footing for the purpose of promotion to the administrative posts. The non-consideration of the case of respondent No. 1 at the time respondent No. 2 was promoted to the post of Joint Director in or about the year 1969 was wholly arbitrary, unjustified and illegal. The High Court was right in making the order which it did on the writ application of respondent No. 1.

11. As against the purpose and object of the merger of the cadre mentioned in the Resolution dated 2-10-1967 we find Rule 3 of the Rules going contrary to them. Rule 9 (1) of the Rules says:

"Promotions to the posts of Senior grade in Class I shall be made from among the members of the Junior grade in Class I."

12. Constitution of the service is provided in Rule 3. We are concerned with Rule 3 (1). It reads as follows:

"3 (1) The cadre of the service shall consist of two branches, viz., Class I and Class II, the former comprising two grades, viz., the Senior grade and the Junior grade, as indicated below:—

(i) The Senior grade shall include posts of Joint Directors and Officers of equivalent status as may be declared by Government from time to time.

(ii) The Junior grade shall include the posts of Deputy Directors, Senior Lecturers in Engineering Schools and such other posts as may be declared by Government from time to time to be of equivalent status, besides the posts of Principal, Engineering Schools (except Mining Engineering) and Polytechnics which carry a special scale of pay."

13. Clause (ii) of the Rules when it says in the first part that the "junior grade shall include the posts of Deputy Directors, Senior Lecturers in Engineering Schools" it means clearly Senior Lecturers in Engineering Schools not excluding Mining Engineering School. But in the last part when in the junior grade were included the posts of Principals, Engineering Schools by the words "except Mining Engineering" given in the parenthesis, the post of the Principal of the Mining Engineering School was excluded. It was so done during the pendency of the writ application of respondent No. 1 and without any reasonable and sound basis for making a discrimination apropos the post of the Principal of the Mining Engineering School. We find no justification for making the distinction

in the junior grade of Class I service in the case of the Principal of Mining Engineering School. The rule in that regard has rightly been held to be violative of Articles 14 and 16 of the Constitution by the High Court. But striking down of the whole of clause (ii) of Rule 3 (1) of the Rules was not necessary. Only the words in parenthesis had to be deleted and struck down on that account. That would serve the purpose of making the posts of Principal of all Engineering Schools including the Mining Engineering School being the posts in the junior grade, Class I.

14. For the reasons stated above, we find no merit in this appeal. It is accordingly dismissed but subject to the clarification made above with costs payable to respondent No. 1.

Appeal dismissed.

AIR 1975 SUPREME COURT 1909

(From: Madhya Pradesh)*

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

Nizamuddin Ahmed, Appellant v.
Narbada Prasad and others, Respondents.

Civil Appeal No. 1384 of 1973. D/-
22-8-1975.

(A) Representation of the People Act (1951), S. 116-C — Power of Supreme Court to differ from trial Judge on credibility of witnesses.

When on the evidence on certain point of some of the election petitioner's witnesses two views are possible but if one of them is accepted by the trial Judge, who had the advantage of seeing the witnesses while they were giving evidence and a good opportunity of deciding for himself whether the witnesses were stating the truth, in appeal to Supreme Court his view is certainly entitled to great weight in absence of any strong reason to differ from him. (Para 12)

(B) Representation of the People Act (1951), S. 123 — Corrupt practice — Evidence and proof.

In a case where the charge is of corrupt practice it is unsafe to place any reliance on evidence of very nebulous nature when the allegations in the election petition are very vague and the actual evidence is very rarely in accordance with those allegations. The allegations of corrupt practice have to be proved by evidence which leave little room for doubt even though it may not be necessary to prove the allegations beyond all reason-

*(Elec. Petn. 10 of 1972, D/- 10-7-1973—
Madh. Pra.).

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able doubt as in a criminal prosecution.

(Para 13)

Mr. S. N. Andley, Sr. Advocate (M/s. J. B. Dadachanji and D. N. Misra, Advocates), for Appellant; Mr. Y. S. Dharamadhikari, Sr. Advocate, (M/s. S. S. Khan-duja, S. G. Godha, and R. N. Bhalgotra, Advocates with him), for Respondents.

Judgment of the Court was delivered by

A. ALAGIRISWAMI, J.:— This appeal arises out of an election petition filed by the appellant, a voter, questioning the election of the 1st respondent to the Madhya Pradesh Legislative Assembly from the Lanji constituency in Balaghat District held on the 8th of March, 1972.

2. The 1st respondent had applied for a Congress ticket and on being refused a Congress ticket he contested the election as an independent candidate and won the election having obtained 20051 votes. The 2nd respondent was the Congress candidate who got the next highest votes of 19166. The other respondents were also unsuccessful candidates.

3. The appellant made a number of allegations against the successful candidate the purport of which would appear from issues 1 to 4 set out below:

1. Has the Respondent No. 1 incurred or authorised expenditure beyond the prescribed limit as detailed in paragraph 5-B, B-i, B-ii, B-iii, B-iv and B-v and what is its effect?

2. Whether the Respondent No. 1 made a gift of expenses for election including the deposit of Rs. 250/- at the time of filing the nomination papers of the Respondents Nos. 5 and 6 with a view to divide the votes to support his candidature as detailed in paragraph 5 (c) of the petition and does this amount to a corrupt practice under Section 123 (1) (A) and (B) of the Representation of the People Act, 1951?

3. Whether the Respondent No. 1 obtained the services of Shri Raizada as alleged in paragraph 5 (E) and the Schedule concerned for the furtherance of the prospects of his election and is he guilty of a corrupt practice under S. 123 (7) of the Representation of the People Act, 1951?

4. Whether the respondent No. 1 got printed and widely distributed in the constituency the leaflet with a heading with his symbol with a threat that Goddess Durga rides on his symbol and in case he is not voted they will suffer from the wrath of Goddess Durga? Does this amount to an appeal on the ground of religion or religious symbol within the mischief of Section 123 (3) of the Representation of the People Act, 1951? All the issues were found against the appellant and as we agree with the learned

Judge completely we do not consider it necessary to discuss the evidence at length. We shall indicate our reasons within a short compass.

Issue No. 1

4. The first item of expenditure was a sum of Rs. 1,500/- representing the amount alleged to have been spent by the 1st respondent for putting up sheds at each of the hundred polling booths in the constituency and for having boards at each of those polling booths. The second item was a sum of Rs. 2,340/- alleged to have been spent for two lorries for nine days at the rate of Rs. 100/- a day and for a jeep for nine days at the rate of Rs. 60/- per day. The third item was a sum of Rs. 400/- consisting of Rs. 100/- alleged to have been given to one Bhivram for repairing the roof of Ram Mandir in village Mohara and another sum of Rs. 300/- alleged to have been paid to one Alambeg of village Rusewada for constructing a well in the village.

5. As regards the expenses for the sheds and boards it was admitted by the 1st respondent that he did not spend any amount for putting up sheds. On the other hand there was no evidence on the appellant's side as to the number of sheds which were put up or on the amount spent on putting up the sheds. The only evidence which had any relevance to this question was that of P. W. 13 that he made the mandap at the request of Brijlal Mishra, Sarpanch of the Gram Panchayat, Bhanegaon and that the 1st respondent had made the request to Brijlal Mishra to make arrangements for the construction of the mandap and paid him Rs. 20/- which in turn was given to him by Brijlal Mishra. The evidence of this witness has been rightly disbelieved by the High Court as he also said that one Manmohan paid the money to Brijlal Mishra, that he is unable to recognize Manmohan and he himself had not told about it to anybody till he was examined in the Court. In addition, both Brijlal Mishra as well as the 1st respondent deny this. The whole case seems to have proceeded on the basis that there must necessarily have been one shed at each polling booth and each shed would have cost at least Rs. 10/-. It may well be that friends and sympathisers of the 1st respondent had put up sheds. In the absence of any positive evidence that the 1st respondent had spent any money for putting up those sheds we cannot hold that this amount was spent. Similarly there is no positive evidence about the amount spent for the boards at each of the polling booths.

6. As regards the conveyances a sum of Rs. 1,800/- is said to have been incurred by contractor Devsibhai for and on behalf of the 1st respondent. The truck

numbers were given as BYY 2809 and MPK 6757. There was no evidence, oral or documentary, regarding the number of days for which the trucks were used nor about the rate at which the trucks were paid for. Apart from the scanty material found in the petition on this point it is found that while the number of the jeep was given the letters which preceded the number were not given. Exhibits R-15 and R-16 show that there was a motor-cycle bearing number MPK 2770 and one Bedford truck bearing number MPJ 2770, both belonging to persons other than Devsibhai and in any case they were not jeeps. The truck number BYY 2809 is found to belong to M/s. Raj Kumar Transport Service of Tumsar. Ex. R-17 shows that it was not in use from 1-7-1965 till 11-5-1973. The evidence regarding purchase of diesel oil for this truck was in respect of the period from 10-6-1971 to 25-1-1972 and did not cover the relevant period of the election. Apart from the fact that it was the evidence given by a person who had not even been summoned to give evidence, the witness P. W. 20 was an employee of a firm in which Radhe-shyam, President of the Block Congress, Lanji, who was working on behalf of the 2nd respondent, was a partner and he had no personal knowledge. He also stated that he did not meet Devsibhai. Therefore no satisfactory evidence is available to prove that truck number BYY 2809 was used for the purposes of the 1st respondent's election. The same applies to the jeep. That apart, the evidence regarding the use of these trucks and jeep covers only three days and none of the witnesses speak to the number of the truck. P. W. 3 spoke of the 1st respondent having come to his village 8 or 10 days before the Holi and of two jeeps followed by one truck having come there. P. W. 4 stated that the 1st respondent had come to village Sadra on 4-3-1972 and one jeep and two trucks had come there. P. W. 8 spoke of a procession in which there was one car, two jeeps and two trucks. Thus the evidence is only about the use of trucks and jeeps on three days. At the most, therefore, it could be said that a sum of Rs. 300/- was incurred in using one truck on three days. This it may be noted is even though there is no evidence about the number of the truck or the amount paid or about Devsibhai's connection with it. There is certainly no evidence to show that two trucks and one jeep were used for nine days and a sum of Rs. 2340/- was spent.

7. As regards the payment of Rs. 100/- to Bhivram, P. W. 11, for repairing the roof of Ram Mandir in village Mohara, it is to be noticed that one Chaturbhuj was the Sarvarakar of the temple and Chaturbhuj as R. W. 6 has

deposed that no amount of Rs. 100/- was donated by the 1st respondent. This Bhivram was not even a member of the temple committee. It appears also that the mandir is an old one and required repairs at the relevant time to the extent of Rs. 2,000/- to Rs. 3,000/-. The High Court has rightly disbelieved this allegation.

8. As regards the construction of a well, it appears that there is already a well and it belongs to one Jahruddin, a very rich person. Alambeg to whom the amount is said to have been paid is not said to be an influential person and a rich man like the owner of the well need not certainly look to a donation for repairing his well. Furthermore, Alambeg, P. W. 17, did not tell about it to anybody till he gave evidence in the Court.

9. The result of this discussion is that the appellant should be held to have failed miserably in his attempt to show that the 1st respondent had exceeded the statutory limit of expenses.

Issue No. 2

10. This issue relates to the payment to respondents 5 and 6 of Rs. 250/- each towards deposit and Rs. 50/- each for expenses. During the arguments it was admitted on behalf of the appellant that there was no evidence of payment to respondent No. 6. The evidence in respect of the allegation of payment to respondent No. 5 was that of respondent No. 5 himself as P. W. 18 and another witness Rajaram Patel, P. W. 19. Respondent No. 5 had asked for any one of the three symbols, 'Elephant', 'Flower' and 'Lion'. The 1st respondent's election symbol was 'Lion'. It is quite unlikely that the 1st respondent would have therefore paid any money to the 5th respondent. The learned Judge, who had an occasion to note 5th respondent's demeanour when he gave evidence, has noted that whenever a question was asked he took two to three minutes to answer and even though he understood the question he avoided the answer. The 5th respondent's nephew, Gautam was the Secretary of the Republican Party of India for an area consisting of 31 villages. He has stated that the Republican Party supported the 1st respondent in the election. To the same effect is the evidence of Mr. Meshram, R. W. 9, an advocate who is also the President of the Republican Party of India for Madhya Pradesh. It is, therefore, extremely unlikely that the 1st respondent would set up the 5th respondent as a candidate and pay the deposit amount to him. We are not entering into the question whether the allegations in the petition even if proved would amount to a corrupt practice. We agree with the High Court that this allegation has not been proved.

Issue No. 3

11. There is no satisfactory evidence before the Court to show that Raizada, who is alleged to have worked for the 1st respondent was a gazetted officer in the Government. From an answer given by him even in his chief examination that an order placing him under suspension was issued under the signature of the Governor as also an order reinstating him it could be inferred that he was probably a gazetted officer though that is not proved by the best evidence possible. But the appellant had miserably failed to prove that he worked for the 1st respondent in the election. The allegation in the petition is only that he moved in jeep No. 2770 (MPK) and visited three villages and he moved in Fiat No. MPK 25 and visited three villages. Fiat car No. MPK 25 is one belonging to the 1st respondent. We have already shown that there is no satisfactory evidence about the registration number of the jeep. However, the recitation of the various villages which Raizada is alleged to have visited and the dates on which he did so does not amount to an allegation of corrupt practice. It is not alleged that he visited these villages in the company of the 1st respondent. However, evidence was let in that he made a speech asking people to vote for the 1st respondent. Being a Government servant it is extremely unlikely that he would run the risk of making a speech requesting people to vote for the 1st respondent. Without going elaborately into the evidence on this point it is enough to say that we agree with the High Court in its assessment of the evidence on this point and hold that the appellant has failed to substantiate the allegations covered by this issue.

Issue No. 4

12. The allegation on this point is that the 1st respondent had got a pamphlet, Ex. P-1, printed and published, the contents of which were as follows:

"Your popular candidate, Shri Narbada Prasad Shrivastava is from Lanji Constituency. 'Lion' is the vehicle of world's Goddess mother Durga, which is the election symbol of indivisible power and faith of the Indian public, the same lion is the election symbol of Shri Narbada Prasad Shrivastava. After adopting and making his election symbol of the vehicle of Goddess Durga, Shri Narbada Prasad Shrivastava requests to the whole public, for the sake of Goddess Durga to put the seal on her vehicle, and to make successful to the vehicle of Goddess Durga."

Without going into the question whether even if the allegations are proved the appeal made in this pamphlet could bring it under Section 123 (3) of the Represen-

tation of the People Act, we may point out that there is no proof at all that it was got printed by the 1st respondent. So the success of the appellant on this issue would depend purely on the question whether this pamphlet was distributed by the 1st respondent or by others at his instance. Two leaflets, Ex. P-1 and Ex. P-2, were alleged to have been distributed but it is unnecessary to refer to Ex. P-2. Chandrabhan Singh, R. W. 2 denies this. One Yakub Thekedar who is said to have been present when Chandrabhan Singh gave the pamphlet to the appellant was not examined as a witness. The 1st respondent stated that he had not seen Ex. P-1 before he saw it in the Court and he had not asked anybody to distribute it. Babulal, P. W. 1, was not believed by the High Court because first he said that Ex. P-1 was given to him by the 1st respondent and then that it was given to him by Chandrabhan Singh. Both the 1st respondent and Chandrabhan Singh denied this. P. W. 3's evidence was rightly not accepted because the petition does not mention his village as one where the pamphlet was distributed. The High Court has elaborately discussed the question of the evidence of P. W. 4 and shown that it cannot be accepted. We see no reason to differ from it. The 3rd respondent as P. W. 5 deposed that Exhibit P-1A, a copy of Ex. P-1, was given to him by Chandrabhan Singh. Even though he is a lawyer and he knew that distribution of Ex. P-1A was against law he did not make any report to the Returning Officer or any other authority. Furthermore, in his written statement he had not mentioned the name of Chandrabhan Singh, who is alleged to have distributed the pamphlet to him. The evidence of P. Ws. 6, 7, 8, 12 and 14 has also been discussed by the High Court and disbelieved. We see no reason to take a different view. At best it may be said that on the evidence on this point of some of the petitioner's witnesses two views are possible but if one of them is accepted by the learned trial Judge, who had the advantage of seeing the witnesses while they were giving evidence and a good opportunity of deciding for himself whether the witnesses were stating the truth, his view is certainly entitled to great weight and we can see no strong reason to differ from him.

13. Furthermore, one common factor about the evidence regarding all the issues is that it is of very nebulous nature. There is nothing clinching about the evidence. Even the allegations in the petition are very vague and quite often the actual evidence is very rarely in accordance with the allegations in the petition. In a case where the charge is of corrupt practice it is unsafe to place any

reliance on such evidence. The allegations of corrupt practice have to be proved by evidence which leave little room for doubt even though it may not be necessary to prove the allegations beyond all reasonable doubt as in a criminal prosecution. Judged by that test none of the charges made by the appellant have been satisfactorily proved.

14. The appeal is, therefore, dismissed. The appellant will pay the costs of the 1st respondent.

Appeal dismissed.

AIR 1975 SUPREME COURT 1913

(From: Kerala)*

A. N. RAY, C. J., K. K. MATHEW AND Y. V. CHANDRACHUD, JJ.

1. V. A. Subhadra (In C. A. 247 of 1975) 2. State of Kerala and another (In C. A. No. 248 of 1975), Appellants v. A. Satyavan and others (In Both the Petns.). Respondents.

Civil Appeals Nos. 247 and 248 of 1975. D/- 22-8-1975.

(A) Constitution of India, Art. 309 — Service rules — Promotion and seniority — Kerala Government notification dated 2-1-1961 — Applicability.

A was appointed as a Lower Division Clerk in Department of Museum and Zoos in 1949 and was confirmed in that post in 1950. B was appointed as Lower Division Clerk in same department and was confirmed in 1963. On 9-4-1962 A, on her own request was transferred to Department of Agriculture. A maintained her rank and lien in the former department. In course of time when vacancy arose in the post of Upper Division Clerk in Department of Museum and Zoos and the two persons (including A) having declined the offer of the said post, B was appointed provisionally as Upper Division Clerk without prejudice to claims of the seniors in the department. On 18-3-1971, A was appointed as an Upper Division Clerk in her parent department and on 3-5-1971 she was promoted as a Senior Superintendent. On writ petition by B.

Held that notwithstanding the fact that A was senior to B and A's claim of seniority would not be affected by appointment of B as Upper Division Clerk, the appointment of A as an Upper Division Clerk in Department of Museum and Zoos was invalid because in view of notification issued by Kerala Government dated 2-1-1961 A was not entitled to return to her parent department, when the substan-

tive post held by A on date of transfer to the Department of Agriculture was that of Lower Division Clerk. The notification could apply only when there was no vacancy available to A in the Department of Agriculture in which she could have continued, and when the pay which A would have drawn as Upper Division clerk in her parent department on 18-3-1971 was higher than the pay which she was drawing in the Department of Agriculture. Since neither of these two conditions were satisfied in case of A and as such she could not revert to her old unit, she could not be appointed to a post higher than the one substantively held by her in that unit on date of transfer.

(Paras 7 to 10)

Mr. T. S. Krishnamoorthy Iyer, Sr. Advocate, (Mr. N. Sudhakaran, Advocate with him), for Appellant in Appeal 247 of 1975 and Respondent No. 2 in C. A. No. 248 of 1975; Mr. T. C. Raghavan, Sr. Advocate (Mr. P. K. Pillai, Advocate with him), for Respondent No. 1 in both the Appeals and Mr. K. T. Harindranath, Sr. Advocate (In C. A. No. 248 of 1975 only) and (Mr. K. R. Nambiyar Advocate with him), for Respondent No. 2, in C. A. No. 247 of 1975 and Appellant in C. A. No. 248 of 1975.

Judgment of the Court was delivered by

Y. V. CHANDRACHUD, J.:— This appeal by special leave arises out of the judgment of the High Court of Kerala in Writ Petition No. 5463 of 1971. That petition was filed by the 1st respondent A. Satyavan against the State of Kerala, the Director of the Department of Museums and Zoos, Trivandrum and the appellant Smt. V. A. Subhadra. The main relief sought by the 1st respondent was that the order passed by the State of Kerala on March 18, 1971 appointing the appellant as an Upper Division Clerk in the Department of Museums and Zoos be quashed.

2. The appellant was appointed as a Lower Division Clerk in the Department of Museums and Zoos, Trivandrum in 1949. She was confirmed in that post in 1950. The 1st respondent was appointed as a Lower Division Clerk in the same Department in 1955 and was confirmed in 1963. On April 9, 1962, the appellant, on her own request, was transferred to the Department of Agriculture. That was an inter-departmental transfer. Though on transfer the appellant became the junior-most employee in the Department of Agriculture, her rank and lien were maintained in the Department of Museums and Zoos.

3. In course of time a vacancy arose in the post of the Upper Division Clerk in the Department of Museums and

* (Original Petn. No. 5463 of 1971, D/- 29-5-1974—Ker.).

Zoos. One M. S. Pillai was the senior-most Lower Division Clerk in that Department but when the post of promotion was offered to him he declined it on the ground of ill-health. The appellant was next in order of seniority amongst the Lower Division Clerks in the Department of Museums and Zoos and since her rank and lien in that Department were maintained, she was offered the post of the Upper Division Clerk. She conveyed her inability to accept that post for the time being and thereupon the 1st respondent, who was next in order of seniority, was appointed provisionally as an Upper Division Clerk. His appointment was made without prejudice to the claims of the seniors in the Department of Museums and Zoos.

4. On the retirement of M. S. Pillai, a permanent vacancy in the post of the Upper Division Clerk arose in the Department of Museums and Zoos. On July 6, 1970 the appellant, who was working in the Department of Agriculture, conveyed her willingness to accept that post. By an order dated March 18, 1971 she was appointed as an Upper Division Clerk and later on May 3, 1971 she was further promoted as a Senior Superintendent. Both of these appointments as also the order by which his representation was rejected by the Government were challenged in the writ petition by the 1st respondent.

5. The High Court of Kerala allowed the writ petition holding that under the relevant rules, the appellant was not entitled to be retransferred to her parent department and without a valid order of retransfer she could not be appointed as an Upper Division Clerk in that Department. The High Court therefore quashed the order dated March 18, 1971 by which the appellant was appointed as an Upper Division Clerk and the orders consequent upon it.

6. There are two things in favour of the appellant and they must first be mentioned. The order dated April 9, 1962 passed by the Director of Museums and Zoos by which the appellant was transferred to the Department of Agriculture expressly mentions that her lien and rank will be maintained in the Department of Museums and Zoos. It is therefore plain that if and when the appellant rejoined the Department of Museums and Zoos in conformity with the rules and regulations, she would occupy the rank which she would have occupied but for her transfer to the Department of Agriculture. Secondly, the order dated April 4, 1968 passed by the Director of Museums and Zoos by which the 1st respondent was appointed as an Upper Division Clerk in the Department of Museums and Zoos

mentions expressly that he was appointed in the higher post for the time being only and that the appointment was made without prejudice to the claims of his seniors. In the Department of Museums and Zoos the appellant was senior to the 1st respondent and therefore her claim of seniority would not be affected by the appointment of the 1st respondent as an Upper Division Clerk.

7. In spite of this position, the appellant's appointment as an Upper Division Clerk in the Department of Museums and Zoos is invalid because such an appointment could be made only if, in the first place, the appellant was entitled under the relevant rules to return to her parent department. It was common ground that the appellant's right to return to the Department of Museums and Zoos was governed by the notification issued by the Government of Kerala on January 2, 1961. Paragraph 2 of that notification reads thus:

"A permanent person need not be required to relinquish his permanency. He may be permitted to retain his permanent lien in the old post until he is confirmed in the new unit or department, but he can come back to the old unit or department only if and when there is no vacancy for him to continue in the new unit, or if for any reason his pay in the substantive post in the parent department becomes higher than the pay of the new post held by him."

It is clear from this provision that a person can return to his parent department in one of the two contingencies only. He can return if there is no vacancy for him to continue in the new unit to which he is transferred. Admittedly, there was a vacancy available to the appellant in the Department of Agriculture in which she could have continued and therefore this clause has no application. The second contingency in which a person can return to his parent Department as if his pay in the substantive post in the parent department becomes higher than his pay in the post held by him in the department to which he is transferred. The question which arises for consideration is whether by reason of this clause, the appellant was entitled to go back to her old unit. If she could validly go back, there is no doubt that it was open to the Government to appoint her to the post of an Upper Division Clerk.

8. The High Court, in our opinion, was right in taking the view that "pay in the substantive post in the parent department" means the pay attached to the post substantively held by the employee on the date of transfer to another department. Since the substantive post held by the appellant on the date of her transfer

to the Department of Agriculture was that of a Lower Division Clerk, what must be considered is whether the pay which the appellant would have drawn in that post, had she continued in her parent department, had for any reason become higher than the pay drawn by her in the post held by her in the Department of Agriculture. It is undisputed that the pay which the appellant would have drawn as an Upper Division Clerk in her parent department on March 18, 1971 was not higher than the pay which she was drawing in the Department of Agriculture. Since under Paragraph 2 an employee can come back to his old unit or department, "only if and when" either of the two conditions is satisfied, the appellant was not entitled to return to her parent department. Unless she could validly revert to her old unit, she could not be appointed to a post higher than the one substantively held by her in that unit on the date of her transfer.

9. It is urged on behalf of the appellant that the pay which she would draw in the post of an Upper Division Clerk in the parent department, after her retransfer to that department, would be higher than the pay which she was drawing in the post which she was holding in the Department of Agriculture and therefore she would be entitled to return to her parent department under the second of the two conditions mentioned above. It is impossible to accept this contention. The substantive post held by the appellant, apart from the impugned order of promotion, was that of a Lower Division Clerk in the Department of Museums and Zoos. The comparison therefore has to be between the pay of that post and the pay of the post which the appellant was holding in the department to which she was transferred.

10. The order dated March 18, 1961 by which the appellant was appointed as an Upper Division Clerk in the Department of Museums and Zoos is therefore illegal and was rightly quashed by the High Court. The order dated May 3, 1971 further promoting the appellant as a Senior Superintendent must fall with that order. The appeal is accordingly dismissed.

Civil Appeal No. 248 of 1975:

11. This appeal is filed by the State of Kerala against the same judgment of the High Court which gave rise to the appeal just disposed of by us. In accordance with the view taken by us in C. A. No. 247 of 1975, this appeal must be dismissed.

12. While admitting these two appeals, this Court had directed that the Government of Kerala shall pay the costs of the 1st respondent. A. Satvavan. In any

event. Accordingly the Government of Kerala shall pay the costs of the 1st respondent. Costs shall be in one set only.
Appeals dismissed.

AIR 1975 SUPREME COURT 1915

(From: Punjab & Haryana)*

A. N. RAY, C. J., K. K. MATHEW,
V. R. KRISHNA IYER AND
S. MURTAZA FAZL ALI, JJ.

Gurjit Singh Sahota, Appellant v. State of Punjab and another, Respondents.

Civil Appeal No. 501 of 1975, D/- 11-8-1975.

(A) Constitution of India, Art. 311 — Promotion — Promotion of appellant to Class I post on ad hoc basis — Reversion to Class II as his service record in Class II post did not justify promotion — His service record in Class I post must be considered when his juniors are promoted to Class I post on ad hoc basis. C. W. P. No. 4209 of 1974, D/- 17-9-1974 (Punjab and Haryana). Reversed.

It is true that when the appellant was promoted to Class I on ad hoc basis his record of service in Class II post did not justify his promotion and that was the reason why he was ordered to be reverted. But that is no reason why when his juniors were subsequently promoted to Class I posts, the case of the appellant for promotion to Class I post should not have been considered on the basis of his service in the Class I post, though his ad hoc promotion to that post was subsequently found to be not justified. If, on the basis of the subsequent record of his service, the appellant was entitled to be promoted to Class I post in preference to any one of his juniors, there was no justification for the order reverting him to Class II service. C. W. P. No. 4209 of 1974, D/- 17-9-1974 (Punjab & Haryana), Reversed.

(Para 7)

M/s. R. K. Garg, S. C. Agarwal, V. J. Francis and T. Ansari, Advocates, for Appellant; Mr. V. C. Mahajan, M/s. N. S. Das Bahl and Balak Ram, Advocates, for Respondents.

Judgment of the Court was delivered by

MATHEW, J.:— The appellant filed a writ petition before the High Court of Punjab and Haryana praying for issue of a writ of certiorari or other appropriate writ or direction quashing an order reverting him from the post of Divisional

*(Civil Writ Petn. No. 4209 of 1974, D/- 17-9-1974—Punjab & Haryana).

IS/IS/D118/75/MVJ

Soil Conservation Officer (Class I) to the post of Assistant Soil Conservation Officer (Class II) the High Court dismissed the petition and this appeal, by special leave, is from that order.

2. The appellant was appointed as Assistant Soil Conservation Officer (Class II) on 14-9-1962. When the appellant was working as Class II officer, the Government confirmed 5 Class II Officers, on 16-9-1968. The appellant was not one among them. But the order of confirmation stated that one post was reserved for the appellant for his being confirmed when found suitable. One Mehtab Singh who was a junior to the appellant in the post of Assistant Soil Conservation Officer was confirmed with effect from 10-7-1968.

3. The Government informed the Public Service Commission on 1-8-1969 that Mehtab Singh was eligible for promotion to the post of Divisional Soil Conservation Officer (Class I) and he was promoted to that post. On 16-6-1971, the appellant was promoted as Divisional Soil Conservation Officer (Class I) on ad hoc basis. Thereafter four of the juniors of the appellant were also promoted to the post of Divisional Soil Conservation Officer (Class I) on ad hoc basis. The appellant was confirmed as Assistant Soil Conservation Officer (Class II) on 22-9-1971 with retrospective effect from 9-6-1968. Subsequently, the Government informed the Public Service Commission that as the appellant was confirmed, he became senior to Shri Mehtab Singh and therefore, the Government had decided to promote the appellant as Class I Officer on regular basis. The Public Service Commission disagreed with the proposal of the Government on the basis that the appellant's confirmation with effect from a date earlier than that of Mehtab Singh was not justified. The Commission also gave approval of the regularisation of Shri Mehtab Singh's promotion. On 16-8-1974, the appellant was served with an order stating that he had been reverted from the post of Divisional Soil Conservation Officer to the post of Assistant Soil Conservation Officer. As already stated it was to quash this order that the appellant filed the writ petition.

4. There is no dispute that when the appellant was promoted on ad hoc basis to the Class I Post, his record of service was unsatisfactory and it was for this reason that the Public Service Commission advised that he should be reverted and that the Government passed the order reverting him to the Class II post.

5. The appellant's contention is that when four of his juniors were promoted on ad hoc basis as Divisional Soil Conservation Officer (Class I), his record

of service in the Class I post on the basis of ad hoc promotion should have been taken into consideration in adjudging whether he was eligible for promotion to Class I post in preference to any one of them. In other words, the argument was that, although he had been found unsuitable for promotion on the date when he was promoted to Class I post on ad hoc basis, that was no reason for not considering his record of service in the Class I post when his juniors were promoted to Class I posts on ad hoc basis.

6. The High Court found that since the appellant was not reverted by way of punishment and the Public Service Commission did not adjudge him suitable for the post, the order of reversion was not open to challenge. But the Court, however, observed:

"It will be open to the Government to refer the case of the petitioner to the Public Service Commission specifically for advice as to his suitability for the post of Divisional Soil Conservation Officer and thereafter to act in accordance with law."

7. We think that the grievance of the appellant to the extent that his record of service in the Class I post should have been considered when his juniors were promoted to Class I Posts is legitimate. It is true that when the appellant was promoted to Class I on ad hoc basis his record of service in Class II post did not justify his promotion and that was the reason why he was ordered to be reverted. But that is no reason why, when his juniors were subsequently promoted to Class I posts, the case of the appellant for promotion to Class I post should not have been considered on the basis of his service in the Class I post, though his ad hoc promotion to that post was subsequently found to be not justified. If, on the basis of the subsequent record of his service, the appellant was entitled to be promoted to Class I post in preference to any one of his four juniors, there was no justification for the order reverting him to Class II service.

8. We would, therefore, direct the Public Service Commission to consider the record of service of the appellant in Class I post on the basis of his ad hoc promotion to that post and see whether he was eligible for promotion to that class of post in preference to any one of his four juniors who have been promoted to Class I posts and tender the proper advice to the Government.

9. We quash the order of reversion and allow the appellant to continue in Class I post until the Government passed a fresh order on the basis of the advice to be given by the Public Service Commission. The appeal is allowed to

the above extent but is dismissed in other respects. There will no order as to costs.
Order accordingly.

AIR 1975 SUPREME COURT 1917

(From: Allahabad)*

M. H. BEG, P. N. BHAGWATI AND
R. S. SARKARIA, JJ.

Dharam Pal and others, Appellants v.
The State of U. P. Respondent.

Criminal Appeal No. 108 of 1971. D/-
1-9-1975.

(A) Penal Code (1860), Section 149 —
Unlawful assembly — Fourteen out of
eighteen acquitted on ground of benefit
of doubt — Scope for applying S. 149.

If only five known persons are al-
leged to have participated in an attack
but the Courts find that two of them were
falsely implicated, it would be quite natu-
ral and logical to infer or presume that
the participants were less than five in
number. (Para 10)

On the other hand, if the Court holds
that the assailants were actually five in
number, but there could be a doubt as to
the identity of two of the alleged assai-
lants, and, therefore, acquits two of them,
the others will not get the benefit of
doubt about the identity of the two ac-
cused so long as there is a firm finding,
based on good evidence and sound reason-
ing, that the participants were five or
more in number. (Para 10)

It may be that a definite conclusion
that the number of participants was at
least five may be very difficult to reach
where the allegation of participation is
confined to five known persons and there
is doubt about the identity of even one.
But, where a large number of known per-
sons (such as eighteen, in the instant case),
are alleged to have participated and the
Court acts on the principle that it is
better to err on the side of safety, so that
no injustice is done to a possibly wrongly
implicated accused, and benefit of doubt
is reaped by a large number, with the re-
sult that their acquittal, out of abundant
caution, reduces the number of those about
whose participation there can be no doubt
to less than five, it may not be really
difficult at all to reach the conclusion
that, having regard to undeniable facts,
the number of participants could not pos-
sibly be less than five. (Para 10)

It has to be remembered that doubts
may arise with regard to the participa-
tion of a particular accused person in cir-

cumstances whose benefit can only be
reaped by the accused who raises such
doubt. If the Court, whose duty is to
separate the chaff from the grain, does
hold that the convicted persons were
certainly members of an unlawful as-
sembly which must have consisted of
more than five persons, there can be no
principle of law or justice which could
stand in the way of the application of
Section 149, I. P. C. for convicting those
found indubitably guilty of participation
in carrying out of the common object of
an unlawful assembly. AIR 1973 SC 337
= 1972 Cri LJ 1254, Rel. on. (Para 14)

(B) Penal Code (1860), Sections 34
and 149 — Vicarious liability — Principle
of — Applicability.

The principle of vicarious liability
does not depend upon the necessity to
convict a required number of persons. It
depends upon proof of facts, beyond rea-
sonable doubt, which makes such a prin-
ciple applicable. AIR 1973 SC 337 =
1972 Cri LJ 1254 and AIR 1974 SC 323 =
1974 Cri LJ 354, Relied on. (Para 11)

(C) U. P. Children Act (1 of 1951),
Section 29 — Accused although armed
with lathi no specific part assigned to him
by any prosecution witness — Accused
found to be misled by bad example of his
elders — No previous participation and no
previous conviction — Fit case for taking
action under Section 29. (Para 16)

Cases Referred: Chronological Paras
AIR 1974 SC 323 = (1974) 2 SCR 518 =
1974 Cri LJ 354 11
AIR 1973 SC 337 = (1973) 1 SCR 291 =
1972 Cri LJ 1254 11, 12, 13
(1964) 1 SCR 775 14, 15
AIR 1963 SC 174 = 1962 Supp (3) SCR
848 = (1963) 1 Cri LJ 100 14
AIR 1963 SC 1413 = (1964) 1 SCR 678 =
(1963) 2 Cri LJ 351 13, 15
AIR 1960 SC 289 = (1960) 2 SCR 172 =
1960 Cri LJ 424 14
AIR 1961 SC 1787 = (1961) 2 Cri LJ 853
14
AIR 1953 SC 364 = 1954 SCR 145 = 1953
Cri LJ 1465 14

Mr. D. Mukherjee, Sr. Advocate (Mr.
U. K. Jha, Advocate for Mr. U. P. Singh,
Advocate with him), for Appellants; Mr.
D. P. Uniyal, Sr. Advocate (Mr. O. P.
Rana, Advocate with him), for Respondent.
Judgment of the Court was delivered
by

BEG, J.:— The four appellants Dar-
yao Singh, aged 46 years, Birbal aged 50
years, Dharam Pal aged 29 years and Om
Pal, aged 25 years, were tried, along with
14 others, for the offence of rioting in the
course of which two murders were com-
mitted, on 7-6-1967, at about 6.30 a.m.,
on a path adjoining the field of the ap-
pellant Daryao Singh leading to village
Parsoli from village Nirpura, in Police

*(Criminal Appeal No. 495 of 1968, D/-
20-11-1970 (All)).

Station Doghat, in the District of Meerut. The trial Court acquitted eleven accused persons giving them the benefit of doubt and convicted seven including the four appellants. Each of the accused persons was charged and convicted under Section 302, read with Section 149, Indian Penal Code and sentenced to life imprisonment, in addition to charges and convictions under Section 149/324 and 149/34, I. P. C. and either under Section 147 or Section 148, I. P. C. depending upon the weapon alleged to have been used by an accused person.

2. The prosecution case revealed a long standing enmity between two groups of village Nirpura: one to which the appellants belonged and another to which Mukhtara and Raghubir, the murdered men, and the four other injured persons belonged. As is not unusual, the origin of the hostility between the two sides seems to have been a dispute over cultivable land between collaterals who had some joint Khatas. Asa Ram, P. W. 1, claimed to be in separate possession of some plots with his two brothers, including Raghubira (murdered), and his uncle Mukhtara (murdered). It was alleged by Asa Ram (P. W. 1) that Daryao Singh appellant wanted to take forcible possession of some land cultivated by him. Daryao Singh and others had already filed a partition suit which was pending at the time of the occurrence. It appears that Hargyan, the father of the appellant Daryao, a first cousin of Mukhtara, the murdered man, had also been murdered (sic?) dispute. Asa Ram (P. W. 1), and Raghubira (deceased), Bija (P. W. 10) and Asghar (P. W. 4) had been convicted and sentenced to life imprisonment. They had been released on parole after five years' imprisonment.

3. On the date of occurrence, Mukhtara, the murdered man, was said to be proceeding with Raghubir, who was also murdered, and Asa Ram, P. W. 1, and Bija, P. W. 10, all sitting in a buggi driven by Asghar, P. W. 4, and Smt. Jahani, P. W. 3, the wife of Asa Ram, P. W. 1, was said to be following the buggi at a short distance with some food for the party. When this buggi reached the field of Daryao Singh, where a number of persons, said to be eighteen altogether, whose names are mentioned in the First Information Report lodged at Police Station Doghat at a distance of three miles from village Nirpura at 8.30 a. m. were sitting on the boundary. These persons are alleged to have surrounded the buggi and attacked its occupants with balams and lathies shouting that the whole party in the buggi should be killed. Five occupants of the buggi, and, after that, Smt. Jahani, who soon joined them, were

injured. Two of them, Mukhtara and Raghubir, died very soon after the attack. It was alleged that Dharam Pal, Birbal, and Daryao, appellants, and Nahar, Ajab Singh, and Ram Kishan, acquitted persons, were armed with balams, one Salek Chand was armed with a spade, and the rest with lathis. A number of witnesses are said to have arrived in response to the shouts of the injured occupants of the buggi. The following injuries are shown to have been sustained by the victims of the attack:

1. MUKHTARA:

"1. Vertical abrasion, $1\frac{1}{2}'' \times \frac{1}{2}''$ on the head, $4''$ above the middle of the left eyebrow.

2. Transverse abrasion, $1\frac{3}{4}'' \times \frac{3}{4}''$ on the head, $5''$ above the right eyebrow.

3. Round swelling, $2'' \times 2''$ on the right side of the head, $\frac{1}{2}''$ above the ear, there was a depressed fracture $2'' \times 2''$ underneath the bone.

4. Transverse incised wound $1\frac{1}{2}'' \times \frac{1}{2}'' \times$ bone and brain deep on the head $1''$ behind the middle of the right ear. Brain matter was coming out of the wound.

5. Transverse incised wound $1\frac{1}{2}'' \times \frac{1}{2}'' \times$ bone deep on the head $3''$ behind the upper part of the right ear. The margins of injuries Nos. 4 and 5 were clear cut, smooth and well defined and angles on both the ends were acute.

6. Round blue mark $2'' \times 2''$ on the right shoulder portion. There was swelling all over the head. There was no reference of injuries Nos. 1 and 6 in the inquest report."

2. RAGHUBIRA:

"1. Transverse abrasion $\frac{1}{2}'' \times \frac{1}{2}''$ on the left ankle inner side.

2. Vertical punctured wound $\frac{1}{2}'' \times 1\frac{1}{3}'' \times \frac{1}{2}''$ on the back side, of the elbow, margins, clean cut, smooth and well defined and angles were acute.

3. Transverse lacerated wound on the head, $1\frac{1}{2}'' \times \frac{1}{2}''$ bone deep on the right side $3''$ above the ear.

4. Round wound on the head $4\frac{1}{2}''$ above the middle of the right eyebrow with margins clean cut."

3. ASA:

"1. Punctured wound $\frac{1}{2}'' \times \frac{1}{2}'' \times \frac{1}{2}''$ on the left side of the chest with abrasions on the margins, $6\frac{1}{2}''$ below the axilla.

2. Abrasion $\frac{1}{2}'' \times \frac{1}{2}''$ on the left shoulder.

3. Abrasion $1\frac{1}{2}'' \times 1\frac{1}{8}''$, oblique, on the right side of the chest extending towards right shoulder from epigastrium.

4. Abrasion $\frac{1}{2}'' \times 1\frac{1}{8}''$ on the inner side of the left hand $1''$ above the wrist.

5. Abrasion $\frac{1}{2}'' \times 1\frac{1}{8}''$ on the right arm back side $3''$ above the elbow.

6. Contusion $\frac{3}{4}'' \times \frac{1}{2}''$ on the right side $3\frac{1}{2}''$ below the edge of the iliac crest.

7. Incised wound $\frac{1}{2}'' \times 1/10'' \times$ skin deep $\frac{1}{2}''$ below the left eye."

4. SMT. JAHANI:

"1. Lacerated wound $1\frac{1}{4}'' \times \frac{1}{2}''$ bone deep from front to backward $3\frac{1}{2}''$ above the left ear.

2. Contusion $4\frac{1}{2}'' \times 1''$ on the left scapular region, $2\frac{1}{2}''$ below the shoulder.

3. Contusion $1\frac{1}{2}'' \times \frac{3}{4}''$ parallel to the earth extending from the upper and inner end of injury No. 2. These injuries were simple and had been caused by some blunt weapon, like lathi and were about 6 hours old (fresh). I had prepared the injury report Ex. Ka 16 at the time of examination. It bears my signature and is correct."

5. ASGHAR:

"1. Contusion $2'' \times \frac{1}{2}'' \times \frac{1}{2}''$ going from front to back $3\frac{1}{2}''$ above the nose.

2. Punctured wound $1/8'' \times 1/8'' \times 1/4''$ on the left hand, outer side $2''$ below the elbow.

6. BIJAI SINGH:

"1. Contused wound $\frac{1}{2}'' \times 1/8'' \times$ skin deep at the part above the nail of the thumb of right hand with contusion $1\frac{1}{4}'' \times \frac{1}{2}''$ in the inner part of the nail.

2. Contusion $2\frac{1}{4}'' \times \frac{3}{4}''$ extending from the palm on the 1st and 2nd knuckles where blood had clotted in an area of $\frac{1}{2}'' \times \frac{1}{4}''$ on the palmar side.

3. Abrasion $\frac{1}{2}'' \times \frac{1}{2}''$ on the back and anterior side of Right hand, $3\frac{1}{2}''$ above the wrist."

4. Injuries were found on the side of the accused on 3 appellants only. They were as follows:

1. OM PAL:

"1. Lacerated wound $\frac{1}{2}'' \times 4/10'' \times 2/10''$ on the inner side of left forearm, $3\frac{1}{2}''$ above the left wrist.

2. Lacerated wound $2/10'' \times 2/10'' \times 6/10''$ on the inner side of left forearm.

3. Abrasion $3/10'' \times 2/10''$ on the upper side of left forearm, $3\frac{1}{2}''$ above the left wrist."

2. DARYAO:

"1. Abrasion $\frac{1}{2}'' \times 3/10''$ on the left shoulder in front side."

2. Wound with scab $4/10'' \times 2/10''$ on the left arm, outer side, $6''$ below left shoulder."

3. BIRBAL:

"1. Lacerated wound $2'' \times 3/10''$ bone deep on the front side of head.

2. Abraded contusion $1'' \times 2/10''$ on the left side of head, $3''$ above the left ear.

3. Contusion $\frac{1}{2}'' \times 4/10''$ on the right side of head, $2''$ above the right ear.

4. Abrasion $\frac{1}{2}'' \times \frac{1}{2}''$ on the index finger of the right hand upper side on the middle phalux.

5. Abrasion $\frac{1}{2}'' \times \frac{1}{2}''$ on the upper side at the root of the middle finger of right hand.

6. Abrasion $\frac{1}{2}'' \times 1/10''$ on the inner side of the lower portion of left fore-arm, $3/4''$ above the wrist.

7. Abrasion $3/10'' \times 1/10''$ on the inner side of left wrist.

8. Lacerated wound $3/10'' \times 1/10'' \times 3/10''$ on the right at a distance of $3\frac{1}{2}''$ from side of thigh, anterior iliac spine."

5. It is significant that in answer to the last question put to Daryao Singh, appellant, in the Committing Magistrate's Court, under Section 342, Criminal Procedure Code, whether he had nothing else to say, the first thing that came to his mind was that Asa Ram, P. W. 1, and Bijai, P. W. 10, and Raghubir (deceased) had killed his father about 15 years ago.

6. The defence case seemed quite absurd. It was that, Asa Ram and Bijai and Asghar, after having killed Mukhtara and Raghubir, had come and attacked the three injured appellants at the time and place given by the prosecution. Their defence witness, however, in an obvious attempt to explain the injuries of the three appellants, put forward the entirely new version that, when Asa, Bijai, and Asghar, were killing Mukhtara and Raghubir, the three injured appellants had attempted to save the murdered men and were injured as a consequence. The accused had even filed a First Information Report on these lines. They unsuccessfully tried to prosecute Asa and Bijai and Asghar who could not, as the trial Court and the High Court had rightly observed, be expected to run berserk suddenly and attack persons on their own side for no explicable reason.

7. The prosecution had, in addition to examining injured witnesses, mentioned above, produced Rattan Singh, P. W. 2, Kalu, P. W. 9, and Lakhi, P. W. 7, whose testimony was discarded by it on two grounds: firstly, because each one was shown to have some enmity with some accused persons; and, secondly, because they were said to have been standing at a Harat nearly 400 paces away from where, according to the High Court, they could not have seen the occurrence. If there was no obstruction to the range of vision, and none was shewn by evidence, these witnesses could at least make out the number of assailants from this distance as sunlight was there.

8. The prosecution evidence suffered from some quite obvious infirmities. Each of the four injured eye-witnesses, while naming each of the eighteen accused persons as participants in the occurrence and specifying their weapons, without any contradiction, had failed to assign any particular part to any of them. Each injured witness said that all the eighteen accused persons, named in the First Information Report, were assaulting

the injured. This was hardly consistent with either the Medical evidence or the very short time the whole occurrence was said to have lasted. It was physically impossible for all the eighteen accused persons to attack simultaneously each of the five victims. However, we cannot interpret the impressions of rustic witnesses, sought to be conveyed through their statements, as though they were made in carefully drawn up documents calling for a literal interpretation. It was likely that each of them had seen some acts of some assailants, but, due to natural discrepancies in their accounts, as each could only depose the part he had observed, each had been instructed to omit this part of his testimony. That may explain how each consistently stated that all the accused persons were attacking his or her party although he or she could not specify which accused attacked which victim. From the manner in which each witness could, without making any mistake, name each of the eighteen accused persons, almost in the same order, and specify the weapon each carried, without any discrepancy, some tutoring could be suspected. Nevertheless, both the trial Court and the High Court had reached the definite conclusion that the party of assailants consisted of more than five persons. It also found that this party was sitting on the boundary of the field of Daryao, apparently waiting with their weapons for the buggi, carrying Raghubir and Mukhtara and others, to reach the spot where they surrounded it and attacked. It was clear, from the nature and number of injuries of both sides, which we have set out above in extenso, that the attacking party must have consisted of more persons than the party of the male victims who were five in number. Even if these five victims were sitting in the buggi they were not all empty handed. Some of them had lathis which they plied in self-defence. The number and location of injuries on both sides also indicated an attack by a group of persons which must have surrounded the party travelling in the buggi. Even if two persons are engaged in stopping the buggi and there are two on each of the two sides of the buggi their number would be six. Again, even if at least one person is assumed to be the assailant of each of the victims, in a simultaneous attack upon them, the number of such assailants alone would come to at least six. It is, however, clear from the injuries of Mukhtara and Raghubir that each was attacked by more than one person because each had injuries with sharp edged weapons and lathis. These facts were enough to come to the conclusion that the total number of assailants could not conceivably have been less than five. The

High Court, however, after giving the benefit of doubt, to four of the accused persons, on the ground that their cases did not differ from those of the others acquitted, came to the obviously correct conclusion that at least the four appellants before us must have taken part in the attack because they admitted their participation in the occurrence which took place at the time and place of the incident in which Raghubir and Mukhtara had lost their lives. Three of the accused persons, as already indicated, had received injuries. On their own version, these injuries were sustained in the same occurrence. If, therefore, the prosecution version about the broad character of the incident is correct, the only question which remained was: Against which accused person was the case of participation in the attack established beyond reasonable doubt?

9. The High Court came to the conclusion that the admissions of the four accused, corroborated by the injuries on the bodies of three of them, left no doubt whatsoever that they were, in any case, among the assailants. The others had merely been given the benefit of doubt lest some injustice is done by reliving implicitly on partisan witnesses appearing in a type of case in which the innocent are not infrequently sought to be roped in with the guilty who are, of course, not spared. This did not mean that the total number of assailants was actually less than five as the learned Counsel for the appellants asked us to presume from the fact that fourteen out of the eighteen accused persons were actually acquitted.

10. It is true that the acquittal of an accused person does raise, in the eye of law, a presumption that he is innocent even if he was actually guilty. But, it is only the acquitted accused person and not the convicted accused persons who can, as a rule, get the benefit of such a presumption. The effect of findings on questions of fact depends upon the nature of those findings. If, for example, only five known persons are alleged to have participated in an attack but the Courts find that two of them were falsely implicated, it would be quite natural and logical to infer or presume that the participants were less than five in number. On the other hand, if the Court holds that the assailants were actually five in number, but there could be a doubt as to the identity of two of the alleged assailants, and, therefore, acquits two of them, the others will not get the benefit of doubt about the identity of the two accused so long as there is a firm finding, based on good evidence and sound reasoning, that the participants were five or more in number. Such a case is one of doubt only as

to identity of some participants and not as to the total number of participants. It may be that a definite conclusion that the number of participants was at least five may be very difficult to reach where the allegation of participation is confined to five known persons and there is doubt about the identity of even one. But, where a large number of known persons (such as eighteen, as is the case before us), are alleged to have participated and the Court acts on the principle that it is better to err on the side of safety, so that no injustice is done to a possibly wrongly implicated accused, and benefit of doubt is reaped by a large number, with the result that their acquittal, out of abundant caution, reduces the number of those about whose participation there can be no doubt to less than five, it may not be really difficult at all, as it is not in the case before us, to reach the conclusion that, having regard to undeniable facts, the number of participants could not possibly be less than five. We have, for the reasons given above, also reached the same conclusion as the learned Judges of the Allahabad High Court. We wish that the High Court had itself given such reasons, which are not at all difficult to find in this case, so that its conclusion on the number of participants may not have appeared rather abrupt. Justice has not only to be done, but, as has been often said, must manifestly appear to be done.

11. Even if the number of assailants could have been less than five in the instant case (which, we think, on the facts stated above, was really not possible), we think that the fact that the attacking party was clearly shown to have waited for the buggy to reach near the field of Darvao in the early hours of 7-6-1967, shows pre-planning. Some of the assailants had sharp-edged weapons. They were obviously lying in wait for the buggy to arrive. They surrounded and attacked the occupants shouting that the occupants will be killed. We do not think that more convincing evidence of a preconcert was necessary. Therefore, if we had thought it necessary, we would not have hesitated to apply Section 34, I. P. C. also to this case. The principle of vicarious liability does not depend upon the necessity to convict a required number of persons. It depends upon proof of facts, beyond reasonable doubt, which makes such a principle applicable. (See: *Yeshwant v. State of Maharashtra*, (1973) 1 SCR 291 at pp. 302, 303 = (AIR 1973 SC 337 at p. 343 = 1972 Cri LJ 1254 at p. 1260) and *Sukh Ram v. State of U. P.*, (1974) 2 SCR 518 = (AIR 1974 SC 323 = 1974 Cri LJ 354)). The most general and basic rule, on a question such as the one we are considering, is that there is no uniform, inflexible, or invariable rule ap-

plicable for arriving at what is really an inference from the totality of facts and circumstances which varies from case to case. We have to examine the effect of findings given in each case on this totality. It is rarely exactly identical with that in another case. Other rules are really subsidiary to this basic verity and depend for their correct application on the peculiar facts and circumstances in the context of which they are enunciated.

12. In *Yeshwant's* case 1973 (1) SCR 291 = (AIR 1973 SC 337 = 1972 Cri LJ 1254) (supra), the question was whether the acquittal of an alleged participant, said to be Brahmanand Tiwari, for the murder of a man called Sukal, could make it impossible to apply the principle of vicarious liability to convict, under Section 302/34, I. P. C., *Yeshwant*, the only other participant in murder. This Court observed (at p. 303 of SCR) = (at p. 343 of AIR = at p. 1260 of Cri. LJ):

"The benefit of this doubt can only go to the appellant Brahmanand Tiwari and not to the other accused persons who were known well to each eye-witness."

13. *Distinguishing Krishna Govind Patil v. State of Maharashtra*, (1964) 1 SCR 678 = (AIR 1963 SC 1413 = 1963-2 Cri LJ 351) this Court said in *Yeshwant's* case (1973) 1 SCR 291 = (AIR 1973 SC 337 = 1972 Cri LJ 1254) (supra) (at p. 302 of SCR) = (at p. 343 of AIR = at p. 1260 of Cri LJ):

"We do not think that this decision which depends upon its own facts, as criminal cases generally do, lays down any general principle that, where the identity of one of the participants is doubtful, the whole case must end in acquittal. Such a question belongs to the realm of facts and not of law."

14. The following cases were also cited before us: *Dalip Singh v. State of Punjab*, 1954 SCR 143 = (AIR 1953 SC 364 = 1953 Cri LJ 1465); *Bharwad Mepa Dana v. State of Bombay*, (1960) 2 SCR 172 = (AIR 1960 SC 289 = 1960 Cri LJ 424); *Kartar Singh v. State of Punjab*, (AIR 1961 SC 1787 = 1961-2 Cri LJ 853); *Mohan Singh v. State of Punjab*, 1962 Supp (3) SCR 848 = (AIR 1963 SC 174 = 1963-1 Cri LJ 100); *Ram Bilas Singh v. State of Punjab*, (1964) 1 SCR 775.

In the case of *Ram Bilas Singh*, ((1964) 1 SCR 775) (supra) previous decisions of this Court on the question argued before us have been considered at some length and a passage from *Krishna Govind Patil's* case (AIR 1963 SC 1413 = 1963-2 Cri LJ 351) (supra) was also quoted. In none of these cases was it decided that where, out of abundance of caution, a large number of accused persons obtained an acquittal with the result that the

number of those whose participation is established beyond reasonable doubt is reduced to less than five, but, at the same time, it is clear that the total number of assailants could not be less than five, the convicted accused persons must necessarily get the benefit of doubt arising in the cases of the acquitted accused persons. A case like the one before us stands on the same footing as any other case where there is certainty that the number of participants was not less than five but there is doubt only as to the identity of some of the participants. It has to be remembered that doubts may arise with regard to the participation of a particular accused person in circumstances whose benefit can only be reaped by the accused who raises such doubt. Doubts may also arise about the veracity of the whole prosecution version and doubts about the participation of individual accused persons may contribute to the emergence of such doubts which may cover and engulf the whole case. Nevertheless, if, as in the instant case, the Court, whose duty is to separate the chaff from the grain, does hold that the convicted persons were certainly members of an unlawful assembly which must have consisted of more than five persons, we do not see any principle of law or justice which could stand in the way of the application of Section 149, I. P. C. for convicting those found indubitably guilty of participation in carrying out of the common object of an unlawful assembly.

15. The only remaining question arises from the age of Ompal which, at the time of trial, was found by the trial Court to be about 15 years. This means that S. 29 of the Uttar Pradesh Children Act, 1951, was applicable to the case. This Section reads as follows:

"29. Commitment of child to approved school.— (1) Where a child is found to have committed an offence punishable with transportation or imprisonment, the Court, if satisfied on inquiry that it is expedient so to deal with the child, may order him to be sent to an approved school for such period of stay as will not exceed beyond the time when the child will attain the age of 18 years or for a shorter period, the reasons for such period to be recorded in writing.

(2) Where prior to the commencement of this Act a youthful offender has been sentenced to transportation or imprisonment, the State Government may direct that in lieu of undergoing or completing such sentence he shall, if under the age of sixteen years, be sent to an approved school, and thereupon the offender shall be subject to all the provisions of this Act as if he had been origi-

nally ordered to be detained in such school."

16. This question was not raised earlier so that the trial Court or the High Court may take the action it was open to the Courts to take after due inquiry. Such action, if considered expedient, could only be to send the appellant to an approved school. We may observe that, although the appellant Ompal was said to be armed with a lathi, no specific part was assigned to him by any prosecution witnesses. He was bound, with the background of hostility between two sides and the events mentioned above, to have been misled by the bad example of his elders. No previous participation in such a case and no previous conviction was shewn against him. We, therefore, think that appropriate action under Section 29 of the Children Act could have been taken in his case if the question had been raised in time. We hope that the punishment he has already undergone has had a salutary effect in making him conscious of the gravity of the consequences of joining an unlawful assembly. All that we can do now, in the circumstances of Om Pal's case, is to recommend the remission of the remaining period of Om Pal's sentence to the authorities concerned.

17. Subject to the observations made above with regard to Om Pal, we affirm the convictions and sentences and dismiss this appeal.

Appeal dismissed.

AIR 1975 SUPREME COURT 1922

(From: (1975) 1 Andh WR 363)

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

A. Pandurangam Rao, Appellant v.
State of Andhra Pradesh and others, Respondents.

Civil Appeal No. 2059 of 1974. D/-
2-9-1975.

(A) Constitution of India, Art. 233 (2)
— Appointment of District Judges — Recruitment from the Bar — Candidates not recommended by High Court — Cannot be appointed — "Recommended" meaning — (1975) 1 Andh WR 363, Reversed — (Words & Phrases — Recommended).

A candidate for direct recruitment from the Bar does not become eligible for appointment of District Judges in any State, without the recommendation of the High Court, exercising jurisdiction in relation to such State. He becomes eligible only on such recommendation under clause (2) of Article 233. The literal meaning of the word "recommended" in the Concise Oxford Dictionary is quite

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simple and apposite. It means "suggest as fit for employment." In case of appointment from the Bar, it is not open to the State Government to choose a candidate for appointment until and unless his name is recommended by the High Court. (Para 8)

The final authority is the Government in the matter of appointment and for good reasons it can reject the High Court's recommendations. In that event it can ask the High Court to make more recommendations in place of those who have been rejected. But it is wrong and incompetent for the State Government to appoint candidates whose names had never been recommended. AIR 1967 SC 1987. Rel. on; (1975) 1 Andh WR 363. Reversed. (Para 9)

Cases Referred: Chronological Paras
AIR 1967 SC 1987 = (1967) 1 SCR 77 7

M/s. P. A. Chowdhary and Mr. K. Rajendra Chaudhury, Advocates, for Appellant; Mr. P. Ram Reddy, Sr. Advocate and Mr. P. P. Rao, Advocate (for No. 1); Mr. A. V. Rangam and Miss A. Subhashini, Advocates (for No. 2); Mr. G. Narasimhulu, Advocate (for Nos. 3, 5 & 6) and Mr. G. N. Rao, Advocate (for No. 4); for Respondents; Mr. A. V. K. Rao, Intervener, in person.

Judgment of the Court was delivered by

UNTWALIA, J.:— In this appeal by Special Leave we are once again called upon to lay down the meaning and scope of Article 233 of the Constitution of India relating to the appointment of District Judges. This Article along with other Articles in Chapter VI of Part VI of the Constitution came up for consideration and was interpreted by this Court on several occasions in the past, yet, a Bench of the High Court of Andhra Pradesh in its judgment under appeal felt persuaded to take a wholly erroneous view as to the meaning of the Article and committed a serious error in the application of the principles of law settled by this Court to the facts of the instant case.

2. We shall state the facts in a narrow compass shorn off unnecessary details. On 3-1-1972 the Government of Andhra Pradesh, respondent No. 1 was requested by the High Court, respondent No. 2, to take necessary steps "for filling up six vacancies by notifying six posts of District and Sessions Judges, Grade II for direct recruitment." By a D. O. letter dated 14-9-1972 the first respondent informed the second respondent that the six vacancies were being notified for direct recruitment. They were actually notified in the Gazette of that date. With the approval of the High Court, an advertisement was published on 1-8-1972 in the Deccan Chronicle. The total number

of applications received in response to the advertisement was 381. Twenty six applications were found to be not in order and rejected. The remaining 355 candidates were called by the High Court for interview by the Selection Committee of the High Court on various dates. Shri A. Panduranga Rao, the sole appellant in this Appeal was one of the candidates interviewed on 14-6-1973.

3. The High Court eventually made its recommendations in its D. O. letter dated 13-7-1973 recommending in order of merit six persons "as most suitable candidates from among the applicants, for being appointed as District and Sessions Judges, Grade II." This letter was written by the Registrar of the High Court as directed "by the Hon'ble the Chief Justice, and the Hon'ble Judges of the Andhra Pradesh High Court." The appellant's name was the fifth amongst the six names recommended.

4. Although it is not very relevant to say so, just to complete the link in the chain of relevant events, it may be stated here that the recommendations made by the High Court seemed to have leaked out. Whoever might have been responsible for this leakage it was all the same a very unfortunate thing. This led the Bar Association Civil City Court, Hyderabad and the High Court Bar Association to pass certain resolutions and to send certain memoranda to the Government even to the extent of making some adverse comments against some of the persons recommended by the High Court for appointment. On receipt of the same Government wrote a D. O. letter to the High Court on 24-7-1973 expressing surprise at the leakage of secret information but at the same time inviting the High Court to send its comments. The High Court sent a detailed reply and comments in its D. O. letter dated 26-7-1973 pointing out that the leakage of the secret information could not be possible at the High Court end. It is not necessary for us to advert to the comments or resolutions of the Bar Association or the views of the High Court expressed in its letter dated 26-7-1974.

5. We now come to the relevant letters in question. A. D. D. letter dated 26-7-1973 was written by the Government to the High Court with reference to the latter's letter of recommendation dated 13-7-1973. We may point out here that this letter dated 26-7-1973 was written by the Government without any reference to, and in all probability, before the receipt of the High Court's letter dated 26-7-1973 in reply to the Government's of 24-7-1973. In the Government's letter dated 26-7-1973 attention of the High Court was invited to Instruction 12 (5) of the Secre-

tarlat instructions and a request was made "to send the list of persons whom the High Court considered to have reasonable claims to the appointment or suitable for the posts of District and Sessions Judge, Grade II along with remarks regarding the qualifications and claims of the several persons in the list." It may be stated here that as usual the correspondence was going on between the Chief Secretary on behalf of the Government and the Registrar on behalf of the High Court. The latter in reply to former's letter dated 26-7-1973 sent the following reply on 1-8-1973:

"Your letter reached me on 28-7-1973. With reference to your above letter dated 26-7-1973, I have been directed to forward the entire list of the candidates interviewed by the High Court, with the remarks obtained by them. The High Court has no further remarks to offer. All the applications of the candidates sent by you are returned separately."

6. Thereupon the Government wrote D. O. letter dated 30-11-1973 to the Chief Justice of the High Court intimating that Government had decided to select the six-candidates mentioned in that letter for filling up the six vacancies. Out of the persons so selected two were those who had been recommended by the High Court along with four others in its letter dated 13-7-1973. They were serials 1 and 4. Four out of the six were not appointed and in their place, as it appears, treating the entire list of 263 as a list recommended by the High Court in order of merit persons at serials 9, 12, 13 and 16 were selected by the Government for appointment. And finally orders appointing the six persons so selected were issued on 7-12-1973. Several writ applications were filed in the High Court to challenge the appointments made by the Government. We are in this appeal concerned with the judgment of the High Court dismissing the Writ Petition No. 895 of 1974* filed by the appellant to challenge the appointment of only four viz. respondents 3 to 6 and the non-appointment of the appellant. His case was that respondents 3 to 6 were appointed in violation of the constitutional provision contained in Article 233 and that he was not appointed on grounds which are unsustainable in law. The High Court has taken the view that the appointments have been made by the Government consistent with the requirement of Article 233 (2) out of the entire list of 263 recommended by the High Court. The appellant's claim on merits for appointment to the post has not found favour with the High Court. In the view which we take as to the violation of Article 233 in this case, we would not like,

nor is it necessary to do so, to examine the claim of the appellant for appointment in one of the six vacancies.

7. It would be convenient to read once again Article 233 of the Constitution.

"(1) Appointments of persons to be, and the posting and promotion of, district Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

As pointed out at page 89 by this Court in *Chandra Mohan v. State of Uttar Pradesh*, (1967) 1 SCR 77 = (AIR 1967 SC 1987):

"There are two sources of recruitment, namely, (i) service of the Union or the State, and (ii) members of the Bar. The said Judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court."

8. A candidate for direct recruitment from the Bar does not become eligible for appointment without the recommendation of the High Court. He becomes eligible only on such recommendation under clause (2) of Article 233. The High Court in the judgment under appeal felt some difficulty in appreciating the meaning of the word "recommended." But the literal meaning given in the Concise Oxford Dictionary is quite simple and apposite. It means "suggest as fit for employment." In case of appointment from the Bar it is not open to the Government to choose a candidate for appointment until and unless his name is recommended by the High Court.

9. The recommendation of the High Court for filling up the six vacancies was contained in its letter dated 13-7-1973. Government was not bound to accept all the recommendations but could tell the High Court its reasons for not accepting the High Court's recommendations in regard to certain persons. If the High Court agreed with the reasons in case of a particular person the recommendation in his case stood withdrawn and there was no question of appointing him. Even if the High Court did not agree the final authority was the Government in the matter of appointment and for good reasons it could reject the High Court's recommendations. In either event it could ask the High Court to make more recommendations in place of those who

have been rejected. But surely it was wrong and incompetent for the Government to write a letter like the one dated 26-7-1973 inviting the High Court's attention to Instruction 12 (5) of the Secretariat instructions and on the basis of that to ask it to send the list of persons whom the High Court considered to have reasonable claims to the appointment. On the basis of the furor created by the two Bar Associations of Hyderabad and the High Court's letter dated 26-7-1973 written in reply to the Government's letter dated 24-7-1973 no person's candidature recommended by the High Court had been rejected when the letter dated 26-7-1973 was written by the Government. Even after rejection the Government could not ask the High Court to send the list of all persons whom the High Court considered to have reasonable claim to the appointment. We feel distressed to find that instead of pointing out the correct position of law to the Government and itself acting according to it, a letter like the one dated 1-8-1973 was sent by the High Court in reply to the Government's letter dated 26-7-1973. It is not clear from this letter whether it was written under the directions of Chief Justice and the other Judges of the High Court as in the case of the letter dated 13-7-1973. But surely it was very much wrong on the part of the High Court to forward the entire list of the candidates interviewed with the marks obtained by them and adding at the same time that the High Court had no further remarks to offer. We could not understand the reason for writing such a letter by the High Court. But if we may hazard a surmise it seems to have been written in utter disgust at the Government's unreasonable attitude displayed in its letter dated 26-7-1973. By no means could it be, nor was it, a recommendation by the High Court of all the 263 candidates interviewed, that all of them had a reasonable claim, or in other words, were fit to be appointed District Judges. We must express our displeasure at and disapproval of all that happened between the Government and the High Court—in the former writing the letter dated 26-7-1973 and the latter sending the reply dated 1-8-1973.

10. Then comes the letter dated 30-11-1973. After tracing the history of the recommendations made by the High Court in its letter dated 13-7-1973 and "in the light of further information about these candidates as required from High Court," Government decided to select the six candidates mentioned therein including respondents 3 to 6 as if they were from "the list recommended by the High Court." It was further stated in this letter "Reasons for not selecting candidates placed by the High Court higher

than those now selected are given in the annexure enclosed to this D. O. letter." The High Court, to be more accurate, the Chief Justice to whom the letter dated 30-11-1973 was addressed seems to have not resented or protested against the selection so made by the Government in clear violation of Article 233 of the Constitution. We find it intriguing that the letter written by the Registrar of the High Court on 1-8-1973 was treated as a recommendation of all the 263 candidates as having been found fit for appointment as District Judges. By no means could it be so. It was not so. And yet the High Court or the Chief Justice did not object to the appointment of respondents 3 to 6 as District Judges. They were not eligible to be so appointed as their names had never been recommended.

11. In the result we allow this appeal and set aside the judgment of the High Court. The writ application filed by the appellant succeeds only to this extent that the appointments of respondents 3 to 6 are quashed. The four posts manned by them are declared vacant. There will be no order as to costs.

Appeal allowed.

AIR 1975 SUPREME COURT 1925

(From: Andhra Pradesh)*

Y. V. CHANDRACHUD, P. N. BHAGWATI AND R. S. SARKARIA, JJ.

Kodali Puranchandra Rao and another, Appellants v. The Public Prosecutor, Andhra Pradesh, Respondent.

Criminal Appeal No. 392 of 1974. D/- 2-9-1975.

(A) Penal Code (1860), Section 201—
Offence under — Ingredients to be proved by prosecution.

In order to bring home an offence under Section 201, Penal Code the prosecution has to prove:

(1) that an offence has been committed;

(2) that the accused knew or had reason to believe the commission of such offence;

(3) that with such knowledge or belief he

(a) caused any evidence of the commission of that offence to disappear, or

(b) gave any information respecting that offence which he then knew or believed to be false;

(4) that he did so as aforesaid, with the intention of screening the offender from legal punishment.

*(Criminal Appeal No. 701 of 1972. D/- 25-4-1974 (Andh Pra)).

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(5) If the charge be of an aggravated form, it must be proved further that the offence in respect of which the accused did as in (3) and (4), was punishable with death or with imprisonment for life or imprisonment extending to ten years.

(Para 12)

Whether the circumstantial evidence in a particular case is sufficient and safe enough to warrant a finding that an offence has been committed, is a question which belongs to the realm of facts and not of law. So is the question whether the accused knew or had reasons to believe that such an offence has been committed. It is true that this question further depends on an assessment of the accused's mind. Nevertheless, it is a question of fact.

(Para 43)

Held on facts and circumstances that all the elements of the charge under Section 201 had been proved. AIR 1952 SC 354 = 1953 Cri LJ 154. Distinguished; Cri. App. No. 701 of 1972 (A.P.). D/- 25-4-1974. Affirmed. (Paras 41, 45 and 46)

(B) Criminal P. C. (1898), S. 174 (1) and (3) — Duty of Police to hold inquest at spot — Discretion not to send body for post-mortem — Should be exercised prudently and honestly.

Section 174 peremptorily requires that the officer holding an inquest on a dead body should do so at the spot. This mandate is conveyed by the word "there" occurring in Section 174 (1). Sub-sec. (3) of the section further requires the Officer holding the inquest to forward the body with a view to its being examined, by the medical man appointed by the State Government in this behalf, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless. The subsection gives a discretion to the Police Officer not to send the body for post-mortem examination by the medical officer only in one case, namely, where there can be no doubt as to the cause of the death. This discretion however is to be exercised prudently and honestly.

(Para 37)

(C) Penal Code (1860), Sections 201, 299 — Possibility of death being as a result of suicide by drowning — When excluded.

The facts that the stomach was not filled with water and bloated and no froth was coming out of the mouth of the deceased, are important symptoms which go a long way to exclude the possibility of death being as a result of suicide by drowning.

(Para 25)

Medical jurists have warned that in the case of a dead body found floating in water, the medical man from a mere observance of the external condition of the

body, should not jump to the conclusion that the death was from drowning. Only internal examination of the body can reveal symptoms which may indicate with certainty as to whether the death was from drowning or from unlawful violence before the body was immersed in water.

(Para 40)

Cases Referred: Chronological Paras
AIR 1952 SC 354 = 1953 SCR 94 = 1953
Cri LJ 154 42, 43, 44

Mr. P. Baasi Reddy, Sr. Advocate, and Mr. G. Narsimhulu, for Appellants; Mr. A. S. Mulla, Sr. Advocate, (M/s. T. V. S. N. Chari and P. P. Rao, Advocates with him), for Respondent.

Judgment of the Court was delivered by

SARKARIA, J.:— This appeal is directed against a judgment of the High Court of Andhra Pradesh, converting — on appeal by the State — the acquittal of the appellants into conviction. Appellant No. 1 (for short, A-1) was an arrack contractor doing liquor business inter alia within the territorial jurisdiction of Police Station Indukurpet, District Nellore, while Appellant No. 2 (for short, A-2) was a Sub-Inspector of Police in-charge of this Police Station.

2. The appellants and one other person were tried by the First Additional Sessions Judge Nellore on charges under Sections 120-B, 366, 376, 302/34, 201, 218, 468/34, 324, Penal Code relating to the abduction, rape and murder etc. of two sisters, named Kalarani and Chandrika Rani of Nellore. The Sessions Judge acquitted the three accused of all the charges. Against the acquittal of the appellants only the State preferred an appeal. The High Court partly allowed the appeal, set aside the acquittal on charges 7, 8, 9 and 11 and convicted A-2 and A-1, under Sections 201, 201/34, Penal Code and sentenced each of them to five years rigorous imprisonment. A-2 and A-1 were further convicted under Sections 318 (sic) (S. 218?) and 318/109, (sic) (218/109?), Penal Code and sentenced to two years rigorous imprisonment, each. They were also convicted under Sections 468 and 468/34, Penal Code and sentenced to two years rigorous imprisonment each. The sentences on all the counts were directed to run concurrently. Their acquittal on the remaining charges, including those of abduction, rape and murder, was upheld.

3. The facts of the prosecution case, as they emerge from the record, are as follows:

Kalarani and Chandrikarani deceased were two of the six daughters of P. W. 1, a legal practitioner of Nellore. Kalarani was aged 21 and a graduate from the local Women's College, Nellore. She used to be the President of the College Union and

as such was well known. Chandrika Rani was, aged 17 and a B.A. student in that very college. On 6-6-1971 in the morning the deceased girls along with their parents and other sisters attended a marriage in the house of a family friend (P. W. 2). In the afternoon they went away from the marriage house saying that they were going out to have coca-cola. At about 4 p.m. they boarded a bus bound for Mypaud which is a seashore resort at a distance of 11 miles from Nellore. At about 5-40 p.m. they were seen alighting from the bus at Mypaud and then proceeding towards Sagarvilla, a Travellers' Bungalow situated near the seashore. They were last seen at about 6-30 p.m. on the seashore by P. Ws. 11, 12, 13 and 14. Shortly thereafter, P. W. 18, a rickshaw puller was attracted to the seashore by the outcry of a woman. When he proceeded in that direction, Chandrika Rani came running to him for help. P. W. 18 saw 4 persons, including A-1 and A-2 carrying away Kala Rani who was groaning. On seeing P. W. 18, A-1 and A-2 turned on him. A-1 first slapped and then stabbed P. W. 18 on his right arm with a penknife, while A-2 gave blows on his back. Out of fright, P. W. 18 took to his heels while Chandrika Rani was dragged away by the appellants.

4. On 6-6-1971 Chamundeshwari Festival was being celebrated in Gangapatnam and neighbouring areas at about 9 p.m. It was bright moonlight. On learning that the dead body of a girl had been seen on the beach of Pallipalem which is a hamlet of Gangapatnam, many persons went there. P. W. 23, a fisherman of Pallipalem and P. W. 25, an employee of the Electricity Department were also among those persons. It was the body of a girl, aged about 21 or 22 years, of fair complexion and stout build. Blood was oozing from a reddish abrasion on the forehead. There was a gold ring with a red stone on the finger of the body. Next morning, P. W. 23 went to P. W. 26, the Sarpanch of Gangapatnam and informed the latter about the corpse on the seashore. P. W. 23 and P. W. 26 then went to the village Karnam (P. W. 27) as they found the village Munsiff absent. The Karnam scribed a report to the dictation of P. W. 23. The Sarpanch signed it and sent it at about 7-30 a.m. through a bus driver (P. W. 29) to the Police Station Indukurpet. The report was handed over in the Police Station at about 8-30 a.m. to the Head Constable (P. W. 34), as A-2, the Sub-Inspector was away. The Head Constable (P. W. 34), read the report and returned it to P. W. 29 with the objection that the bearer should fetch a report drawn up on the printed form and signed by the village Munsiff. Within a few minutes of

the return of the report, between 8-30 and 8-45 a.m., A-2 returned to the Police Station. Just at this juncture P. W. 49, a Personal Assistant to P. W. 38, a cine actor of Madras, and A-1, arrived there in Car No. M.S.V. 1539, driven by a motor driver. The car had met an accident on the 4th June within the jurisdiction of this Police Station. The car was therefore — at least theoretically — in the custody of the Police.

5. A-1 was a mutual friend of A-2 and of the owner of the car. P. W. 49 therefore, had brought A-1 to the Police Station to help the former in getting the car released. A-1 introduced P. W. 49 to A-2. A-1 then asked A-2 if he knew that the dead body of a girl was found floating on the sea-shore. A-2 then asked the Head Constable (P. W. 34) if any report regarding the dead body was received. The Head Constable replied that a report from the Sarpanch about the dead body seen on the sea-shore at Pallipalem had been received but had been returned, as it was not from the village Munsiff. A-2 said some person might have been drowned as it usually happened on the seashore. The Head Constable and A-1 told A-2 that the body found on the shore was said to have been wearing drawers and might be of a person of high-class family. A-2 said that he himself would go and enquire about it. A-2 asked P. W. 4 to take him in his car to the spot. Thereupon, A-1, A-2, P. W. 49, two constables and two others in addition to the driver, proceeded in the car. After going some distance, the two "others" got down. A-1 and A-2 had a talk with them. The car was then taken to Ramudupalem. There at about 11-30 A.M., A-1 and A-2 met the Sarpanch (P. W. 26) and asked him to follow them to Pallipalem. The car was then taken to Gangapatnam. There the Constables were dropped. They left a message for the Karnam of the village to reach Pallipalem. Thereafter, they proceeded to the sea-shore of Pallipalem. The car was left at the canal before the sea.

6. A-2, A-1, P. W. 49 and P. W. 26 then at about Noon, went to the beach where the dead body lay. P. W. 23 and P. W. 25 were guarding the dead body. It was the body of a fair, stout girl aged about 20 years, who was wearing brassiers, blouse, striped drawers and a white petticoat. P. W. 23 handed over the ring M.O. 9 to A-2 after removing the same from the body. On being directed by A-2, P. W. 23 washed the face of the corpse. There was a mark on the forehead from which blood was oozing out. There was a reddish abrasion on the thigh, and blood marks on the drawer of the dead body. On seeing the blood marks on the drawer,

A-2 said that she might be in menses. A-2 further remarked that the body appeared to be of a girl from a high class family who had been out of doors. A-2 did not hold any inquest there on the dead body. He did not prepare any record there. He directed the village vettis (menials) to bury the dead body forthwith while he himself proceeded along with his companions towards the village. In the distance they saw the Constables coming towards them. A signalled them not to come near the dead body but to proceed to the Travellers' Bungalow at Mypad, while A-2 and party went to Mahalaxamma Temple in village Pallipalem. There A-2 secured the signatures of P. W. 25, P. W. 26, P. W. 28 and A-1 on a blank sheet of paper. A-2 and his companions then went to the car. The Karnam (P. W. 27) was there. A-2 reproached the Karnam for coming late and added that he had finished all the work for which he (Karnam) had been sent for. He further told the Karnam that he had got the body buried. The Karnam asked as to why A-2 did not send the body for post-mortem examination. A-2 replied that the body was of a prostitute who had committed suicide and that he did not suspect any foul play and so he ordered burial. The Karnam then enquired if any relation of the deceased had come. A-1 replied: "yes", while A-2 pointed towards P. W. 49 and said that he was the person connected with the deceased. A-1, A-2, P. W. 26, P. W. 27 and P. W. 49 then got into the car and proceeded. P. Ws. 26 and 27 were dropped near their houses. On the way P. W. 49 asked A-2 as to why he had represented him (P. W. 49) as a relation of the deceased. A-2 assured P. W. 49 that there was nothing to worry.

7. According to the prosecution, this dead body found ashore near Pallipalem — which is about 2 miles from Mypad — was of Kala Rani deceased who was well-known to A-2. In spite of it, in the inquest report (Ex. P-11) which was not prepared on the spot but sometime later, A-2 wrote that the body was of a prostitute, named Koppulu Vijaya, daughter of Chandrayya, Baliya by caste of Ongole Town who had on 6-6-1971, come to Mypad along with her prostitute friend Nirmala by Bus A. P. N. 1400 at 5.45 P. M. and thereafter both these girls committed suicide by entering sea at about 6-30 P. M. A-2 ended the report with an emphatic note:

"It is conclusive that the deceased (Koppulu Vijaya) died due to drowning." Despite the presence of injuries noticed on the dead body A-2 recorded: "There are no injuries on the dead body."

In order to support his version as to the cause of death A-2, according to the pro-

secution falsely noted that the "stomach is bloated due to drinking of water."

8. The prosecution case further is that A-2 fabricated sometime after the burial of the dead body, a false report (Ex. P-25) purporting to have been made to him on 7-6-1971 by one Nuthalapati Subba Rao who despite the best efforts of the investigators has remained untraced and is believed to be a fictitious person. As this report has an important bearing on the points for determination, we will reproduce it in extenso:

"Statement of Nuthalapati Subbarao, son of Venkateswarlu, aged about 30 years. Vysya of Patha-Guntur:

"Being an orphan for about 10 years, I have been doing brokerage in supplying extras in the cine field. Day before yesterday i.e. on Friday at Chirala near Lodges two girls Koppulu Vijaya d/o Sundarayya of Ongole and Paranjapi Nirmala d/o Raghavayya of Chilakaluripeta were met by me. I came to know that they live by prostitution. When I told them that I would join them in Cinema they believed me and came with me. On Sunday i.e. on 6-6-1971, in the morning we came to Nellore and stayed in Venkateswara Lodge till 3.30 p.m. There demand came for the girls. I booked two males for these two girls. Afterwards dispute arose between me and the girls in respect of my brokerage, sharing of the money got by such prostitution out of the money collected. They scolded me in an angry tone and went away crying and weeping and saying that I took them away from their places promising to join them in Cinema, cheated them and committed rowdysm without giving them money due to them. They had only wearing apparel with them. Vijaya is short, stout and fair. Nirmala is lean, tall and fair. They did not come back. I waited for a long time. I searched for them at the railway station, bus stand and lodges. When I was inquiring at Atmakur Bus Stand I came to know that the girls went by Mypaud bus at 4.30 p.m. I went to Mypaud and enquired. It was learnt that the two girls went towards north of Pattapulalem and entered the sea at 6 p.m. Having learnt that the body of Vijaya was washed ashore I went and saw the dead body. She had died and appears to have committed suicide. It was also learnt that the second girl also committed suicide but her dead body was not washed ashore. Other facts about them are not known.

Sd/- N. Subbarao

Taken down by me, read over to the person and admitted by him to be correct. On this 7th day of June 1971 at 11-30.

Sd/- B. Manoharam
S. I., E-3, dt. 7-6-1971.

H. C. 1212 Issue F. I. R. under Section 174, Criminal P. C. and send copy to me for investigation.

Sd/- B. Manoharan,
S. I. E-3, Camp Mypad
dt. 7-6-1971."

9. The dead-body of the other girl, Chandrika Rani was not washed ashore. But in the morning of 7-6-1971, P. W. 36, a fisherman saw the deadbody of a girl aged 16 or 17 years floating in the sea at a distance of about 2½ or 3 miles from Pallipalem. P. W. 36 saw a piercing wound on the left arm and black-marks, indicating throttling, on the neck of the dead-body. P. W. 36 removed a wrist watch, a ring and an ear-ring from the deadbody and allowed it to drift away. These articles were later handed over by P. W. 36 to the Investigating Officer and were identified to be of Chandrika Rani.

10. The disappearance of the deceased girls caused a sensation. The local newspapers took up the matter. Representations were made to the Home Minister to get the matter investigated by the C. I. D. The Superintendent of Police directed P. W. 59, a Probationer D. S. P., to investigate the matter. On 18-6-1971, at the request of P. W. 59, the Tehsildar (P. W. 40) proceeded to exhume the dead-body of Kalarani. The place was pointed out by P. W. 33. A-2 was also present there. On digging the pit only some clothes were found in it. But close to it, was found a skeleton. No marks of violence were detected on the skeleton by the Medical Officer, P. W. 45, who examined it at the spot. The skeleton was sent to P. W. 44, Professor of Forensic Medicine, who opined that it was of a female aged between 18 to 25 years. Further investigation of the case was taken over by P. W. 60, the C. I. D. Inspector who, after completing it laid the charge-sheet against A-1, A-2 and one other person in the Court of the Magistrate.

11. A-1 pleaded that he had been falsely implicated. He stated that he knew nothing about the deceased girls. He added that on 7-6-1971, he was in the Travellers' Bungalow at Mypad and went away from that place in the afternoon. He admitted that he had accompanied, P. W. 49, to the Police Station on 7-6-1971 to assist the latter in getting the car released, and from the Police Station both of them (A-1 and P. W. 49) on being asked by A-2, went with the latter in the car to the spot. He further admitted that he had slab-signed on a sheet of paper like others but he expressed ignorance if any inquest was held by A-2.

12. The plea of A-2 was that he had duly made an inquiry as to the cause of the death and prepared the inquest report Ex. P-11. He denied that there were

injuries on the dead body. Pleading alibi for the 5th and 6th June, 1971, he said that on these dates he was away on casual leave to attend the marriage of a cousin at Chiraja which is at a distance of about 100 miles from Indukurpet. He said that he had proceeded to Chiraja in a car on the 5th morning, and after attending the marriage returned to Nellore on the 6th by 5-30 p.m. and then on the morning of the 7th June, resumed duty at Indukurpet Police Station. On receiving information about the corpse of a female washed ashore, he went to Mypad and enquired about a person named Nathalapati Subba Rao. The latter gave the information. Ex. P-25, which he (A-2) reduced into writing and then held the inquest in the presence of this Subba Rao and other Panchaitdars at the spot. He did not know if Vijaya and Nirmala mentioned in Ex. P-25 and Ex. P-11 were fictitious persons. He further admitted that he was unable to produce this Subba Rao in response to the memo dated 15-6-1971, issued by the D. S. P. (P. W. 59) during the stipulated time of 48 hours.

13. The Additional Sessions Judge held that the dead bodies found floating near the sea shore were of Kala Rani and Chandrika Rani. He further found that P. W. 18, who claimed to be an eye-witness of the occurrence, was not worthy of credit, and consequently, the charges of abduction, rape and murder had not been proved against the accused. Regarding the charge under S. 201, Penal Code, the trial Judge held that the prosecution had failed to prove that an offence had been committed in respect of the deceased. While holding that the identity of the deceased was wrongly mentioned in Ex. P-25 and Ex. P-11 as Vijaya and Nirmala, prostitutes, he did not rule out the possibility of suicide. In the result, he acquitted the accused of all the charges. In appeal by the State, the learned Judge of the High Court, after an exhaustive survey of the evidence, upheld the acquittal of the accused in respect of the charges of abduction, rape and murder, but reversed the findings of the trial Judge in regard to the charges under Sections 201, 318 and 468, Penal Code against A-1 and A-2.

14. In order to bring home an offence under Section 201, Penal Code the prosecution has to prove:

(1) that an offence has been committed;

(2) that the accused knew or had reason to believe the commission of such offence;

(3) that with such knowledge or belief he

(a) caused any evidence of the commission of that offence to disappear, or

(b) gave any information respecting that offence which he then knew or believed to be false;

(4) that he did so as aforesaid, with the intention of screening the offender from legal punishment.

(5) If the charge be of an aggravated form, as in the present case, it must be proved further that the offence in respect of which the accused did as in (3) and (4), was punishable with death, or with imprisonment for life or imprisonment extending to ten years.

15. The High Court has found that all these ingredients of Section 201, were established in the present case.

16. Mr. Bassi Reddy, learned Counsel for the appellant assails the finding of the High Court with particular reference to the first and the last ingredients enumerated above. Counsel contends that the conviction under Section 201, cannot be sustained as there is no credible evidence on record to show that an offence had been committed. It is maintained that the prosecution has been unable to prove that the two girls met a homicidal death. In all probability, proceeds the argument, the deceased girls committed suicide by jumping into the sea and were drowned.

17. For reasons that follow we are unable to accept these contentions.

18. The concurrent finding of the Courts below that the dead body washed ashore near Pallipalem was of Kala Rani deceased and that seen floating in the sea, two miles away was of Chandrika Rani deceased, has not been disputed before us. It is also not controverted that these two girls died an unnatural death on the night between the 6th and 7th of June, 1971, sometime after 6-30 P. M. at Mypad. Only the cause of their death is in issue. In regard to such cause, there could be only three possibilities, the choice of any of which would lead to the exclusion of the other two. First, the girls committed suicide by drowning. Second, that their deaths were accidental. Third, that they were done to death by some person or persons.

19. After a careful consideration of these alternatives in the light of evidence on record, the learned Judges of the High Court firmly ruled out the first and the second possibilities, and concluded in favour of the third.

20. In our opinion, the credible circumstantial evidence on record reinforced by the inferences available from the incriminating conduct of the appellants, particularly of A-2 in deliberately preparing false records to suppress the identity and cause of the deaths of the deceased girls, fully justifies the conclu-

sion reached by the learned Judges. We therefore, do not feel the necessity of embarking upon a reappraisal of the entire evidence. It would be sufficient to survey and consider the salient circumstances bearing on the alternatives posed above.

21. First, we take up the possibility of suicide. Mr. Reddy submits with reference to the statement of P. W. 1, the father of the deceased girls, that on a previous occasion both these girls had without the permission of their parents, run away from home and were ultimately traced to the Rescue Home in Madras; that Kala Rani deceased had about 4 or 5 years before the occurrence taken an overdose of tranquillizers presumably to end her life; that they did not feel happy in their parental home and once attempted to join the Ashram. This background, according to the learned counsel, shows that the deceased had a predisposition to commit suicide. In the alternative, suggests Mr. Reddy, something might have happened at Mypad on the 6th June, 1971, which impelled them to commit suicide. Might be the girls got themselves into such a situation that they thought suicide was the only course left to them to get out of the same.

22. We are not impressed by these arguments. It is wrong to assume that these girls were very unhappy in their paternal house, or their relations with their parents were estranged. Kala Rani, particularly, was a mature graduate girl of 22 years. She used to be the leader of the College Union. On the day of occurrence, the deceased girls along with their parents and sisters had participated in the festivities of a marriage in the house of a family friend. They took their meals in the marriage house. From Nellore, these girls brought change of clothes for two or three days stay. Thereafter, they came happily to Mypad. They first went to the Travellers' Bungalow and were then last seen together at about 6-30 p. m. on the sea-shore. It is in evidence that the evening of the 6th June, was an occasion of Channamma Festival. Procession of the deity accompanied by festivities was being taken out by the devotees of the neighbouring villages. These circumstances unmistakably show that the deceased girls had come to enjoy and stay at the sea-side resort of Mypad for 2 or 3 days. They were not suffering from any mental depression or schizophrenia with suicidal tendencies.

23. Another circumstance in the case of Kala Rani which is contra-indicative of suicide, is that her dead body though seen within an hour or two of the occurrence on the beach, was in a semi-nude condition. The sari was not on her

dead body, which she was wearing when last seen at about 6-30 P. M. It can be argued that the Sari was washed off her body by the sea-waves. But considering that her dead body was detected only within a couple of hours of the occurrence and the fact that it is customary for women living in or near the coastal towns to tie their saris tightly, the possibility of the sari having been swept off by the sea-waves was remote. The inference is that in all probability, she was not wearing this sari when her body was immersed in water. Ordinarily, no Indian woman would commit suicide by jumping into the sea by getting into such a near-nude condition and thereby expose her body to the risk of post-mortem indignity.

24. Another important circumstance which militates against the suggestion of the death of Kala Rani from drowning is that when the body was first seen at 9 P. M., its stomach was not in a bloated condition; nor was any froth seen coming out of the mouth of the corpse. The fact was vouched by P. W. 23, a fisherman, who was rightly found worthy of credence by the High Court. It may be added that contrary to what P. W. 23 has testified A-2 has in the inquest report said that the stomach was bloated with water and froth was coming out of the mouth. But as shall be presently discussed, these notes regarding the condition of the dead-body, were invented by A-2 to support his false report that the deceased had committed suicide and her death was from drowning. Medical jurisprudence tells us that in a case of death from drowning, the stomach is ordinarily found bloated with air and water which is instinctively swallowed by the drowning person during the struggle for life (see Taylor's Medical Jurisprudence, 12th Edn. Vol. I pp. 374-375).

25. The facts that the stomach was not filled with water and bloated and no froth was coming out of the mouth of the deceased, are important symptoms which go a long way to exclude the possibility of death being as a result of suicide by drowning.

26. Then there were injuries and blood-marks on the dead body. P. Ws. 23, 25, 26 and 27, all testified with one voice that they had seen one injury, from which blood was oozing out on the forehead, another on the thigh and blood marks on the drawer (under-garment) of the deceased. In examination-in-chief, even P. W. 49, who in cross-examination tried to dilute his version in a possible attempt to favour A-2, stated that he had seen a reddish strain (stain?) on the forehead and blood marks on the drawer of the deceased. Out of these P. Ws. 23, 25 and 26 were present near the dead body

when A-2, accompanied by A-1 and P. W. 49, went there to hold the pretence of an inquest. P. W. 23 was a fisherman of Pallipalem, P. W. 25 was also a resident of the same hamlet. He was an employee of the Electricity Department. P. W. 27 was the Karnam of Gangapatnam. P. Ws. 23 and 25 were among those villagers who had seen the dead body washed ashore at about 9 P. M. on 6-6-1971. The High Court found that the version of these witnesses in regard to the injuries and blood-marks on the dead body was entirely reliable. No reason has been shown why we should take a different view of their evidence.

27. It is further in the evidence of P. Ws. 23, 25, 26 and 49 that when the blood-marks on the drawer were pointed out to A-2, the latter ignored it saying that the girl had been out of doors and was in menstruation. Contrary to what he and the P. Ws. had observed at the spot, A-2 wrote in the inquest report, P-11, Col. VII: "There are no injuries on the dead body."

28. Having excluded the possibility of suicide, we may now consider, whether the deaths of these girls were accidental. It is nobody's case that on the 6th June, 1971, any sea-craft, vessel or boat met with an accident off or near about Mypad, resulting in loss of human life. No suggestion of accidental death of any person, much less a woman, off/or on the sea-shore near or far from Pallipalem was put to any of the prosecution witnesses. Nor such a plea has been put forward by the accused in their statements recorded under Section 342, Criminal P. C. Indeed, the learned Counsel for the appellants has not pursued any such line of argument. We have, therefore, no hesitation in negating the possibility of accidental death.

29. This process of elimination inevitably leads us to the conclusion that in all probability the death of these girls, at any rate of Kala Rani was due to culpable homicide.

30. Now we come to the last but the most telling circumstance which not only confirms this conclusion and puts it beyond doubt, but also unerringly establishes, by inference, the other ingredients of the offence, including that the accused knew or had reason to believe that culpable homicide of Kala Rani had been committed. This circumstance is the conduct of A-2, in intentionally preparing false records and its abetment by A-1.

31. From its very start the investigation conducted by A-2 was dishonest and fraudulent. He intentionally indulged in suppressio veri et suggestio falsi at every step. He had been informed by the Head Constable (P. W. 34) at about 8

or 8-45 A.M. in the Police Station that a report from the Sarpanch had been received about the dead body of a girl bearing injuries, found washed ashore near Pallipalem. This information which was passed on to A-2 and on receiving which he proceeded from the Police Station for investigation, was the real F. I. R. It was the duty of A-2 to enter faithfully and truly the substance of this information in the Station Diary and to record further that he was proceeding for investigation on the basis thereof. Instead of doing so, he intentionally suppressed the factum and substance of this first information and the real purpose of his departure from the Police Station in the records prepared by him or by his subordinates in his immediate presence or under his supervision. Instead of retrieving the written report that had been first received at 8 A.M. in the Police Station and was returned by the Head Constable to the Sarpanch, he fabricated the document Exhibit P-25, purporting to be the First Information Report given to him at Mypad by one N. Subba Rao. The false story contained in this document has been substantially repeated in the inquest report, Ex. P-25.

32. P. Ws. 23, 25, 27 and 49 discount the presence of any such person, named N. Subba Rao either at the inspection of the dead body in the sea-shore by A-2 or at the Temple, where according to A-2, he prepared the inquest report. None of these P. Ws. has sworn that a statement of any N. Subba Rao was recorded in their presence by A-2. No specific question was put by the defence to P. W. 49 in cross-examination to establish that the report Ex. P-25 was scribed by A-2 at Mypad at about 11.30, to the dictation of N. Subba Rao or any other person, although the witness was generally questioned as to the number of persons carried in the car. P. W. 27, the Karnam, has definitely excluded the presence of any informant named Subba Rao. P. W. 27 testified that after the inquest, A-1, A-2, P. W. 26 and "a new person" involving P. W. 49, met him and thereafter all the five (including P. W. 27) got into the car and proceeded to the village. P. W. 27 did not vouch the presence of a sixth man in the car. Only P. W. 26 has stated that A-2 had recorded the statements of witnesses, including that of a person named N. Subba Rao. P. W. 26 had reason to tell a lie on this point. P. W. 26 admitted that at the time of the inquest, he was an accused in a criminal case of Indukurpet Police Station. A-2 was at the material time in-charge of that Police Station and was presumably concerned with the investigation of that case against P. W. 26. P. W. 26 therefore, appears to have deviated from truth in regard to the pre-

sence of N. Subba Rao, under the influence of the accused. In any case, the evidence of P. W. 26 on this point stands contradicted by the reliable testimony of P. Ws. 23, 25, 27 and 49.

33. In the inquest report, as also in Ex. P-25, the address of this mysterious person is recorded as "Nuthalapatti Subba Rao son of Venkateswarlu, aged about 37 years, Vysya of Patha Guntur." Despite efforts, the Investigating Officers, P. Ws. 59 and 60, could not trace on the basis of this address; any person bearing the said particulars at Pata Guntur or anywhere else in the District. In response to the memo issued by the D. S. P. (P. W. 59) A-2 could neither produce this N. Subba Rao, nor give any indication about his existence, though A-2 claimed to have known him. For these reasons, the High Court was right in holding that this Nathalapatti Subba Rao was a fictitious person of A-2's imagination. Similarly, during investigation all efforts made by P. Ws. 59 and 60 to trace and find if Vijaya and Nirmala prostitutes, represented in Ex. P-25 and Ex. P-11 as the deceased persons ever existed in flesh and blood, remained futile. In these premises, the High Court was right in concluding that Vijaya and Nirmala prostitutes were also the coinage of the brain of A-2.

34. It is necessary to say something more about Ex. P-25 because the entire story was spun around it by A-2. It did not see the light of the day till the 11th June. A-2 did not send it to the Police Station for registration before that date. It is in the evidence of P. W. 55, who at the material time was a Head Constable posted in this Police Station, that after his departure on the morning of the 7th, A-2 returned to the Police Station on the 10th evening and it was then that he handed over this document to the witness with the direction that the latter should enter that report in the relevant register, dating it as the 7th June, 1971. The Head Constable after slight hesitation agreed and inserted this report in the blank space meant for the entries of the 7th June, and thereafter as required by A-2 handed over to the latter, a copy of that report, A-2 also made an entry (Exhibit P-34) in the General Diary of the Police Station, dated 10-6-1971 on 11-6-1971 at 2 A.M. It reads:

"Returned to P. S. after leaving it on 7-6-1971 at 9-30 a.m. visited Mypadu enroute to Gangapatnam at 11-00 hours at 11-30 a.m., recorded statement of N. Subba Rao, sent to Police Station for issuing First Information Report under S. 174, Cr. P. C. then visited Pallipalem at 12-30 p.m. investigated, held inquest over dead body of K. Vijaya. At 20-30 p.m., left village reached Mypadu at 21-30

hours, made enquiries in Cr. 48/71 and halted. On 8-6-1971 visited Gangapatnam detailed duties for bandobust and visited Ravur, investigated into Cr. 47/71, visited Nellore at 12-30 hours, did bandobust for festival and halted for the night. On 9-6-1971 visited Mypadu for petition enquiry and investigated into Cr. 48/71 41, 42 and 44/71 and halted. On 10-6-1971 visited Gangapatnam, supervised and did bandobust for car festival at 00-30 hours, received First Information Reports in Cr. 49 to 51/71 at 00-45 hours, left the village with men and reached Police Station."

35. A mere glance at this report betrays its falsity. This shows how in his anxiety to suppress the truth he tried to reinforce and cover up one falsehood with another. In this connection, it may be noted that the D. S. P. persistently pressed A-2 to send the copies of the F. I. R. and the Inquest Report. A-2 was unable to supply any copy of the F. I. R. before the 12th of June, when the D. S. P. himself came to the Police Station and collected it. The D. S. P. (P. W. 59) testified that on the 11th June, 1971, he had questioned A-2 about the First Information Report and the inquest report. As a result he received a copy of the F. I. R. on the 12th but did not receive any copy of the inquest report. Consequently on 14-6-1971, he telephoned to A-2 to send the case diaries and inquest report without further delay. Despite these efforts, the D. S. P. did not receive those records on that day. On 15-6-1971, he issued a memo. to A-2 directing the latter to produce immediately the complaint of N. Subba Rao, the inquest report and the case diaries. It was only then that A-2 produced the persistently requisitioned records.

36. These inordinate delays in sending the records prepared by A-2, confirm the testimony of P. Ws. 23, 25 and 49 that no inquest on the dead body was held at the spot, nor was the inquest report or any other record prepared there and then, and that their signatures were obtained by A-2 on a blank sheet of paper. Of course P. W. 26 stated that A-2 had recorded statements of witnesses and had prepared the inquest report at the Temple. As already noticed, it is not prudent to accept this version of P. W. 26. He had a motive to favour A-2. Moreover, his version stands inferentially falsified by the circumstances, including the unusual delay in registering the report Exhibit P-25 in the Police Station and in sending the copies of the records to the D. S. P.

37. Section 174, Criminal P. C. peremptorily requires that the officer holding an inquest on a dead body should do so at the spot. This mandate is con-

veyed by the word "there" occurring in Section 174 (1). Sub-section (3) of the Section further requires the Officer holding the inquest to forward the body with a view to its being examined, by the medical man appointed by the State Government in this behalf, if the State of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless. The sub-section gives a discretion to the Police Officer not to send the body for post-mortem examination by the medical officer only in one case, namely, where there can be no doubt as to the cause of the death. This discretion however is to be exercised prudently and honestly. Could it be said in the circumstances of the case, that there was no doubt as to the death of Kala Rani being from drowning?

38. In this connection it is important to note that Kala Rani was not a total stranger to A-2. It is in evidence that A-2 used to go to Nellore for Bandobust and there he had had sufficient opportunity to come across Kala Rani who was a prominent student-leader. The testimony of P. W. 47 is to the effect that when on 17-7-1971, A-2 came to him and requested the witness to dissuade the father of the deceased from getting the dead body exhumed, he (A-2) admitted that Kala Rani deceased was well-known to him.

39. The body was not in an unidentifiable condition. A-2 therefore could be under no mistake that it was the body of Kalarani deceased, particularly when he inspected it after its face had been washed by P. W. 23 under the orders of A-2. Despite such knowledge, he laid a false trail and prepared false record mentioning that the dead body was of a prostitute named Vijaya.

40. Medical jurists have warned that in the case of a dead body found floating in water, the medical man from a mere observance of the external condition of the body, should not jump to the conclusion that the death was from drowning. Only internal examination of the body can reveal symptoms which may indicate with certainty as to whether the death was from drowning or from unlawful violence before the body was immersed in water. This is what Taylor, the renowned medical jurist, has said on the point:

"When a dead body is thrown into the water, and has remained there some time, water, fine particles of sand, mud, weeds etc. may pass through the wind-pipe into the large air-tubes. In these circumstances, however, water rarely penetrates into the smaller bronchi and alveoli as it may by aspiration, and even

the amount which passes through the glottis is small. If immersed after death the water is found only in the larger air-tubes and is unaccompanied by mucous froth. Water with suspended matters can penetrate even to the distant air-tubes in the very smallest quantity, even when not actively inhaled by respiratory efforts during life. The quality, or nature of the suspended matter may be of critical importance. *** When decomposition is advanced the lungs may be so putrefied as to preclude any opinion as to drowning but the demonstration of diatoms in distant parts of the body inaccessible except to circulatory blood, provides strong evidence of immersion in life if not of death from drowning." (emphasis supplied)

41. A-2 was a Police Officer of standing and experience. He knew the deceased. He saw injuries on her dead body. He must have known — if he were honest — that in the circumstances of the case autopsy of the dead body by a medical officer was a must to ascertain the cause of her death. Instead of sending the dead body for post-mortem examination, he in indecent haste purposely got it buried without holding any inquest at the spot. He did not send for the relations of the deceased. Even a layman like the Karnam (P. W. 27) felt something strangely amiss in this conduct of A-2. In response to the queries made by the Karnam, A-2 made false excuses. He intentionally misrepresented (in concert with A-1) that P. W. 49 was a relation of the deceased. He flouted all the salutary requirements of Section 174, Criminal P. C. A-2's conduct in distorting and suppressing material evidence and in preparing false records (Exs. P-11 and P-25) as to the identity of the dead body, the cause of the death and the falsification of the data bearing on that cause, could not be explained on any reasonable hypothesis save that of his guilt. The circumstances established in this case unmistakably and irresistibly point to the conclusion that within all human probability, accused No. 2 knew or had reasons to believe that Kala Rani had been done to death by some person or persons. All the elements of the charge under Section 201 had thus been proved to the hilt against him.

42. Before considering the case of A-1, we may notice here the decision of this Court in *Palvinder Kaur v. State of Punjab*, 1953 SCR 94 = (AIR 1952 SC 354 = 1953 Cri LJ 154). This decision was cited by the learned Counsel for the appellants in support of his argument that the circumstances: that the deceased died, that the appellant prepared false record regarding the cause of her death or caused post-haste disposal of the dead body with-

out any autopsy or its identification by the relations of the deceased, do not establish the cause of Kalarani's death or the manner and the circumstances in which it came about. Counsel laid particular stress on the observation of this Court in that case that in cases depending on circumstantial evidence Courts should safeguard themselves against the danger of basing their conclusions on suspicions howsoever strong.

43. The decision in *Palvinder Kaur's case*, (AIR 1952 SC 354 = 1953 Cri LJ 154) (supra) is a precedent on its own facts. The observations of this Court to the effect, that "Jaspal died, that his body was found in a trunk and was discovered from a well and that the appellant took part in the disposal of the body do not establish the cause of his death or the manner and circumstances in which it came about" cannot be construed as an enunciation of a rule of law of general application. Whether the circumstantial evidence in a particular case is sufficient and safe enough to warrant a finding that an offence has been committed, is a question which belongs to the realm of facts and not of law. So is the question whether the accused knew or had reasons to believe that such an offence has been committed. It is true that this question further depends on an assessment of the accused's mind. Nevertheless, it is a question of fact. "The state of a man's mind," quoth Lord Bowen, "is as much a fact as the state of his digestion."

44. In *Palvinder Kaur's case* (AIR 1952 SC 354 = 1953 Cri LJ 154) (supra) there was, in the first place, no material, direct or indirect, justifying a finding that the death of Jaspal was caused by the administration of potassium cyanide and if the defence version was believed his death would be the result of an accident. If that version was disbelieved then there was absolutely no proof of the cause of his death. In the method and the manner in which the dead body of Jaspal was dealt with and disposed of by the accused did raise some suspicion but from these facts, the Court found it unsafe to draw a positive conclusion that he necessarily died an unnatural death. Nor could the possibility of the commission of suicide by Jaspal be totally ruled out.

45. The position of A-2 in the present case was very different. He was a Police Officer and as such was expected to discharge the duties entrusted to him by law with fidelity and accuracy. He was required to ascertain the cause of the death and to investigate the circumstances and the manner in which it was brought about. His duty it was to make honest efforts to reach at the truth. But he flagrantly abused the trust reposed in him

by law. He intentionally fabricated false clues, laid false trails, drew many a red herring across the net, smothered the truth, burked the inquest, falsified official records and shortcircuited the procedural safeguards. In short, he did everything against public justice which is penalised by Section 201, Penal Code. The other circumstantial evidence apart, the series of these designed acts of omission and commission on the part of A-2, were eloquent enough to indicate in no uncertain terms that A-2 knew or had reasons to believe that Kalarani's death was homicidal.

46. It is not disputed that A-1 was a friend of A-2. It was A-1 who had supported A-2's idea that the latter should himself go to the spot to investigate as the deceased girl appeared to be from a high class family. Standing alone, this circumstance is not of a conclusive tendency. But in the context of his subsequent conduct it assumes significance. He wilfully conducted himself in such a manner that there could be no doubt that he was a guilty associate of A-2. When in the context of the burial of the dead body ordered by A-2 without sending the body for post-mortem, the Karnam (P. W. 27) asked whether any relation of the deceased had come, A-2 pointed towards P. W. 49 saying that he was related to the deceased. Simultaneously, A-1 said: "Yes". This concerted conduct of A-1 in fraudulently representing P. W. 49 to be a relation of the deceased, when he knew that P. W. 49 was not such a relation, clearly marks him out as an intentional abettor and a guilty partner in the commission of the offence under S. 201, Penal Code.

47. There can be no doubt that on the basis of the facts found, the charges under Sections 218, 468, Penal Code had been fully established against the appellant. A-2 being a public servant charged with the preparation of official record relating to the investigation of the cause of the death of Kalarani, framed that record in a manner which he knew to be incorrect with intent to save or knowing to be likely that he will thereby save the true offender or offenders from legal punishment. Obviously, he prepared this false and forged record with the fraudulent and dishonest intention of misleading his superior officers and inducing them to do or omit to do anything which they would not do or omit if they were not so deceived or induced. A-1, as discussed already, facilitated and intentionally aided A-2 in the preparation of the false and forged record.

48. For the foregoing reasons we uphold the convictions and sentences of

the appellants, on all the counts, as recorded by the High Court, and dismiss the appeal.

Appeal dismissed.

AIR 1975 SUPREME COURT 1935

(From: Madras)*

A. N. RAY, C. J., K. K. MATHEW AND
Y. V. CHANDRACHUD, JJ.

The Trustees of the Port of Madras,
Appellant v. M/s. Aminchand Pyarelal
and others, Respondents.

Civil Appeal No. 707 of 1973, D/-
9-9-1975.

(A) Madras Port Trust Act (2 of 1905), Sections 42, 43 and 43-A — "Scale of Rates" framed under, Chapter IV, Rule 13 (a) (b) — Scale of Rates not ultra vires on ground of unreasonableness—It is not in excess of power. C. S. No. 158 of 1966, D/- 23-12-1971 (Mad), Reversed. (1) Interpretation of Statutes — Rule and Bye-law — Distinction; (2) Words and Phrases — "Demurrage").

The scale of rates fixed by the Board is not ultra vires and void on the ground that it is unreasonable. It is not in excess of power conferred by Section 42 of the Act. Civil Suit No. 158 of 1966, D/- 23-12-1971 (Mad), Reversed. (Para 32)

The Board having been expressly empowered by Section 42 to frame a scale of rates and a statement of the conditions under which it shall perform the services specified in the section and the Board having in terms exercised that power under the aforesaid section, there is no justification for supposing that in framing the scale of rates and the statement of conditions, the Board has purported to frame a bye-law. (Para 21)

A bye-law has been said to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers, ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance. The Board's power to frame the scale of rates and statement of conditions is not a regulatory power to order that something must be done or something may not be done. The rates and conditions govern the basis on which the Board performs the services mentioned in Sections 42, 43 and 43-A. Those who desire to avail of the services of the Board are liable to pay for those services at prescribed rates and to perform the conditions framed in that behalf by the Board. (Para 22)

*(Civil Suit No. 158 of 1966, D/- 23-12-1971 — Mad).

IS/IS/D337/75/CWM

Even a bye-law cannot be declared ultra vires on the ground of unreasonableness merely because the Court thinks that it goes further than is necessary or that it does not contain the necessary qualifications or exceptions. (1898) 2 Q. B. 91 and (1888) 13 AC 446, Rel. on.

(Para 23)

The requirement of sanction by the Central Government is a restraint on unwise, excessive or arbitrary fixation of rates. Section 44 (2) confers on the Board the power, in special cases and for reasons to be recorded in writing, to remit the whole or any portion of rates or charges leviable according to any scale in force under Section 44. Thus, the statute provides for the necessary safeguard, checks and counter-checks as an insurance against fixation and levy of harsh or unjust rates.

(Para 25)

Section 49 of the Customs Act, 1962 confers power on the Assistant Collector of Customs, if he is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time, to permit that the goods may, pending clearance, be stored in public warehouse and if such a facility is not available, then in a private warehouse. This provision together with Section 44 (2) of the Act constitutes a measure of mitigation. In face of these considerations, it is impossible to characterise the scheme for the levy of rates as arbitrary or unreasonable.

(Para 26)

The two clauses of Rule 13 deal with different sets of cases. Equating the two clauses of cases dealt with by clauses (a) and (b) of Rule 13 may seem to the Court, a more prudent or reasonable way of fixing scale of rates but that is not a correct test for deciding the validity of the impugned provision.

(Para 27)

The Board is under a statutory obligation to render services of various kinds and those services have to be rendered not for the personal benefit of this or that importer but in the larger national interests. Congestion in the ports affects the free movement of ships and of essential goods. The scale of rates has therefore to be framed in a manner which will act both as an incentive and as a compulsion for the expeditious removal of goods from the transit area. Viewed from this angle, the scale of rates cannot be characterised as unreasonable.

(Para 28)

The Section 42 power is conferred on the Board to frame "a scale of rates at which and a statement of the conditions under which any of the services specified" in the section "shall be performed". And the Board has fixed the scale of rates and the statement of conditions for the services it may have to perform. It is difficult to see in what manner or respect the Board has exceeded its power under Section 42.

(Para 29)

Demurrage being a charge and not a service, the power of the Board is not limited to fixing rates of demurrage. Besides, it is plain that the Board has used the expression 'Demurrage' not in the strict mercantile sense but merely to signify a charge which may be levied on goods after the expiration of Free Days.

(Para 31)

Cases Referred: Chronological Paras
(1898) 2 QB 91 = 67 LJQB 782 22, 23
(1888) 13 AC 446 = 57 LJPC 73 23

Mr. K. S. Ramamurthi, Sr. Advocate (M/s. S. Balakrishnan and N. M. Ghatate, Advocates of M/s. Balakrishnan and Ghatate with him), for Appellant; Mr. A. K. Sen, Sr. Advocate, (M/s. J. S. Arora and H. K. Puri, Advocates with him) (for No. 1) and Mr. G. L. Sanghi, Sr. Advocate, (Mr. Girish Chandra Advocate with him) (for Nos. 2 and 3), for Respondents.

Judgment of the Court was delivered by

CHANDRACHUD, J:— The Trustees of the Port of Madras, appellants herein, filed Suit No. 158 of 1966 in the High Court of Madras for recovering a sum of Rs. 3,18,968.04 from the respondents by way of demurrage. The 1st respondent is a firm called M/s. Aminchand Pyarelal, the 2nd respondent is the Union of India and the 3rd respondent is the Collector of Customs, Madras. A learned single Judge referred the suit to a Division Bench which dismissed it by a judgment dated December 23, 1971. This is an appeal by certificate granted by the High Court under Article 133 (1) (a) of the Constitution.

2. On April 10, 1963, a Steamer "A. P. J. AKASH" arrived at the Madras Port and landed, among other goods, a consignment of 202 bundles of black plain sheets of various sizes. The appellants received the goods and stored them in transit sheds. The goods were imported by the 1st respondent under an authorisation issued by the State Trading Corporation of India which held a licence dated June 16, 1962, to import the goods from Hungary. The Clearing Agents of the 1st respondent filed a Bill of Entry with the 3rd respondent but the Customs authorities detained the goods as the specifications in the import licence did not tally with the description of the imported goods. The Customs authorities then issued a show cause notice to the 1st respondent and after considering its explanation the 3rd respondent passed an order on November 12, 1963, confiscating the goods under Section 111 (a) of the Customs Act, 1962. The 1st respondent preferred an appeal against that order to the Central Board of Excise and Customs, New Delhi, which was allowed by the Board on July 27, 1964. On August

21, 1964, the Clearing Agents of the 1st respondent requested the Customs Authorities to issue a certificate for the remission of the transit dues for the period during which the goods were detained. A certificate was accordingly issued by the 3rd respondent stating that the goods were detained by the Customs Authorities from April 24, 1963, to August 21, 1964 for examination under Section 17 (3) and Section 17 (4) of the Customs Act 1962, other than in the ordinary process of appraisal and that the detention was due to no fault or negligence on the part of the 1st respondent. Acting on this certificate, appellants waived the demurrage for the period covered by the certificate, whereupon the 1st respondent cleared the consignment on August 25 and August 27, 1964, on payment of the Harbour dues, Cranage charges and Demurrage charges for the period not covered by the certificate.

3. Thinking that the certificate was issued erroneously, appellants wrote a letter dated January 27 1965 to the 3rd respondent requesting him to reconsider the matter. By his letter of April 12, 1965, the 3rd respondent owned up the mistake and stated that the certificate was incorrect as the goods were detained in order to ascertain whether the Import Trade Control formalities were complied with and not for examination and assessment of duty under Section 17 (3) and (4) of the Customs Act.

4. The case of the appellants is that due to the negligent mistake committed by the 3rd respondent in issuing the certificate, they charged to the 1st respondent a sum of Rs. 1,963.60 only whereas it was liable to pay a sum of Rs. 3,20,951.64 by way of demurrage. The appellants called upon the 3rd respondent to pay up the balance but the latter, by his reply dated July 6, 1965, repudiated all liability, contending that the Union of India could not be held liable for the negligent or tortious acts of its officers done in good faith during the course of their official duties and that the appellants should seek their remedy against the 1st respondent.

5. Later, the appellants brought the present suit against the three respondents to recover the demurrage. The case of the appellants as made out in the plaint is that the liability of respondents 2 and 3 was in the region of contract or quasi-contract, that the appellants were put to a loss due to the wrong certificate issued by the 3rd respondent and therefore respondents 2 and 3 could not repudiate their liability to pay the demurrage. As regards the 1st respondent, the case of the appellants is that it had contravened the Import Trade Control regulations, that it was fully aware of the

true facts, that it was not open to it to take advantage of the wrong certificate issued by respondent 3 and that therefore it was also liable to pay the demurrage.

6. The 1st respondent disputed its liability to pay the demurrage contending that it could not be penalised either for the delay caused by the Customs authorities in clearing the goods or for the issuance by them of a wrong certificate. According to the 1st respondent, the consignment imported in April, 1963, was one of a series of consignments which the 1st respondent had imported under a contract with the State Trading Corporation for a fixed remuneration. The 1st respondent had no authority to deal with the imported goods but was bound to hand them over at the agreed price to the State Trading Corporation or its nominee. The 1st respondent further stated that the only controversy raised by the Customs authorities related to a difference in the size of the sheets imported under the import licence and that if the appellants had called upon it to pay by way of demurrage a sum as large as over rupees 3 lakhs the 1st respondent would have rejected the goods as against the supplier unless the State Trading Corporation was willing to accept the goods. The import clearance orders were granted on the recommendation of the Corporation which held the import licence and which arranged for the grant of import clearance permits to persons like the 1st respondent on the basis that the goods were imported on behalf of the Corporation. Finally, the 1st respondent contended that the scale of charges in the Port Trust Regulations under the heading "Chapter IV — Demurrage" was void and ultra vires both for the reason that it was unreasonable and because the scale of charges was not within the authority of the appellants. The unreasonableness of the demurrage charges, according to the 1st respondent, was obvious from the fact that whereas the goods were of the value of Rs. 1,31,501/- appellants were claiming a sum of over rupees 3 lakhs by way of demurrage.

7. The 2nd respondent, the Union of India, set out the various facts attendant upon the import of the goods and contended that the appellants had no cause of action against it or the 3rd respondent. The 3rd respondent adopted the written statement of the 2nd respondent.

8. The High Court held that the levy of demurrage in cases where the goods were detained by the Customs authorities for no fault or negligence on the part of the importer, was unreasonable and also beyond the powers of the appellants and that the appellants were not entitled to recover demurrage from any of the respondents.

9. Two questions, mainly, arise for consideration in this appeal: firstly, whether the scale of fees under which the appellants charge demurrage is void as being unreasonable and as being beyond their powers; and, if the answer to the first question is in the negative, whether the 1st respondent is liable to pay the demurrage claimed by the appellants. Counsel for the appellants did not press the claim against respondents 2 and 3. The decision of the first question turns on the relevant statutory provisions but before considering the legality of the levy, it would be necessary to know the procedure which is adopted in the Madras Port during the process of importation and clearance of goods.

10. The local agents of the ship inform the Traffic Manager of the Port Trust of the probable date of arrival of the ship and submit to the Customs House the "Import General Manifest" which contains a description of the goods which are at board for landing at the Port. The Dock Labour Board supplies the labour to the Master of the Ship for unloading the goods and for putting them on the quay-side so as to enable the Port Trust authorities to take charge of the goods. The Port Trust labour handles the goods on the shore and when the Port Trust takes charge of the same, it is obliged under Section 39 (3) of the Madras Port Trust Act, 1905, to give a receipt to the Master of the Ship. With few exceptions, all goods received by the Port Trust are kept in the transit sheds. The Port Trust charges Harbour Dues for receiving the goods, handling them and keeping them in the transit sheds. The importer then files the Import Application and the Steamer Agent's Delivery Order which is in the nature of an authority from the Steamer as bailor, to the Port Trust as the bailee, to deliver the goods to the importer or his agent. Section 45 of the Customs Act, 1962 forbids the person having the custody of any imported goods in the customs area from permitting their removal except under and in accordance with the written permission of the Customs authorities. The goods are cleared by the Customs Authorities if the importation is not contrary to any law and if the importer pays the import duty assessed on the goods and the other charges payable under the Customs Act. If the Customs Officer is of the opinion that the goods have been imported contrary to any prohibition imposed by the Customs Act or the Imports and Exports (Control) Act, or by the orders issued or the rules framed thereunder, a notice is issued under Section 111 or Section 112 of the Customs Act calling upon the importer to show cause why the goods should not be confiscated. If the importer shows good cause, the goods are released and

thereupon the Customs Authorities issue a Detention Certificate stating, if that be true, that the goods were detained for examination under Sections 17 (3) and (4) of the Customs Act and that the detention was due to no fault or negligence on the part of the importer.

11. The Port Trusts are under a statutory obligation to perform certain duties and equally so they have statutory powers to fix scales of fees and rates. The statute with which we are here concerned directly is the Madras Port Trust Act, 2 of 1905, (hereinafter called "the Act"). It is necessary to notice the relevant provisions thereof in order to understand the controversy in this appeal.

12. Section 5 (1) defines the "Board" to mean the Trustees of the Port of Madras appointed under the Act. Section 5 (12) defines "Rate" as including any toll, due, rent, rate or charge leviable under the Act. By Section 7 the Board consists of 21 Trustees including the Chairman. Section 8 provides that the Chairman of the Board shall be appointed by the Central Government and the remaining Trustees shall be (1) the Collector of Customs, Madras, (2) the Municipal Commissioner for the City of Madras, (3) the General Manager, M. & S. M. Railway, (4) the General Manager, South Indian Railway, (5) one representative of the Mercantile Marine Department chosen by the Central Government; (6) one representative of the Defence Services chosen by the Central Government; (7) one representative of the State Government chosen by the State Government; (8) two representatives of Labour chosen by the Central Government after consultation with the registered trade unions, if any, composed of persons employed in the port; and (9) eleven elected trustees. By Section 8 (2) of the eleven elected trustees one is elected by the Madras Municipal Corporation and the remaining ten by such provincial or local bodies representing commercial interests as the Central Government may, from time to time, by notification in the Official Gazette, specify. Such notification may also specify the number of trustees that each of such bodies may elect. Section 10 which lays down disqualifications for the trustee's office provides, inter alia, that a person shall be disqualified to be a trustee if, inter alia, he holds any office or place of profit under the Board. This provision does not, however, apply to the Chairman, ex-officio Trustees and Trustees appointed by virtue of office. Section 23 (1) lays down the procedure governing the proceedings of the Board while Section 23 (2) provides that the Board may, from time to time, appoint committees consisting of not less than five of its members for carrying into effect any part

of the provisions of the Act with such powers and under such instructions, directions, or limitations as shall be defined by the Board.

13. By Section 39 (1) the Board is under an obligation, according to its powers, to provide all reasonable facilities for, and has the power to undertake the services of the description mentioned in the sub-section. Among those services are landing of goods from vessels in the Port, and receiving, storing or delivering goods brought within the Board's premises. Section 39 (2) imposes upon the Board the obligation, if so required by any owner, to perform in respect of goods all or any of the services mentioned in clauses (a), (b) and (d) of Section 39 (1). Under Section 39 (3) the Board shall, if required take charge of the goods for the purpose of performing the service and shall give a receipt in the prescribed form. After the goods have been taken charge of and the receipt given by the Board, no liability for any loss or damage which may occur to the goods can attach to any person to whom a receipt shall have been given by the Board or to the master or the owner of the vessel from which the goods have been landed. Under Section 40 the responsibility of the Board for the loss, destruction or deterioration of goods of which it has taken charge is, subject to certain provisions, that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act subject to certain modifications.

14. Chapter VI of the Act which appears under the heading "Imposition and Recovery of Rates" contains provisions which have direct impact on the contentions raised in this appeal. Section 42 empowers the Board to frame a scale of rates at which and a statement of the conditions under which any of the services specified in clauses (a) to (e) of the section shall be performed by the Board. Clause (b) refers to landing of goods from any vessel upon any land or building in the possession or occupation of the Board or at any place within the limits of the Board. Clause (d) refers to "wharfrage, storage or demurrage of goods on any such place." Sections 43 and 43-A also confer on the Board power similar to that conferred by Section 42. By Section 44 every scale and every statement of conditions framed by the Board under Sections 43 and 43-A shall be submitted to the Central Government for sanction and, when so sanctioned and published in the Official Gazette, such scale and statement of conditions have the force of law. The Central Government has power under Section 44 (1a) at any time to cancel any of the scales framed by the Board or to call upon the Board to modify any portion of such scales

whereupon the Board shall modify the scales according to the directions of the Central Government. Sec. 44 (2) confers power on the Board, in special cases, for reasons to be recorded in writing, to remit the whole or any portion of the rates or of any charge leviable according to any scale. Under Section 50 rates in respect of goods to be landed are payable immediately on the landing of the goods; rates in respect of goods to be removed from the premises of the Board are payable before the goods are removed. Under Section 51 the Board has a lien on the goods for the amount of all rates leviable under the Act on the goods and it may seize and detain the goods until the rates are fully paid. This lien has by Section 52 priority over all other liens and claims except for general average and the ship-owner's lien for freight and other charges where such lien exists and has been preserved in the manner provided in Section 53. Under Section 56, if the rates payable to the Board remain unpaid, it is competent to the Board to sell the goods by public auction after expiry of two months from the time that the goods have passed into its custody and in the case of perishable goods after the expiry of a shorter period not being less than 24 hours. Section 57 requires that the notice of sale must be published in the Official Gazette. By Section 58 notice is also required to be given to the owner of the goods, if the address of the owner is known. Under Section 58-A, notwithstanding anything contained in the Act, where any goods placed in the custody of the Board are not removed by the owner or other person entitled thereto from the premises of the Board within one month, the Board may, after due notice, require that the goods be removed forthwith or that in default of compliance the goods would be liable to be sold by public auction. In cases where all the rates and charges payable under the Act have been paid such a notice for removal of the goods cannot be given before the expiry of two months from the date on which the goods were placed in the custody of the Board. If the notice is not complied with, the Board may at any time after the expiration of one month from the date on which the notice was served or published, sell the goods by public auction. Section 62 preserves the right of the Board to recover the rates by a suit.

15. Section 95 of the Act which appears in Chapter XI called "Bye-Laws" empowers the Board to make bye-laws not inconsistent with the provisions of the Act, inter alia, for the safe and convenient use of sheds, for the reception and storage of goods brought within the premises of the Board, for the mode of the payment of the rates leviable under

the Act and generally for carrying out the purposes of the Act.

16. Section 109 of the Act which has an important bearing on these proceedings provides that nothing contained in the Act shall affect any power vested in the Chief Officer of Customs under any law for the time being in force. Section 49 of the Customs Act, 52 of 1962, provides that where in the case of any imported goods, the Assistant Collector of Customs, is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time, the goods may, pending clearance, be permitted to be stored in a public warehouse or in a private warehouse if facilities for deposit in a public warehouse are not available.

17. Acting in pursuance of the power conferred by Sections 42, 43 and 43-A, the appellants have framed a "Scale of Rates" payable at the Port of Madras, which has been duly sanctioned by the Central Government under Section 44 of the Act. We are concerned with the rates framed under Section 42 which are contained in Chapter IV of the Scale of Rates. The various scales of rates are divided into three parts: Book I, Book II and Book III. Chapter IV is headed "Demurrage" and it occurs in Book I called "Charges for certain services which the Board is prepared to render to the public". The introductory part of Chapter IV says:—

"Demurrage is chargeable on all goods left in the Board's transit sheds or yards beyond the expiry of the free days. After demurrage begins to accrue no allowance is made for Sundays or Board's holidays. The free days are fixed by the Board from time to time."

18. Scale 'A' of Chapter IV prescribes conditions governing "Free Days", the normal rule being that two working days in the case of coast cargo and three working days in the case of foreign cargo excluding Sundays and Board's holidays are treated as free after complete discharge of a vessel's cargo, or the date when the last package was put overside. R. 13 (b) is the focus of controversy between the parties and it would be useful to read along with it clause (a) as well:

"13. The following free periods are allowed in addition to the free periods applicable as per description of goods:—

(a) Periods during which goods are detained by the Collector of Customs for examination under Section 17 (3) and (4) and for chemical test under Section 144 of the Customs Act, 1962, other than the ordinary processes of appraisement and certified by the Collector of Customs to be not attributable to any fault or negligence on the part of the Importers plus one working day. The Customs holidays

will also be treated as free days in addition.

(b) Where goods are detained by the Collector of Customs on account of Import Trade Control formalities or for compliance of formalities prescribed under the Drugs Act and certified by the Collector of Customs to be not attributable to any fault or negligence on the part of Importers, demurrage shall be recovered for this period at the rate of 30 per cent. of the normal rate, i.e., the rate at which the goods would incur demurrage had there been no detention by the Customs. This concession in demurrage shall be limited to a period of 30 days plus one working day and demurrage shall be recovered at the full rate (i.e., third slab) for detention beyond the above said period."

Under clauses (c) and (d) of Rule 13, periods during which the goods are detained by the Port Health Authority and the periods during which the Board is unable to trace packages owing to congestion of accommodation, wrong sorting or incorrect tallying are also treated as Free Days.

19. The High Court dismissed the appellants' suit for the following reasons: (1) The Scale of Rates fixed by the Board is in the nature of Bye-Laws; (2) Bye-Laws may be treated as *ultra vires* for the reasons, *inter alia*, that they are repugnant to the statute under which they are made or that they are unreasonable; (3) Viewed as a bye-law, Rule 13 (b) under which the Board can charge demurrage for the period during which the goods are detained for no fault or negligence of the importer or his agent, is unreasonable and therefore void; (4) In principle, there can be no distinction between cases falling under clause (a) and those falling under clause (b) of Rule 13 and if no demurrage is leviable in respect of cases falling within clause (a), no demurrage could be charged in respect of cases falling within clause (b). The distinction made by the Board between the two kinds of cases is therefore arbitrary and unreasonable; (5) 'Demurrage', being a charge for wilful failure to remove the goods within the free period, can be levied only if the failure to remove the goods is due to the fault or negligence of the importer or his agent; (6) Having regard to this well accepted meaning of the word 'demurrage', the authority given to the Board by Section 42 of the Act to frame the scale of rates can be exercised only for the purpose of levying charges where the importer was not prevented by any lawful authority from clearing the goods from the transit area and he had defaulted or was negligent in clearing the goods; (7) Since Rule 13 (b) empowers the Board to charge demurrage even when the goods are detained for no fault or negligence of the importer or his

agent, it is beyond the authority conferred by Section 42 and is therefore void; (8) All the same, if two views are reasonably possible, a construction which favours the validity of a rule or statute should be preferred to that which renders it void. Therefore, under the scale of charges for demurrage provided in Chap. IV, the appellants can levy demurrage only in cases where the delay in clearing the goods is due to the fault or negligence of the importer or his agent.

20. The first four of these reasons relate to the invalidity of R. 13 (b) viewed as a bye-law while the last four relate to its invalidity on the ground that it is in excess of the power conferred by Section 42 of the Act. Both of these sets of reasons appear to us unsustainable.

21. As stated in "Craies on Statute law" (7th Ed., pp. 325-326), bye-laws may be treated as ultra vires on the grounds, amongst others, that they are repugnant to the statute under which they are made or that they are unreasonable. But the error of the High Court's judgment lies in the assumption that the "Scale of Rates and Statement of Conditions" framed by the appellants under Sections 42, 43 and 43-A are bye-laws. Section 42 with which we are concerned confers authority on the Board to "frame a scale of rates at which and a statement of the conditions under which any of the services specified" in the section shall be performed. Section 43 confers an identical power on the Board in regard to certain other matters while Section 43-A authorises the Board to prescribe consolidated rates. Provision for framing bye-laws is made in Chapter XI called "Bye-laws" and Section 95 which occurs in that Chapter mentions the various subjects on which the Board may frame bye-laws. Under Chapter XI, the Board has no power to frame bye-laws for fixing scales of rates or a statement of the conditions under which any of the services specified in Sections 42, 43 and 43-A shall be performed. The nearest that Section 95 touches the subject of rates is by clause (6) which refers to "the mode of the payment of the rates leviable under this Act". The Board having been expressly empowered by Section 42 to frame a scale of rates and a statement of the conditions under which it shall perform the services specified in the section and the Board having in terms exercised that power under the aforesaid section, there is no justification for supposing that in framing the scale of rates and the statement of conditions, the Board has purported to frame a bye-law. What the High Court has done is to assume, in the first place, that the Board has not exercised the power which it undoubtedly possesses and which in fact and in terms it

did exercise. The High Court then assumed that the Board had exercised the power which it did not possess, a power which the Board has not even purported to exercise. Making these unfounded assumptions, the High Court invalidated Rule 13 (b) on the basis that it was a bye-law and a bye-law could be declared ultra vires on the ground that it is unreasonable. We are unable to accept the High Court's view that the scale of rates prescribed by the Board under Sections 42, 43 and 43-A consists, as it were, of so many bye-laws or that Rule 13 is in the nature of a bye-law.

22. A bye-law has been said to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers, ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance.* The Board's power to frame the scale of rates and statement of conditions is not a regulatory power to order that something must be done or something may not be done. The rates and conditions govern the basis on which the Board performs the services mentioned in Sections 42, 43 and 43-A. Those who desire to avail of the services of the Board are liable to pay for those services at prescribed rates and to perform the conditions framed in that behalf by the Board. Indeed, some of the services which the Board may perform are optional and if the importer desires to have the benefit of those services, he has to pay the charges prescribed therefor in the Scale of Rates. For example, any one wanting to use the Board's premises for any of the purposes mentioned in clauses (a) to (d) of Section 43 would have to pay the charges prescribed by the Board for the use of its premises. Similarly any one desiring to have the benefit of the Board's services in behalf of cramage or storage as specified in clauses (c) and (d) of Section 42 shall have to pay for these services at the prescribed rates. Whether the services are from the importer's point of view optional in the sense that he may or may not require them or whether the importer has no option save to avail himself of the basic services of the Board as for landing and keeping the goods in the transit area, the services have to be paid for at the scale of rates prescribed by the Board. In such matters, where services are offered by a public authority on payment of a price, conditions governing the offer and acceptance of services are not in the nature of bye-laws. They reflect or represent an agreement between the

*See Halsbury's Laws of England, 3rd Edn., Vol. 24, p. 510. Paragraph 940 citing *Kruse v. Johnson*, (1898) 2 QB 91 at p. 96.

parties, one offering its services at prescribed rates and the other accepting the services at those rates. As, generally, in the case of bye-laws framed by a local Authority, there is in such cases no penal sanction for the observance of the conditions on which the services are offered and accepted. If the services are not paid for, the Board can exercise its statutory lien on the goods under Section 51 and enforce that lien under Section 56 of the Act; or else, the Board may take recourse to the alternative remedy of a suit provided for by Section 62.

23. With this, the entire reasoning of the High Court on the first aspect of the matter must fall because Rule 13 (b) has been declared ultra vires on the basis that it is a bye-law and, as such, it is arbitrary and unreasonable. But we would like to point out, since the High Court has taken pains to go into the matter quite elaborately, that even a bye-law cannot be declared ultra vires on the ground of unreasonableness merely because the court thinks that it goes further than is necessary or that it does not contain the necessary qualifications or exceptions. In *Kruse v. Johnson*, (1898) 2 QB 91 at pp. 98, 99 a question was raised as to the validity of a bye-law made by a county council for regulating street music. Lord Russell of Killowen observed in that case:—

"When the Court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described, accompanied by the checks and safeguards which I have mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, benevolently interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered."

The learned Chief Justice said further that there may be

"cases in which it would be the duty of the court to condemn bye-laws made under such authority as these were made (by a county council) as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this and in this sense only, as I conceive, that the question of reasonableness or unrea-

sonableness can properly be regarded. A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by an exception which some judges may think ought to be there."

In *Slattery v. Naylor*, (1888) 13 AC 446 (452) it was observed that when considering whether a bye-law is reasonable or not, the courts need a strong case to be made out against it, and decline to determine whether it would have been wiser or more prudent to make the by-law less absolute, nor will they hold that it is unreasonable because considerations which the Court would itself have regarded in framing such a by-law have been overlooked or rejected by its framers.

24. In the first place, Port Trusts are bodies of a public representative character who are entrusted by the legislature with authority to frame a scale of rates and statement of conditions subject to which they shall or may perform certain services. Port Trusts are not commercial organisations which carry on business for their own profit. Sections 39 (1) and (2) of the Act cast on the Board an obligation, according to its powers, to provide all reasonable facilities, if so required by any owner, for various kinds of services mentioned in clauses (a), (b) and (d) of Section 39 (1), which include services in regard to landing of goods between vessels and docks in possession of the Board and receiving, storing or delivering goods brought within the Board's premises. The Board under Section 39 (3) shall, if required, take charge of the goods for the purpose of performing the service. After the goods are thus taken charge of and a receipt given for them, no liability for any loss or damage which may occur to the goods attaches to any person to whom the receipt has been given or to the master or owner of the ship from which the goods have been landed. The responsibility of the Board for the loss, destruction or deterioration of goods of which it has taken charge is, under Section 40 of the Act, that of a bailee under Sections 151, 152 and 161 of the Contract Act, subject to some modifications. Thus the rates which the Board levies are a consolidated charge for the various services it renders and the liability which it is compelled by statute to undertake.

25. The Board of Trustees is a representative body consisting of 21 Trustees out of whom eleven are elected. The Collector of Customs, the Municipal Commissioner, the General Managers of Railways, a representative each of the Mercantile Marine Department and the Defence Services of the Central Government, and two representatives of labour

are the other members of the Board. Out of the eleven elected Trustees, one is elected by the Municipal Corporation and the remaining by provincial or local bodies representing commercial interests. The Board of Trustees is thus a broad based body representing a cross-section of a variety of interests. It is the Board thus constituted that frames the Scale of Rates and Statement of Conditions under which the services shall or may be performed by it. Every scale and every statement of conditions framed by the Board has to be submitted to the Central Government for sanction under Section 44 and it is only when it is so sanctioned that it has the force of law. The requirement of sanction by the Central Government is a restraint on unwise, excessive or arbitrary fixation of rates. Section 44 (2) confers on the Board the power, in special cases and for reasons to be recorded in writing, to remit the whole or any portion of rates or charges leviable according to any scale in force under Section 44. Thus, the statute provides for the necessary safeguards, checks and counter-checks as an insurance against fixation and levy of harsh or unjust rates.

26. Section 109 of the Act provides that nothing in the Act shall affect any power vested in the Chief Officer of Customs under any law for the time being in force. Section 49 of the Customs Act, 1962 confers power on the Assistant Collector of Customs, if he is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time, to permit that the goods may, pending clearance, be stored in a public warehouse and if such a facility is not available, then in a private warehouse. This provision together with Section 44 (2) of the Act constitutes a measure of mitigation. In face of these considerations, it is impossible to characterise the scheme for the levy of rates as arbitrary or unreasonable.

27. The High Court contrasted clause (b) of Rule 13 with its clause (a) and held that there is no distinction between the two classes of cases and if cases falling under clause (a) are wholly exempt from the payment of demurrage, so ought to be those falling under clause (b). The error of this conclusion lies in equating cases falling under clause (b) with those falling under cl. (a). The two clauses deal with different sets of cases: clause (a) deals with cases where the goods are detained for examination under Section 17 (3) and (4) or for chemical test under Section 144 of the Customs Act, other than for the ordinary processes of appraisement; clause (b) deals with cases where the goods are detained on account of Import Trade Control formalities or for compliance of formalities prescribed under the Drugs Act. We see no

warrant for the court substituting its own view as to the allowance of Free Days in a technical matter like the fixation of rates which has been considered by an expert Board of Trustees and whose decision has been confirmed by the Central Government. Equating the two classes of cases dealt with by clauses (a) and (b) of Rule 13 may seem to the court a more prudent or reasonable way of fixing scales of rates but that is not a correct test for deciding the validity of the impugned provision.

28. There is a fundamental aspect of the fixation of rates which the High Court has overlooked. What is the object and purpose of the rates which the Board charges to the importer? Port Trusts do not do the business of warehousing goods and the rates which the Board charges for storage of goods are not levied as a means of collecting revenue. The Board is under a statutory obligation to render services of various kinds and those services have to be rendered not for the personal benefit of this or that importer but in the larger national interests. Congestion in the ports affects the free movement of ships and of essential goods. The scale of rates has therefore to be framed in a manner which will act both as an incentive and as a compulsion for the expeditious removal of the goods from the transit area. Ships, like wagons, have to be kept moving and that can happen only if there is pressure on the importer to remove the goods from the Board's premises with the utmost expedition. The appellants in their reply statement filed in the High Court have referred to the Report of the Committee set up in 1967 by the Ministry of Transport and Shipping, Government of India. The Committee consisted of top-level experts, one each from the Ports of New York, London and Rotterdam who made a general survey of the Ports and Harbours in India. The Committee observed in its Report, "To effect quick clearance of the cargo from the Harbour, the demurrage rates may be so fixed as to make it unprofitable for importers to use the Port premises as a warehouse." Viewed from this angle, the scale of rates cannot be characterised as unreasonable.

29. That takes us to the question whether the scale of rates fixed by the Board is beyond the power conferred on it by Section 42 of the Act. If Section 42 were to authorise the Board to fix rates of 'Demurrage', it might perhaps have been arguable that the Scale of Rates and the Statement of Conditions must conform to the accepted meaning of the word 'Demurrage'. But the statute has placed no such limitation on the power of the Board to fix the rates. By Section 42 power is conferred on the Board to frame

"a scale of rates at which and a statement of the conditions under which any of the services specified" in the section "shall be performed". And the Board has fixed the scale of rates and the statement of conditions for the services it may have to perform. It is difficult to see in what manner or respect the Board has exceeded its power under Section 42.

30. The High Court seems to have thought that the Board had the limited right to fix rates of demurrage and therefore rates could only be levied on goods which were not removed from the Board's premises due to some fault or negligence on the part of the importer or his agent. The High Court was probably misled in this conclusion by the use of word 'demurrage' in clause (d) of Section 42. But 'demurrage' is surely not a service to be performed by the Board and is, on any view, a charge leviable on goods. Clauses (a) to (d) of Section 42 refer to various services like transhipment of passengers and goods, landing and shipment of passengers or goods, craning or portering of goods and wharfage or storage of goods. It is these services in respect of which Section 42 authorises the Board to frame a scale of rates and the statement of conditions. The circumstance that the Board has used the expression 'Demurrage' as a heading for Chap. IV of the Scale of Rates or that it has used that expression in R. 13 (b) and (c) cannot constitute a fetter on its powers to fix the rates. The validity of the exercise of that power has to be judged on the language of Section 42 which is the source of the power.

31. The High Court has cited many texts and dictionaries bearing on the meaning of 'Demurrage' but these have no relevance for the reason that demurrage being a charge and not a service, the power of the Board is not limited to fixing rates of demurrage. Besides, it is plain that the Board has used the expression 'Demurrage' not in the strict mercantile sense but merely to signify a charge which may be levied on goods after the expiration of Free Days. Rule 13 (b) itself furnishes a clue to the sense in which the expression 'demurrage' is used by the Board. It provides, inter alia, that "demurrage" shall be recovered at a concessional rate for a period of thirty days plus one working day where the goods are detained for compliance with certain formalities and where the Collector of Customs certifies that the detention of goods is "not attributable to any fault or negligence on the part of Importers".

32. The High Court was therefore in error in holding the scale of rates fixed by the Board as ultra vires and void on the grounds that it is unreasonable and that it is in excess of the power conferred by Section 42 of the Act.

33. The only question which now remains to be considered is whether the respondents are liable to pay the demurrage demanded of them by the appellants. The appellants' claim against respondents 2 and 3 has no foundation in law and was rightly not pressed by the appellants' counsel. Respondent 3 is the Collector of Customs who, obviously, cannot be made personally liable to pay the demurrage. Respondent 2 is the Union of India against whom and respondent 3, the appellant's claim is said to reside partly in the region of "contract or quasi-contract". We are unable to spell out any such basis on which the claim of the appellants could rest. The issuance of an incorrect 'Detention Certificate' by the 3rd respondent cannot also help the appellants to fasten the liability for demurrage on respondents 2 and 3 on the ground of their negligence. As observed by the High Court, all the relevant facts were before the appellants who could, with reasonable care, have avoided the consequences flowing from the Certificate issued by the 3rd respondent.

34. As regards the appellants' claim against the 1st respondent, the High Court was prepared to hold the latter liable to pay the demurrage except for the fact that the scale of rates was unreasonable and beyond the power of the Board. As we have set aside the High Court's findings on those points, it has to be examined whether the 1st respondent is liable to pay the demurrage. Unfortunately, parties fought in the High Court a legal battle and gave no importance to facts on which the liability of the 1st respondent may be said to rest. Facts must come before the law for, legal principles cannot be applied in a vacuum. No oral evidence was led by the parties and we find it difficult on a mere perusal of documents to say that respondent 1 ought to be held liable to meet the appellants' claim. Documents do not prove themselves nor indeed is the admissibility of a document proof by itself of the truth of its contents. Import Licence No. CL/53/3/02105-1 dated June 16, 1962, under which the goods were imported stood in the name of the State Trading Corporation of India. It issued an authorisation in favour of the 1st respondent which, as the documents go, was liable to deliver the consignment to the nominees of the Corporation. The 1st respondent, it would appear, was only entitled to charge a Commission for the work done by it in pursuance of the authorisation issued by the Corporation. The 1st respondent had no title to or interest in the goods except to deliver them in accordance with the instructions of the Corporation. If the appellants were to enforce their statutory lien, the incidence of the demurrage would have fallen on

the Corporation in whom the title to the goods was vested. The appellants permitted the goods to be cleared without then demanding the demurrage which they claimed later, thereby depriving the 1st respondent of an opportunity to reject the goods as against the supplier unless, of course, the Corporation was willing to accept them and along with them the liability for the payment of demurrage. In the absence of any more facts we find it impossible, on the record as it stands, to accept the appellants' claim against the 1st respondent. Out of 15 issues framed in the suit, issues 1 and 10 only pertain to the liability of the 1st respondent and on those issues, the facts appearing on the record are too scanty to support the appellants' claim against the 1st respondent. We, therefore, hold that the claim against the 1st respondent must also fail.

35. In the result, we confirm the decree of the High Court dismissing the appellants' suit, though for entirely different reasons. In the circumstances, there will be no order as to costs.

Order accordingly.

AIR 1975 SUPREME COURT 1945

(From Allahabad: (1970) 75 ITR 592)

H. R. KHANNA, V. R. KRISHNA IYER,

A. C. GUPTA AND

S. MURTAZA FAZL ALI, JJ.

J. K. Cotton Manufacturers Ltd., Appellant v The Commr. of Income-tax, Lucknow, Respondent.

Civil Appeal No. 2203 of 1970. D/- 4-8-1975.

(A) Income-tax Act (1922), S. 10 (2) (xv) — Claim for deduction under — Conditions precedent — Termination of managing agency, voluntary so as to obtain enduring benefit — Disbursement of compensation — Held, to be of capital nature and as such not deductible — (Income-tax Act (1961), S. 37).

The assessee is a public limited company known as 'J. K. Cotton Manufacturers Ltd.' and the matter in dispute relates to the assessment year 1944-45. The assessee entered into an agreement with the firm called Juggilal Kamlatpat and employed the said firm as the Managing Agents of the Company. The agreement was executed on August 8, 1941 and the Managing Agents were to work for the Company for a period of 20 years and were to charge commission at the rate of 2½%. About two years later the assessee decided to terminate the agreement executed in favour of Juggilal Kamlatpat and the said Managing Agents readily accepted the offer made by the assessee as

a result of which a deed of release was executed by the Managing Agents Juggilal Kamlatpat on September 28, 1943. Under the release the assessee agreed to pay a sum of Rs. 2,50,000/- to the outgoing Managing Agents by way of compensation for terminating the agreement much earlier than stipulated under the original contract. The assessee, however, employed another firm, namely, J. K. Commercial Corporation as their new Managing Agents and executed an agreement in their favour on September 30, 1943. The action of the assessee Company was approved by the Board of Directors. Very high compliments were paid to the outgoing Agents for their very good services; and by the terms offered to the new Agents, namely, J. K. Commercial Corporation there was to be a saving of Rs. 30,000/- per annum. Termination of the managing agency of the outgoing Agents was a voluntary act not caused by any negligence, inefficiency by the outgoing managing agents. The question was whether the compensation of Rs. 2,50,000/- paid to the outgoing Managing Agents was a capital or a revenue expenditure incurred by the assessee.

Held that the termination of the agency could not be said to be in terrorem but was voluntary so as to obtain an enduring or recurring benefit. The disbursement of compensation of Rs. 2,50,000 was of a capital nature and was, therefore, not deductible expenditure under Section 10 (2) (xv). Various tests to determine when expenditure incurred amounts to capital expenditure pointed. AIR 1959 SC 1352. Followed. (1970) 75 ITR 592 (All). Affirmed. Case law discussed. (Paras 21, 22, 26, 27)

In order to be deductible expense the amount in question must fulfil two essential conditions: (i) that expense must be laid out wholly and exclusively for the purpose of the business, profession or vocation; and (ii) that it should not be expense of a capital nature. Both these conditions have to be complied with before an assessee can claim deduction under Section 10 (2) (xv). (Para 23)

Cases Referred: Chronological Paras

AIR 1973 SC 420 = (1973) 3 SCC 201 =

1973 Tax LR 358 18, 20

AIR 1973 SC 524 = (1973) 3 SCC 30 =

1973 Tax LR 371 19

AIR 1972 SC 1634 = (1971) 3 SCC 736

17, 20

AIR 1971 SC 1590 = 80 ITR 167 = 1971

Tax LR 944 14

(1968) 68 ITR 147 = 72 Cal WN 157 15

AIR 1966 SC 54 = 57 ITR 400 14

(1963) 48 ITR 111 (Bom) 16

AIR 1959 SC 1352 = 37 ITR 381

3, 4, 9, 10, 11, 25

AIR 1933 Cal 777 = 1 ITR 129 12

AIR 1932 PC 138 = 59 Ind App 206 13

(1928) 12 Tax Cas 266

21

(1928) 10 Tax Cas 671

17. 20

Mr. A. K. Sen, Sr. Advocate. (Mr. M. M. Kshatriya, Advocate, with him), for Appellant; M/s. B. B. Ahuja and Mr. S. P. Nayar, Advocates, for Respondent.

Judgment of the Court was delivered by

S. M. FAZL ALL J.:— This is an appeal by special leave against the order of the High Court of Allahabad dated September 26, 1969 on a reference made to it by the Income-tax Appellate Tribunal, Allahabad Bench. The facts giving rise to the present appeal may be briefly summarised as follows:

The appellant assessee is a public limited company known 'as J. K. Cotton Manufacturers Ltd.' and the matter in dispute relates to the assessment year 1944-45. The appellant entered into an agreement with the firm called Juggilal Kamlatpat and employed the said firm as the Managing Agents of the Company. The agreement was executed on August 8, 1941 and the Managing Agents were to work for the Company for a period of 20 years and were to charge commission at the rate of 2½%. About two years later the appellant decided to terminate the agreement executed in favour of Juggilal Kamlatpat and the said Managing Agents readily accepted the offer made by the appellant as a result of which a deed of release was executed by the Managing Agents Juggilal Kamlatpat on September 28, 1943. Under the release the appellant agreed to pay a sum of Rs. 2,50,000/- to the outgoing Managing Agents by way of compensation for terminating the agreement much earlier than stipulated under the original contract. The appellant, however, employed another firm, namely, J. K. Commercial Corporation as their new Managing Agents and executed an agreement in their favour on September 30, 1943. The action of the Company was approved by the Board of Directors.

2. The dispute in the instant case centres round the question as to whether the compensation of Rs. 2,50,000/- paid to the outgoing Managing Agents was a capital or a revenue expenditure incurred by the appellant. The stand taken by the assessee before the revenue was that as the expenses were incurred wholly and exclusively for the purpose of carrying on the business of the Company it would fall under Section 10 (2) (xv) of the Income-tax Act, 1922, which is the same as Section 37 (1) of the Income-tax Act, 1961, and therefore an allowable deduction under the aforesaid provision. The appellant's case was negatived by the Income-tax Officer, the Appellate Assistant Commissioner and also by the Tri-

bunal. The Tribunal also refused to make a reference to the High Court as in its opinion no point of law arose. The appellant then approached the High Court of Allahabad which directed the Tribunal to make a reference on the following four points and accordingly the Tribunal made a reference to the High Court on those points:

"1. Whether there was any material on the basis of which the Appellate Tribunal could hold that the goodwill of Juggilal Kamlatpat Cotton Manufacturers Ltd. was transferred to the J. K. Cotton Manufacturers Ltd.

2. Whether there was any material on the record for a finding that the said transfer had been for a sum of Rupees 1,00,000/- or for any other sum, and

3. Whether there was any material on the record from which it could be held that the land had appreciated in value from Rs. 49,526/13/6 to Rs. 1,00,000/-.

4. Whether a sum of Rs. 2,50,000/- paid by the assessee to the Managing Agents for the termination of their Managing Agency is an expenditure admissible under Section 10 (2) (xv) of the Income-tax Act."

When the matter was heard by the High Court, the assessee did not press any other point excepting point No. 4 which related to the question whether a sum of Rs. 2,50,000/- paid by the assessee to the outgoing Managing Agents was an admissible expenditure under Sec. 10 (2) (xv) of the Income-tax Act, 1922. The High Court by its judgment dated September 26, 1969, held that the expenditure in question was incurred wholly and exclusively for the purpose of assessee's business, but as the amount was in the nature of a capital expenditure it was not deductible under the provisions of the Income-tax Act and hence this appeal before us by special leave.

3. Mr. Asoke Sen learned counsel for the appellant has submitted two points before us in support of his case. In the first place it was contended that the High Court having held that the expenditure incurred was wholly and exclusively for the purpose of the business should have held that Section 10 (2) (xv) applied in terms and, therefore, the expenditure was a revenue expenditure which would be deductible under Section 10 (2) (xv) of the Income-tax Act; and secondly, it was submitted that the High Court was in error in not correctly applying the decision of this Court in *Godrej & Co. v. Commr. of Income-tax, Bombay City*, 37 ITR 381 = (AIR 1959 SC 1352).

4. The learned counsel for the appellant has adumbrated four propositions before us for consideration:

(1) Where a payment is made by the payer's Company to the payee Company

in lieu of termination of its agency, it does not follow that the said payment which was made for the purpose of business must ipso facto be considered to be capital expenditure in the hands of the payer's Company.

(2) So far as the payee Company is concerned, the law is that generally any compensation received by it must be considered as capital receipt.

(3) So far as the payer Company is concerned, if payment is for the purpose of business, the mere fact that it has, by virtue of the payment, increased its profits and reduced its expenses, should not be regarded as expenditure of capital nature but would be one in the course of business unless some oblique or gratuitous purpose is involved.

(4) The principles laid down in *Godrej and Co's* case would have to be read as laying down only a proposition that the payer company, namely, the managed company, was making a payment to the payee company as a capital contribution to the payee company and in the hands of the payee company the amount becomes a receipt of compensation for incurring losses. In other words the High Court did not correctly apply the decision of this Court in *Godrej & Company's* case (supra).

So far as propositions Nos. (1) to (3) are concerned their correctness cannot be disputed, because these propositions are covered by abundant authorities. As regards proposition No. (4) it seems to us that on a close and careful reading of the judgment of this Court in *Godrej and Company* case (supra) the contention of the learned counsel for the appellant on this point appears to be without any substance. We shall show that the facts of the present case appear to be on all fours with the ratio laid down by this Court in *Godrej & Co's* case (AIR 1959 SC 1352) (supra).

5. Mr. Ahuja appearing for the revenue, however, submitted that the termination of the managing agency by the appellant was made for extra-commercial reasons, the main intention being to benefit both the outgoing Managing Agents Juggilal Kamlapat and the incoming Managing Agents J. K. Commercial Corporation which belonged to the same family of Singhania and, therefore, as the compensation paid to the outgoing Managing Agents led to a profit to the Company it would amount to acquisition of a new asset and would, therefore, be a capital expenditure.

6. Before dealing with the contentions raised before us by the learned counsel for the appellant, it may be necessary to mention a few facts which have been found by the Tribunal and

whose correctness has not been disputed before us.

(1) That there was no suggestion nor any iota of evidence to show that the outgoing Managing Agents were in any way guilty of laches, negligence or that they had caused any loss or disadvantage to the appellant so as to justify a sudden termination of their agency after two years although it was stipulated to continue for 20 years. On the other hand the annexures filed along with the statement of the case sent by the Tribunal to the High Court clearly show that the Board of Directors paid high compliments to the outgoing Managing Agents Juggilal Kamlapat.

(2) That although the incoming Managing Agents J. K. Commercial Corporation were prepared to serve the appellant on a commission of 2% only, there is nothing to suggest that the outgoing Managing Agents had refused to reduce their commission if that was the only ground for changing hands of the managing agency.

(3) This is not a case where the appellant reduced its expenditure by doing away with the middleman's profit, e.g. to get rid of the managing agency and taking the managing agency itself. It is only a question of substituting one Managing Agents for another.

(4) That although a compensation of Rs. 2,50,000/- was paid by the appellant to the outgoing Managing Agents yet by employing the new Managing Agents a net profit of Rs. 30,000/- was made by the Company which was in the nature of a recurring benefit, apart from other facilities.

(5) That constitution of the two Managing Agents, namely, outgoing and the incoming Managing Agents shows that Singhania family (the appellant) had major interest in both of them.

7. These facts have been clearly proved by the additional documents filed in this Court which were the annexures filed by the Tribunal in the statement of the case sent to the High Court along with the reference. Annexure 'G' at p. 69 of the Paper Book shows that at the time of terminating the agency of Juggilal Kamlapat high compliments were paid to the said Managing Agents as would appear from the minutes of the meeting held on August 24, 1943. The following observations were made in that meeting:

"There was a frank discussion among the Directors and it was unanimously agreed that even though the present Managing Agents have been rendering very good services to the Company, and have been carrying on its affairs in a creditable manner, there was no denying of the truth that the appointment of Managing Agents of the constitution and

composition of the J. K. Commercial Corporation Ltd. would give to the Company unique advantages which the present Managing Agents may perhaps be not able to impart, being a partnership firm, and further as the J. K. Commercial Corporation Ltd., has offered its services on lower terms, the company would be benefited by a saving of above Rs. 30,000/- per annum."

The minutes quoted above would clearly show two things— (1) that very high compliments were paid to the outgoing Agents for their very good services; and (2) that by the terms offered to the new Agents, namely, J. K. Commercial Corporation there was to be a saving of Rs. 30,000/- per annum.

8. Similarly the Tribunal in its order of reference to the High Court and the statement of case has found as follows: (p. 65 of the Paper Book)

"The constitutions of the two managing agents do show that the Singhanla family has major interest in both of them."

The Tribunal on the basis of these facts came to the conclusion that the compensation was paid due to extra commercial reasons and could not be regarded as expenditure incurred wholly and exclusively for the purpose of the business. The High Court differed from the reasons given by the Tribunal but affirmed its view on the ground that the expenditure incurred by the assessee Company being of a capital nature it was not deductible.

9. Having regard to the facts and circumstances of the present case we have no doubt that this case is wholly covered by the decision of this Court in Godrej and Company's case (AIR 1959 SC 1352) (supra). In this case, while it is true that this Court was dealing with the case of compensation in the hands of the payee Company who were the Agents, yet in view of the clear observations made by the Court there can be no manner of doubt that the expenses incurred in the present case by way of payment of compensation to the outgoing Agents would be of a capital nature. This Court in the aforesaid case observed as follows:

"In the light of those decisions the sum of Rs. 7,50,000 was paid and received not to make up the difference between the higher remuneration and the reduced remuneration but was in reality paid and received as compensation for releasing the company from the onerous terms as to remuneration as it was in terms expressed to be. In other words, so far as the managed company was concerned, it was paid for securing immunity from the liability to pay higher remuneration to the assessee firm for the rest of the term of the managing agency and, therefore, a capital expenditure and so far as the as-

sessee firm was concerned, it was received as compensation for the deterioration or injury to the managing agency by reason of the release of its rights to get higher remuneration and, therefore, a capital receipt within the decisions of this Court in the earlier cases referred to above."

10. Mr. Asoke Sen tried to distinguish this case on the ground that the Court was concerned in the Godrej and Company's case (AIR 1959 SC 1352) only with the nature of the payment in the hands of the payee company and any observations made as to what would be the nature of the payment in the hands of the payer company would be obiter, and, therefore, not binding on this Court. We are, however, unable to agree with this view. Godrej and Company's case has considered all the previous decisions and has clearly laid down that in the circumstances, such as the present, the expenditure incurred would be a capital expenditure in the hands of the payer company and a capital receipt in the hands of the payee company within the meaning of Section 10 (2) (xv) of the Income-tax Act. The distinction sought to be made by the learned counsel for the appellant is extremely subtle and it is a distinction without any difference. Moreover, there are a number of other circumstances which clearly show that the expenditure concerned cannot, but be treated as a capital expenditure.

11. Mr. Asoke Sen then submitted that if the Godrej & Company's case (AIR 1959 SC 1352) is held to be an authority for the proposition that the amount of compensation in the hands of the payer company also would be of a capital nature, then that case was wrongly decided and should be re-considered by us. We are, however, unable to agree with this argument, because apart from the principle of stare decisis, on the facts and circumstances of the present case, we do not find any special reasons to reconsider the decision in Godrej & Company's case particularly when in view of the facts and circumstances of this case we are really of the opinion that the amount in question is undoubtedly a capital expenditure.

12. Reliance was placed by the learned counsel for the appellant on a decision of the Calcutta High Court in Anglo-Persian Oil Co. (India) Ltd. v. Commissioner of Income-tax, 1 ITR 129 (133) = (AIR 1933 Cal 777 at p. 779). It is true that some observations in the aforesaid case are presumably in favour of the appellant but the Calcutta High Court was careful to guard itself against its decision being treated as a general principle to apply to all cases and in this connection it observed as follows:

"The case of payer and payee must be considered upon an independent statement of the relevant facts proved in his presence, there being no overriding principle of law that the Income-tax authorities are entitled to tax once at least on every payment."

In that case the Court proceeded on the admitted finding of fact that the expenditure incurred was wholly and exclusively for the purpose of the business. This, however, is not the case in the present case. In these circumstances, the decision in Anglo-Persian Oil Co. (India) Ltd.'s case does not appear to be of any assistance to the assessee.

13. Reliance was also placed on a decision in Commr. of Income-tax v. Shaw Wallace and Co., 59 Ind App 206 at p. 211 = (AIR 1932 PC 138 at p. 140) in which case the Judicial Committee of the Privy Council merely affirmed the finding of the High Court that the sums received by the respondents were not income, profits or gains within the meaning of the Act though they gave different reasons for that conclusion. It may be noticed that Shaw Wallace and Company's case turned upon the facts and circumstances of the case and the nature of the payment made to the Company. While affirming the finding of the High Court their Lordships observed as follows:

"The question was, however, restated by the learned Chief Justice in more precise terms namely, 'whether these sums are income, profits or gains within the meaning of the Act at all,' and for the reasons stated in his judgment he came to the conclusion that they were not. Their Lordships think that his conclusion was right though they arrive at this result by a slightly different road."

14. Reliance was also placed on a decision of this Court in Karam Chand Thapar and Bros. P. Ltd. v. Commr. of Income-tax (Central), Calcutta, 80 ITR 167 (171) = (AIR 1971 SC 1590 at p. 1593 = 1971 Tax LR 944 at p. 946) where this Court observed as follows:

"As held by this Court in Commr. of Income-tax v. Chari and Chari Ltd., (57 ITR 400) = (AIR 1966 SC 54), that ordinarily compensation for loss of office or agency is regarded as a capital receipt, but this rule is subject to an exception that payment received even for termination of an agency agreement would be revenue and not capital in the case where the agency was one of the many which the assessee held and its termination did not impair the profit-making structure of the assessee, but was within the framework of the business, it being a necessary incident of the business that existing agencies may be terminated and fresh agencies may be taken."

This was, however, a case where their Lordships were dealing with the question as to whether or not the amount of compensation in the hands of the payee company for loss of office or agency would be regarded as a capital receipt. Karam Chand Thapar and Bros. P. Ltd.'s case does not throw any light on the point with which we are concerned in the instant case.

15. Great reliance was sought to be placed on the decision of the Calcutta High Court in Commr. of Income-tax, Calcutta v. Turner Morrison and Co. (P.) Ltd., (1968) 68 ITR 147 (156) (Cal) where the High Court observed as follows:

"It is now well settled that the expression 'expenditure laid out or expended wholly and exclusively for the purpose of such business' includes expenditure voluntarily incurred for commercial expediency and in order indirectly to facilitate business. It is immaterial if a third party also benefits thereby. It is further well settled that an expenditure incurred in maintaining the efficiency of the manpower from time to time utilised in a business is also expenditure wholly or exclusively laid out for the purpose of such business. It is also well settled that the employment of, say a director, at a reasonable extra remuneration to supervise a particular business of the company, regard being had to his expert knowledge in that particular line of business, is expenditure within the meaning of Section 10 (2) (xv) and the revenue authorities are not justified in reducing such remuneration. The expression 'commercial expediency' is an expression of wide import and expenditure in commercial expediency includes such expenditure as a prudent man may incur for the purposes of business. An expenditure which is entirely gratuitous and has no connection with the business does not come within the meaning of Section 10 (2) (xv) of the Act."

This case also is distinguishable from the facts of the present case, inasmuch as in Turner Morrison & Company's case there was no question of termination of any managing agency but what had happened was that two directors had retired and in their place an expert director was appointed to manage the affairs of the company. On the facts of that case this Court held that the expenditure was incurred for commercial expediency in order to facilitate business. In the instant case, as we have already pointed out, termination of the managing agency of the outgoing Agents was a voluntary act not caused by any negligence, inefficiency by the outgoing managing agents. In these circumstances on the facts and circumstances we would not consider whether it was commercially expedient in order to faci-

litate business that the managing agency of the outgoing Agents should have been terminated.

16. Learned counsel for the appellant also referred us to the decision of the Bombay High Court in Greaves Cotton & Co. Ltd. v. Commr. of Income-tax, Bombay City I, (1963) 48 ITR 111 (Bom) at p. 134 where the Bombay High Court observed as follows:

"We have already said that the inference drawn on the material on record is that the managing agency agreement had been terminated with the object of taking over its management by the board of directors and there is no evidence which will lead to an inference that it was done with the oblique motive or oblique purpose of securing the payment of the said amount of Rs. 17 lakhs to the managing agents.

For reasons stated above, our answer to the question is in the affirmative, i.e. in favour of the assessee."

This was obviously a case where the Managing Agents had not changed hands at all but what happened was that the managing agency was terminated and the managing agency was taken over by the Board of Directors themselves. Thus this case also does not appear to be of any assistance to the appellant.

17. In C. I.-T., West Bengal, II, Calcutta v. Coal Shipment (P.) Ltd., (1971) 3 SCC 736 (740-741) = (AIR 1972 SC 1634 at p. 1638) this Court indicated the various considerations which would govern the Court in deciding whether a particular amount is of a capital nature. Relying on a decision in the case of Atherton v. British Insulated and Helsby Cables Ltd., (1926) 10 Tax Cas 671 this Court observed as follows:

"The character of the payment can be determined, it was added, by looking at what is the true nature of the asset which has been acquired and not by the fact whether it is a payment in a lump-sum or by instalments. It is also an accepted proposition that the words 'permanent' and 'enduring' are only relative terms and not synonymous with perpetual or ever-lasting.

There are some other tests like those of fixed capital and circulating capital for determining the nature of the expenditure. An item of disbursement can be regarded as capital expenditure when it is referable to fixed capital. It is revenue when it can be attributed to circulating capital."

18. Similarly in Commr. of Income-tax, Madras v. M/s. Ashok Leyland Ltd., (1973) 3 SCC 201 at p. 204 = (AIR 1973 SC 420 at p. 422 = 1973 Tax LR 358 at p. 359) this Court observed as follows:

"A long line of decisions have laid down that when an expenditure is made with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, there is good reason (in the absence of special circumstances leading to the opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

From the facts found, it is clear that the managing agency was terminated on business considerations and as a matter of commercial expediency. There is no basis for holding that by terminating the managing agency, the company not only saved the expense that it would have had to incur in the relevant previous year but also for a few more years to come. It will not be correct to say that by avoiding certain business expenditure, the company can be said to have acquired enduring benefits or acquired any income yielding asset."

It may be seen that in that case there was a finding of fact that the termination of the managing agency was purely on business considerations and as a matter of commercial expediency and that no enduring benefits were acquired by the company.

19. Similarly in M. K. Brothers (P.) Ltd. v. Commr. of Income-tax, Kanpur, (1973) 3 SCC 30 at p. 34 = (AIR 1973 SC 524 at p. 527 = 1973 Tax LR 371 at p. 373) my brother Khanna, J., speaking for the Court indicated the real tests to determine whether an amount is of a capital nature. In this connection the Court observed as follows:

"The answer to the question as to whether the money paid is a revenue expenditure or capital expenditure depends not so much upon the fact as to whether the amount paid is large or small or whether it has been paid in lump-sum or by instalments, as it does upon the purpose for which the payment has been made and expenditure incurred. It is the real nature and quality of the payment and not the quantum or the manner of the payment which would prove decisive. If the object of making the payment is to acquire a capital asset, the payment would partake of the character of a capital payment even though it is made not in a lump sum but by instalments over a period of time."

20. It would thus appear that numerous cases have laid down various tests to determine as to when on the facts and circumstances of a particular case the expenses disbursed by an assessee amount to a capital expenditure or a revenue receipt. The classic test laid down is by Viscount Cave, L. C. in Atherton's case (supra) where he observed at pp. 192-193 as follows:

"But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

Atherton's case has been followed by this Court in a large number of decisions such as in *M/s. Ashok Leyland Ltd. case* and *Coal Shipment (P.) Ltd's. case* and a lot of other cases.

21. Several tests that have been evolved over the years by this Court as also the other High Courts may be briefly formulated as follows:

(1) Bringing into an asset or advantage of enduring nature would lead to the inference that the expenditure disbursed is of a capital nature. These terms, such as "asset" or "advantage of enduring nature" are, however, purely descriptive rather than definitive and no rule of universal application can be laid down. Ultimately the question will have to depend on the facts and circumstances of each case, namely, quality and quantum of the amount, the position of the parties, the object of the transaction which has impact on the business, the nature of trade for which the expenditure is incurred and the purpose thereof etc.

(2) An item of disbursement may be regarded as of a capital nature when it is relatable to a fixed asset or capital, whereas the circulating capital or stock-in-trade would be treated as revenue receipt. Lord Haldane in *John Smith and Sons v. Moore*, (1928) 12 Tax Cas 266 (282) has aptly and adroitly explained the terms 'fixed capital' and 'circulating capital' thus:

"Fixed capital is what the assessee turns into profit by keeping it in his own possession and circulating capital is what he makes profit of by parting with it and letting it change masters."

(3) Expenditure relating to framework of business is generally capital expenditure.

(4) Another important and safe test that may be laid down particularly in cases where the managing agency is terminated would be to find out whether the termination of the agency is in *terrorem* or purely voluntary for obtaining substantial benefits. In other words, the decisive test to determine whether or not termination of the agency is in *terrorem* would be to find out if in such case commercial expediency requires that the agency should be terminated as it had become onerous or it was creating difficulties or the Agents were guilty of neglig-

ence etc. It will also include payments for retrenchment compensation or conferment of benefits on employees or termination of other disadvantages or onerous relationships.

22. These are some of the instances which I have given but they are by no means exhaustive. The present case, however, falls within condition No. (4) pointed out by us above, and the termination of the agency cannot be said to be in *terrorem* but was voluntary so as to obtain an enduring or recurring benefit.

23. Before applying these tests to the facts of the present case, I would like to stress the important ingredients of Section 10 (2) (xv) of the Income-tax Act, 1922 itself. Section 10 (2) (xv) runs thus:

"10. (2) Such profits or gains shall be computed after making the following allowances, namely:—

(xv) any expenditure not being an allowance of the nature described in any of the clauses (i) to (xiv) inclusive, and not being in the nature of capital expenditure or personal expenses of the assessee laid out or expended wholly and exclusively for the purpose of such business, profession or vocation."

An analysis of this section would clearly show that in order to be deductible expense the amount in question must fulfil two essential conditions: (i) that expense must be laid out wholly and exclusively for the purpose of the business, profession or vocation; and (ii) that it should not be expense of a capital nature. Both these conditions have to be complied with before an assessee can claim deduction under Section 10 (2) (xv). The High Court in this case has found that while the assessee had complied with the first condition that the expenditure was incurred for the purpose of the business, yet it has held that in the circumstances the expenditure is of a capital nature. It cannot be argued as was suggested by Mr. Asoke Sen at one time that whenever an expenditure is incurred in the course of the business it would never be a capital expenditure because Section 37 of the Income-tax Act, 1961, itself contemplates contingency where even though the expenditure may be incurred wholly and exclusively for the purpose of the business yet it may be of a capital nature.

24. Let us now apply the tests laid down by the Courts as specified by us to the facts of the present case. We have already given the facts found by the Tribunal which have not been disputed before us. In this connection there are two circumstances which clearly indicate that the expenses incurred by the assessee were not dictated by commercial expediency but were inspired by a profit-hunting motive:

(1) That there was absolutely no necessity to terminate the managing agency of Juggilal Kamlatpat only two years after the appellant entered into agreement with them. There was no complaint that the Agents had in any way caused any loss or damage to the appellant or to their reputation, nor was there anything to show that the outgoing agents were guilty of negligence, laches, fraud or inefficiency. In these circumstances, therefore, the only irresistible inference that could be drawn is that the assessee wanted to benefit both the firms, namely, incoming agents and the outgoing agents, which belonged to the Singhanla family as found by the Tribunal and not disputed before us. The outgoing agents were benefited because an amount of Rupees 2,50,000/- was paid to them and the incoming agents were benefited because they were given the managing agency of the Company and as found by the Tribunal the appellant had pledged their goods in lieu of advance.

(2) That it is the admitted case of the appellant that by virtue of the fact that the incoming agents had agreed to charge only 2% commission, the appellant got a benefit of Rs. 30,000/- per annum. This amount is a recurring benefit to the appellant and can safely be regarded as an advantage of an enduring nature so as to fall within the definition laid down by Viscount Cave, L. C.

25. In these circumstances, therefore, the present case is fully covered by the decision of this Court in Godrei and Company's case (AIR 1959 SC 1352) (supra).

26. For these reasons we are satisfied that the High Court was right in holding that the disbursement of compensation of Rs. 2,50,000/- was of a capital nature and was, therefore, not deductible expenditure under S. 10 (2) (xv) of the Income-tax Act, 1922. We, however, feel that the High Court was in error in giving a cryptic finding that the expenditure in question was incurred wholly and exclusively for the purpose of the business. This finding has been arrived at without considering the facts mentioned by us above and is not borne out from the facts and circumstances proved in this case. Nevertheless we uphold the order of the High Court on reasons different from those given by the High Court.

27. We would, however, like to make it clear that we have held that the compensation paid to the outgoing Agents in the peculiar facts of the present case amounts to capital expenditure. But we should not be understood as laying down a general rule that in all cases where compensation is paid to the Managing Agents whose agency is terminated it

would amount to capital expenditure. We have already pointed out the various tests to be applied which are by no means exhaustive, nor are they of universal application. Each case has to be examined in the light of the circumstances of that case.

28. The appeal accordingly fails and is dismissed, with costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 1952

(From: 1968 Cur LJ 274 (Punj))

V. R. KRISHNA IYER, A. C. GUPTA
AND S. MURTAZA FAZL ALI, JJ.

Civil Appeal No. 123 of 1969

The State of Haryana and others, Appellants v. Sampuran Singh, Respondent.
Civil Appeal No. 2023 of 1972.

State of Punjab and another, Appellants v. Pardam Singh and others, Respondents.

Civil Appeals Nos. 123 of 1969 and 2023 of 1972, D/- 3-9-1975.

(A) Interpretation of Statutes — Agrarian Laws — Construction — Rules of.

If the constitutionally envisioned socio-economic revolution is not to be a paper tiger, agrarian laws have to be meaningfully enacted, interpreted and the Court is not the anti-hero in the drama of limping land reform. (Para. 6)

The agrarian policy is equitable ownership and the reform philosophy is redistributive justice, the rural goal being small peasant proprietorship. In case of inconsistency, Courts should favour an interpretation that promotes the general purpose of an Act rather than one that does not. (Paras. 9, 10)

The agrarian reform laws, with special constitutional status, warrants interpretative skills which will stifle evasive attempts, specially by way of gifts and bequests and suspect transfers. (Para 13)

(B) Punjab Security of Land Tenures Act (10 of 1953), Sections 19-B, 10-A (as amended by Act 14 of 1962) — Surplus area — Computation — Gift by land-owners — Consideration — 1968 Cur LJ 274 (Punj), Overruled.

The gifts made by land-owners who exceeded their permissible area having come by additional lands by inheritance are to be ignored or taken into account when computing the surplus area in their hands, having regard to Section 19-B read with S. 10-A. 1968 Cur LJ 274 (Punj). Overruled. (Para 14)

The profound concern of the law to preserve the surplus stock is manifest

IS/IS/D307/75/SSG

that is from the agreement of the parties concerned, ... We have as it seems to me reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially. Looked at in this way the board, in my judgment, comes fairly and squarely within jurisdiction of this Court."

20. These observations clearly indicate that in the opinion of the learned Judges of the Supreme Court, a writ of certiorari will issue to secure a procedure consistent with the principles of natural justice, not only in cases of judicial or quasi judicial orders but also in cases of administrative orders affecting the rights of the subjects. It will however exclude from its ambit cases which are governed by a contract pure and simple wherein the rights of the parties flow from a voluntary agreement. Such rights are quite distinct from the obligations and rights which flow as a result of some public obligation on the part of statutory authorities.

21. In the case of Divisional Forest Officer South Kheri v. Ram Sanehi Singh, AIR 1973 SC 205 certain persons purchased the right to cut timber for the period November 1, 1965 to October 31, 1966 from certain forest lands as a result of an auction held by the Forest Officer. The petitioner claimed that he had removed certain wood from the forest with the consent of the forest authorities before 31st October, 1966. The Forest Officer made an order in respect of that timber on the footing that the same had been removed after 1-11-1966 and that would be considered to be removal for the year 1966. Being aggrieved, the contractor moved the High Court for restraining the Divisional Forest Officer South Kheri from giving effect to the order dated 10-1-1967 directing that the timber purported to have been removed on 29th October, 1966, be considered to be removal of timber after 1st November, 1966. The Supreme Court repelled the argument raised on behalf of the Divisional Forest Officer that as the dispute arose out of the terms of the contract, no petition under Article 226 of the Constitution to enforce a right flowing from the contract lay. It observed that merely because the source of the right which the respondent claims was initially in a contract, it did not mean that in order to obtain relief against any arbitrary and unlawful action on the part of public authority, the person concerned must in all cases resort to a suit and not to a petition by way of a writ. Relying upon its judgment in K. N. Guruswamy AIR 1954 SC 592, the Sup-

reme Court held that a writ petition could be maintained even in a case where action of a public authority invested with statutory powers was challenged so as to entitle a person to relief for breach of contract. Accordingly, if, by the purported exercise of statutory powers, even if a right flowing under a contract is affected it may be possible for the person to maintain a petition under Article 226 of the Constitution. In such a case the writ petition is primarily directed against the illegal exercise of statutory power which adversely affects petitioner's contractual rights. While engrafting an exception to the general rule and laying down that a writ can lie even for protecting contractual rights, violated under the purported exercise of a statutory power the case nowhere lays down that a petition under Article 226 of the Constitution would also lie when a party to a contract purports to take action in terms of the contract itself.

22. Learned Counsel for the petitioner then relied upon the decision of the Supreme Court in the case of M/s. Erusian Equipment and Chemicals Ltd. v. State of West Bengal, Writ Petns. Nos. 34 of 1974 and 959 of 1973 connected with Civil Appeal No. 318 of 1974, decided on 11-11-1974 = (AIR 1975 SC 266). In that case certain persons were engaged in the business of purchase and export of Cinchona products. They had been entering into contracts with the Government of West Bengal for the purchase of Cinchona. The Government of West Bengal received certain complaints against these persons and it resolved not to deal with these persons till they were cleared of the charges levelled against them. Similarly one person was on the approved list of the Director General, supplies and disposals. Some reports had been received against him regarding shortage of timber. Accordingly, he was black-listed with the result that the Director General of Supplies and Disposals decided not to enter into contract with him. The Supreme Court observed that under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to acquisition, holding and disposal of property and to the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and function in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws, equality of opportunity should apply to matter of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government can-

not choose persons by discrimination. The order of black-listing has the effect of depriving a person of equality of opportunity in them matter of public contract. The Supreme Court further notices that due to black-listing, the person who was entitled to participate in the purchase of cinchona, has been denied that right. The Supreme Court, after taking into consideration the circumstances of the case came to the conclusion that the order of black-listing and the resolution by the Government not to deal with a particular person, resulted in the infringement of such person's fundamental right to be treated equally in the matter of public contracts, and that such deprivation of right could be effected only after following a procedure consistent with the principles of natural justice. In our opinion the ratio of the aforesaid decision of the Supreme Court applies to only such cases where the Government chooses to preclude a person from entering into a public contract for in such a case a fundamental right of the person is going to be affected and if any one wishes to impair that right he has to do it after following the principles of natural justice (if procedure for impairing that right is not laid down by a valid law). The position where a legal contract has been entered into and the same is being terminated in terms thereof is however, quite different. Termination of contract in such a case does not deprive the person concerned from an opportunity to be considered in the matter of public contracts. This distinction has clearly been brought out by the learned Judges of the Supreme Court themselves when they observed:—

"The black-listing order does not pertain to any particular contract, ...". In the instant case we find that the action has been taken in accordance with the terms of a particular contract that had been entered into by the petitioner. The impugned order does not preclude the petitioner from being considered in the matter of public contracts. Circumstances in which the impugned order has been passed in the present case are materially different from those in which the order of black-listing or a resolution not to deal with particular persons was passed in the case that was before the Supreme Court. We, are, therefore, of opinion that the observations made by the Supreme Court in *M/s. Erusian Equipment and Chemicals Ltd.* case AIR 1975 SC 266 (supra) do not support the case of the petitioner.

23. In the result we are of opinion that by terminating the agreement the respondents did not interfere with any right of the petitioner which could be secured by filing a petition under Article 226 of the Constitution. Infringement, if any, was that of petitioner's contractual

rights which he can, if so advised, secure in a properly instituted suit.

24. In the result the petition succeeds only to the extent that the order dated 15-10-1974 passed by the District Magistrate in so far as it purports to cancel petitioner's licence is quashed. In other respects that order stands. That order would not affect petitioner's right to carry on his business in foodgrains.

Order accordingly.

AIR 1975 ALLAHABAD 354

M. P. SAXENA, J.

Shiv Charan Das and others, Appellants
v. Rukmani Devi and another, Respondents.

Second Appeal No. 904 of 1968, D/- 31-3-1975.*

(A) Registration Act (1968), Ss. 73, 74 and 75 — Sub-registrar refusing to register sale-deed on ground of denial of execution — Vendee's application to District Registrar beyond thirty days — District Registrar excluding time under S. 12, Limitation Act for obtaining copy and directing Sub-Registrar to register document — Deed registered accordingly — Effect — Vendee's suit for partition of his share — Co-sharer's right to challenge validity of registration and of vendee's title — (Limitation Act (1963), S. 12).

The executants of a sale-deed were not present for its registration before the Sub-Registrar in spite of his notices to appear. The Sub-Registrar, therefore, treated it a case of denial of execution and refused to register the document. The vendee thereupon applied under Section 73 (1) to the District Registrar. This application was made beyond thirty days which is a period prescribed under Section 73 (1). But the District Registrar gave the benefit of Section 12, Limitation Act to the vendee and directed the Sub-Registrar under Section 75 to register the sale-deed. After the registration, when the vendee brought a suit for partition and possession of his share in property, the Co-sharers defendants attacked his title on the ground that the sale-deed was not validly registered, that it was void and the vendee had no title on the basis of it.

Held (i) that the registration itself did not affect the co-sharer's right to challenge the validity of the document. (Para 10)

(ii) that the provisions of Section 12, Limitation Act did not apply to the proceedings before a Registrar, because a Registrar under the Registration Act is not a Court, as no judicial functions are exercised by him. Further, the Registration Act is a complete Code by itself and prescribes its own limita-

*(Against order of M. Noorul Ain, Addl. Dist. J. Moradabad in C. A. No. 40 of 1964, D/- 11-3-1965.

tion for various remedies. The application under Section 73 is neither an appeal nor an application for leave to appeal or to review. Sub-sections (2) or (3) of S. 12, Limitation Act or even the general principles of Section 12, Limitation Act will not therefore apply to applications under Section 73.

(Paras 13 to 20)

(iii) that the application under Section 73 in the instant case having been presented to the District Registrar after the expiry of 30 days was thus beyond the jurisdiction of the District Registrar and therefore ultra vires. The sale-deed was thus void and unenforceable. No remedy having been provided under the Registration Act against the decision of the District Registrar the co-sharers-defendants could assail his order in the suit for partition. The provisions of Section 30 also were not available to the vendee.

(Paras 23, 24)

(iv) that the principles of equity and good conscience would not override the particular provisions of Section 73. Consequently, the vendee was not entitled to claim partition on the basis of the said sale deed. Case law discussed.

(Paras 25, 26)

Cases Referred: Chronological Paras

AIR 1974 SC 480 = (1974) 2 SCC 133 16
AIR 1974 SC 1471 = (1974) 2 SCC 121 21
(1970) 1 SCC 673 = (1971) 1 SCJ 215 10
AIR 1970 All 428 = 1970 All LJ 163 (FB) 14

AIR 1968 SC 488 = (1968) 1 SCR 505 19
AIR 1966 SC 153 = (1966) 1 SCR 102 22
1965 All LJ 211 14, 22
AIR 1965 Punj 378 = 67 Pun LR 326 10, 20

AIR 1964 SC 907 = (1964) 1 SCR 495 21
AIR 1964 SC 1336 = (1964) 3 SCR 495 22
AIR 1964 Ker 190 = 1963 Ker LJ 1233 12
AIR 1962 SC 1563 = (1963) 1 SCR 121 9
AIR 1960 Mad 401 = (1960) 2 Mad LJ 63 13, 16

AIR 1956 SC 367 = 1956 SCR 166 19, 21
AIR 1954 SC 73 = 1954 Cri LJ 351 19, 21
AIR 1939 All 403 = 1939 All LJ 522 (FB) 14

AIR 1932 PC 165 = 59 Ind App 283 19, 21
AIR 1930 Mad 490 = 59 Mad LJ 585 11
AIR 1928 PC 103 = 55 Ind App 161 14
AIR 1926 Nag 126 = 89 Ind Cas 884 17
AIR 1924 Lah 28 = 74 Ind Cas 688 19
AIR 1922 PC 135 = 26 Cal WN 369 22
(1902) ILR 24 All 402 = 1902 All WN 99 (FB) 10, 14, 20, 22

(1894) ILR 17 Mad 146 10
(1888) ILR 12 Bom 36 16
(1883) ILR 9 Cal 150 = 11 Cal LR 440 10, 22

(1881) ILR 3 All 397 (FB) 10
(1881) ILR 7 Cal 736 = 9 Cal LR 471 13

S. P. Gupta, for Appellants; H. S. Joshi, for Respondents.

JUDGMENT:— This is plaintiffs' second appeal against the judgment and decree dated 11-3-1965 passed by the Additional District Judge, Moradabad.

2. Briefly stated the facts alleged in the plaint were that one Sheel Chand was the owner of the house described in para 1 of the plaint. After his death it devolved on his two sons, namely, Babu Ram and Ram Swarup in equal shares. On the death of Babu Ram his one half share was inherited by his widow, Smt. Kalawati Devi and on the death of Ram Swarup his one half share devolved on his sons Maharaj Kumar and Ratan Kumar. The latter died in 1940 leaving behind his widow Smt. Rukmini Devi who got his 1/4 share. Maharaj Kumar died in or about the year 1943 and his one-fourth share devolved on his widow, Smt. Tribeni Devi and three sons namely, Devendra Kumar, Mahendra Kumar and Surendra Kumar. In 1950 Smt. Kalawati filed a suit (No. 64 of 1950) against Devendra Kumar and others for partition of her half share. It was decreed and the final decree separating her share was prepared on 23-1-1954. The remaining one half share remained with Smt. Rukmini Devi, Smt. Tribeni Devi and her three sons.

Smt. Tribeni Devi and her three sons sold their one fourth share in this house to the plaintiff for Rs. 2,500/- by means of a sale deed dated 15-2-1954 (Ex. 1). On the same day the vendors took this portion on rent and executed a rent note in plaintiff's favour. On 7-4-1958 the vendors vacated it and put the plaintiff in possession of it. Smt. Kalawati's heirs did not relish it and got proceedings under Section 145, Criminal P. C. initiated against him with a view to oust him from the house. These proceedings terminated against the plaintiff and the revision application filed against it was also dismissed on 23-7-1959. According to the plaintiff he was ousted from a portion of his share. Hence that suit for partition of his one fourth share and for possession thereon. Originally the suit was filed against Smt. Rukmini Devi alone but during the pendency of the suit she transferred her share to Smt. Ram Dulari, daughter of Babu Ram. Therefore, Smt. Ram Dulari was also impleaded as defendant No. 2.

3. Smt. Rukmini Devi contested the suit on the grounds that the sale deed dated 15-2-1951 (Ex. 1) relied upon by the plaintiff was obtained by fraud and without consideration; that it was got registered in a wrong manner and was not binding on her or on Devendra Kumar and others nor any relief could be claimed on its basis, that the sale deed was inadmissible in evidence; that the suit was bad for non-joinder of Devendra Kumar etc. and heirs of Smt. Kalawati; that the suit was undervalued and court-fee paid was insufficient and lastly, that the suit was barred by the principles of estoppel and Section 4 of the Partition Act.

4. At first Smt. Ram Dulari gave out that she would adopt the written statement of Smt. Rukmini Devi but later on she filed a written statement which was rejected by the learned trial Court.

5. The learned trial Court rejected all the pleas raised by the defendants except that the application under Section 73 (1) of the Registration Act was presented beyond the prescribed period of thirty days and the District Registrar had no jurisdiction to direct registration of the sale deed. In his opinion the document was not validly registered and did not transfer any interest in the property to the plaintiff. Accordingly the suit was dismissed with costs on parties.

6. The plaintiff filed an appeal and the learned First Appellate Court agreeing with the findings of the trial court dismissed it with costs to the respondents.

7. The plaintiff has now come up in second appeal mainly on the ground that both the learned lower courts were wrong in holding that the sale deed dated 15-2-1954 was not validly registered and was void. The case has been argued at great length and various points of interest have been pressed. Before going into the merit of these points it is necessary to state a few facts.

The sale deed in question was presented for registration before the Sub-Registrar, Moradabad on 25-2-1954. As the executants were not present the registration was postponed. On 13-5-1954 the plaintiff moved an application for summoning the executants. Notices were issued to them for 31-5-1954. On this date only Devendra Kumar appeared and as the remaining executants remained absent the Sub-Registrar held it to be a case of denial of execution and refused to register the document. On 5-7-1954 the plaintiff moved an application (B6) under Section 73 (1) of the Indian Registration Act before the District Registrar, Moradabad, in order to establish his right to have the document registered. It may be stated here that an application under Section 73 (1) has to be moved within thirty days from the date of the making of the order of refusal. In the instant case this order was made on 31-5-1954 and the application to the District Registrar was presented on 5-7-1954 i.e. beyond the period prescribed. Therefore, the Chief Registration Clerk gave a report that the application was liable to be rejected as it was given beyond time. According to him, the Indian Registration Act being a special Act the provisions of Section 12 of the Act were not applicable to it and the period spent in obtaining copy of the Sub-Registrar's order could not be excluded. The District Registrar did not agree with him and held that the Registration Act nowhere expressly provides that the time spent in obtaining copy of the order shall not be computed. Hence benefit of Section 12 of the Limitation Act was extended. As the application was within time, if the period spent in obtaining copy was excluded, the District Registrar passed an order on 15-1-1955 that further proceedings be started. The copy of this order is Ex. B-7. On 19-3-1955 the District Registrar issued directions under Section 75 of the Indian Registration Act to the

Sub-Registrar to register the sale deed. Accordingly, on 4-4-1955 the Sub-Registrar registered it.

8. To begin with, the learned counsel for the appellant has urged that the learned lower courts should not have gone into the merit of the question whether the sale deed was validly registered or not because this plea was not specifically taken in the written statement. It carries no force because in her written statement the respondent No. 1 had clearly alleged that the sale deed was registered in a wrong manner and was not admissible in evidence. The plaintiff filed replication to the same. A specific issue was struck on this point and the parties led evidence. Both the learned lower courts went into its merit and held that the document was not validly registered. It is now too late in the day to contend that the plea should not have been considered.

9. It is further argued that the plaintiff-appellant is a transferee of Smt. Tribeni Devi and her sons of one fourth share in the whole house. He got registration done and it became final under Section 75 (3) of the Registration Act against them. If his transferers cannot challenge it the defendants-respondents can do it much less. To substantiate this contention reliance has been placed on certain cases. One of them is the case of Raja Jagannath Baksh Singh v. State of U. P., (AIR 1962 SC 1563). It was a case on Section 11 of the Civil P. C. in which writ proceeding challenging the validity of certain notices under U. P. Act 31 of 1957 were dismissed by the High Court. The petitioner obtained certificate to appeal to the Supreme Court but failed to deposit necessary security as required by rules of the High Court. In consequence the certificate granted was cancelled. Subsequently writ petition was filed by the petitioner under Article 32 of the Constitution of India in the Supreme Court challenging the same proceedings and it was held to be barred by *res judicata*. It does not apply to the case under consideration because as will be just discussed, the order of the District Registrar directing the Sub-Registrar to register the sale deed was passed without jurisdiction. It was a nullity and did not bind any one. Secondly, no remedy was available against this order.

10. Another case is of Sri Bhavanarayana Swamivari Temple v. Vадpalli Venkata Bhavanarayana Charyulu, (1970 (1) SCC 673). In this case one of the important questions the Board had to decide was whether the properties in dispute were Archakatwam service Inam properties. The Board's decision which was adverse to the temple, affected the rights of the temple in a substantial manner. It was open to the temple to get its rights established by means of a suit under Section 57 (3). It failed to take that step. Therefore, the decision of the Board became final and binding on the temple. This principle does not apply because in the instant

case no remedy was available against the order passed by the District Registrar. As held in the cases of *Edun v. Mahomed Siddik*, ((1883) ILR 9 Cal 150) and *Udit Upadhia v. Imam Bandi Bibi*, (1902) ILR 24 All 402 (FB) the right of suit given by Section 77 of the Registration Act arises only when the Registrar, on an application complying with All the provisions of the second and third paragraphs of Section 73 of the Act having been presented to him has upheld the order of the Sub-Registrar and has refused to direct the document to be registered. The same view was taken by the Full Bench in the earlier case of *Bhagwan Singh v. Khuda Baksh*, ((1881) ILR 3 All 397 (FB)).

In the instant case neither the condition prescribed by paragraph second, that an application under Section 73 must be made within thirty days from the date of the making of the order of refusal, by the Sub-Registrar, was complied with nor the Registrar refused to register the document. Therefore, there was no remedy by means of a suit. Besides it, the order of the Registrar directing registration of the document, as will be discussed elsewhere in this judgment, was beyond jurisdiction and a nullity and it was not at all necessary to have that order set aside. The plaintiff-appellant filed that suit for partition of his share. The defendant being a co-sharer could non-suit him on the ground that he had no title. One of the grounds attacking his title was that the sale deed was not validly registered and conveyed no title. The defendant was not estopped or precluded from challenging the sale deed on this ground. The contention of the learned counsel for the appellant that registration was complete and the validity of the document could not be assailed on this ground is without any substance. The registration of a document merely shows that the document was duly presented by the person authorised to do so and has received due publicity by the process of registration, its execution having been established by the registration authority. Registration itself does not affect right to challenge validity of document; *Daulat Ram v. Smt. Jai Dai*, (AIR 1965 Punj 378). The expression 'registered' means validly registered under the law for the time being in force in India. Where an instrument which purports to transfer title to property requires to be registered the title does not pass until registration has been effected under the law; *Ponnayya Goundan v. Muttu Goundan*, ((1894) ILR 17 Mad 146). For all these reasons the defendants had every right to challenge the validity of the sale deed in the suit.

11. The crucial point for consideration is whether the application, Ex. B6, was presented to the District Registrar within time. Section 73 (1) of the Registration Act lays down that an application is to be made "within thirty days after the making of the order of refusal" by the Sub-Registrar. The mean-

ing of this expression has been considered in the case of *Swaminathan v. Lakshmanan*, (AIR 1930 Mad 490) and it has been held that if the order is made in the presence of the party the period of thirty days starts from the date when it was made. Where it is made in the absence of the party the period is to be counted from the date when the order was made if notice of the date of the hearing of the application was given to him, but if no notice was given, the period runs from the date when the order is communicated to the party. In the instant case the plaintiffs' own application, Ex. B6, shows that he had moved an application before the Sub-Registrar on 13-5-1954 for summoning the executants and on it 31-5-1954 was fixed. It further states that on this date only one executant had arrived and the rest had remained absent and on the same day the Sub-Registrar had passed the order refusing to register the document. It makes it clear that he had not only knowledge of the date on which the order was passed but was also personally present on that date. Therefore, the period of thirty days commenced from 31-5-1954 and ended on 29-6-1954 but the application before the Registrar was filed on 5-7-1954 obviously after the expiry of 30 days.

12. The learned counsel for the appellant has argued that in view of Section 73 (2) filing of certified copy of the order of the Sub-Registrar with the application was essential. As the Sub-Registrar had taken time in supplying it the period of limitation remained held up during all this period. According to him, if this period is excluded his application Ex. B6, will be found to be within time. In this connection reliance is placed on the case of *Madura Co. P. Ltd. v. A. Thangal Junju Musaliar*, (AIR 1964 Ker 190) which lays down that when a party is prevented from doing a thing because of an act of a court or an authority, he is entitled to do it at the subsequent opportunity. This contention has no force because Section 71 (1) of the Act lays down that where registration is refused on the ground of denial of execution (as in this case) the Sub-Registrar on application made by any person executing or claiming under the document, shall, without payment and unnecessary delay, give him a copy of the reasons so recorded. The appellant furnished no material to prove when he had applied for copy of the order and when the same was issued to him. In its absence there is no scope for argument that there was any delay on the part of the Sub-Registrar in issuing the copy and this period should have been excluded.

13. It is further urged that the period spent in obtaining copy of the order was liable to be excluded under Section 12 of the Limitation Act. There is no controversy that a Registrar under the Registration Act is not a court. He has not to determine the jural relations between parties arising out of the documents presented for registration. He

merely makes an enquiry to satisfy himself whether he is justified in registering the document prescribed for that purpose. The Registrar also in determining whether a document should be registered or not on an appeal being preferred against the decision of the Sub-Registrar on that point, even if he takes evidence does so, not as a court but under Section 75 "as if he were a court." No judicial function is exercised by him. In *Mohima Chunder Dhur v. Jugal Kishore Bhattacharji* ((1881) ILR 7 Cal 736) a Registrar was held to be an executive officer invested with quasi-judicial function. In *Kuppa Gounder v. Joint Sub-Registrar*, (AIR 1960 Mad 401) he was held to be a Special Tribunal. Since the Registrar is not a court provisions of the Limitation Act cannot be applied to the proceedings before him.

14. The next question which arises for consideration is, whether the Limitation Act applies to Special Tribunals. From the side of the appellant reliance is placed on the cases of *Jijibhoy N. Surty v. T. S. Chettyar*, (AIR 1928 PC 103), *Durg Pal Singh v. Pancham Singh*, (AIR 1939 All 403) and *Commr. of Sales Tax U. P. Lucknow v. Parson Tools and Plants, Kanpur*, 1970 All LJ 163 = (AIR 1970 All 428) (FB) to show that by virtue of Section 29 of the Limitation Act Section 12 applies to Tribunals other than Courts and that general principles of Section 12 are applicable to all proceedings where certified copy is required. From the side of the respondents reliance is placed on the cases of ((1902) ILR 24 All 402) (FB) and *Shyam Sunder Bajpai v. Commr. Allahabad Division*, (1965 All LJ 211). I have given my anxious consideration to the whole matter and in my judgment the case of (1902) ILR 24 All 402 (FB) (ibid) is on all fours with the facts of this case and I with respect agree with the preposition of law laid down in it.

The scheme of Sections 71 to 77 of the Act is that if a Sub-Registrar refuses to register a document except on the ground that the property to which it relates is not situate within his sub-district, he shall make an order of refusal and record his reasons, for such order and on application being made by either party to the document issue copy of the reasons so recorded forthwith, Section 72 provides for an appeal to a Registrar from orders of Sub-Registrars refusing registration on a ground other than denial of execution. Thirty days period of limitation is prescribed for the appeal. Section 73 provides for an application to a Registrar where a Sub-Registrar refuses to register on the ground of denial of execution. The period of limitation prescribed for this application is also 30 days. Section 74 lays down procedure for disposal of an application moved under Section 73 of the Act. Section 75 relates to the order of the Registrar to register and procedure thereon. Section 76 applies to orders of refusal by a Registrar made under Section 72 as well as under Sec-

tion 75. Section 77 provides for a suit if the Registrar refuses to order a document to be registered. Thirty days' time is prescribed even for filing of the suit. In this manner the Registration Act is a complete Code by itself and prescribes its own limitation for various remedies. Therefore, the Limitation Act will not apply. The following observation made in (1902) ILR 24 All 402 (FB) (ibid) can be cited with advantage:

"Now this period of thirty days is one which I must presume was intentionally inserted in this section by the Legislature, with the object, most probably, of procuring a speedy settlement of the question as to whether a particular document was or was not to be registered. It is a provision which I presume, the legislature intended to be obeyed, and not to be disregarded. I cannot believe the Legislature intended that the limitation period of thirty days might be disregarded, and that the rejection of an application presented under Section 73, say 20 years after the refusal by the Sub-Registrar would give a right of suit under Section 77. When, then an application purporting to be an application under Section 73 of the Act is presented to the Registrar after the expiration of the thirty days limited by that section, such an application is not in my opinion an application which could be entertained under that section and summary rejection of such an application, on the ground that it was put in beyond time cannot be considered to be a refusal under Section 76 of the Act."

15. The words "in such case" in Section 75 are important and clearly imply that it is only when an application, purporting to have been presented under Section 73, complies with all the conditions required by that section, that action is to be taken under Section 74 and the two following sections. If an application purporting to be an application under Section 73 of the Act is presented to the Registrar after the expiration of 30 days limited by that section, such an application cannot be regarded as an application which could be entertained under that section and is liable to be rejected in limine.

16. In *Queen Empress v. Tulja*, ((1888) ILR 12 Bom 36 at p. 43) it has been held that special laws must be confined in their operation to their special object. In (AIR 1960 Mad 401) also it has been held that a Tribunal functioning under a special enactment has got its jurisdiction circumscribed by the provisions of the Act creating it. In *Hukumdev Narain v. Lalit Narain*, (1974) 2 SCC 133 = (AIR 1974 SC 480) it has been observed that:—

"..... What we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the legislature intended it to be a complete Code by itself which alone should govern the several matters provided by it. If on an examination

of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view even in such a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation."

17. As stated above, Sections 71 and 77 of the Registration Act lay down a complete procedure and prescribe their own periods of limitation for various remedies and will be deemed to exclude the application of the Limitation Act to it. The same view was expressed in *Fatelal v. Mst. Siti*, (AIR 1926 Nag 126). The following observations were made in this case:

"Under Section 29 (1) of the Limitation Act nothing in that enactment affects or alters any period of limitation specially prescribed for any suit, appeal or application by any special or local law and inasmuch as Sections 71 to 77 of the Registration Act lay down a complete procedure where registration is refused and as Section 77 limits the period within which suit is to be brought to 30 days, the period cannot be extended under Section 14 of the Limitation Act on the ground of prosecution of proceedings in good faith in court not having jurisdiction in the matter. I am, therefore, of the view that the Registration Act is a complete Code by itself and prescribes its own periods of limitation for various remedies and the Limitation Act does not apply.

18. Another contention of the learned counsel for appellant is that by virtue of Section 29 (2) of the Limitation Act, the provisions of Limitation Act will apply to special or local law. Even if this proposition is accepted, the question will arise whether Section 12 of the Limitation Act, as it stood in 1954 when the disputed sale deed was registered, applied to proceedings under Section 73 of the Registration Act. In 1954 Section 12 of the Limitation Act read as follows:—

"12 (1) In computing the period of Limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

(2) In computing the period of Limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for

obtaining a copy of the judgment on which it is founded, shall also be excluded.

(4) In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded." Obviously sub-section (1) of S. 12 is not applicable to the controversy before us. Benefit is claimed of sub-section (2). In my judgment, even it does not come to the help of the appellant because it applies to appeals, an application for leave to appeal and an application for a review of judgment. The application under Section 73 of the Registration Act is neither an application for leave to appeal nor an application of a review of judgment. This section did not apply to all types of applications. Therefore, even the benefit of this provision could not be claimed.

19. In order to claim the benefit of sub-section (2) of S. 12 of the Limitation Act the learned counsel for the appellant has strenuously argued that the alleged application under Section 73 of the Registration Act was in substance an appeal and as such benefit of the said provision of the Limitation Act was available. This argument is based on the contention that an appeal is not defined under the Registration Act or Limitation Act. In ordinary parlance an application to a higher court for correcting errors of a subordinate court is treated as an appeal. It is only a complaint to higher authority to correct an error committed. It is further argued that copy of the order passed by the Sub-Registrar is required to be filed simply to hear an application under Section 73 of the Registration Act as an appeal. According to him, what is provided in Section 73 is an appeal though it is to be done by an application. In this connection reliance has been placed on four cases. I have given my anxious consideration even to this contention and I am reluctant to subscribe to this view. At first I may analyse the cases relied upon by the learned counsel for the appellant. The first case is of *Nagendra v. Suresh*, (AIR 1932 PC 165) in which it was held that:

"There is no definition of appeal in Civil P. C. but their Lordships have no doubt that any application by a party to an appellate court asking it to set aside or revise a decision of a subordinate court, is an appeal within the ordinary acceptance of the term and that it is no less an appeal because it is irregular or incompetent."

The second case is of *Raja Kulkarni v. State of Bombay*, (AIR 1954 SC 73). In this case also the meaning of the word "Appeal" was considered. The third case is of *M/s. Mela Ram and Sons v. Commr. of Income-tax*, (AIR 1956 SC 367). The last case is of *M/s. Lakshmi Ratan Engineering Works Ltd. v. Asst. Commr. Sales Tax*, (AIR 1968 SC 488). All these cases relate to proceedings before the courts. Applications which were treated as appeals were filed before the appellate courts which had power to set aside or revise

a decision of a subordinate court. The position of proceedings under the Registration Act is entirely different. This Act itself makes a distinction between an appeal and an application. An appeal is provided under Section 72 of the Act when the registering officer has refused to register document on a ground other than denial of execution. In the instant case registration was refused on the ground of denial of execution and not on any other ground. In such a case the remedy lay by means of an application under Section 73. Secondly, Section 72 provides that the Registrar may revise or alter such order which is an attribute of appeal. Section 73 on the other hand does not provide for revision or alteration. Even if it is described as an appeal or wrong section is erroneously mentioned, it will still be an application under Section 73. The same view was taken in the case of *Uttam Singh v Ratan Devi*, 74 Ind Cas 688 = (AIR 1924 Lah 28).

20. There is no scope for argument that for the purpose of Section 73 the District Registrar is an appellate court. Section 73 nowhere states that the District Registrar shall reverse or alter the order passed by the Sub-Registrar. He can simply issue direction to the Sub-Registrar to register a document whose registration has been refused by him on the ground of denial of execution by the executant. It is for this reason that in an application under Section 73 no request for setting aside the order of the Sub-Registrar is made. The simple prayer is that the Sub-Registrar may be directed to register the document. Its implied effect may be revision of the order passed by the Sub-Registrar. This view finds support from the case of (1902) ILR 24 All 402 (FB) (ibid) and (AIR 1965 Punj 378). In the latter case an application under Section 73 (1) of the Registration Act was presented to District Registrar. The latter erroneously described the proceedings before him as appeal. It was held that this description could not make an application an appeal. It was further held that under Section 73 (1) of the Act an application and not an appeal lies. It makes it clear that the Registration Act itself makes a distinction between an appeal and an application. An appeal lies under Section 72 but under Section 73 only an application is maintainable. Period of limitation is prescribed separately for both. I am, therefore, of the view that Ex. B6 was an application under Section 73 and could not be treated as appeal. In this view of the matter the provisions of sub-section (2) of S. 12 could not be applied to it.

21. Learned counsel for the appellant has further contended that at least general principles of Section 12 are applicable to all proceedings where certified copies are required to be filed. This aspect of the matter has already been discussed above. There is nothing on the record to show on which date the application for copy of the order was

moved and when the same was issued. In its absence the general principles of Section 12 cannot be applied. The aforesaid discussion makes it clear that the application Ex. B-6 was moved after the expiration of 30 days contemplated by Section 73 of the Registration Act. It is on this application that the District Registrar issued directions to the Sub-Registrar to register the sale-deed. The crucial point which arises for consideration is whether this order of the District Registrar was ultra vires and the registration was a nullity. The learned counsel for the appellant has referred to the cases of *Ittyavira Mathai v. V. Verkey*, (AIR 1964 SC 907) and *Nawab Khan Abbas Khan v. State of Gujarat*, (1974) 2 SCC 121 = (AIR 1974 SC 1471) to show that the judgment and order, even if passed beyond period of limitation, is not a nullity or void. It is further argued on the basis of AIR 1932 PC 165 (ibid); AIR 1954 SC 73 (ibid) and AIR 1956 SC 367 (ibid) that the error was purely of limitation and not of competence and the order could not become void. It is urged that the appellant had filed an application under Sec. 73 beyond 30 days. The District Registrar did not act beyond jurisdiction because he had jurisdiction alright to entertain that application but he wrongly decided the question of limitation. Therefore, no question of jurisdiction which could render the order as nullity was involved. According to him, an erroneous order about limitation does not become a nullity as rules of limitation are procedures and do not create any substantive right in a party. Even if an application under Section 73 is presented beyond 30 days it will nonetheless be an application under Section 73. I am reluctant to subscribe to this view in the peculiar circumstances of this case. In the first two cases the court had jurisdiction over the subject-matter as well as over the parties. Therefore, it was held that merely because it made an error in deciding a vital issue, it could not be said that it had acted beyond jurisdiction. Secondly, in those cases the aggrieved party was entitled to have the decree or order set aside by preferring an appeal.

22. Sections 71 to 77 of the Registration Act lay down when an appeal or an application against an order passed by a Sub-Registrar can be filed. It also lays down the procedure. The jurisdiction of the District Registrar was conditional upon the appellant making an application in 30 days and filing copy of Sub-Registrar's order therewith. If there was no valid application before him, then he had no jurisdiction. There must be initial jurisdiction and then a court or a tribunal can decide a matter rightly or wrongly. An order of registration passed on an application presented beyond 30 days is ultra vires. Jurisdiction to pass an order arises only when all the requirements are fulfilled. I am fortified in this view by the observations made in (1883) ILR 9 Cal 150 and ((1902) 24 All 402) (FB) (ibid)

In the former case it was held that under the Registration Act a suit to compel registration is maintainable only when the provisions of Section 77 of the Act have been complied with. A person omitting to make an application to the Registrar as provided by Section 73 cannot be said to have complied with the conditions precedent to a suit under Section 77. In the latter case it was held that where an application purporting to be one under Section 73 of the Act is presented to the Registrar after the expiration of 30 days limited by that section, such an application is not an application which could be entertained under that section and the summary rejection of such application on the ground that it was put in beyond time is perfectly justified. According to the view taken in this case, such an application is liable to be rejected in limini. Even the contention that if period is not extended it will have disastrous effect on a party was repelled on the ground of "*vigilantibus non dorminentibus jura subveniunt*." In *Pandurang Dhondi v. Maruti Hari Jodhan*, (AIR 1966 SC 153) it has been held that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the court which tries. In *Manindra Land & Building Corporation v. Bhutnath Banerji*, (AIR 1964 SC 1336) it was held that under Section 3 of the Limitation Act, 1908, it is the duty of the court not to proceed with the application if it is made beyond the period of limitation prescribed, it should be rejected in limini.

A similar situation arose in (1965 All LJ 211). That was a case in which Rent Control and Eviction Officer had granted permission to file a suit for ejectment. Revision to the Commissioner was filed beyond 30 days. There was delay of one day. The Commissioner condoned it without application by any one. The point pressed was that entertainment of the revision by the Commissioner when the revision was barred by time was wholly without jurisdiction. Shelter of Section 29 (2) read with Section 12 of the Limitation Act was taken as the delay of one day occurred in obtaining copy of the Rent Control and Eviction Officer's order. It was held that the order of the Commissioner condoning the delay was without jurisdiction. After carefully examining the entire position I am in agreement that the application 6-B was presented after the expiry of 30 days and the District Registrar had no jurisdiction to issue direction that the sale deed be registered. It was liable to be rejected in limini. The order passed by the District Registrar was *ultra vires* with the consequence that the deed itself was void and unenforceable. In the case of *Amba v. Srinivasa Kamathi*, (26 Cal WN 369 = (AIR 1922 PC 135) there was lack of authority for presenting a document for registration and it was held that the registration of the deed was illegal, invalid and void.

23. So far as the contention that the respondents should have got the order of the

Registrar set aside is concerned, it is worth stating that no suit under Section 77 of the Registration Act could be filed against an order directing Sub-Registrar to register a document. Such a suit lies only when registration is refused. No other remedy against District Registrar's order is provided in the Registration Act. If the order was *ultra vires* it was not necessary to file a writ petition for having it set aside. They could assail it as defendants when it was used against them.

24. Learned counsel for the appellant has also contended that in any case the District Registrar was himself competent to register the sale deed under Section 30 of the Registration Act and this order should be deemed to have been passed under this provision. I am unable to agree even with this contention. If the appellant had moved an application to the District Registrar to register the document and the latter had himself registered it the registration could be upheld, but in the instant case the application was moved under Section 73 for direction to the Sub-Registrar to register the document. It was not permissible under Section 30 of the Registration Act and its advantage cannot be taken.

25. Lastly, it is urged that in the circumstances of this case equity and good conscience should prevail because the appellant has parted with sale consideration. It cannot be done because equity cannot override the written provisions of law. If S. 73 prescribes an application for registration to be made in a particular manner equity cannot be allowed to override it.

26. The aforesaid discussion makes it clear that the order of the District Registrar was without jurisdiction and the registration of the sale deed was void. Section 17 of the Registration Act provides for compulsory registration of documents. Section 49 lays down that no document required by Section 17 to be registered shall affect any immovable property comprised therein or to be received in evidence of any transaction affecting such property unless it has been registered in accordance with the provisions of the Act. In the instant case the sale deed Ex. 1 was not validly registered and conferred no title on the plaintiff appellant and he was not entitled to claim partition on its basis. Therefore, the view taken by the learned lower appellate court was correct.

27. The appeal is dismissed with costs to the respondents.

Appeal dismissed.

AIR 1975 ALLAHABAD 362

G. C. MATHUR AND

C. D. PAREKH, JJ.

Rana Rudra Pratap Jung Bahadur, Appellant v. The State of U. P. and others, Respondents.

Special Appeal No. 1 of 1975, D/- 14-3-1975.*

(A) Court-fees Act (1870), S. 19-E — Section does not apply unless the person to whom probate or letters of administration has been granted makes an application — Chief controlling Revenue Authority has no jurisdiction to call upon any person to produce the probate or Letters of Administration.

Section 19-E does not provide for the calling upon any person to produce the probate or the letters of administration before the Chief Controlling Revenue Authority. If the person, to whom the probate or letters of administration has or have been granted, does not make any application under Section 19-E and does not produce the probate or letters of administration before the Chief Controlling Revenue Authority, none of the actions contemplated by the section can at all be taken by the Authority. The section comes into operation only when the person to whom the probate or the letters have been granted discovers that, by mistake or ignorance, he had not correctly evaluated the estate and had not paid proper court-fee and he then moves the Chief Controlling Revenue Authority to rectify the defect by accepting the full proper court-fee and by causing the probate or letters to be duly stamped. In the absence of such application the Authority has no jurisdiction to take any action or pass any order under the section. (Para 6)

(B) Court-fees Act (1870), S. 19-H (As amended in U. P.) — Notice under, to Chief Controlling Revenue Authority — Latter not moving the Court within one year to make the necessary amendment — Finding of the Court regarding the value of the property becomes final. (Para 3)

Cases Referred : Chronological Paras
AIR 1916 Cal 797 = 22 Cal LJ 375 6

B. C. Dey, for Appellant; Standing Counsel, for Respondents.

G. C. MATHUR, J. :— The appellant applied to this Court for the grant of a probate of a will left by his father. The probate was granted on May 4, 1961. The appellant paid a court-fee of Rs. 5,665.20 before the probate was granted. An order dated August 23, 1971, was received by the general attorney of the appellant from the Board of Revenue U. P. Allahabad, demanding payment of a deficiency of Rs. 3,952.50 in the court-fee in the pro-

bate case and directing that an application, a duly attested affidavit and the original probate "be sent to this office to enable us to grant a certificate under Section 19-E of the Court-fees Act." The appellant thereupon filed a writ petition in this Court, challenging the order dated August 23, 1971. The writ petition was dismissed by the learned Single Judge. Hence this appeal.

2. Sri B. C. Dey learned counsel for the appellant, has contended that the order of the Board of Revenue, demanding additional court-fee in the probate matter, is totally without jurisdiction and is illegal. The contention appears well founded. Court-fee on an application for probate is payable under Item 11 of Schedule I to the Court-fees Act. After an application for probate is filed. Sub-sections (1) and (2) of Section 19-H require that, if the application is filed in the High Court, notice shall be given to the Chief Controlling Revenue Authority and, if it is filed before any other court, notice shall be given to the Collector of the district. Sub-section (3) of S. 19-H provides that, if the collector, after hearing the petitioner in the application for probate, is of opinion that the value of the property in the application for probate has been under estimated, he may require the petitioner to amend the valuation. Sub-section (4) then provides :

"(4) If the petitioner does not amend the valuation to the satisfaction of the Collector, the Collector may move the Court, before which the application for probate or letters of administration was made, to hold an inquiry into the true value of the property :

Provided that no such motion shall be made after the expiration of one year from the date of the exhibition of the inventory required by Section 317 of the Indian Succession Act."

Sub-section (5) required the Court, when so moved, by the Collector, to hold an inquiry and to record a finding as to the true value of the property of the deceased. Sub-section (6) lays down the procedure for the inquiry. Sub-section (7) is in these words :—

"(7) The finding of the Court recorded under sub-section (5) shall be final; but shall not bar the entertainment and disposal by the Chief Controlling Revenue Authority of any application under Section 19-E."

3. The scheme of Section 19-H thus is that, after notices have been sent to the Collector or to the Chief Controlling Revenue Authority, the Collector may examine the valuation shown in the application for probate and, if he is of opinion that the value has been under estimated, he may require the petitioner to make the necessary amendment in the petition. If the amendment is not made, the Collector may move the Court, before which the petition is pending, and that Court will record a finding about the value of the property. The Collector can move the Court only within one year from the date of the exhibition of the inventory. After the ex-

* (Against judgment of R. L. Gulati, J. in C. M. W. No. 6140 of 1971, D/- 1-11-1974).

piry of this period, he cannot exercise this right. The finding of the Court regarding the value of the property is final. This finality does not bar the entertainment of an application under Section 19-E.

4. In the present case, even though, admittedly, a notice under Section 19-H (2) was given to the Chief Controlling Revenue Authority, the Collector did not move the High Court under sub-section (4) within the stipulated period of one year or at any time thereafter. The right of the Collector to move the Court under sub-section (4) is now barred. The learned Standing Counsel has sought to justify the impugned order under Sec. 19-E. If the order can be justified under Sec. 19-E, then it is immaterial whether the Collector did or did not move this Court under sub-section (4) of S. 19-H.

5. We have then to see whether the impugned order could be passed under Section 19-E. This section makes provision for cases where too low a court-fee has been paid on probates. Section 19-E is in these terms:—

"19-E. Where any person on applying for probate or letters of administration has estimated the estate of the deceased to be of less value than the same has afterwards proved to be, and has in consequence paid too low a Court-fee thereon, the Chief Controlling Revenue Authority for the local area in which the probate or letters has or have been granted may, on the value of the estate of the deceased being verified by affidavit or affirmation, cause the probate or letters of administration to be duly stamped on payment of the full court-fee which ought to have been originally paid thereon in respect of such value and of the further penalty, if the probate or letters is or are produced within one year from the date of grant, of five times, or, if it or they is or are produced after one year from such date, of twenty times, such proper court-fee without any deduction of the court-fee originally paid on such probate or letters :

Provided that if the application be made within six months after the ascertainment of the true value of the estate and the discovery that too low a court-fee was at first paid on the probate or letters, and if the said Authority is satisfied that such fee was paid in consequences of a mistake or of its not being known at the time that some particular part of the estate belonged to the deceased, and without any intention of fraud or to delay the payment of the proper court-fee, the said Authority may remit the said penalty, and cause the probate or letters to be duly stamped on payment only of the sum wanting to make up the fee which should have been at first paid thereon."

6. Sri Dey has urged that proceedings under Section 19-E can be started only upon an application of the person who has filed the petition for probate and these proceedings cannot be initiated by the Chief Con-

trolling Revenue Authority itself. He has relied upon the decision of a Division Bench of the Calcutta High Court in *Nikunja Rani Chowdhurani v. Secretary of State*, AIR 1916 Cal 797. It was held by the learned Judges—

"Section 19-E contemplates an application on the part of the person who has taken out probate and produces the same to be duly stamped."

With respect we are in agreement with the learned Judges. Sub-section (7) of S. 19-H provides that the finding recorded by the Court under sub-section (5) shall not bar the entertainment and disposal by the Chief Controlling Revenue Authority of any application under Section 19-E. This clearly indicates that the Legislature contemplated that the proceedings under Section 19-E were to start on an application. The language of Sec. 19-E also indicates the same. This section empowers the Chief Controlling Revenue Authority to act "on the value of the estate of the deceased being verified by affidavit or affirmation." The verification by affidavit or affirmation can only be by the person who applied for the probate. The power of the Authority is to "cause the probate or letters of administration to be duly stamped on payment of the full court-fee which ought to have been originally paid thereon." This power can only be exercised if the probate or letters of administration is or are produced by the person to whom it or they has or have been granted before the Chief Controlling Revenue Authority. Such a person alone can produce it after making an application. The section also provides for imposition of penalty for late production of the probate or letters of administration. This section does not provide at all for calling upon any person to produce the probate or letters of administration before the Chief Controlling Revenue Authority. This clearly shows that the section applies only when the probate or letters of administration is or are produced voluntarily by the party to whom it or they have been granted. The proviso to the section empowers the Authority to waive the penalty if good cause is shown. This also indicates that the section applies when the probate or letters of administration is or are produced by the person to whom it or they has or have been granted. If the person, to whom the probate or letters of administration has or have been granted, does not make any application under Section 19-E and does not produce the probate or letters of administration before the Chief Controlling Revenue Authority, none of the actions contemplated by this section can at all be taken by the Authority. In our opinion, Section 19-E comes into operation only when the person, to whom the probate or letters of administration has or have been granted, discovers that, by mistake or ignorance, he had not correctly evaluated the estate and had not paid proper court-fees and he then moves the Chief Controlling Revenue Authority to rectify the defect by accepting the full proper court-fee and by

causing the probate or letters of administration to be duly stamped. No action under this section can be taken by the Authority in the absence of any such application. Since, in the present case, no application was made by the appellant for action under Section 19-E, the Chief Controlling Revenue Authority had no power or jurisdiction to pass any order, demanding additional court-fees, or directing the appellant to produce the probate. The action taken by the respondents cannot be justified under Section 19-E.

7. The appeal is accordingly allowed, the judgment of the learned Single Judge is set aside, the writ petition filed by the appellant is allowed, the order of the Board of Revenue dated August 23, 1971, is quashed and the respondents are restrained from demanding and recovering the sum of Rupees 3,952.50 on account of arrears of court-fees in respect of the probate granted to the appellant. The appellant is entitled to his costs of this appeal as well as of the writ petition.

Appeal allowed.

AIR 1975 ALLAHABAD 364

R. L. GULATI, J.

Municipal Board, Hathras, Petitioner v. Union of India and others, Opposite Parties.

Civil Misc. Writ No. 3641 of 1971, D/- 13-2-1975.

(A) **Emergency Risk (Factories) Insurance Act (1962), S. 2 (c) — "Factory" — Water works of Municipal Board held covered by definition of "factory". (Factories Act (1948), Ss. 2 (m) and 2 (k)).**

The pumping of water is a manufacturing process according to the definition given in the Factories Act, even though it may not be so in the common parlance. Water works of the Municipal Board is, therefore, clearly covered by the definition of "factory" and the Act is applicable to it where it is not disputed that ten or more persons are working in the water works and water is pumped by use of power. (Para 3)

(B) **Emergency Risks (Factories) Insurance Act (1962), Ss. 1 (3) and 11 (1) — Arrears of premia — Proceedings for recovery — Can be initiated even after expiry of the Act. 1971 All LJ 231 and AIR 1971 Andh Pra 145 and AIR 1972 Pat 314, Rel. on; AIR 1971 Mad 442, Dissented from.**

(Para 4)

(C) **Emergency Risks (Factories) Insurance Act (1962), S. 11 (2) — Recovery of dues from Municipality — Remedy under S. 35 (2) of U. P. Municipalities Act — Not barred. (U. P. Municipalities Act (2 of 1916), S. 35 (2)).**

Section 11 (2) provides for a speedy mode of recovery of the arrears. But this

mode of recovery is not exhaustive in the sense that it bars the other modes of recovery available under the law. Section 35 (2) of the U. P. Municipalities Act provides another mode of recovery of dues against a municipality and it is open to the Government to press into aid this mode of recovery. Section 11 (2) of the Act does not bar such a remedy. AIR 1938 Mad 360 and AIR 1942 Pat 87, Rel. on. (Paras 7, 8)

Cases Referred: Chronological **Paras**
AIR 1972 Pat 314 = 42 FJR 573. 4
AIR 1971 Andh Pra 145 = 1971 Lab IC 651 4

AIR 1971 Mad 442 = 39 FJR 137. 4

(1970) Civil Misc. Writ No. 2261 of 1970, 4

D/- 16-12-1970 = 1971 All LJ 231 4

AIR 1942 Pat 87 = 9 ITR 673 7

AIR 1938 Mad 360 = 6 ITR 180 7

T. P. Asthana, for Petitioner; Standing Counsel, for Opposite Parties.

ORDER:— This is a petition under Article 226 of the Constitution by the Municipal Board, Hathras.

2. The petitioner Board runs a water works for the supply of water to the town of Hathras. On 23rd of January, 1967, the Enforcement Officer appointed under the Emergency Risks (Factories) Insurance Act, 1962 (hereinafter referred to as the 'Act') served a notice requiring the Board to pay a total sum of Rs. 10,711.00 as arrears of premia from 1963 upto date, as the Board had failed to take out insurance in respect of the water works. The petitioner Board was also required to pay a sum of Rs. 5,360/- as compounding fee. As the premia and the compounding fee was not paid, proceedings were initiated under Section 35 of the U. P. Municipalities Act for its recovery. The petitioner has challenged the demand as also the recovery proceedings.

3. The first contention raised on behalf of the petitioner is that the Act is not applicable as it requires compulsory insurance of factories and the water works department of the petitioner cannot be said to be a 'factory.' Under clause (c) of Section 2 of the Act, "factory" means "a factory as defined in clause (m) of Section 2 of the Factories Act." The definition of 'factory' as contained in clause (m) of Section 2 of the Factories Act reads:

(m) "Factory means any premises including the precincts thereof—

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on."

It is not disputed that ten or more persons are working in the water works of the petitioner and water is pumped by use of power. But it is said that no manufacturing process is carried on. Clause (k) of Section 2 of the Factories Act defines "manufacturing process" to mean any process for—

- (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or
- (ii) pumping oil, water or sewage, or
- (iii)

Thus pumping of water is a manufacturing process according to the definition given in the Factories Act; even though pumping of water may not be a manufacturing process in the ordinary common parlance. Water works is, therefore, clearly covered by the definition of "factory" and the Act is applicable to it.

4. It is then argued that the Act was a temporary measure lasting during the emergency and it came to an end when the emergency was withdrawn on 10th of January, 1968 and no action could be taken under the Act after its expiry. In the case of the petitioner action for the first time was taken on 23rd of January, 1968. This contention is again not acceptable in view of the provisions contained in Section 1 (3) of the Act which provides:

"It shall remain in force during the period of operation of the proclamation of Emergency issued on the 26th October, 1962, and for such further period as the Central Government may, by notification in the Official Gazette declare to be the period of emergency for the purposes of this Act, but its expiry shall not affect anything done or omitted to be done before such expiry and Section 6 of the General Clauses Act, 1897 (10 of 1897) shall apply upon the expiry of this Act as if it had been repealed by a Central Act."

This provision clearly shows that even after the lapse of the Act, action could be taken to levy and recover insurance premia, if it had not been done during the operation of the Act. This provision clearly saves the power to take action against persons who had evaded the payment of premia by not taking out a policy of insurance in respect of insurable premises. Section 11 contains a specific provision for the levy and recovery of evaded premiums. That section reads:

"11. Recovery of Premiums Unpaid.—

(1) Without prejudice to the provisions of sub-section (4) of S. 5, where any person has failed to insure as, or to the full amount, required by this Act, and has thereby evaded the payment by way of premium of any money which he would have had to pay out for such failure, an officer authorised in this behalf by the Central Government may determine the amount payment of which has been so evaded and the amount so determined shall be payable by such person and shall be recoverable from him as provided in sub-section (2)."

(Thus Section 11 (1) read with Section 1 (3) of the Act provides a complete machinery

for the levy and recovery of evaded premiums even after the expiry of the Act. This position is fully supported by a decision of a Division Bench of this Court in *Raja Ram Om Prakash v. Union of India*, (Civil Misc. Writ No. 2261 of 1970, decided on 16-12-1970), reported in 1971 All LJ 231 where a similar question arose under the identical provisions of the Emergency Risks (Goods) Insurance Act, 1962. The same view has been taken in *Union of India v. T. Sitaramanjaneyulu*, AIR 1971 Andh Pra 145 and Eastern Bihar Divisional Chamber of Commerce and Industry, *Bhagalpur v. The Chief Enforcement Officer*, AIR 1972 Pat 314 where it has been held that proceedings for recovery of evaded premiums payable under the Emergency Risks (Goods) Insurance Act, 1962 and the Emergency Risks (Factories) Insurance Act can be initiated even after the Acts have ceased to be in force on the expiry of the emergency. The Madras High Court has, however, taken a contrary view in *M/s. Stoneware Pipes (Madras) Ltd. v. Union of India*, AIR 1971 Mad 442. The contrary view taken by the Madras High Court in the above case has not been accepted by the Patna High Court and I am in respectful agreement with the view of the Patna High Court. The Act casts an absolute liability upon every person to take an insurance policy and to pay premiums due thereon and on his failure to do so a provision has been made to recover from him the arrears of premia.

5. The last contention relates to the mode of recovery of the demand, Section 11 (2) of the Act provides that any instalment of premium due on a policy of insurance issued under the Scheme, and any amount determined as payable under sub-section (1), shall be recoverable as an arrear of land revenue and shall be a first charge on the property in respect of which the default has been made. It is urged that the demand on account of arrears of premium and compounding fee could be recovered under Section 11 (2) only as arrears of land revenue. Arrears of land revenue are recoverable under the U. P. Zamindari Abolition and Land Reforms Act. The proposed action under Section 35 (2) of the U. P. Municipalities Act is, therefore, wholly unauthorised.

6. Now, Section 11 (2) provides for a speedy mode of recovery of the arrears. But this mode of recovery is not exhaustive in the sense that it bars the other modes of recovery available under the law. For instance a suit would not be barred.

7. Section 46 (2) of the Income-tax Act, 1922, contains a similar provision for the recovery of arrears of income-tax through a Collector as arrears of land revenue. It has been repeatedly held by various High Courts that the special mode of recovery contained in Section 46 (2) is not exhaustive and does not take away from the Government the right of enforcing payment by any other method open to it. See *Manickam Chettiar v. In-*

come-tax Officer Madura, 6 ITR 180 = (AIR 1938 Mad 360) and Inderchand v. Secretary of State for India in Council, 9 ITR 673 = (AIR 1942 Pat 87).

8. Section 35 of the U. P. Municipalities Act contains a special provision for enforcing any obligation against a municipality cast by the Municipalities Act or by any other enactment. If such a duty is not performed within the specified time, sub-section (2) of S. 35 provides that the District Magistrate or any other officer not below the rank of the Deputy Collector may be required to secure compliance and expenses incurred in that connection shall be borne by the Municipal board concerned. This, in my opinion, is another mode of recovery of dues against a municipality and it is open to the Government to press into aid this mode of recovery. Section 11 (2) of the Act does not bar such a remedy.

9. The petition fails and is dismissed with costs.

Petition dismissed.

AIR 1975 ALLAHABAD 366
K. B. ASTHANA, C. J. AND
GOPI NATH, J.

Gulab Singh and another, Petitioners v. The Principal, Sri Ramji Das, Opposite Party.

Misc. Contempt Case No. 37 of 1973, D/-24-1-1975.

(A) Contempt of Courts Act (1971), S. 20 — Petitioner bringing acts of contempt to the notice of High Court within one month — High Court not initiating proceedings within limitation of one year — Plea that petitioner ought not be allowed to suffer for the mistake of court is not available.

The petitioner has no right to have the respondent punished for contempt. His only duty was to bring to the notice of the Court the facts of the alleged contempt and then it was entirely a matter between the High Court and the respondent. The petitioner not having any right as such and none of his rights having been prejudiced if the respondent is not punished for contempt, he cannot be heard to say that he should not be allowed to suffer for the mistake of the Court.

(Para 6)

(B) Contempt of Courts Act (1971), S. 20 — No provision stops running of the time of limitation of one year.

Cases Referred: Chronological Paras
AIR 1974 SC 2255 = (1974) 2 Serv LR 549

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G. C. Battacharya, for Petitioners; Dr. R. Dwivedi and Addl. Govt. Advocate, for Opposite Party.

ASTHANA, C. J.:— It is unfortunate though this petition was presented in this

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Court as early as 1-5-1973 notice against the respondent No. 4 could not be issued till 9-8-1974. The alleged incident of contempt is said to have taken place on 23-4-1973. For some reasons which need not be mentioned here the notice could not be issued against the respondent by this Court till 9-8-1974. Dr. R. Dwivedi on behalf of the respondent raised an objection that the proceedings against the respondent are without jurisdiction inasmuch as this Court had no jurisdiction or power to initiate proceedings against the respondent after the expiry of one year from the date on which the contempt is alleged to have been committed. Reference was made to Section 20 of the Contempt of Courts Act, 1971. Dr. Dwivedi brought to our notice a decision of the Supreme Court in the case of Baradakanta Mishra v. Mr. Justice Gati-krushna Misra, C. J. of the Orissa High Court AIR 1974 SC 2255. In this case the Supreme Court on the language of S. 20 declared as follows:—

"It is only when the Court decides to take action and initiates a proceeding for contempt that it assumes jurisdiction to punish for contempt. The exercise of the jurisdiction to punish for contempt commences with the initiation of a proceeding for contempt, whether suo motu or on a motion or a reference. That is why the terminus a quo for the period of limitation provided in Section 20 is the date when a proceeding for contempt is initiated by the Court. Where the Court rejects a motion or a reference and declines to initiate a proceeding for contempt, it refuses to assume or exercise jurisdiction to punish for contempt and such a decision cannot be regarded as a decision in the exercise of its jurisdiction to punish for contempt."

2. Earlier the learned Judges of the Supreme Court in the same case observed:—

"The petition or reference is only for the purpose of drawing the attention of the Court to the contempt alleged to have been committed and it is for the Court, on a consideration of such motion or reference, to decide, in exercise of its discretion, whether or not to initiate a proceeding for contempt. The Court may decline to take cognizance and to initiate a proceeding for contempt either because in its opinion no contempt prima-facie appears to have been committed or because, even if there is prima-facie contempt, it is not a fit case in which action should be taken against the alleged contemner."

3. It is clear from what has been extracted above from the judgment of the Supreme Court that when a petition supported by an affidavit is filed alleging acts of contempt to have been committed by the respondent and is considered by the Court to find out whether the contemner be called upon to show cause, the mere filing of the petition and the consideration by the Court would not amount to initiation of proceedings. It is only when the Court decides to proceed

against the contemner on a prima facie case having been made out that it initiates the proceedings by issuing notice and process. In the instant case, the learned Chief Justice, as required by Rule 19 of Chapter XVIII of the Rules of the Court, passed an order on 9-5-1973 — "List before the Bench concerned." The order sheet shows that on 16-5-1973 the petition was listed before Sinha, J. but that day it was passed over. Then on the next day, i.e., 17-5-1973, Sinha J. seems to have ordered the papers to be laid before the Chief Justice for nominating a Division Bench as in his opinion a case of criminal contempt was made out against some of the opposite parties. The learned Chief Justice passed an order for listing the case before the Habeas Corpus Bench. Successively during the months of May and July the case was listed before Division Benches but for one reason or the other was passed over. On 17-7-1973 a Division Bench of this Court ordered— "list after the decision of writ petition No. 1015 of 1973."

4. Then on 25-6-1974 the office reported that the said writ petition No. 1015 of 1973 had been decided on 23-7-1973 and a special appeal against the judgment of the learned Single Judge was also dismissed on 5-9-1973. This petition was then listed before a Division Bench on 11-7-1974 but no orders were passed till 19-8-1974. When the matter was listed the learned counsel for the petitioner seems to have struck off the names of the opposite parties 1, 2 and 3 from the array of the respondents and this Court issued notice against the remaining respondent No. 4 the Principal of the College, who is alleged to have in defiance of the direction of the Court not only refused to admit two of the students to take examination but also expressed words derogatory to the dignity of the High Court.

5. From what has been narrated above it is clear that this Court on 17-7-1973 did not like to initiate proceedings and directed that the matter will wait till the decision of Writ Petition No. 1015 of 1973. May be either the learned counsel for the petitioner or the Bench Secretary on that date did not draw the attention of the Court that the time was running out and further waiting for the decision of writ petition No. 1015 of 1973 may take the case beyond the period of one year from the date of the commission of the act of contempt.

6. It was contended by Sri G. C. Bhattacharya for the petitioner that petitioner ought not be allowed to suffer for the mistake of the Court as he had brought to the notice of the Court the alleged acts of contempt within a period of one month and it was the duty of the Court to initiate proceedings. This submission on behalf of the petitioner appears to us to be futile. The petitioner has no right to have the respondent punished for contempt. His only duty was to bring to the notice of the Court the facts of the alleged

contempt and then it was entirely a matter between this Court and the respondent. The petitioner not having any right as such and none of his rights having been prejudiced if the respondent is not punished for contempt, he cannot be heard to say that he should not be allowed to suffer for the mistake of the Court.

7. It was then contended by Sri Bhattacharya that Sinha, J. on 17-5-1973 would be deemed to have initiated proceedings for contempt as he applied his mind and found that prima facie case of contempt was made out of a criminal nature against some of the respondents and of a civil nature against others and then directed that the matter be laid before the Chief Justice for nominating a Division Bench. That may be so. There is no doubt that Sinha, J. did apply his mind but that would not amount to initiation of proceedings of contempt as he himself directed that the papers be laid before the Chief Justice for nominating a Division Bench to consider the matter for he doubted that he had power to initiate the proceedings. Therefore, there was no question of initiation of proceedings on 17-5-1973 by Sinha, J. Likewise, the argument that on 17-7-1973 the Division Bench would be deemed to have initiated the proceedings is fallacious because that Division bench itself directed the listing of the matter after the decision of the writ petition No. 1015 of 1973. That goes to show that the mind of the Division Bench was not made up or prepared to initiate any proceedings till the decision of the writ petition No. 1015 of 1973. It was only on 9-8-1974 that the proceedings were initiated by issuing notice to the respondent. That was after more than one year of the date of the alleged contempt.

8. Sri Bhattacharya, learned counsel for the petitioner, contended that the period during which the writ petition No. 1015 of 1973 was pending should not be counted in computing the period of one year under Section 20 of the Contempt of Courts Act. This is a hollow argument without any thoughtful content in it. There is no provision under the Contempt of Courts Act which in any manner stops the running of time of one year contemplated by Section 20 of the Act. Sri Bhattacharya then made a more hollow argument to the effect that the Indian Limitation Act applies. We fail to understand what benefit can Sri Bhattacharya derive from the provisions of the Indian Limitation Act when the time, within which the proceedings for contempt are to be initiated, is prescribed by the Contempt of Courts Act and not by the Limitation Act.

9. Sri Bhattacharya then lastly made an argument that since the Division Bench on 17-7-1973 had directed that the case be listed after the decision of writ petition No. 1015 of 1973 that direction itself would operate for extending the time. We fail to understand the logic behind this argument.

When the running of time under Section 20 of the Act cannot be stopped as there is no provision to that effect under the law, merely by the order of the Division Bench the running of time will not stop.

10. For the reasons given above, we find that the notice issued to the respondent being more than after a year of the alleged act of contempt, the proceedings being without jurisdiction are liable to be quashed.

11. The notice is discharged. No order for costs.

Ordered accordingly.

AIR 1975 ALLAHABAD 368

M. P. MEHROTRA, J.

Radha Charan Das, Applicant v. Th. Mohini Behariji Maharaj and others, Opposite Parties.

Civil Revn No. 916 of 1969, D/- 23-5-1974*

(A) Civil P. C. (1908), S. 15—Valuation of suit for Court-fee and jurisdiction — Determination of.

The Court-fee payable and the valuation for purposes of jurisdiction must be determined on the basis of allegations made, and the reliefs claimed, in the suit. Defence in the written statement have no relevance for such determination. (Para 3)

(B) Suits Valuation Act (1887), S. 8 — Suit for injunction involving right to immovable property or affecting it — Market value of property determines jurisdiction.

The plaintiffs, trustees of a temple, sued the mahant who looked after and managed the affairs of the idol, for a mandatory injunction removing the defendant from the Tattisthan on which the temple was situated, for a prohibitory injunction restraining the defendant from frequenting the Tattisthan, and from interfering with the management of the same and other properties connected therewith, and, if necessary, for possession of the Office held by the defendant. Held that the suit involved or affected the title to the immovable properties claimed by the plaintiffs-trustees as belonging to the idol and that the market value of the property determined the valuation of the suit for purposes of jurisdiction. 1969 All LJ 248 and 1971 All LJ 909 and AIR 1973 SC 76, Distinguished.

(Paras 2, 14)

(C) Civil P. C. (1908), S. 115 — Trial Court holding that it had no jurisdiction to try the suit — Appellate Court holding that it had, and directing trial Court to retain seisin of the case — Order of appellate Court is one affecting jurisdiction — Revision therefore lies. (Para 17)

*(Against Judgment and decree of A. C. Bansal, Dist. J., Mathura, D/- 26-4-1969

GR/IR/D133/74/KNA

Cases Referred:	Chronological	Paras
AIR 1973 SC 76 = 1972 SCD 161		15
AIR 1971 All 516 = 1971 All LJ 860	8, 11	
1971 All LJ 909 = 1971 All WR (HC) 448	8, 13, 14	
1969 All LJ 248 = ILR (1969) 1 All 158	8, 12, 14	
AIR 1969 Orissa 257 = ILR (1968) Cut 270	17	
AIR 1964 SC 497 = 1964 SCD 435	17	
AIR 1961 SC 1299 = (1961) 3 SCR 1015	17	
AIR 1949 All 560 = 1949 All WR (HC) 92	8, 10	
AIR 1932 All 593 = 1932 All LJ 777	8, 9	

D. Sanyal, for Applicant; J. N. Chatterji, for Opposite Parties.

ORDER :— This revision is directed against the judgment of the lower appellate Court whereby the said Court allowed an appeal and set aside the order passed by the trial Court. The trial Court by its order dated(?) returned the plaint for presentation to the proper Court holding that it had no jurisdiction to try the suit as the same was beyond its pecuniary jurisdiction. The lower appellate Court held that the suit was within the pecuniary jurisdiction of the trial Court and, therefore, set aside the order passed by the trial Court and directed that the plaint be retained and the suit be tried by it.

2. The brief facts are these. The plaintiffs filed the suit against the defendant seeking the relief of mandatory injunction removing the defendant from the Tattisthan and a prohibitory injunction was also claimed that he should not frequent the said Tattisthan and should not interfere with the management of the same and the other properties connected therewith. These reliefs were claimed in Cl. (a) of the reliefs claimed in the plaint. In clause (b) of the reliefs claimed in the plaint, the plaintiff sought that if in the opinion of the Court it was necessary, then the possession of the office held by the defendant be given to the plaintiffs. In the body of the plaint it was alleged that the plaintiff No. 1 Thakur Mohini Behariji was an idol Birajman in the temple situated on the Tattisthan. The entire property vested in the idol and the management of the idol was entrusted to the plaintiffs Nos. 2 to 6 who were the trustees. It was further alleged that the trustees appointed a person who looked after and managed the affairs of the idol and such person was described as the Mahant. By an agreement dated 30th September, 1937 the defendant was appointed such Mahant and he was a licensee and agent of the plaintiffs bound by the terms of the agreement. The defendant committed breach and acted against the terms laid down in the said agreement. Some of the breaches were detailed in clauses (a) to (d) of paragraph 5 of the plaint. Certain complaints against the defendant were lodged with the plaintiffs and the trustees enquired into the said complaints and found them to be correct. An explanation was sought

from the defendant but he submitted none. Hence the trustees (plaintiffs Nos. 2 to 6) acting on behalf of the idol (plaintiff No. 1) held a valid meeting and removed the defendant from his office. In paragraph 8 (a) of the plaint it was stated that the defendant had removed many valuable manuscripts and religious books from the Tattisthan and had buried some of these books in the ground and some of the books were thrown into the river Jamuna. It was further alleged that the defendant was denying the rights and title of the plaintiff No. 1 and he was also denying the right of management of the plaintiffs Nos. 2 to 6. In fact, he was denying that the plaintiffs Nos. 2 to 6 were the trustees and he claimed the right of management in himself. On all these grounds the defendant was not fit to continue in the office of the Mahant and he was fit to be removed from the said office. In paragraph 8 (b) of the plaint it was alleged that the defendant had alienated a property owned by the plaintiff No. 1 and situated in Madhya Pradesh and this was done without the knowledge and permission of the plaintiffs trustees and he (the defendant) had misappropriated and squandered the receipts from the sale of the said properties. It was further alleged that the alienation of the said property was made on the false representation that the property belonged to the defendant. On all these grounds the defendant was unfit to continue as the Mahant and was liable to be removed from the said office. In paragraph 9 of the plaint it was stated that the defendant was directed to remove himself from the Tattisthan and not to visit the same and not to interfere in the management of the same, but he did not pay any heed to the plaintiff's direction. In paragraph 10 of the plaint it was stated that the plaintiff was entitled to a mandatory injunction removing the defendant from the Tattisthan and the plaintiffs were also entitled to a prohibitory injunction against the defendant restraining him from frequenting the Tattisthan and from interfering with the management of the same. Further, in case it was found necessary that possession should be got back from the defendant, then the plaintiffs were also entitled to get back possession. In paragraph 12 of the plaint it was said that for the purposes of determining the jurisdiction of the Court and paying court-fee the suit was being valued at Rupees 500/- as the property in question belonged to the idol. Further, the office and the management were not capable of any valuation. Hence court-fee was paid on the said amount of Rs. 500/-.

3. The defendant filed his written statement and contested the claim set up by the plaintiffs in the plaint. It is not necessary to refer to the defences raised in the written statement, because the court-fee is payable and the valuation is to be determined on the basis of the allegations made, and the reliefs claimed, in the plaint and the defences

in the written statement have no relevance for determining the valuation of the suit for the purpose of deciding the jurisdiction of the Court and for the payment of court-fee in the suit.

4. The trial Court issued a commission to the Amin to make a local inspection and submit his report regarding the valuation of the properties involved in the suit. The Amin submitted his report which is Paper No. 219-C and the map is Paper No. 220-C in the record of the trial Court. According to the estimate submitted by the Amin the value of the property attached to the Tattisthan was about Rs. 21,385/-. The said figure included the value of the temple also. The trial Court held that a temple has no market value. Therefore, the value of the temple should not have been included in the said figure of Rs. 21,385/-. Thereafter, the trial Court, in its order, observed :—

“Therefore, on a rough estimate having been made it appears that the property of about Rs. 15,000/- valuation is attached to the Tattisthan excluding the temple.”

5. The trial Court held further the Mahant is not a mere Pujari of a temple, but he is the spiritual head of the Math having control over the Math property. Therefore, in the conception of Mahantship as in the case of Shebaitship both the elements of office and property are blended together and neither can be detached from the office. At the same time a Mahant as a superior in the Math has in addition to his duties even a personal interest of a beneficial character which is much longer than that of a Shebait. Therefore, the ejectment of the defendant from the office of Mahantship has not to be taken into consideration as ejectment merely of Pujari. His ejectment from the office is in the sense of dispossessing him of his rights as a spiritual head as well as the right to hold property of a Math. What I mean to say is that the property attached to the Math being managed by the Mahant by virtue of holding this office has to be taken into consideration. In the said view of the matter the trial Court, therefore, came to the conclusion that as the value of the property in dispute was over Rs. 5,000/-, therefore the said Court had no jurisdiction to try the suit. The plaint, therefore, was directed to be returned for presentation to the proper Court. The plaintiffs felt aggrieved and took out an appeal to the lower appellate Court. The lower appellate Court allowed the appeal on the ground that there was only a dispute about the management of the affairs of the idol and no question of ownership or possession was involved. No question of claiming back possession could, therefore, arise. Therefore, the market value of the property was irrelevant and the valuation disclosed in the plaint should have been accepted. The suit was, therefore, within the jurisdiction of the Munsif's Court. The defendant felt aggrieved

with the decision of the lower appellate Court and the instant revision was filed by him in support whereof I have heard Sri D. Sanyal, the learned counsel for the defendant-applicant and in opposition Sri J. N. Chatterji, the learned counsel for the plaintiff-opposite parties, has been heard.

6. The basic question is about the valuation of the suit for the purposes of determining the jurisdiction of the Court and, therefore, the relevant provisions of the Suits Valuation Act have to be noticed. Section 3 of the said Act lays down as under:—

Power of State Government to make rules determining value of land for jurisdictional purposes:—“The State Government may make rules for determining the value of land for the purposes of jurisdiction in the suits mentioned in the Court-fees Act 1870, as in force for the time being in Uttar Pradesh, Section 7, paragraphs v, v-A and v-B:

Provided that such rules shall provide that the value of land for the purposes of jurisdiction shall in no case be less than the value as determined for the computation of court-fees.

(2) The rules may determine the value of any class of land, or of any interest in land in the whole or any part of a local area, and may prescribe different values for different places within the same local area.”

7. Under the said section the State Government has framed certain rules. These rules are known as the Uttar Pradesh Suits Valuation Rules, 1942 and R. 3 (e) lays down that in suits for the possession of land, the value of land for purposes of jurisdiction shall be determined as follows:—

“Where there are also buildings or a garden on the land the aggregate of the value of the land as determined in accordance with these rules plus the market value of such building or garden situated thereon.”

Section 4 of the Act reads as under:—

Valuation of certain suits for the purposes of jurisdiction:—“Suits mentioned in paragraphs iv (a), iv-A, iv-B, v, v-A, v-B, vi, vi-A, viii and x (d) of Sec. 7 and Arts. 17, 18 and 19 of Schedule II of the Court Fees Act, 1870, as in force for the time being in the Uttar Pradesh, shall be valued for the purposes of jurisdiction at the market value of the property involved in or affected by or the title to which is affected by the relief sought, or at the amount involved in or affected by or the title to which is affected by the relief sought, and such value shall in the case of land, be deemed to be the value as determinable in accordance with the rules framed under Section 3.”

8. Now it has not been disputed before me that if the relief sought in the suit involved or affects the immovable property in question, then the suit will not be cognizable by the Munsif's Court. However, the contention of the learned counsel for the plaintiff-respondents is that it is the managerial right i. e.

the right to manage the affairs of the idol which is in dispute and not the immovable properties owned by the plaintiff idol. On the other hand, the learned counsel for the defendant-applicant contends that it is not a suit wherein the managerial rights only are involved but it is basically a suit where possession of the immovable property is claimed by the plaintiffs from the defendant. It is contended that the effect of both the reliefs (a) and (b) claimed in the plaint is that the defendant is sought to be removed from the possession of the property and the plaintiffs claim back possession. The learned counsel for the defendant-applicant placed reliance on the following cases:—

- (1) Parsottamanand Giri v. Mayanand Giri, AIR 1932 All 593;
- (2) Chief Inspector of Stamps, U. P. v. Sewa Sunder Lal, AIR 1949 All 560;
- (3) Mahabir Prasad v. Shamshuddin Ansari, 1971 All LJ 860 = (AIR 1971 All 516).

The learned counsel for the plaintiff-respondents placed reliance on the following cases:—

- (1) Vaish College Society Shamli v. Lakshmi Narain, 1969 All LJ 248;
- (2) Gaidan Lal Misra v. Misri Lal Misra, 1971 All LJ 909.

9. I shall first take up these cases. The head note of AIR 1932 All 593 is as under:—

“There is no justification for interpreting “possession” in Section 7 (v) as meaning possession as beneficial owner and consequently the question whether the plaintiff has or has not any beneficial interest in the properties does not make any difference as regards the court fee payable by him.

Where the plaintiff alleges that he is duly elected as Mahant in place of another and brings a suit for possession as Mahant of the properties attached to the mutt his case falls under Section 7 (v) and court-fee is payable ad valorem upon the value of the properties of the mutt. In calculating the value of such properties the temple should be left out of consideration as having no market value.”

10. The head note in AIR 1949 All 560 is as under:—

“A suit with a prayer (i) that an order of the T. R. O. requiring the plaintiff to vacate the premises be declared ultra vires, null and void and (ii) that the defendant be restrained by perpetual injunction from interfering with the possession of the plaintiff over the premises so long as the tenancy continues and is not legally determined, falls under Section 7 (iv) (a) and the consequential relief cannot be valued according to Sec. 7 (iv-B) as that provision applies to suits for injunction and not to suits for declaration with consequential relief. The consequential relief should be valued in the manner provided under Section 7 (iv) (a). According to proviso to Section 7 (iv) (a) the valuation would be in accordance with either sub-section (v), (v-A) or (v-B) of Section 7. The valuation has to

be in accordance with the value to be put on the immovable property, namely the tenancy right in the premises and has to be computed in accordance with principles laid down in sub-section (v), (v-A) or (v-B) of Section 7. But to the facts, sub-sections (v) and (v-A) would not apply; strictly sub-section (v-B) also would not in terms apply. But its principle can be applied. Consequently, the court-fee in such a suit for consequential relief of injunction should be on one year's rent."

11. The head note of 1971 All LJ 860 is as under:—

"In the instant case the defendants did not enter in possession of the shop in dispute through the landlord who had at no time ejected the plaintiff, who was the tenant of the shop. On the other hand these persons originally went on the premises when the plaintiff took them as his partners in the business and they continued to remain in possession of the shop even after the partnership was dissolved. In order to take a plausible stand to justify their possession over the shop after the dissolution of the alleged partnership, they had persuaded the landlords, as alleged by the plaintiff, to recognise them as tenants. In such a case the suit for recovery of possession by the plaintiff against the landlord as well as the defendants who were his erstwhile partners in the business would fall within the scope of sub-section (V) (II) of the Court-fees Act which relates to suits for possession of land, buildings or gardens.

"The subject-matter is, so far as the question of possession is concerned, the shop, and not the possession of the leasehold rights which are intangible and are not capable of physical possession. The valuation of the suit, therefore, depends on the market value of the shop and not on the value of the leasehold rights in it."

12. The head note in the Division Bench decision reported in 1969 All LJ 248 lays down as under:—

"Section 4 of the Suits Valuation Act and Section 7 (iv-B) (b) of the Court-fees Act are complementary, and the crucial words in these sections should receive similar construction. It may be observed that these sections have two common expressions, namely, "involved in" and "affected by". Section 4 contains one more material expression namely, "the title to which is affected by." The words "the relief sought" are to be read along with all these three expressions. The third expression is, however not to be found in S. 7 (iv-B).

There is a certain indeterminacy in the words "involved" and "affected." It is not possible to give them such an exhaustive meaning as will fit in with the changing patterns of cases. Each case should be decided on its own facts. These words will not cover a case where a property is remotely involved in or affected by the relief sought. The true nature and character of the allegations in the plaint should be examined in

order to determine whether any property is involved in or affected by the relief, sought.

In the instant case it appeared from the allegations in the plaint that the subject matter of dispute was not any property but the right of the plaintiff to act as the principal of the College. As Principal, the plaintiff had got no beneficial interest in the property of the College and the College funds. He was merely a paid employee of the College and performed certain duties of a merely ministerial nature with respect to the College property. The effective possession of property and control of funds was really vested in the Secretary-Manager and through him, ultimately in the Managing Body of the Society which ran the College. Accordingly it could not be said that any property was involved in or affected by the reliefs sought in the plaint.

The reliefs claimed by the plaintiff were incapable of valuation and he put a value on them according to his own choice. The valuation put by him will, in the circumstances of this case, be deemed to be the correct valuation and will determine the forum."

13. In 1971 All LJ 909 a learned single Judge of this Court laid down as under:—

"A manager of a school cannot be said to have any beneficial interest in the properties of the school.

The dispute in the instant case related to the Office of the Manager of an educational institution. The suit does not expressly or directly relate to any of the properties owned by the educational institution. The mere fact that the manager in the course of his duties as an office-bearer appointed by the school committee has to look after the affairs of the institution cannot mean that the dispute directly relates to the properties of the educational institution."

14. In my view the instant case does not fall within the ratio laid down in 1969 All LJ 248 and 1971 All LJ 909 (supra). I have given a gist of the allegations made in the plaint and it is obvious that it is not one of those cases where a mere right of management can be said to be involved. The plaintiffs' clear allegation is that the defendant is denying the title of the plaintiffs in the suit properties. It has been further alleged in the plaint that the defendant alienated one of the properties owned by the plaintiff idol claiming the said property to be his personal property. The relief of mandatory injunction has been claimed for the removal of the defendant from the properties in the suit. Further, the relief of possession has also been claimed if held by the Court to be necessary to be awarded in the circumstances of the case. In such a case I do not think it can be said that a mere right of management is involved in the suit. The ratio laid down in 1969 All LJ 248 and 1971 All LJ 909 (supra) will be applicable to those cases

where the rival claimants seek to manage the properties owned by a corporate body. For example, one claims to be the duly elected Secretary of the Society which claim is denied by a rival contender to the office of Secretary. In the same manner if a defendant principal of a College is sought to be got rid of by the plaintiff society running the institution, then it can be plausibly suggested that such a suit is not a suit involving or affecting the immovable properties of the Society or the institution. However, where the idol feels that some one is illegally in possession of the properties of the idol and seeks the removal of such person from the properties in question, then in my view it cannot be contended that the relief will not affect or involve the immovable properties claimed by the idol to belong to it. In this case I have found that on the plaint allegation the dispute is not merely regarding the management of the idol, but the title to the immovable properties claimed by the idol is in dispute. Therefore, in my view the immovable properties are involved in or will be affected by the relief claimed in the suit and, therefore, the trial Court correctly held that the suit was beyond the pecuniary jurisdiction of the said Court.

15. Sri J. N. Chatterji, the learned counsel for the plaintiff opposite parties contended that Section 115, Civil P. C. did not stand attracted to the facts of the case as there was no jurisdictional error in the decision given by the lower appellate Court. He placed reliance for this contention on *The Managing Director (MIG) Hindustan Aeronautics Ltd. v. Ajit Prasad Tarway*, 1972 SCD 161. The head note reads as under:—

"The order of the first appellate Court may be right or wrong; may be in accordance with law or may not be in accordance with law; but one thing is clear that it had jurisdiction to make that order. It is not the case that the first appellate Court exercised its jurisdiction either illegally or with material irregularity. That being so, the High Court could not have invoked its jurisdiction under Section 115 of the Civil P. C."

16. The facts of the case are distinguishable. The plaintiff happened to be an employee of the defendant Company. The latter framed charges against him in respect of certain matters and pending enquiry of those charges the plaintiff was placed under suspension. Immediately he was placed under suspension, the plaintiff rushed to the Court and filed a suit challenging the validity of the enquiry ordered against him. He also challenged the validity of his suspension. He asserted that proceedings against him were initiated on malicious grounds. In the suit he applied for an interim order staying the operation of his suspension as well as the proceedings in the enquiry directed against him. Initially an interim ex parte order was issued, but subsequently the trial Judge revok-

ed that order after hearing both the parties. The plaintiff felt aggrieved and filed an appeal which was partly allowed. Thereafter, both the parties went up in revision to the High Court and the said Court accepted the revision petition of the plaintiff but rejected that of the defendant. It stayed the operation of the suspension order as well as the proceedings in the enquiry. Thereafter, the matter was taken to the Supreme Court and it was laid down by the said Court that the High Court had no jurisdiction to interfere with the order of the first appellate Court. In the said context the aforesaid observations were made by the Supreme Court.

17. In the case before me the order passed by the lower appellate Court is directly related to the jurisdiction of the trial Court to try the suit in question. If the trial Court had no jurisdiction to try the suit, then the direction of the lower appellate Court directing the trial Court to retain seisin of the case and to try the suit will clearly be a direction without jurisdiction. The trial court has held that it had no jurisdiction to try the suit, but the lower appellate Court has held that the trial Court did have the jurisdiction to try the suit. If the order of the lower appellate Court directs the trial Court to retain and try a suit which the trial Court has no jurisdiction to try, then the direction of the lower appellate Court will be without jurisdiction. In any case, it will be an illegal order affecting the jurisdiction of the Court concerned. In this connection a reference may be made to *Indrajit Behera v. Bhaja Meher*, AIR 1969 Orissa 257, wherein it was laid down:—

"If a Civil Revision filed by the defendant involves only the question of court-fee, it must be dismissed as no revision is entertainable on that question at the instance of defendants. But if it involves a question of jurisdiction it cannot be dismissed. That is, if the suit had been undervalued and on proper valuation being determined the lower court viz. Munsif would not have the pecuniary jurisdiction and the suit would be triable by the Sub-Judge, it is open to the High Court to interfere in revision."

See also *Sri Rathnavarmaraja v. Smt. Vimla*, AIR 1961 SC 1299 and *S. S. Khanna v. F. J. Dillon*, AIR 1964 SC 497.

18. In the result, the revision is allowed. The order of the lower appellate Court is set aside and that of the trial Court restored. There will be no order as to costs.

Revision allowed.

AIR 1975 ALLAHABAD 373**M. N. SHUKLA AND K. C. AGRAWAL, JJ.**Babu Fazal Haq and others, Appellants
v. Lala Data Ram and another, Respondents.Second Appeal No. 2291 of 1960, D/-
22-1-1975.***(A) Transfer of Property Act (1882), Section 105 — Lease or licence — Tests for determination — Licence when irrevocable. (Easements Act (1882), Ss. 52, 60).**

The cardinal touchstone on which the relationship between the parties who claim to be licensors or licensees or lessors or lessees must be decided, is whether the grant creates an interest or estate in the property which is the subject-matter of the agreement. Delivery of exclusive possession is a relevant factor but it would be conclusive to the existence of a lease only when it is coupled with an interest in the property and not otherwise. (Case law discussed). (Para 21)

The very definition of the two terms 'lease' and 'licence' indicates that the essence of the distinction lies in the fact as to whether the agreement intended to create an interest in the property or it only permitted the other party to make use of the property for a particular purpose which but for the permission would be unlawful. If the agreement does not transfer any estate to the defendant, then he would be merely a licensee having a permissive occupation. The right of ownership is a bundle of rights which the owner is entitled to enjoy at his place. He is also at liberty to dispose of or grant the use of any of these rights to other persons. Such disposition or action may be exclusive, extinguishing the enjoyment of such right in him and vesting it to a person to whom the grant is made, or it may be only restrictive, restricting the enjoyment of such right by the grantor to the extent it is to be enjoyed by the grantee. In the former case it is the grant of interest in the property itself, while in the latter case it is only the grant of right of enjoyment of licence. (Para 11)

Held, that the grant in question was a licence and not a lease and was covered by clause (b) of Section 60 of the Easements Act, which is based on the principle of estoppel by acquiescence. (Para 22)

When the licensee acting upon a licence has executed a work of permanent character and incurred expenses in the execution the licence cannot be revoked by the grantor. The man who stands by and allows another person to build on his land, in the belief that he has power or authority to do so, and incurs expenses in such building, cannot turn round and claim the removal of such building on the ground that the latter had no authority to

* (Against judgment and decree of Rama Nand Rai, Addl. Civil J., Meerut, in C. A. No. 139 of 1959, D/- 6-2-1960).

build. He is estopped by his conduct from adopting that course and the law will presume an authority from him in such cases. Since acting on that agreement the defendant made costly constructions of permanent nature, the licence had become irrevocable.

(Para 22)

Cases	Referred:	Chronological	Paras
(1971) 1 SCC 276 =	(1971) 3 SCR 319	20	
AIR 1968 SC 175 =	(1968) 1 SCR 23	14, 19	
AIR 1965 SC 610 =	(1964) 6 SCR 642	20	
(1957) 3 All ER 563 =	(1957) 3 WLR 980	15	
AIR 1959 SC 1262 =	(1960) 1 SCR 368	10, 12, 14, 18	
(1956) ILR (1956) Andhra 515		20	
(1952) 1 All ER 149 =	(1952) 1 KB 290	12, 13, 15, 16, 17, 18, 19, 20	
(1952) 1 All ER 1199 =	(1952) 1 TLR 1037	12, 13, 14, 20	
(1952) 1 TLR 1389		15, 16	
(1952) Decided on 26-3-1952		11	
(1951) Decided on 24-10-1951		13	
(1951) 2 All ER 271 =	(1951) 2 KB 496	13	
(1950) 1 KB 311 =	(1949) 2 All ER 822	13	
(1950) 1 All ER 708 =	(1950) 1 KB 657	13	
(1949) 2 All ER 724 =	65 TLR 655	13	
(1946) 1 All ER 570		13	
(1944) 1 All ER 238 =	(1944) 1 KB 298	13	
(1944) 1 All ER 603 =	(1944) KB 541	13	
(1942) 1 All ER 137 =	(1942) 1 KB 370	13	
(1942) 2 All ER 674		13	
(1936) 3 All ER 483		20	
(1899) 1 QB 486 =	68 LJQB 275	13	
(1895) 2 IR 359		13	
(1882) 10 QBD 327		20	
(1841) 151 ER 973 =	(1841) 8 M & W 118:	13	
(1839) 5 M & W 14 =	151 ER 7	13	
(1673) 124 ER 1098 =	(1673) Vaugh 330	11	

Shanti Bhushan, for Appellant; S. D. Agarwal, Brijlal Gupta and Ashok Gupta, for Respondents.

M. N. SHUKLA, J.:— This second appeal came to us on a reference made by a learned single Judge in view of "the importance and the difficulty of the question involved therein."

2. The main point which arises for consideration in this appeal is whether the defendant-respondents were the lessees of the plaintiff-appellant or only his licensees. In order to appreciate the point certain facts need be stated.

3. The appellant filed a suit giving rise to this appeal for possession after demolition of the constructions over the land in dispute and for the recovery of Rs. 900/- by way of past damages for use and occupation for the period from 1-6-1944 to 30-6-1947 and also for the recovery of pendente lite and future damages at the rate of Rupees 25/- per month.

4. The plaintiff allegations were that the plaintiff was the owner of a big plot of land, that in June 1944 the eastern portion of this

land was taken by the defendants on payment of Rs. 25/- per month with a definite promise that the defendants would use the said portion of the plaintiff's land during the period of the second World War and would not make any construction thereon and they would also vacate it immediately on the plaintiff's demand after the end of the war, that despite these terms and conditions and the repeated demands made by the plaintiff in this regard after the end of the war the defendants did not give up the disputed land from their use and occupation; on the other hand, they made constructions over a part thereof without the knowledge and consent of the plaintiff and against the terms and conditions originally settled, that their possession had now become that of a trespasser and hence they were liable for ejectment and also to pay damages mentioned in the plaint. The plaintiff, therefore, claimed the relief for possession of the land after demolition of the constructions made by the defendants and also for recovery of damages.

5. The suit was resisted by the defendant No. 1 mainly on the ground that the disputed land was taken on a premium of Rs. 15/- per month in the year 1944 expressly for the purposes of making constructions and installing a factory thereon, that the defendants had made permanent constructions at a cost of Rs. 10,000/- with the permission and consent of the plaintiff and hence the defendants' position had been that of a licensee and a permanent tenant and they were not liable for ejectment. It was further contended by defendant No. 1 that he had installed a saw machine, an oil expeller and a flour mill over the land in dispute in the very beginning, that as the plaintiff did not object to the making of those constructions and installations, he was estopped from claiming demolition of the constructions, removal of the said machines and possession over the said land.

6. The suit was dismissed both by the trial court and the lower appellate court and the concurrent findings of fact recorded by those courts were that the land was given by the plaintiff to the defendants for the making of constructions and for establishing a factory over it and without specification of the period whatsoever and, therefore, the defendants had been in occupation of the afore-said land as licensees, that the licence had become irrevocable by virtue of the provisions of Section 60 of the Indian Easements Act owing to the fact that the defendants had made costly and permanent constructions over the land acting upon the licence.

7. The question, therefore, which arises for determination in this case is the status of the defendants i. e. whether they were licensees or lessees. It is well established that it is the substance of the agreement which matters and not the form or the label which the parties chose to put upon it, otherwise

clever drafting can camouflage the real intention of the parties. Nevertheless since the appellant is the plaintiff who can succeed only if he is able to prove his allegations, it is appropriate to examine his pleadings. Normally there is no justification for attributing to the plaintiff a case which he himself did not set forward and we cannot start with a presumption that he deliberately engineered a false case against the defendants in the plaint with a view to disguising the real relationship between the parties. A perusal of the plaint in the instant case makes it abundantly clear that the plaintiff has not set out a case of lease. The entire plaint uses phraseology appropriate only to a licence. Instead of stating simply in the manner of a suit based on lease that the defendants were liable to pay so much amount as arrears of rent the plaintiff chose to state that on account of the use and occupation of the disputed land made by the defendants the latter were liable to pay damages. In his evidence also the plaintiff deposed that the disputed land was taken from him by the defendants for use during the period of war and they had agreed to pay Rs. 25/- per month as compensation for use and occupation. Even at this stage he did not say that the amount of Rs. 25/- per month had been settled by way of rent or that the defendants had been the tenants or lessees of the land. Exhibit F is a copy of notice given by the plaintiff to the defendants on 14-4-1947 and the recital therein is that the disputed land had been given to the defendants for use on monthly charges of Rs. 25/- to be paid by them by way of compensation. The notice nowhere states that the transaction had been in the nature of a lease or that the possession of the defendants over the disputed land was that of a lessee and the amount of Rs. 25/- had been settled as rent. Therefore, prima facie the appellant is not entitled to a decree for ejectment on the basis that the defendants are the lessees as that case would be completely at variance with his pleadings. The learned counsel for the appellant however, contended that irrespective of the pleadings the terms and conditions of the agreement between the parties should be scrutinised and the status of the parties be determined according to law and not on the basis of the mere allegations made by them either in their pleadings or in the agreement. Even in the agreement it is the substance and not its form which would be conclusive.

8. Now what was the nature of the agreement between the parties in the present case? There was no instrument disclosing the terms and conditions of the transaction in suit. The only material on which we have to rely consisted of the pleadings of the parties and their oral evidence. In our opinion on the findings recorded by the courts below as to the terms and conditions of the agreement between the parties it is impossible to hold that the transaction was one of lease.

Section 105 of the Transfer of Property Act which defines the lease lays down :

"A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered, periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

9. Section 52 of the Indian Easements Act defines licence thus :

"Where one person grants to another, or to a definite number of persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

10. The subtle distinction between a lease and a licence has proved to be a veritable Serbonian bog into which has fallen a whole army of jurists and legal thinkers. In *Associated Hotels of India v. R. N. Kapoor*, AIR 1959 SC 1262 four well known tests were formulated in order to appreciate the distinction between the two. They are as follows :

"(1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties — whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease, but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, 'prima facie' he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease."

11. As the very definition of the two terms indicates, the essence of the distinction lies in the fact as to whether the agreement intended to create an interest in the property or it only permitted the other party to make use of the property for a particular purpose which but for the permission would be unlawful. If the agreement does not transfer any estate to the defendant, then he would be merely a licensee having a permissive occupation. The right of ownership is a bundle of rights which the owner is entitled to enjoy at his place. He is also at liberty to dispose of or grant the use of any of these rights to other persons. Such disposition or action may be exclusive, extinguishing the enjoyment of such right in him and vesting it to a person to whom the grant is made, or it may be only restrictive, restricting the enjoyment of such right by the grantor to the extent it is to be enjoyed by the grantee. In the former case it is the grant of interest in the property itself, while in the latter case it is only the

grant of right of enjoyment or licence. On the findings recorded in the present case it is not possible to come to the conclusion that the agreement between the parties betrays any intention to transfer an interest in the property to the defendants. The object of the plaintiff clearly was to permit the defendants to use the land for making of constructions and establishing a factory over it without specification of any period. It is true that the defendants in their written statements state that their position had been that of permanent tenants. In his evidence also the defendant No. 1 stated that he entered into a contract of tenancy with the plaintiff, his wife and wife's sister under which he was given the disputed land on a monthly rental of Rs. 15/- per month. He also deposed that the plaintiff had given him the land for permanent possession and occupation and on rent. But the mere use of the term "rent" is not conclusive of the nature of the transaction. It is the substance which is to be seen and not the label applied. We have no doubt that the defendant No. 1 in his evidence used the word "rent" loosely. According to the findings of the courts below all that the defendants were permitted to do was to subject the land to a particular kind of use. The theory of permanent tenancy pleaded by the defendants has been totally rejected by the two courts below. It has been categorically held that there was no agreement conferring any right on the defendants to hold the land for any particular period. By the mere fact that a plot of land is given for making constructions over it, the transaction cannot necessarily be said to be one of lease and not one of licence. The lease is a transfer of interest in the property whereas the licence is not. In other words, the licence is a personal right whereas the lease is a right in the property. The classic definition of licence was propounded by Vaughan, C. J. in the Seventeenth Century in *Thomas v. Sorrell*, (1673) 124 ER 1098 as follows :

"A dispensation or licence properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful." The difference between a tenancy and a licence is, therefore, that in a tenancy an interest passes in the land, whereas in a licence it does not. In the present litigation it was not the case of either party that any interest in the property was transferred by them. Their case merely was that the defendants were given a right to do certain acts on the disputed land which would have been unlawful in the absence of such licence. In other words, it was only a personal privilege granted to the defendants with no interest in the land itself.

12. The most important contention urged by the learned counsel for the appellant was that the land in dispute was for all intents and purposes given to the exclusive possession of the defendants and this was con-

clusive of the fact that the defendants were lessees. This argument is untenable and cannot be endorsed in view of the present state of law on the subject. As observed by Subba Rao, J. in the case of *Associated Hotels of India* AIR 1959 SC 1262 (supra).

"At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in *Errington v. Errington*, (1952) 1 All ER 149 wherein Lord Denning reviewing the case law on the subject summarizes the result of his discussion thus at p. 155 :

"The result of all these cases is that, although a person who is let into exclusive possession is 'prima facie', to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

The Court of Appeal again in *Cobb v. Lane*, (1952) 1 All ER 1199, considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of a document. At p. 1201 Somervell, L. J. stated :

"..... the solution that would seem to have found is, as one would expect, that it must depend on the intention of the parties."

Denning, L. J. said much to the same effect at p. 1202 :

"The question in all these cases is one of intention : Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?"

13. The old authorities supposed that the crucial test was whether the occupier had exclusive possession or not. If he was held to be in exclusive possession, he was said to be a tenant. See *Doed Tómes v. Chamberlaine*, (1839) 5 M & W 14; *Lynes v. Snaith*, (1899) 1 QB 486 whereas if he had not exclusive possession he was only a licensee *Peekin v. Peakin*, (1895) 2 IR 359. The later judicial opinion, however, realised that this did not often correspond to realities and was by no means decisive. That is why in (1952) 1 All ER 149 (supra) Denning, L. J. held that these older authorities were no longer good law. He quoted a number of later authorities which has broken new grounds. He referred to *Howard v. Shaw*, (1841) 151 ER 973; *Booker v. Palmer*, (1942) 2 All ER 674; *Minister of Health v. Bellotti*, (1944) 1 All ER 238; *Southgate Borough Council v. Watson*, (1944) 1 All ER 603; *Minister of Agriculture and Fisheries v. Matthews*, (1949) 2 All ER 724; *Marcroft Wagons Ltd. v. Smith*, (1951) 2 All ER 271; *Webb, Ltd. v. Webb*, (1951) Decided on 24-10-51; *Bramwell v. Bramwell*, (1942) 1 All ER 137; *Pargeter v. Pargeter*, (1946) 1 All ER 570; *Old Gate Estates, Ltd. v.*

Alexander, (1949) 2 All ER 822; *Middleton v. Baldock*, (1950) 1 All ER 708, (1952) 1 All ER 1199 (supra) Denning, L. J. referred to one more case on the point namely *Gorham (Contractors) Ltd. v. Field*, (1952) Decided on 26-3-1952. On the basis of such overwhelming authorities Denning, L. J. ruled in (1952) 1 All ER 149 :

"The result of all these cases is that, although a person who is let into exclusive possession is, prima facie, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee. In view of these recent cases I doubt whether (1899) 1 QB 486 (supra) and the case of the game-keeper referred to therein (1899) 1 QB 490 would be decided the same way today." In our opinion the instant case comes squarely within the ambit of this dictum.

14. As we have seen, the cases of *Errington v. Errington* (supra) and (1952) 1 All ER 1199 (supra) were approved by the Supreme Court in AIR 1959 SC 1262 (supra) and also in *B. M. Lall v. Dunlop Rubber Co.*, AIR 1968 SC 175.

15. There is, however, another English decision namely *Addiscombe Estates, Ltd. v. Crabbe*, (1957) 3 All ER 563 in which Jenkins, L. J. commented on the dictum of Denning, L. J. in (1952) 1 All ER 149 (supra) in the following words :

"We are also referred by counsel for the owners to *Errington v. Errington* and *Woods*, ((1952) 1 All ER 149) mentioned by Denning, L. J. in his judgment. In that case it was held that in very unusual circumstances a lady was a licensee, and entitled to remain in occupation of premises so long as she paid the instalments on a certain mortgage; and in the course of his judgment, Denning, L. J. said, "The test of exclusive possession is by no means decisive." I think that wide statement must be treated as qualified by his observations in *Facchini v. Bryson*, (1952) 1 TLR at p. 1389 and it seems to me that save in exceptional cases of the kind mentioned by Denning, L. J. in that case, the law remains that the fact of exclusive possession, if not decisive against the view that there is a mere licence, as distinct from a tenancy, is at all events a consideration of the first importance." Jenkins, L. J. had in mind the following observations of Lord Denning made in (1952) 1 TLR 1389 (supra) :

"In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like, to negative any inten-

tion to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy, with all the momentous consequences that that entails nowadays, when there was no intention to create a tenancy at all. In the present case, however, there are no special circumstances. It is a simple case where the employer let a man into occupation of a house in consequence of his employment at a weekly sum payable by him. The occupation has all the features of a service tenancy, and the parties cannot by the mere words of their contract turn it into something else."

16. On the basis of the above observations and the conclusion reached by Jenkins, L. J. in *Addiscombe's case* (1957) 3 All ER 563 it might appear that Lord Denning was later persuaded to revise his opinion expressed in *Errington's case* (1952) 1 All ER 149 and that there was a conflict between the two decisions. We are, however, unable to read any antithesis between these two authorities. It is erroneous to refer to *Errington's case* (1952) 1 All ER 149 as laying down the proposition that exclusive possession by the occupier is an irrelevant factor in pronouncing upon the nature of his status as a lessee or licensee. All that it postulated was that the test of exclusive possession was not decisive and *Addiscombe's case* (1957) 3 All ER 563 also holds merely that the fact of exclusive possession is a consideration of foremost importance and nothing beyond that. It does not assign to it the character of a conclusive test. We also find no force in the contention that in *Facchini's case* (1952) 1 TLR 1389 Denning, L. J. in any manner circumscribed the amplitude of the rule laid down by him in *Errington's case* (1952) 1 All ER 149. After referring to a number of cases he observed that they were cases of family arrangements, acts of friendship or generosity etc. But by adding the words "such like circumstances" he fully maintained the wide scope of the ratio of *Errington's case* (1952) 1 All ER 149. On the other hand, he emphasised the supreme significance of the crucial test, namely, "the intention of the parties." The factors which may negative an intention to create a tenancy were not confined to "family arrangement, acts of friendship or generosity" etc; they were wide enough, as is clear from the use of the expression "such like", to include the generality of circumstances which may go to negative any intention to create a tenancy. Thus, the rule propounded in *Errington's case* (1952) 1 All ER 149 has not been eroded in the later decisions of the English Courts.

17. The reader may sometimes be apt to miss the real principle enunciated in *Addiscombe's case* (1957) 3 All ER 563. On a deeper understanding of the facts of the case it would be manifest that it does not run counter to the main stream of the principle flowing from *Errington's case* (1952) 1 All ER

149. The judgment in the former case turned on the interpretation of the particular provisions of the agreement between the parties in that case which were typically those of a lease. As Jenkins, L. J. pointed out, the agreement expressly authorised the grantees to "enter upon use and enjoy" the property which were clearly apt to give to the tenant something in the nature of an interest in the land. Another significant provision was that the grantees agreed to repair and maintain the said club house and keep it in good tenable repair. It also contained a prohibition with respect to the grantee "not to erect any building or other structures upon the said property except as shall be approved by the grantors." It also enjoined upon the grantees "to deliver up the said premises at the termination of the agreement." "To deliver up" was held to be an expression more appropriate to a tenant with an interest in the land than to a person who has a mere contractual right to be on the land; it was held to be an expression universally used in all tenancy agreements. The provision as to insurance also pointed to the same direction. Similarly reference to "re-entry", "non-payment of any of the said payments of court-fee" (which was construed as only euphemism for rent) were justly regarded as provisions wholly appropriate to a lease. It was held that the conception of re-entry i.e. resumption of possession by the landlord and the determination of the interest of the tenant was absolutely inappropriate to the case of licence. Taking all these considerations together it was held to be a case of tenancy.

18. The rule in *Addiscombe Estate Ltd. v. Crabbe* (supra) was followed by the Supreme Court in AIR 1959 SC 1262 (supra) but that again in our opinion does not militate against the dictum in (1952) 1 All ER 149 (supra). The Supreme Court had to deal with case of a lodger in a hotel where the test of exclusive possession bears extraordinary importance and has a special significance. Normally a lodger is in the position of a licensee as the hotel keeper retains a control or dominion over the apartment but where the lodger is proved to have exclusive control, he must be deemed to be a tenant. In that case, the lodger had affirmatively proved himself to be in exclusive control of the premises and the best evidence was withheld from the scrutiny of the court to show that the hotel keeper still retained control and in the circumstances the inference was drawn that the occupiers were the tenants.

19. The fact that the case of (1952) 1 All ER 149 (supra) still holds the field can be proved with reference to another decision of the Supreme Court rendered in the same year. That was the case of AIR 1968 SC 175 (supra). It was a case of occupation of premises by an employee of the company which was the owner and it was held that the agreement on its true construction read in

the light of surrounding circumstances operated as licence and not as a tenancy. It created no interest in the land. It gave only a personal privilege or licence to the servant to occupy the premises for the greater convenience of his work. Bachawat, J. speaking for the Court referred to the case of (1952) 1 All ER 149 (*supra*) and observed:

"The transaction is a lease if it grants an interest in the land; it is a licence if it gives a personal privilege with no interest in the land. The question is not of words but of substance and the label which the parties choose to put upon the transaction, though relevant is not decisive. The test of exclusive possession is not conclusive, see (1952) 1 KB 290."

20. Thus, the test of exclusive possession is not a clinching test. The real, viable test is whether the grant conveys an interest in the property to the grantee. This is not to say that exclusive possession is not a relevant factor but surely it is not the final test. The crucial test is the one which was enunciated in Errington's case (1952) 1 KB 290 namely, the creation of estate or interest in the immovable property of the grantor. In a recent decision the Supreme Court reiterated the dictum of Errington's case. Thus, in *Sohan Lal Narain Das v. Laxmidas* (1971) 1 SCC 276 Shah, C. J. speaking for the court held:

"The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property the subject-matter of the agreement. If it is in fact intended to create an interest in the property it is a lease, if it does not, it is a licence. In determining whether the agreement creates a lease or a licence, the test of exclusive possession, though not decisive, is of significance." In the above case the Supreme Court followed its own previous decision in *M. N. Chubwala v. Fida Hussain Sahab*, AIR 1965 SC 610. In our opinion *M. N. Chubwala's* case AIR 1965 SC 610 lays down the final law on the subject and is of a piece with the rule in (1952) 1 All ER 149. It sums up the law on the subject in the following words:

"Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties."

This intention has to be ascertained on a consideration of all the relevant provisions in the agreement, if they are not clear, from the surrounding circumstances and the contention of the parties. Mudholkar, J. adverted to Errington's case ((1952) 1 All ER 149) and some earlier decisions also of the English courts and remarked at page 614 of the Reports as under:

"We must, therefore, look at the surrounding circumstances. One of those circumstances is whether actual possession of the stalls can be said to have continued with

the landlords or whether it had passed on to the stall-holders. Even if it had passed to a person, his right to exclusive possession would not be conclusive evidence of the existence of a tenancy though that would be a consideration of first importance. That is what was held in (1952) 1 KB 290 and (1952) 1 All ER 1199. These decisions reiterate the view which was taken in two earlier decisions *Clore v. Theatrical Properties Ltd.* and *Westby & Co. Ltd.*, (1936) 3 All ER 483 and *Smith & Son v. Assessment Committee for the Parish of Lambeth*, (1882) 10 QBD 327 at p. 330. Mr. S. T. Desai appearing for the appellants also relied on the decision of the High Court of Andhra Pradesh in *Vurum Subba Rao v. Eluru Municipal Council*, ILR (1956) Andhra 515 at p. 520-4 as laying down the same proposition. That was a case in which the High Court held that stall-holders in the Municipal market were liable to pay what was called rent to the municipality, were not lessees but merely licensees. The fact, therefore, that a stall-holder has exclusive possession of the stall is not conclusive evidence of his being a lessee. If, however, exclusive possession to which a person is entitled under an agreement with a landlord is coupled with an interest in the property, the agreement would be construed not as a mere licence but as a lease (See (1960) 1 SCR 368 = (AIR 1959 SC 1262))."

That is substantially the law as stated in *Halsbury's Laws of England*, Third Edition, Volume 23, paragraph 1022 at page 427:

"In determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. The parties to an agreement cannot, however, turn a lease into a licence merely by stating that the document is to be deemed a licence or describing it as such; the relationship of the parties is determined by law on a consideration of all relevant provisions of the agreement; nor will the employment of words appropriate to a lease prevent the agreement from conferring a licence only if from the whole document it appears that it was intended merely to confer a licence. In the absence of any formal document the intention of the parties must be inferred from the circumstances and the conduct of the parties."

21. Thus, the entire case law on the subject bears round the position that the cardinal touchstone on which the relationship between the parties who claim to be licensors or licensees or lessors or lessees must be decided is whether the grant creates an interest or estate in the property which is the subject-matter of the agreement. Delivery of exclusive possession is a relevant factor but it would be conclusive to the existence of a lease only when it is coupled with an interest in the property and not otherwise. We have already stated our inference based on a consideration of the oral agreement, the surround-

ing circumstances and the conduct of the parties in the instant case, that the plaintiff-appellant did not intend to transfer any interest in the property to the defendants and consequently the defendant-respondents were merely licensees and not lessees of the plaintiff.

22. We have now to consider whether the said licence was revocable. Section 60 of the Indian Easements Act provides:

"A licence may be revoked by the grantor, unless—

- (a) it is coupled with a transfer of property and such transfer is in force;
- (b) the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution."

The above section embodies two exceptions to the general rule that a licence is revocable. The instant case is covered by clause (b) of Section 60 which is based on the principle of estoppel by acquiescence. When the licensee acting upon a licence has executed a work of permanent character and incurred expenses in the execution the licence cannot be revoked by the grantor. The man who stands by and allows another person to build on his land, in the belief that he has power or authority to do so, and incurs expenses in such building, cannot turn round and claim the removal of such building on the ground that the latter had no authority to build. He is estopped by his conduct from adopting that course and the law will presume an authority from him in such cases. In the instant case we find from the own admission of the plaintiff that within a few days after obtaining his permission the defendants raised the constructions over the disputed land and they established their factory by installing a saw machine, oil expeller and flour mill. The house of the plaintiff is admittedly situate at a very little distance from the said land. It is quite clear that if the plaintiff had not given the land to the defendants for the aforesaid purposes, he would have taken exception to the making of constructions over the same and the installation of the saw machine, oil expeller and the flour mill. As we have already pointed out, the finding of fact recorded by the courts below is that the land was given by the plaintiff to the defendants for the purpose of making constructions and establishing a factory over it. Since acting on that agreement the defendants made costly constructions of permanent nature, the licence has now become irrevocable. According to the finding recorded by the City Munsif, Merrut vide his order dated 18-5-1968 in compliance of the issues remitted by the High Court on 7-9-1967 the market value on the date of the filing of the suit of the constructions made by the defendants comes to Rs. 9,000/- which cannot be said to be an inconsiderable amount and the constructions are of a permanent character. They are made of pacca bricks covered by cement sheets

over which the defendants claim to have spent a sum of ten or twelve thousand rupees. The plaintiff himself described it as a "building" in his cross-examination.

23. In the result, therefore, we find that the defendants are no more liable for ejectment from the disputed land and the constructions which they have made cannot be removed. There is no force in this appeal and it is dismissed but in the circumstances of the case the parties are directed to bear their own costs incurred in this Court.

Appeal dismissed.

AIR 1975 ALLAHABAD 379

HARI SWARUP, J.

M/s. Chakarpur Sugar Works and others, Petitioners v. The Union of India and others, Respondents.

Civil Misc. Writ No. 1303 of 1975 connected with Civil Misc. Writ Petns. Nos. 1302, 1304, 1305, 1679 and 1680 of 1975, D/- 10-3-1975.

(A) Defence of India Rules (1971), R. 114 — Notification under, directing Khandsari units to sell to State Government at a certain price one third of the khandsari sugar manufactured by them — Fixation of levy price at a figure below the cost price — Validity.

The Government can fix price at below cost for a part of the commodity produced by an industry provided the total earnings of the industry bring to the producer a fair price for the entire goods produced. A producer can be made to sell a part of the produce at less than the cost price, provided the loss can be compensated otherwise. (Case law discussed). (Paras 6, 7)

Rule 114 expressly permits the passing of an order when the commodities or articles become non-available at fair prices. The power under Rule 114 (c) is meant to secure the equitable distribution and availability of any article or thing at fair prices. Sub-rule (3) (d) permits the levy. The purpose of Rule 114, thus, clearly is to bring down the market price. Rule 114 substitutes the capitalist economy of free market by the economy on controlled distribution of the entire available stock at a fair price. The express purpose of Rule 114 is to make a break from the economic concept of laissez faire and to introduce into the national economy the socialist concept of distribution of the entire available produce at fair prices. (Para 5)

The only limitation on the power of the State Government in fixing the price of levy sugar under the Defence of India Rules is that the total amount that may ultimately become available to the industry by the sale of entire product should not go below the "fair price" by reason of the below cost levy price. (Para 14)

The determination of the question whether the industry by reason of the levy on sugar at a certain price (in the instant case at Rs. 200/- per quintal) will be put to a loss or that it will not get fair price in return to its entire produce taken as a unit will depend upon the cost of production and the expected return from the goods. The cost of production will have to be taken on the basis of the entire units functioning in the State and not on the basis of the manufacturers' units only. (Para 9)

Price fixation is more in the nature of a legislative measure even though it may be based upon objective criteria found in a report or other material. It could not, therefore, give rise to a complaint that a rule of natural justice has not been followed in fixing the price. Nevertheless, criterion adopted must be reasonable. Where reasonable conduct is expected the criterion of reasonableness is not subjective, but objective. The onus of establishing unreasonableness, however, rests upon the person challenging the validity of the acts. AIR 1975 SC 460 and AIR 1974 SC 2249, Followed.

(Paras 11, 12)

In the instant case a Study Group had been appointed by the State Government for determining the cost of production and the price which should be paid for the levy sugar. The Study Group according to the Government had taken into consideration the cost of production and the likely sale prices. On the other hand no attempt has been made by the manufacturers to establish, and in any case they have failed on the material produced, to establish that the total return of the industry will be less than the fair price in case the levy sugar will have to be supplied at the specified rate. It cannot, therefore, be said that the State Government did not apply its mind to the relevant factors, or that in fixing the price it had taken into consideration factors which had no nexus to the matter. It cannot also be said that the price had been arbitrarily fixed or that it has been fixed at a figure which is unreasonable.

(Paras 11, 13)

(B) Defence of India Rules (1971), R. 114 — Fixation of levy price of khandasari sugar at a price below the cost price — Manufacturers failing to prove that the industry will suffer any loss on its total product because of the low price fixed for the levy sugar — Article 31 not attracted — (Constitution of India, Art. 31). (Para 16)

(C) Defence of India Rules (1971), R. 114 — Notification under, fixing levy price of Khandasari sugar — Validity — Not violative of Art. 14 on ground that it discriminated between khandasari units producing Khandasari by sulphitation process and those producing it by non-sulphitation process — Quality of sugar produced through sulphitation process is not similar to that produced by non-sulphitation process — (Constitution of India, Article 14). (Para 17)

(D) Defence of India Rules (1971), R. 114 — Notification under, fixing price of Khandasari sugar — Validity — Not discriminatory on ground that action had been taken under R. 114 and not under S. 3 (c) of Essential Commodities Act (1955) — (Constitution of India, Art. 14).

For an action under Section 3 (3-C) of the Essential Commodities Act the price of sugar had to be determined by the Central Government and unless the price of khandasari sugar had been determined by the Central Government, the State Government could not take effective action. Further, as the emergency is still in force the Defence of India Rules cannot be deemed not to create a particular situation for action being taken under it. (Para 18)

(E) Defence of India Rules (1971), R. 114 — Notification under directing Khandasari units to sell to State Government at a certain price one-third of sugar manufactured by them — Action being taken by State Government to meet the condition prevailing in the State, no discrimination can be said to arise because some other States have not taken similar steps — (Constitution of India, Art. 14). (Para 19)

(F) Defence of India Rules (1971), R. 114 (2) — Notification under by State Government — Validity — Rule 114 (2) when can be invoked.

Rule 114 (2) can be taken resort to as soon as the State Government is of opinion that it is necessary or expedient so to do for securing the equitable distribution and availability of any article or thing at fair prices. (Para 20)

Where the notification directing the Khandasari units to sell to the State Government at a certain price one third of the khandasari sugar manufactured by the Khandasari units mentions 'that the State Government is of opinion that it is necessary and expedient so to do for securing equitable distribution of Khandasari sugar and its availability at fair prices, there is a presumption that the recital on the face of the order indicates the existence of the condition. AIR 1961 SC 1381, Followed. (Para 20)

In the instant case there is nothing to show that the conditions did not exist. The opinion of the State Government cannot be said to be based on no material. The market trends about the price of Khandasari Sugar have been recording a progressive rise and the peak was near the end of 1974. The object of Rule 114 is to check the rise of prices in open market and to make essential goods available at fair prices. The market prices are so high that even on the basis of assertions made by the manufacturers they cannot be deemed to be "fair prices." The exercise of power by the State Government, therefore, cannot be held either to be beyond the scope of the power conferred on it by the rule or colourable. (Para 20)

Cases	Referred:	Chronological	Paras
AIR 1975 SC 460 = (1974) 2 SCC 630			7, 11
AIR 1975 All 272			8
AIR 1974 SC 2249 = (1974) 2 SCC 687			12
(1974) C. M. W. No. 4169 Etc. of 1974 (All)			8
AIR 1973 SC 734 = (1973) 2 SCR 882			7
AIR 1973 SC 537 = (1973) 2 SCR 860			7
AIR 1961 SC 1381 = (1962) 1 SCR 422			20
AIR 1959 SC 1124 = (1960) 1 SCR 39			6, 17

S. C. Khare, Shanti Bhushan, H. S. Nigam, A. D. Prabhakar and A. Kumar, for Petitioners; Standing Counsel, for Respondents.

ORDER :— These six connected writ petitions have been filed to challenge a notification issued by the State Government under R. 114 of the Defence of India Rules, 1971, directing the Khandsari units to sell to the State Government at the price specified in the order one third of the Khandsari Sugar manufactured by the Khandsari units in the first process. The price specified is Rs. 200/- per quintal to be delivered under the conditions prescribed in the order at the purchasing centres. The petitioners have licenses for working Khandsari units and are manufacturers of Khandsari sugar. They have challenged the order of the State Government under Rule 114 of the Defence of India Rules on various grounds. As all the petitions raise similar questions of facts and law, they are heard together and are being decided by a common judgment.

2. Learned counsel for the petitioners clarified in the very beginning that what actually affects them is the fixation of levy price at a figure below the cost price. The contention that the levy price is below the cost price has not been challenged by the respondents. On the other hand, in the counter-affidavit it has been stated that the cost price is Rs. 245/- per quintal while the levy price is Rs. 200/-. The contention of the respondents is that the State Government has power to make a levy at a figure below the cost price provided the total money to be received by the Khandsari industry from the sale of total produce brings to the producers a fair return. According to the State Government the levy price has been fixed in such a manner that the petitioners will on the whole make a profit in the industry and will suffer no loss.

3. The first contention raised by the learned counsel for the petitioners is that Rule 114 does not give any power to the State Government to direct a producer or stockist to sell the goods at any price below the market price. It has been urged that Rule 114 does not confer any power at all on the State Government to fix the levy price. The contention is that the power under Rule 114 (2)/(3) is only to direct the sale of a commodity at the market price and in no case at below the fair price or reasonable price as

contemplated by Section 9 of the Sale of Goods Act. According to the petitioners such sale price can never be below the cost price.

4. The basic question, therefore, that arises in the case is whether Rule 114 permits the State Government to make a levy by paying an amount below the cost price. Rule 114 (2) provides :

"If the Central Government or the State Government is of opinion that it is necessary or expedient so to do for securing the defence of India and civil defence, the efficient conduct of military operations or the maintenance or increase of supplies and services essential to the life of the community or for securing the equitable distribution and availability of any article or thing at fair prices, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution, use and consumption of articles or things and trade and commerce therein or for preventing any corrupt practice or abuse of authority in respect of any such matter."

Sub-rule (3) of Rule 114 provides :

"Without prejudice to the generality of the powers conferred by sub-rule (2), an order made thereunder may provide for—

(d) Requiring any person holding in stock any article or thing to sell the whole or a specified part of the stock to the Government or to an officer or agent of the Government or to such other person or class or classes of persons and in such circumstances as may be specified in the order and if the order relates to foodgrains, edible oil seeds or edible oils at such price as may be specified in the order having regard to—

- (i) the maximum price, if any, fixed by order under clause (h) or by or under any other law for the time being in force, for the grade or variety of foodgrains, edible oil seeds or edible oils to which the order under this clause applies; and
- (ii) where no maximum price as referred to in sub-clause (i) is fixed, the price for that grade or variety of foodgrains, edible oil seeds or edible oils prevailing or likely to prevail during the post-harvest period in the area to which the order applies."

Sub-rule (2), has, in the present case, been brought into service by the State Government on the assertion in the notification that it had become in the opinion of the State Government necessary and expedient to pass the order for securing the equitable distribution of khandsari sugar and to make it available at fair price.

5. Rule 114 expressly permits the passing of an order when the commodities or articles become non-available at fair prices. The power under Rule 114 (c) is meant to secure the equitable distribution and availability of any article or thing at fair prices.

Sub-rule (3) (d) permits the levy. The purpose of Rule 114, thus, clearly is to bring down the market price. The market price in a *laissez faire* economy is the resultant of various forces, most prominent of which are the forces of supply and demand. The supply may become less than demand for various reasons. It may be purposely curtailed to raise the price or may come into existence without any effort on the part of the producer; but once the prices go high for any reason whatsoever, the Central Government and the State Government get the power to bring down the prices. This is a definite inroad on the *laissez faire* economy of open market for the protection of the consumer. *Laissez faire* economy, and the concepts of sale concomitant thereto, cease to operate once the disposal of commodity and fixation of its price come under governmental control. The present law, that is, Rule 114 substitutes the capitalist economy of free market by the economy on controlled distribution of the entire available stock at a fair price. The express purpose of Rule 114 is to make a break from the economic concept of *laissez faire* and to introduce into the national economy the socialist concept of distribution of the entire available produce at fair prices. This is clear from sub-rule (2) of R. 114 which provides for equitable distribution of articles or things; it treats the total quantity of a particular article or thing as goods available to the people for consumption, and provides for the distribution of the total commodity for the consumption of the people at a fair price.

6. 'Fair price' has been interpreted by courts, in various judgments to mean not the market price but a price which brings to the producer the cost of production and a reasonable return for entrepreneurship. Fair price in sub-rule (2) may have two aspects. Looking at it from the point of view of the body of persons in possession of the property or the producers thereof it will mean a price which brings to that body a fair return for the total produce. Looking at it from the point of view of the consumer it would mean payment of total fair price, but that may not mean "cost plus" price for each particular item or article. The total produce has to get a fair price with reasonable return, the total amount to be paid by the body of consumers will necessarily be the same but it will not necessarily mean that each item of article will be paid at the same rate. The aggregate can be obtained by payment of the sale price either at the average rate of fair price or on the basis of slab rates for different quantities. If it has to be paid at different rates and some is permitted to be sold at a rate higher than the "fair price" rate, then some will necessarily have to be sold at below the "fair price" rates, i.e. below the cost price. Thus if for instance, 30 per cent. of the stock is sold at less than the fair price and the remaining 70 per cent. is sold at higher than the fair

price the aggregate amount paid by the consumers may make the fair price and the producer will get a fair price for his produce. In such a case the producer cannot make a complaint. Whether it is wise or not to permit any part of the total commodity to be sold at the unequitable market price, which may be appropriately called "unfair price", is for the State Government to decide. But once the policy of partial contract is adopted for making the goods available at fair prices, it would be for the government to determine the part and the price at which that part of the commodity should be supplied by the producer. There is no law which prohibits the supply of essential commodities to the people at below the cost price. The only rider is that the producer should get fair price for his total produce. The amount to be paid by consumers has to be determined primarily by their consumption budget, the general level of prices of all the essential commodities, and the needs of the consuming public. The legality of making essential goods available to the people at less than its cost price, that is, below the "fair price" has been recognised by the Supreme Court in various cases. In the case of *The Lord Krishna Sugar Mills Ltd. v. Union of India*, (AIR 1959 SC 1124), certain percentage of sugar produce was directed to be sold in export market at a price below the cost price. For meeting this loss higher price of control sugar was fixed. The Supreme Court held that:

"The restriction did not amount to an unreasonable restriction because the loss sustained by the purchaser on a part of the produce was compensated by the price obtained from the sale of the remaining quantity."

This case accepts the principle that a producer can be made to sell a part of the produce at less than the cost price, provided the loss can be compensated otherwise.

7. The power to make a levy on sugar under Rule 114 of the Defence of India Rules is similar to the power under Section 3 of the Essential Commodities Act. Sub-section (3-C) of Section 3 of the Essential Commodities Act provides for fixation of price for the levy sugar; Khandsari sugar is also sugar. Under sub-section (3-C) of Section 3 the price of sugar fixed need not be a "fair price" in the sense that it brings some profit to the producer on the levy sugar. Principles of determining the price of levy sugar are contained in the section itself, and calculated in that manner the produce is not always likely to bring profit, but may have to be supplied at less than cost price. The provision came up for consideration before the Supreme Court in the cases: *Panipat Co-operative Sugar Mills v. Union of India*, (AIR 1973 SC 537); *Anakapalle Co-operative Agricultural and Industrial Society Ltd. v. Union of India*, (AIR 1973 SC 734) and *Saraswati Industrial Syndicate Ltd. v. Union of India*, 1974 (2) SCC 630 = (AIR 1975 SC

460). In the case of Panipat Co-operative Sugar Mills it was observed that:

"The basis of a fair price would have to be built on a reasonably efficient and economic representative cross-section on whose workings cost schedules would have been worked out and the price to be determined by Government under sub-section (3C) would have to be built. A claim that such a price has to be determined unitwise and a reasonable return has to be ensured to each unit or that such a price with such a return would be in respect of that part of its stock required to be sold under sub-section (2) (f) would appear to be inconsistent with the concept of partial control, the background in which it was evolved and the objects which it attempted to secure. Such a policy meant determination of a fair price on the basis of which a producer would be paid for part of his stock required to be sold to Government If this be the true meaning of clause (b), it must mean securing a reasonable return to the industry and not to each unit, irrespective of whether it is economic or reasonably efficient or not, or only in respect of its stock required to be compulsorily sold to Government

We are, therefore, satisfied both on the language of the sub-section, the background in which it was enacted and the mischief the legislature sought to remedy through its working that the true construction is that a fair price has to be determined in respect of the entire produce, ensuring to the industry a reasonable return on the capital employed in the business of manufacturing sugar."

In the case of Anakapalle Co-operative Agricultural and Industrial Society Ltd. v. Union of India the Panipat case was followed and it was reiterated that the fair price had to be determined in respect of the entire produce ensuring to the industry a reasonable return on the capital employed in the business of manufacturing sugar. It was further pointed out that "cost-plus" cannot always be the proper basis for price fixation. The principle laid down in these two cases was re-affirmed in the case of Saraswati Industrial Syndicate Ltd. v. Union of India, 1974 (2) SCC 630 = (AIR 1975 SC 460). The ratio of the decisions of the Supreme Court, accordingly, is that the law permits the government to fix price at below cost for a part of the commodity produced by an industry provided the total earnings of the industry bring to the producer a fair price for the entire goods produced.

8. Learned counsel for the petitioner relied upon two unreported decisions of this Court in support of their contention that fixation of price by the State Government should not be below the fair price. The first is the decision in Civil Misc. Writ No. 4169 of 1974 (All) (M/s. Saraswati Prakash v. Board of High School and Intermediate Education, U.

P., Allahabad) connected with Civil Misc., Writ Petns. Nos. 4161 of 1974 to 4174 of 1974 and Civil Misc. Writ Petns. Nos. 4214, 4215, 4216, 4218 to 4230 of 1974 and Civil Misc. Writ Petns. Nos. 4254 and 4255 of 1974 and Civil Misc. Writ Petns. Nos. 4322, 4217 and 4323 of 1974 (All). That was a case in which the State Government had fixed price of the text books to be sold by the publishers to students of High School and Intermediate Classes. It was held by this Court that the price had been fixed by the State Government at rates which existed before the cost of production had gone up and the price had been fixed without application of the State Government's mind to the relevant circumstances and factors which had to be taken into consideration for fixation of price. It was held in that case that price fixation must be at a figure which brings a profit to the publishers. This case is distinguishable from the present case on various grounds. It was a case in which the price had been fixed of the entire produce. There was no question of partial control in that case. Nothing was there to counter-balance the low price, that is, there was no cushioning available. In the present case the fixation of price has been only in respect of a part of the commodity and the remaining part has been left to be sold at rates much higher than the fair-price rates. The return to be obtained by the producer on these sales can thus act as cushion for the loss to be suffered on the levy sugar. Another distinction between that case and the present case is that the sale of entire commodity was to be made at a particular time and there was no question of any variation in the market price. The goods were not to be controlled by the interaction of the forces of supply and demand but had to be sold in every case at a fixed price. Yet another distinction between the present case and that case is that there the finding was about the non-application of mind by the State Government to relevant facts concerning fixation of controlled price. The other case is in Civil Misc. Writ No. 7322 of 1974 (All), (M/s. Sita Ram Jwala Prasad v. State of U. P.) connected with Civil Misc. Writ No. 7788 of 1974 = (reported in AIR 1975 All 272). This case also is of price fixation of the entire commodity and not about part of the commodity. It deals with the case of control of price under Section 3 (3-B) of the Essential Commodities Act, it was held that the fixation of price of the goods directed to be sold to the State Government by reason of sub-section (3-B) of Section 3 could not amount to "control price" as contemplated by Section 3 (2) (c). The present is not a case where control price has been fixed or that control price as contemplated by Rule 114 (3) (h) of the Defence of India Rules has been made payable.

9. The question, therefore, that has to be determined is whether by fixation of levy price at Rs. 200/- per quintal the indus-

try will be put to such a loss that the cushion which will be provided to it through higher sale price in open market will not be sufficient to compensate the loss? In other words the question is whether the industry by reason of the levy on sugar at Rs. 200/- per quintal will be put to a loss or that it will not get fair price in return to its entire produce taken as a unit? The determination of this question will depend upon the cost of production and the expected return from the goods. As regards the cost of production there is variance in the statements of parties. According to different petitioners the cost of production will range from Rs. 360/- per quintal to Rs. 368/- per quintal to which some amount will have to be added for being sold at the purchasing centre under conditions laid down in the impugned order. According to the counter-affidavit the cost of production is Rs. 246/- per quintal. It is not possible in these proceedings, on the material available, to arrive at any exact figure about the cost of production; moreover the cost of production will have to be taken on the basis of the entire units functioning in the State and not on the basis of the petitioners' units only.

10. As regards the total return from sales adequate material has not been placed by the petitioners for reaching at any conclusion. Of course, it has necessarily to be based on some guess work because it will depend upon the future market rates. According to the respondents the sale price will shoot higher because some sugar out of the total sugar available to the people will be withdrawn for export, thus reducing the supply in the market. Learned Standing Counsel has produced a graph regarding the price lines prevailing in the years beginning from October, 1971 to December 1974 prepared on the basis of figures given in the journal "Co-operative Sugar" Vol. VI, January, 1975, published for the National Federation of Co-operative Sugar Factory Ltd. New Delhi. It is based on the market rates prevailing in the Mandis of Delhi, Hapur and Muzaffarnagar. The market curves appearing in this graph show a steep rise in prices from December 1971 to July and August 1972; there was some fall thereafter upto April 1973 and again there was a gradual rise for about a year; in September and November the prices shot up very high. There was a fall again in December but that too was higher than the price prevailing in August/September, 1972. The highest peaks in this graph are during the months July to October in 1972, November, 1973 and September to November in 1974. Maybe, it is so because these are the periods in which there are festivities. The market rates of sales that appear from this graph show progressive price rise. In October, 1974, it had touched 468 and in November 450. The State Government could have, therefore, reasonably inferred that the prices may go higher even in late 1975, that is, the year in which this season's product will most likely be sold.

It has been urged by the learned Standing Counsel that only a small percentage has been required to be sold at Rs. 200/- per quintal and there is every likelihood of the loss to be suffered on these sales being amply compensated by the sales of free sugar. The argument appears to be tenable.

11. However, the scope of enquiry available to this Court in these proceedings is not to determine whether actually a loss will be suffered by the industry or it will get profits on its total production, but only to determine whether the State Government has applied its mind to the relevant circumstances. In the case of *Saraswati Industrial Syndicate Ltd.*, AIR 1975 SC 460 (supra) it was pointed out that:

"Price fixation is more in the nature of a legislative measure even though it may be based upon objective criteria found in a report or other material. It could not, therefore, give rise to a complaint that a rule of natural justice has not been followed in fixing the price. Nevertheless, criterion adopted must be reasonable. Reasonableness, for purposes of judging whether there was an "excess of power" or an "arbitrary" exercise of it, is really the demonstration of a reasonable nexus between the matters which are taken into account in exercising a power and the purposes of exercise of that power."

In the present case it has come in the counter-affidavit that a Study Group had been appointed by the State Government for determining the cost of production and the price which should be paid for the levy sugar and that it had taken into consideration various factors including the working figures of public sector khandasari units functioning under the name of U. P. Poorvanchal Vikas Nigam Limited. The Study Group according to the respondents had taken into consideration the cost of production and the likely sale prices. It cannot, therefore, be held that the State Government did not apply its mind to the relevant factors, or that in fixing the price it had taken into consideration factors which had no nexus to the matter.

12. In the case of *M. A. Rasheed v. State of Kerala*, (AIR 1974 SC 2249) it was held that:

"Where reasonable conduct is expected the criterion of reasonableness is not subjective, but objective. The onus of establishing unreasonableness, however, rests upon the person challenging the validity of the acts."

In the present case the petitioners have failed to establish that the State Government had not taken into consideration relevant materials for arriving at the conclusion that levy was necessary and was to be taken at Rupees 200/- per quintal. I have come to this conclusion because no data or material has been provided for coming to the conclusion that the market conditions are such that the prices will go down or that the prices will be such that the petitioners will not be able to get

a complete cushion for the loss they may suffer due to the low levy price. The total returns will depend not only on the rates at which the commodity will be sold but also on the quantity which is sold at a particular rate. If larger quantities of sugar will be sold at higher rates they will necessarily bring higher returns. There is also no evidence in this case to establish that more sugar is sold normally when the prices are low in the market or that when the prices go up sales go down.

13. As already seen from the graph prepared by the Standing Counsel the trend appears to be otherwise, that is, sale prices do not go down but go up at times when larger quantities of sugar are expected to be purchased. The contention, therefore, that the price had been arbitrarily fixed, or that it has been fixed at a figure which is unreasonable, in the light of what has been said above, cannot be accepted.

14. The contention that no price can be fixed under Rule 114, and that it can be fixed if at all only in accordance with the illustrations given in clause 3 (d) of Rule 114 of the Defence of India Rules can also not be accepted. The very fact that clause (d) specifically provides for fixation of price in respect of certain goods makes it clear that the law provides for fixation of price of articles which are to be directed to be sold to the Government under clause 3 (d). The criteria given for fixing the price of foodgrains, edible oil seeds or edible oils cannot, from the very nature of things, form the basis for determining the price of sugar. Sugar is a manufactured commodity while foodgrains and edible oil seeds or even edible oils are only agricultural products. The basis on which the price of sugar is to be determined is generally given in Section 3 (3-C) of the Essential Commodities Act. It is not similar to that in Cl. (d). The only limitation, therefore, on the power of the State Government in fixing the price of levy sugar under the Defence of India Rules is that the total amount that may ultimately become available to the industry by the sale of entire product should not go below the "fair price" by reason of the below-cost levy price. In the present case no attempt has been made by the petitioners to establish, and in any case they have failed on the material produced, to establish that the total return of the industry will be less than the fair price in case the levy sugar will have to be supplied at the specified rate.

15. The contention that the fixation of price could not have been made without consultation of the petitioners or other members of the industry, is also without merit, because what the law requires the State Government to do is only to take into consideration the relevant material. Once this has been done the non-consultation of the petitioners or other members carrying on the production will

not vitiate the price fixed by the State Government. As already seen the State Government had appointed a Study Group for advising it on the question of fixation of price, and it has not been shown that relevant factors had not been considered by the State Government while fixing the price. The notification cannot be invalid on this ground also.

16. The argument again about Article 31 of the Constitution cannot be available to the petitioners as they have not succeeded in proving that the industry will suffer any loss on its total product because of the low price fixed for the levy sugar.

17. An argument was also raised on the ground of Article 14 of the Constitution to the effect that the notification is invalid because it discriminated between the khand-sari units which produced khandsari by sulphitation process and those which produced it by non-sulphitation process. It has, however, been mentioned in the counter-affidavit that the sugar produced by sulphitation process is superior to that produced by non-sulphitation process and the crystals resulting from the two processes are different. In the case of Lord Krishna Sugar Mills (supra), an argument was made on the basis of Article 14 of the Constitution and it was urged that the order by being limited to sugar manufactured by vacuum pan process was bad because it did not direct the levy sugar manufactured by non-vacuum pan process. The argument was repelled by the Supreme Court. As the quality of sugar produced through sulphitation process is not similar to that produced by non-sulphitation process. Article 14 will not be applicable.

18. An argument was also sought to be raised on the ground that there was discrimination because action had been taken under the Defence of India Rules and not under Section 3 (3-C) of the Essential Commodities Act. The argument has no merit because for an action under Section 3 (3-C) of the Essential Commodities Act the price of sugar had to be determined by the Central Government and unless the price of khandsari Sugar had been determined by the Central Government, the State Government could not take effective action. Further, as the emergency is still in force the Defence of India Rules cannot be deemed not to create a particular situation for action being taken under it.

19. I also find no merit in the contention that the order is bad because similar orders had not been passed by other States where khandsari units work, viz., Madhya Pradesh and Rajasthan. As the action is taken by the State Government to meet the conditions prevailing here, no discrimination can be said to arise because some other states have not taken similar steps.

20. The last contention on behalf of the petitioners is that the circumstances did not exist justifying the taking of action under Rule 114 of the Defence of India Rules and

that the exercise of power by the State Government is only colourable exercise of power. The notification issued by the State Government mentions "that the State Government is of opinion that it is necessary and expedient so to do for securing equitable distribution of Khandsari sugar and its availability at fair prices." There is a presumption as held in the case of *Swadeshi Cotton Mills Co. Ltd. v. State Industrial Tribunal, U. P.*, (AIR 1961 SC 1381) that the recital on the face of the order indicates the existence of the condition. In the present case there is nothing to show that the conditions did not exist. Rule 114 (2) can be taken resort to as soon as the State Government is of opinion that it is necessary or expedient so to do for securing the equitable distribution and availability of any article or thing at fair prices. In the present case the opinion of the State Government cannot be said to be based on no material. As already seen the market trends about the price of Khandsari sugar have been recording a progressive rise and the peak was near the end of 1974. The object of R. 114 is to check the rise of prices in open market and to make essential goods available at fair prices. The market prices are so high that even on the basis of assertions made by the petitioners they cannot be deemed to be "fair prices." The exercise of power by the State Government, therefore, cannot be held either to be beyond the scope of the power conferred on it by the rule or colourable.

21. Coming to the workability of the order it was contended that the price fixed by the State Government in the notification is vague, inasmuch as it does not say that the price will be paid immediately on supply of goods, leaves the lifting of goods at the will of the State Government and makes delivery of goods at inconvenient delivery points. Learned Standing Counsel has drawn my attention to certain administrative orders already issued and has stated at the bar that further orders can also be issued to ameliorate any hardship that the industry might face in the implementation of the order. In any case the suffering of the petitioners due to the implementation of the order can be questioned only when the petitioners make a demand for the redress of the grievance and do not get the relief. That, however, cannot be a ground for quashing the notification particularly in view of what has been stated at the bar by the learned Standing Counsel.

22. In the result the writ petitions fail and are dismissed with costs.

Petitions dismissed.

AIR 1975 ALLAHABAD 386

YASHODA NANDAN, J.

Sharma & Co. and others, Petitioners v. The State of U. P. and another, Respondents.

Civil Misc. Writ No. 6368 of 1971, D/- 16-4-1975.

(A) Mines and Minerals (Regulation and Development) Act (1957), Section 3 (e) — Minor minerals — "Brick earth" is minor mineral within Section 3 (e) — AIR 1972 Punj & Har 356 (FB) and AIR 1965 Pat 491, Followed; AIR 1969 Cal 281, Distinguished. (Paras 7, 8)

(B) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Sections 4, 6, 130 — Issue of notification under Section 4 — Effect — Rights of Bhumidhars — Extent of — Conferment of Bhumidhari rights — State did not divest itself of rights in mines and minerals.

As consequence of the notification issued under Section 4 of U. P. Act No. 1 of 1951, all rights, title and interest of all the intermediaries in such estates as had vested in the State including rights in any mines or minerals, whether being worked or not, ceased and vested in the State of Uttar Pradesh free from all encumbrances. In view of Sec. 39 (f) and (g) the mines and minerals existing in the estates which vested in the State were taken into account for the assessment of compensation to the intermediaries concerned. Under Sec. 18, Bhumidhari rights were created in favour of the class of persons mentioned therein. Bhumidhars are not owners of the land forming subject-matter of their Bhumidhari and are merely tenure-holders and by virtue of Section 130, have all the rights and are subject to all the liabilities conferred or imposed upon them by or under that Act. By conferment of Bhumidhari rights, the State did not divest itself of rights which had vested in it in mines and minerals by reason of Section 6. (Para 10)

(C) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Sections 3 (14), 130, 142 and 143 — Scope and applicability of Sections 142 and 143 — Bhumidhari land ceasing to be land within Section 3 (14) — Effect — Bhumidhar has no right to remove brick earth from his land in violation of U. P. Minor Minerals (Concession) Rules — (U. P. Minor Minerals (Concession) Rules (1963), Rule 1).

Section 142 merely gives rights to Bhumidhars as tenure-holders to the exclusive possession of all land in respect of which they are Bhumidhars and 'to use it for any purposes whatsoever'. It does not give rights to Bhumidhars to use up the

land forming subject-matter of the Bhumidhari. The ownership of the corpus remains with the State and Bhumidhars are only entitled to use it as tenure-holders. If a Bhumidhar desires to use his holding or part thereof for a purpose not connected with agriculture, horticulture or animal husbandry, the Assistant Collector in-charge of the sub-division may suo motu or on an application, after making such enquiry as may be prescribed, make a declaration to that effect under Section 143 (1). (Para 10)

As long as this declaration subsists, the land concerned would not be treated as Bhumidhari land subject to the provisions of U. P. Act No. 1 of 1951. As soon as the erstwhile Bhumidhari land ceased to be 'land' within the meaning of Section 3 (14) and is brought in use for purposes connected with any industry or mining, its use will be governed by relevant enactments governing such industry or mining. Thus by mere reason of the fact that the persons are Bhumidhars, they acquire no rights to appropriate minerals existing on their Bhumidhari land. Thus, the Bhumidhars have no right to remove brick earth from their Bhumidhari property for the purpose of manufacturing bricks in disregard of the U. P. Minor Minerals (Concession) Rules and notification issued thereunder.

(Paras 10, 12)

(D) U. P. Minor Minerals (Concession) Rules (1963), Rules 21, 57 — Persons, not holding mining lease, removing minerals from their land — They are not liable to pay royalty, but they may be prosecuted under Rule 57. (Para 13)

Cases Referred: Chronological Paras
AIR 1972 Punj 356 = ILR (1971) 2 Punj 314 (FB) 7, 8
AIR 1969 Cal 281 8
(1969) Spl. Ap. No. 967 of 1969, D/- 9-7-1969 (Cal) 9
AIR 1965 Pat 491 = 1966 BLJR 325 7

B. D. Mandhyan, for Petitioners;
Standing Counsel, for Respondents.

ORDER:— This is a petition by 72 brick-kiln owners of Kanpur praying for a writ, order or direction in the nature of certiorari to quash the notification dated 31st August, 1970 (published in the U. P. Gazette dated 12th September, 1970) issued by the State Government purporting to be in pursuance of the provisions of sub-rule (4) of Rule 1 of Uttar Pradesh Minor Minerals (Concession) Rules, 1963 — hereinafter referred to as the Rules — by means of which the said Rules, with effect from the date of the publication of the notification in the gazette, were made applicable to 'brick-earth' found anywhere in the State. The further prayer is for the issue of a writ, order or direction in the nature of mandamus directing the respondents not to implement the aforesaid

notification dated 31st August, 1970. Apart from making some prayers of a general character, the petitioners also pray for issue of a writ, order or direction in the nature of mandamus directing the respondents not to collect, demand or realize any Royalty from them for using earth of their own land for manufacture of bricks under the impugned notice.

2. Admittedly the petitioners manufacture bricks by excavating earth from out of their own 'Bhumidhari' plots. One of the petitioners was served with a notice sometime in July, 1971, informing him that with effect from the 12th September, 1970, the State Government had declared that brick-earth was a 'minor mineral' and had fixed Royalty payable thereon at the rate of Rs. 1.50 per thousand of the bricks manufactured. The notice went on to state that the Kar Nirdharan Adhikari, Kanpur, had come to learn through reliable sources that from the 12th September, 1970, till the 31st March, 1971 the addressee of the notice had excavated brick-earth for the manufacture of 35,00,000/- bricks and was liable to pay Royalty to the extent of Rupees 5,250.00. The notice stated further that if the addressee had any objection to the Royalty determined, he could file an objection within 15 days of the receipt of the notice before the Kar Nirdharan Adhikari. The notice went on to disclose that if no objection was filed within the time fixed, the Royalty payable shall be determined at Rs. 5,250.00. It appears that similar notices tentatively determining different amounts as Royalty payable by various petitioners were served on them.

3. There is no dispute with regard to the basis or material facts on the basis of which the writ petition is founded.

4. Three submissions have been made by the learned counsel for the petitioners in support of this petition. It was firstly contended that brick-earth is not a 'mineral' and consequently the petitioners could not be made liable to pay Royalty for excavating earth and manufacturing bricks therefrom. It was contended that the Mines and Minerals (Regulation and Development) Act, 1957 and the Rules are applicable only to minerals and the popular meaning as understood in common parlance of the word 'mineral' is 'any organic substance which is found in the earth and may be obtained by mining or other process for bringing it to the surface for manufacturing or mercantile purpose for profit'. Since brick-earth is nothing but ordinary earth, it was urged, it was not of organic origin solely and consequently could not be regarded either as a 'mineral' or 'minor mineral'. To appreciate this contention, reference may usefully be made to the relevant provisions of the Mines and

Minerals (Regulation and Development) Act, 1957 and the Rules and notifications issued thereunder.

5. The Central Government enacted a law known as Mines and Minerals (Regulation and Development) Act, 1957 — hereinafter referred to as the Act. Section 3 (a) of the Act defines 'minerals' as 'including all minerals except mineral oils'. Section 3 (d) provides that 'mining operations' means 'any operations undertaken for the purpose of winning any mineral'. 'Minor minerals', according to Section 3 (e), means 'building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a 'minor mineral'. Section 17 of the Act, to the extent relevant for our purposes, is in the following terms:—

"Power of State Government to make rules in respect of minor minerals. (1) The State Government may, by notification in the Official Gazette, make Rules for regulating the grant of prospecting licences and 'mining leases in respect of minor minerals and for purposes connected therewith.

(2)"

6. By Notification No. G. S. R. 436, dated 1st June, 1958, published in Gazette of India 1958 Extraordinary Part II, Section 3 (i), page 229, the Central Government declared brick-earth to be a 'minor mineral'. In exercise of powers under Section 15 of the Act, the State Government framed Rules to which a reference has been made earlier. Rule 2 (7) of the Rules provides that,

"'Minor minerals' means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government has declared from time to time or may declare, by notification in the Official Gazette, to be a minor mineral, under clause (e) of Section 3 of the Mines and Minerals (Regulation and Development) Act, 1957 (Act No. 67 of 1957)."

Rule 3 (1) of the Rules provides that,

"No person shall undertake any mining operations in any area within the State of any minor mineral to which these rules are applicable except under and in accordance with the terms and conditions of a mining lease or mining permit granted under these rules:

Provided that nothing shall affect any mining operations undertaken in accordance with the terms and conditions of a mining lease or permit duly granted before the commencement of these rules." By means of the notification dated 12th September, 1970, which has been impugned in these proceedings, the State Gov-

ernment ordered that the Rules shall apply to 'brick-earth' found anywhere in Uttar Pradesh. The stand taken by the respondents is that on the application of the Rules to 'brick-earth' with effect from the 12th September, 1970, the petitioners cannot undertake any mining operations of 'brick-earth' except under and in accordance with the terms and conditions of mining lease and mining permits granted under the aforesaid Rules.

7. The contention that 'brick-earth' is not a 'minor mineral' and consequently the Central Government had no power to declare it as such was raised before and repelled by a Full Bench of the Punjab and Haryana High Court in M/s. Amar Singh Modi Lal v. State of Haryana, AIR 1972 Punj and Har 356 (FB). In his able and well-reasoned judgment, S. S. Sandhawalia, J., with whom P. C. Pandit, J., concurred, held, after a review of a large number of English and American decisions as well as decisions of courts in our own country, that,

"In view of the above authorities, it is apparent that there is no warrant in the judicial precedent for confining the word 'mineral' to a narrow scientific definition and indeed the unanimous weight of precedent is to the contrary." He went on to hold that,

"Judicial precedent has held brick-earth and brick clays to be within the ambit of the word 'mineral' is again indisputable."

The judgment of S. S. Sandhawalia, J., in the above reported case is convincing and well-reasoned and cannot be improved upon. I respectfully concur with the opinion and consider it futile to attempt to give any further reasons. A Division Bench of the Patna High Court earlier in Laddu Mal v. State of Bihar, AIR 1965 Pat 491 had taken a similar view and was followed with approval by the Punjab and Haryana High Court in AIR 1972 Punj and Har 356 (FB) (Supra).

8. Learned Counsel for the petitioners in support of his contention placed reliance on a Division Bench decision of the Calcutta High Court in State of West Bengal v. Jagadamba Prasad Singh, AIR 1969 Cal 281. This case is clearly distinguishable as was held in M/s. Amar Singh Modi Lal v. State, AIR 1972 Punj and Har 356 (FB) (Supra). The only question that was considered by the Calcutta High Court in the abovementioned decision was as to whether Rule 17 (1) (i) of the West Bengal Minor Minerals Rules, 1959, read with the relevant Entry of Schedule I thereof was ultra vires or not. The question as to whether brick-earth could be declared to be a 'minor mineral' by the Central Government in exercise of powers under Section 3 (e) of the Act was neither canvassed nor decided. The judgment as

reported discloses that no reference at all was made to Notification No. G. S. R. 436 dated 1st June, 1958, published in the Gazette of India, 1958, by means of which brick-earth was declared to be 'minor mineral' by the Central Government. The first submission made by the learned counsel for the petitioners consequently fails.

9. It was next contended that a Division Bench of this Court consisting of S. N. Dwivedi, J. and H. C. P. Tripathi, J., have held in *Mahant Ashok Prapan Sharma v. State of Uttar Pradesh*, (Special Appeal No. 967 of 1969, decided on 9-7-1969) (Cal) that the Rules apply only to 'minerals' owned by the Government and not to 'minerals' belonging to private parties themselves. It was urged that since the petitioners utilised brick-earth excavated from their own Bhumidhari plots, they cannot be made liable to pay Royalty for the same under the Rules. For the contention that the petitioners have a right to use the earth excavated from their own Bhumidhari plots, reliance was placed on Section 142 of the U. P. Zamindari Abolition and Land Reforms Act, 1951 which provides that 'a Bhumidhar shall, subject to the provisions of the Act, have the right to the exclusive possession of all land in respect of which he is a bhumidhar and to use it for any purposes whatsoever'.

It is contended that if the petitioners have a statutory right to use their Bhumidhari land for any purposes whatsoever, this statutory right cannot be curtailed by means of any Rules. The submission, to my mind, has no substance and must be rejected. It is true as held by this Court in *Mahant Ashok Prapan Sharma v. State of Uttar Pradesh*, Spl. App. No. 967 of 1969, D/- 9-7-1969 (Cal) (supra) that the Rules apply only to 'minerals' which vest in the State and not to 'minerals' which are owned by private individuals or other persons. The question, however, still remains to be considered as to whether 'minerals' existing on Bhumidhari land vest in the Bhumidhars and they have a right to utilise it without any interference by the State.

10. As a consequence of the notification issued under Section 4 of U. P. Act No. 1 of 1951, all rights, title and interest of all the intermediaries in such estates as had vested in the State including rights in any mines or minerals, whether being worked or not, ceased and vested in the State of Uttar Pradesh free from all encumbrances. As would appear from Section 39, clauses (f) and (g), the mines and minerals existing in the estates which vested in the State were taken into account for the assessment of compensation to the intermediaries concerned. As a consequence of Section 18, Bhumidhari rights were created in favour of the class

of persons mentioned therein. Bhumidhars are not owners of the land forming subject-matter of their Bhumidhari and are merely tenure-holders and as disclosed by Section 130 of U. P. Act No. 1 of 1951 have all the rights and are subject to all the liabilities conferred or imposed upon them by or under that Act. By conferment of Bhumidhari rights, the State did not divest itself of rights which had vested in it in mines and minerals by reason of Section 6 of U. P. Act No. 1 of 1951.

Section 142 on which reliance has been placed by the learned Counsel for the petitioners merely gives rights to Bhumidhars as tenure-holders to the exclusive possession of all land in respect of which they are Bhumidhars and 'to use it for any purposes whatsoever'. It does not give rights to Bhumidhars to use up (emphasis supplied) the land forming subject-matter of the Bhumidhari. The ownership of the corpus remains with the State and Bhumidhars are only entitled to use it as tenure-holders. If a Bhumidhar desires to use his holding or part thereof for a purpose not connected with agriculture, horticulture or animal husbandry, the Assistant Collector incharge of the sub-division may suo motu or on an application, after making such enquiry as may be prescribed, make a declaration to that effect under Section 143 (1). As soon as a Bhumidhar decides to start mining operations on his Bhumidhari land, he must obtain a declaration from the Assistant Collector incharge of the sub-division under Section 143 (1) of U. P. Act No. 1 of 1951.

As long as this declaration subsists, the land concerned would not be treated as Bhumidhari land subject to the provisions of U. P. Act No. 1 of 1951. As soon as the erstwhile Bhumidhari land ceases to be 'land' within the meaning of Section 3 (14) of U. P. Act No. 1 of 1951 and is brought in use for purposes connected with any industry or mining, its use will be governed by relevant enactments governing such industry or mining. It is thus clear that by mere reason of the fact that the petitioners are Bhumidhars, they acquired no rights to appropriate minerals existing on their Bhumidhari land.

11. The conclusion arrived at by me is further borne out by Chapter VI of U. P. Act No. 1 of 1951. If an intermediary has acquired Bhumidhari rights in respect of his Sir and Khudkasht land, he cannot continue to work mines subsisting thereon by mere reason of the fact that he is a Bhumidhar of the land on which the mines exist, as is obvious from Sec. 107 of U. P. Act No. 1 of 1951. It is unreasonable to hold that a Bhumidhar who was already working a mine on the date of vesting on land which has become his Bhumidhari property can continue to

work only on the basis of a lease on terms and conditions thereof but an intermediary who has become a Bhumidhar can start a new mine after the date of vesting as a matter of right on account of his being Bhumidhar thereof.

12. For the reasons given, I am of the opinion that the petitioners have no right to remove brick-earth from their Bhumidhari property for the purpose of manufacturing bricks in disregard of the Rules and notification issued thereunder.

13. It was already urged on behalf of the petitioners that since the petitioners neither held a prospecting licence nor are they mining licencees or holder of a short term permit for the purpose of exploiting 'minor minerals', Royalty cannot be recovered from them in pursuance of the impugned notices. There is force in the submission which must be accepted. Rule 21 of the Rules is in the following terms:

"(1) The holder of a mining lease granted on or after the commencement of these rules shall pay royalty in respect of any mineral removed by him from the leased area at the rates for the time being specified in the First Schedule to these rules.

(2)"
Rule 21 imposes a liability only on holders of mining lease granted under the Rules to pay Royalty in respect of minerals recovered at the rates for the time being specified in the First Schedule to the Rules. The petitioners have in disregard of the Rules removed minerals but they hold no mining leases. Royalty for a period for which they have removed minerals without mining lease is not payable by them or recoverable from them under Rule 21. For this, they are however liable to be prosecuted under Rule 57.

14. For the reasons given above, this petition is allowed in part. The opposite parties are restrained from recovering Royalties for brick-earth excavated by the petitioners for the period prior to their having obtained mining leases in accordance with the provisions of the Rules. The other reliefs prayed for are refused. In the circumstances of the case, parties shall bear their own costs. Interim orders, if any, are hereby vacated.

Petition partly allowed.

AIR 1975 ALLAHABAD 390

GOPI NATH, J.

Mohammad Matin, Petitioner v. The Additional District Judge, Kanpur and others, Respondents.

Civil Misc. Writ No. 2951 of 1973, D/- 13-3-1975.

ES/ES/B518/75/VSS

(A) U. P. Urban Buildings Regulation of Letting, Rent and Eviction Act (13 of 1972), Sections 21 and 23 — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Section 3 — Proceedings under Section 3 of 1947 Act on ground of bona fide need — During pendency of Revision, 1972 Act coming into force — Revisional authority passing order of release in favour of landlady — Effect of order.

Under Section 43 (m) of the new Act revisions under Section 3 (2) of the old Act pending at the commencement of the new Act stood transferred to the District Judge, who had to decide them on considerations relevant to the old Act. But since no remedy has been left open for enforcing a permission to evict on grounds other than those contemplated by Section 21 (1) and (2) of the New Act the revisional authority has to refuse a permission if it is sought on a ground not covered by that Section and has to grant it if it is covered. On the permission being granted the landlord has to apply to the Prescribed Authority under Sec. 21 and take further proceedings under Sec. 23 of the new Act. The permission in the instant case was sought on the ground of bona fide need, a ground covered by Section 21 of the new Act. Suitable orders could, accordingly, be passed by the learned Judge. The direction for release passed by the Revisional Authority will enable the landlady to take appropriate proceedings under the new Act for the eviction of the petitioner. The order on merits was held, not liable to be quashed. AIR 1974 All 86. Relied on.

(Paras 8, 9)

(B) Constitution of India, Article 226 — No misdirection made by Revisional Authority in assessing comparative needs of the parties in proceedings under Section 3 of the U. P. Rent Act — Finding is a finding of fact, not open to challenge in writ petition — (U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Section 3). Case law ref. (Para 10)

(C) U. P. Urban Buildings Regulation of Letting, Rent and Eviction Rules (1972), Rule 16 — Applicability — Proceedings under Section 3 of the U. P. Rent Act, 1947 — Rule not applicable. Case law ref. (Paras 12, 13)

(D) Constitution of India, Article 226 — Finding as to comparative need of the parties based on objective test — Not vitiated if there is legal evidence to support it, notwithstanding that some of reasons given turn out to be irrelevant.

A finding based on objective test is not vitiated if there is legal evidence to support the conclusion notwithstanding that some of the reasons given turn out to be irrelevant. Thus where the revisional authority in assessing comparative

needs of the parties in a proceeding under Section 3 of the U. P. (Temporary) Control of Rent and Eviction Act while considering two alternative accommodations available to tenant found one good and the other also good though it need not have been considered at all, it was held that the Authority did not go wrong in taking the other accommodation also into consideration. Case law Ref.

(Paras 16, 17)

Cases Referred: Chronological Paras

AIR 1974 SC 1059 = (1974) 1 SCC 561	10
AIR 1974 SC 1596 = (1974) 2 SCR 365	10
AIR 1974 All 86 = 1974 All LJ 7	8, 12
AIR 1974 All 240 = 1974 All LJ 86	12
(1974) C. W. M. No. 1575 of 1971, D/-	
13-9-1974 (All)	14
AIR 1971 SC 1537 = (1970) UJ (SC) 823	17
AIR 1967 SC 1353 = (1967) 2 SCR 583	17
AIR 1957 SC 164 = 1956 SCR 948	17

R. R. Agarwal and A. Rathore, for Petitioner: Standing Counsel, for Respondents.

ORDER:— This is a petition under Article 226 of the Constitution. It challenges the order of respondent No. 1 dated 27-4-1973 allowing a revision in a proceeding under Section 3 of the U. P. (Temporary) Control of Rent and Eviction Act (Act No. III of 1947), hereinafter referred to as the old Act. By the impugned order the revising authority released the accommodation in dispute in favour of respondent No. 3 the landlady.

2. The tenant is the petitioner and the dispute relates to house No. 98/29, Bekanganj, Kanpur. The accommodation is sufficiently big and was let out to the petitioner in the year 1951. He subsequently started a business in it. In 1962 he purchased a house No. 98/157 in the same locality and shifted in it. Since then he has been using the accommodation in dispute only for purposes of business. The respondent No. 3, the landlady, has a large family and her source of livelihood has been income from zamindari property and some rents from houses. Her husband, it is stated, is diabetic and suffers from anginal troubles also. The application for permission was filed on the ground that the family being big, the income was insufficient to maintain it; one of her sons having come of age she wanted to put him in business and start one in the accommodation in dispute. Since the business contemplated was of sale of building materials which involved stocking in sufficient quantity materials like sand, Lime, Surkhi and other such materials, a spacious accommodation was required for the purpose. The house in dispute was the only suitable accommodation available. The application stated that the petitioner owned House No. 98/157, Bekanganj, Kanpur which was very big and where he

had shifted his business; and the premises in dispute were not needed by him any longer; besides, the petitioner owned a large track of land at Jajmau having a godown, shed and store which was another alternative accommodation available for his business. The need of the landlady was thus pressing while the tenant had two sufficiently big alternative accommodations available to him for the purposes of his business. It was stated that he had already shifted his business to premises No. 98/157, but even if he had not done so, he could do so either in those premises or in the premises at Jajmau.

3. The petitioner contested the application on the allegations that respondent No. 3 did not genuinely need the accommodation in dispute; that the application was filed with a view to getting the rent enhanced; that the contesting respondent owned several other houses; that accommodation was available in those houses for the business proposed; that the petitioner had been carrying on the business of hides and skins in the premises in dispute since 1951; that the business carried on in premises No. 98/157 was a different business run in partnership by him; that the plot at Jajmau was not suitable for the business of raw hides and skins. The application in the circumstances deserved to be rejected.

4. The Rent Control and Eviction Officer dismissed the application on the findings that the petitioner was carrying on the business of raw hides and skins in the premises in dispute since 1951; that in premises No. 98/157, owned by the petitioner another business was being carried on by a partnership firm of seven partners of which the petitioner was one, besides, the petitioner was also living in a portion of it; that the stock of raw hides and skins required sufficient space and could not conveniently be shifted to premises No. 98/157; that Bekanganj was a market area for hides and skins and the petitioner had established a good will, that the accommodation at Jajmau was not suitable for the business of hides and skins that even though the landlady had no other suitable accommodation available to her for the business, the permission prayed for could not be granted in the circumstances of the case.

5. On revision the Additional District Judge set aside the order of the Rent Control and Eviction Officer and released the house in dispute in favour of respondent No. 3. The Additional District Judge on a comparison of the needs of the parties held that the need of the landlady was greater and the petitioner was not likely to suffer any hardship by the release as he had suitable al-

ternative accommodation available to him. He held that the landlady had only one house in her name viz. the one in dispute; that the application for permission was not filed with a view to enhancing the rent; that the accommodation was genuinely needed for carrying on the business of building materials; that the petitioner's house No. 98/157 was a very big one and there was sufficient vacant accommodation consisting of rooms and covered sheds and verandas available for the purposes of the petitioner's business. He has given details of the vacant space. This building, according to the learned Judge was a big mansion and can easily accommodate the petitioner's business in a portion of it. Besides the tract of land at Jaimau with a godown, store and shed was another suitable alternative accommodation available to the petitioner. He thus concluded that the need of the landlady was genuine; and that the petitioner was not likely to suffer from the release. He accordingly ordered release.

6. The order has been challenged on the grounds:—

(i) that the learned Judge had no jurisdiction to pass an order of release in a proceeding under Section 3 of the U. P. (Temporary) Control of Rent and Eviction Act, 1947;

(ii) that the comparative need of the parties had not been properly considered, as the directive principles laid down under the Rule 16 of U. P. Urban Buildings Regulation of Letting Rent and Eviction Act, 1972 were not applied; and

(iii) that the finding as to need, was vitiated on the ground of irrelevant considerations influencing the learned Judge."

7. I shall deal with these points serially.

8. Learned counsel contended that the revision filed had to be decided in accordance with the provisions of the Old Act, which permitted no release. Learned Judge was consequently wrong in taking into account the provisions of Section 21 of the new Act, viz., U. P. Urban Buildings Regulation of Letting Rent and Eviction Act, and passing an order of release. We have, however, to consider the true scope and effect of the order passed and then see whether it deserves quashing. Under Section 43 (m) of the new Act revisions under Section 3 (2) of the Old Act pending at the commencement of the new Act stood transferred to the District Judge, who had to decide them on considerations relevant to the old Act. But since no remedy has been left open for enforcing a permission to evict on grounds other than those contemplated by Section 21 (1) and (2) of the New Act the revisional authority has to refuse permission if it is sought on a ground not covered by that Section and has to grant it if it is covered. On the

permission being granted the landlord has to apply to the Prescribed Authority under S. 21 and make further proceedings under S. 23 of the New Act. The permission in the instant case was sought on the ground of bona fide need — a ground covered by Section 21 of the new Act. Suitable orders could, accordingly, be passed by the learned Judge. The question is whether in passing an order of release he has misdirected himself and the same deserves to be quashed. In *Sibte Hasan v. State of U. P.*, 1974 All LJ 7 = (AIR 1974 All 86) the revising authority directed eviction instead of granting permission to sue in a revision under Section 3 (2) of the old Act. The revising authority observed in that case that the application would be deemed to be one under Section 21 of the New Act. It was urged that the result of the order of the revising authority was to allow the landlord to straightway take recourse to Section 23 of the New Act and evict the tenant. The Bench observed that the operative order showed a slight confusion. The application never lost its character as one under Section 3 of the old Act and that "on the basis of the order of the learned Additional Dist. Judge, the landlord shall be required to apply to the Prescribed Authority under Section 21 of the Act and having obtained an appropriate order shall have to move, if necessary, for a proceeding under Section 23 of the Act. The observation, to which reference has been made above, does not, to our mind, in any manner affect the decision of the learned Additional District Judge on merits". The petition was rejected.

9. The direction for release in the instant case, in view of the observations in *Sibte Hasan* (supra) will enable the landlady to take appropriate proceedings under the new Act for the eviction of the petitioner. The order on merits is not liable to be quashed on the ground raised.

10. It was then urged that the learned Judge did not assess the comparative needs in accordance with law. The application was moved on the ground of bona fide need, a ground falling under both the Acts. The learned Judge compared the needs of the parties. According to him the need of the landlady was greater. She stood in need of augmenting her income. She genuinely intended to start a business. The premises were the only available premises she could apply for. She reasonably required the same. As compared to this the tenant had two alternative accommodations at his disposal. House No. 98/157 was in the same locality. It had sufficient accommodation to accommodate the petitioner's business. The assessment of the learned Judge on this part, it seems to me, is not open to

scrutiny — the question involved being one of fact. He then held that the plot at Jajmau was another alternative accommodation at the disposal of the tenant. The tenant was thus to suffer no hardship if he had to vacate premises No. 98/29. There seems to be no misdirection made by the learned Judge in assessing the needs. It is true that a desire is not a requirement and a formal requirement may not be a pressing need. But a reasonable requirement is a bona fide need, and an assessment of that question by an appellate or revising authority becomes concluded by a finding of fact, not open to challenge in a writ petition. See *Mittulal v. Radhe Lal*, AIR 1974 SC 1596 and *Phiroze Bamanji Desai v. Chandrakant M. Patel*, AIR 1974 SC 1059. I thus find no ground for interference in the finding regarding the need of the landlady, recorded by the learned Judge.

11. Learned Counsel for the petitioner urged that the directive principle underlying Rule 16 of the new Act had been ignored by the learned Judge in that the likely hardship of the tenant with reference to the period of his existing business was not taken into account.

12. The argument has no force. The case being one under the Old Act, the provisions of the new Act do not strictly apply. See *Sibte Hasan v. State of U. P.*, 1974 All LJ 7 = (AIR 1974 All 86) and *Inderjeet Singh v. State of U. P.*, 1974 All LJ 86 = (AIR 1974 All 240). In *Inderjeet Singh* (supra) it was held that the vires of Rule 16 did not require consideration as the case being under the old Act, the question of the vires of that Rule did not arise.

13. Further, the learned Judge was alive to the question of hardship as the alternative accommodations according to him sufficiently met with the need of the tenant, particularly when house No. 98/157 was in the same locality. No dislocation of his business was thus involved and he was not likely to suffer any hardship.

14. Learned Counsel invited my attention to Civil Misc. Writ No. 1575 of 1971, decided on 13-9-1974 (All) and urged that the authority below erred in not considering the question of good will of the petitioner's business and the likely hardship ensuing on its disturbance. As observed earlier no dislocation of the petitioner's business could be said to be involved if it was shifted to premises No. 98/157.

15. It was then urged that the order was vitiated on the ground of an irrelevant consideration having influenced the learned Judge viz., that the land at Jajmau constituted a suitable alternative accommodation for the business of the petitioner. The contention is not sound.

16. In the instant case the revising authority took two alternative accommodation into consideration. House No. 98/157 was good enough by itself. The question as to whether it was vacant or not is a question depending on the assessment of evidence. The learned Judge examined the material on record and reached a conclusion in favour of respondent No. 3. The evidence cannot be re-assessed. If that house furnished an alternative accommodation, the plot at Jajmau need not have been considered at all. Learned Judge found it as an additional accommodation. It could not be held to be wholly irrelevant as well. It was an alternative accommodation, but whether it was suitable for the business of the petitioner was a matter which might have required closer scrutiny if no other accommodation was available to the petitioner. The Judge, in my opinion, did not go wrong in taking this accommodation also into consideration while deciding the respondent's revision. Even if he had erred there, that would not vitiate the order.

17. It is well settled that a finding based on objective tests is not vitiated if there is legal evidence to support the conclusion, notwithstanding that some of the reasons given turn out to be irrelevant. See *Zora Singh v. J. M. Tandon*, AIR 1971 SC 1537, *State of Maharashtra v. Babulal Kriparam Takkamore*, AIR 1967 SC 1353 and *Dwarka Das Bhatia v. The State of Jammu and Kashmir*, AIR 1957 SC 164. It is not a case of subjective satisfaction where one irrelevant ground out of many valid ones supporting the conclusion may vitiate the order.

18. In the result the petition fails and is dismissed with costs.

Petition dismissed.

AIR 1975 ALLAHABAD 393

K. N. SINGH, J.

Chhotey Lal Singh, Petitioner v. The State Transport Appellate Tribunal, U. P., Lucknow and another, Respondents.

Civil Misc. Writ No. 8178 of 1973, D/- 5-3-1975.

(A) Motor Vehicles Act (1939). Sections 64 and 57 (7) — U. P. Motor Vehicles Rules (1940), Rule 72 — Appeal against rejection of application for permit — Limitation — When commences — Time taken for certified copy — To be excluded.

The period of limitation for an appeal against the order rejecting an application for grant of a permanent stage carriage permit commences only after a copy of order is served by the Regional Transport

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Authority as contemplated by Section 57 (7). (Para 3)

As the memo of appeal should be accompanied with the certified copy of the impugned order, the appellant is entitled to exclude the time spent in obtaining the certified copy. AIR 1966 SC 1713, Rel. on. (Para 4)

Cases Referred: Chronological Paras AIR 1966 SC 1713 = 1966 SCR (Supp) 46 4

M/s. R. N. Singh and K. P. Singh, for Petitioner; Standing Counsel, for Respondents.

ORDER:— This petition is directed against the order of the State Transport Appellate Tribunal, dated 21-11-1973 dismissing the petitioner's appeal as barred by time.

2. The petitioner made an application for grant of a permanent stage carriage permit on Kuru Tilari via Babatpur crossing route. The Regional Transport Authority Varanasi, rejected the petitioner's application by its order dated 21-9-1973. The order was, however, not communicated to the petitioner as required by Section 57 (7) of the Motor Vehicles Act, 1939. The petitioner, however, made an application on 29-9-1973 for obtaining a certified copy of the order of the Regional Transport Authority. The copy was prepared and delivered to the petitioner on 8-10-1973. The petitioner thereupon presented his appeal before the State Transport Appellate Tribunal on 8-11-1973. The Tribunal dismissed the petitioner's appeal on 21-11-1973 on the ground that it was barred by time.

3. Section 64 of the Motor Vehicles Act lays down that any aggrieved person may file appeal before the Appellate Authority against the order of the Regional Transport Authority within the time prescribed. Rule 72 of the U. P. Motor Vehicles Rules, 1940 framed under the Act provides that an appeal under Section 64 of the Act against the order of the Regional Transport Authority may be filed within 30 days of the receipt of such order and it must be accompanied by a certified copy of that order. Rule 72 thus lays down that appeal should be filed within 30 days of the receipt of the order of the Regional Transport Authority under Section 57 (7) of the Act which requires service of an order in writing on the party whose application may be rejected by the Regional Transport Authority. The period of limitation would thus commence only after a copy of the order is served by the Regional Transport Authority as contemplated by Section 57 (7) of the Act. In the instant case the Regional Transport Authority did not comply with the requirements of Section 57 (7) of the Act as no copy of the order was served on the petitioner.

4. The petitioner, however, obtained a certified copy of the order and filed the appeal. The Appellate Tribunal rejected the appeal on the ground that it was filed beyond 30 days from the date of the receipt of the certified copy of the order, (sic) and it refused to exclude the time spent by the petitioner in obtaining the certified copy. In my opinion the Appellate Tribunal committed a manifest error of law. It is a settled principle that where memorandum of appeal is required to be accompanied by a certified copy of the order against which appeal is preferred the time taken in obtaining certified copy is required to be excluded in calculating the period of limitation. In Addl. Collector of Customs v. M/s. Best and Co., AIR 1966 SC 1713, it was held that section 12 (2) (3) of the Limitation Act contains a positive direction for excluding the time taken in obtaining the copy of the judgment and decree or order as the case may be, more so in a case where the rules require that the memorandum of appeal should be accompanied with a certified copy of the order. As already noted Section 64 of the Act read with Rule 72 requires that the memorandum of appeal should be accompanied with a certified copy of the order of the Regional Transport Authority. In the circumstances the law laid down by the Supreme Court is fully applicable to the instant case and the petitioner was entitled to exclude the time spent in obtaining certified copy of the order of the Regional Transport Authority.

5. The petitioner made an application for obtaining the certified copy of the order on 29-9-1973. The certified copy was delivered to him on 8-10-1973. The period between 29-9-1973 and 8-10-1973 was liable to be excluded in computing the period of limitation. If that period is excluded the petitioner's appeal was filed within time. The Appellate Tribunal committed a patent error of law in rejecting the petitioner's appeal as barred by time. The petitioner's appeal was within time and the appellate Tribunal should have decided the appeal on merits.

6. In the circumstances I allow the petition and quash the impugned order of the State Transport Appellate Tribunal dated 21-11-1973 and direct it to hear and decide the petitioner's appeal in accordance with law. The interim order dated 20-12-1973 is vacated.

Petition allowed.

AIR 1975 ALLAHABAD 395

M. P. MEHROTRA, J.

Jagdish, Appellant v. Rajendra Respondent.

Second Appeal No. 2015 of 1969, D/- 24-2-1975.*

(A) Specific Relief Act, Section 34 — Further relief — Suit for mere declaration of title — Plaintiff not in possession on date of suit, the property being in custodia legis by attachment under Section 145 of the Criminal Procedure Code — Subsequent delivery of possession by Criminal Court to defendant — Suit as filed if bad.

Where the plaintiff filed a suit for a mere declaration of title to property, the property then being in custodia legis having been attached under Section 145 of the Criminal Procedure Code but subsequently the possession was delivered by the Criminal Court to the defendant, held that the suit was not bad for not asking for the further relief of possession, as such relief was not available to him on the date of the plaint. AIR 1955 All 683, Rel. on.

(Para 7)

(B) Hindu Adoptions and Maintenance Act, 1956, Section 13 — Applicability.

The section will be applicable only if the will were validly proved in accordance with law. (Para 8)

(C) Evidence Act, Section 68 — Will — Proof — Production of registration copy, if proof without calling attesting witness.

A will, the execution of which is denied, cannot be said to be proved in accordance with the rules contained in Section 68 without producing an attesting witness to prove it. The production of a registration copy of the will does not render the requirement under Section 68 inapplicable. AIR 1959 SC 443 and AIR 1925 All 56 and AIR 1927 Cal 102, Rel. on. (Para 8)

(D) Civil Procedure Code, Order 41 Rule 27 — Application in second appeal for receiving additional evidence — Want of diligence on the part of the petitioner — He is not entitled to the benefit of the Rule. (Para 9)

(E) Specific Relief Act, 1963, Section 38 — Plaintiff not in possession on date of suit for injunction — He is not entitled to an injunction restraining defendant from interfering with his possession.

Where the plaintiff is not in possession on the date of the plaint the property being in custodia legis having been attach-

ed under Section 145 of the Criminal Procedure Code, and pending suit the possession was delivered to the defendant by the Criminal Court, the plaintiff cannot be granted an injunction restraining the defendant from interfering with his possession. Before an injunction can be granted it has to be shown that the plaintiff was in possession. (Para 10)

Cases Referred: Chronological Paras

AIR 1966 All 570 = ILR (1965) 1 All 483

AIR 1959 SC 443 = 1959 Supp (1) SCR 426

AIR 1955 All 683 = 1954 All LJ 734

AIR 1943 PC 83 = 1943 All LJ 292

AIR 1941 FC 5 = 1940 FCR 84

AIR 1935 All 293 = 1935 All LJ 401

AIR 1927 Cal 102 = 31 Cal WN 215

AIR 1925 All 56 = 82 Ind Cas 306

Santosh Kumar and A. K. Banerji, for Appellant; K. B. L. Gour, for Respondent.

JUDGMENT:— This second appeal arises out of a suit for declaration and injunction. The plaintiff prayed for a declaration that the will dated 3rd July, 1963, executed by Ram Saran in favour of the defendant is void. He also prayed for an injunction restraining the defendant from interfering with the plaintiff's possession over the land in suit. The brief facts are these: The plaintiff-respondent claimed that he was the adopted son of Ram Saran deceased. The defendant, Jagdish, happened to be the daughter's son of the mother of Ram Saran. The said defendant set up a will dated 3rd July 1963, alleged to have been executed by Ram Saran in his favour and the plaintiff came to know about this will in the mutation proceedings. The plaintiff claimed that no such will was really executed and the one in question was forged and it was obtained by fraud and undue influence. The plaintiff claimed to be in possession of the property of Ram Saran as an adopted son. As he felt aggrieved with the alleged will and the claim which the defendant was setting up on the said basis, therefore, he filed a suit for declaration and injunction. It may be stated that the relief for injunction was claimed on the ground that the plaintiff's possession was sought to be disturbed. The defendant-appellant denied the plaintiff's allegations. He claimed that no adoption ceremony took place and that the plaintiff was not the adopted son of Ram Saran. He claimed that he was living with Ram Saran during the latter's lifetime and used to look after the latter's cultivation. He enjoyed the affection and confidence of Ram Saran and the latter executed a registered will dated 3rd July, 1963, in the former's favour. The will was said to be a genuine one. The defen-

* (Against judgment and decree of R. N. Sinha, Addl. Civil J., Meerut, in Civil Appeal No. 73 of 1969, D/- 23-7-1969).

dant claimed to be in possession of the property. The proceedings under Section 145, Criminal Procedure Code took place but ultimately the same also ended in the defendant's favour and the defendant was given possession. The plaintiff's suit for mere declaration was, therefore, said to be not maintainable. It was also claimed that the courts below had no jurisdiction to try the suit.

2. The trial court held that the suit was maintainable in the civil court. However, the plaintiff was held not to have been adopted by the deceased Ram Saran and the will in question was held to be a valid and genuine one in favour of the defendant. The defendant was held to be in possession and the trial court came to the conclusion that the plaintiff's suit for declaration and injunction without the claim for possession was not maintainable under Section 34/41 of the Specific Relief Act. The Lower Appellate Court, however, allowed the appeal by the plaintiff. It held that adoption was validly proved. The will was held to have been not proved in accordance with law. There was no compliance with the requirements of Section 68 of the Evidence Act and otherwise also the will was not proved beyond suspicion. The Civil Court's jurisdiction was upheld so far as the relief for declaration was concerned. However, the relief for injunction was refused to the plaintiff on the ground that it was not shown that he was in possession. The proceedings under Section 145 had ended in the defendant's favour and, therefore, there was nothing to show that the defendant had not been delivered possession. In such a situation the relief for injunction could not be granted to the plaintiff. The appeal was, therefore, partly allowed. The suit for declaration was decreed but the claim for injunction was refused. Feeling aggrieved, the defendant has come up in the second appeal and I have heard the learned Counsel for the appellant, Shri G. P. Bhargava, in some detail. Counsel made the following points:

(1) Section 13 of the Hindu Adoptions and Maintenance Act enacts that despite an adoption the adoptive father or mother retain the power to dispose of his or her property by transfer inter vivos or by will. Therefore, even if Ram Saran had made the alleged adoption, still, he retained the power to execute the will in favour of the defendant and the instant will, therefore, can stand despite the adoption, if any, in favour of the plaintiff.

(2) The suit was not maintainable for mere declaration in the absence of claim for possession.

(3) The suit was not triable by the civil court under Section 331 of the U. P. Act I of 1951.

(4) Mode of proof could not be objected to at the appellate stage; inasmuch as the certified copy of the will had been produced by the plaintiff and admitted by the defendant and exhibited by the court, an objection could not be raised at the later stage. Reliance was placed on Gopal Das v. Sri Thakurji, (AIR 1943 PC 83), Krishna Kumar v. Kayastha Pathshala, (AIR 1966 All 570) and Ajodhya Pd. v. Mahabir Pd. (AIR 1935 All 293).

(5) Section 68, Evidence Act laying down the mode of proof of attested document is not applicable to a case of certified copy. In this connection reliance was placed on a passage occurring in Sarkar's Evidence, 12th Edn. 644 where there is a citation from Field's Evidence Act.

(6) The lower appellate Court was said to have been wrong in reversing the finding of the trial Court regarding the issue of adoption. It was alleged that the mother's concurrence had not been shown in the instant case.

(7) Lastly, Mr. Bhargava strongly contended that in the facts and circumstances of the case his client should be allowed to bring on record the original will with the aid of Order 41 Rule 27 C. P. C. under which provision an application has been moved by the defendant-appellant in this second appeal.

3. Shri K. B. L. Gaur, learned counsel for the plaintiff-respondent, submitted in opposition that the trial court was wrong in thinking that the suit for declaration was not maintainable in the absence of a claim for possession. He pointed out that the suit itself was filed on 18th November, 1966, on which date the property happened to be in custodia legis being under attachment in the criminal court. The Supurdar was appointed by the said court. In consequence of the criminal court's verdict possession was delivered to the defendant in 1967. In such a situation the suit could not be said to be not maintainable on the date when it was filed on the ground that possession had not been claimed. He placed reliance on Lachmeshwar v. Keshwar Lal, AIR 1941 FC 5 and Indra Narain v. Ganga Ram, AIR 1955 All 683.

4. Counsel next contended that the relief for declaration could not be granted by the revenue court and, therefore, the courts below were right in holding that the suit was cognizable by the civil court. It was pointed out that the lower appellate court had discussed fully the evidence bearing on the question of adoption and the finding recorded was a pure finding of fact. So far as the mode of proof was concerned it was pointed out that from the very beginning the plaintiff was contesting the validity and the execution of the will. In fact, the suit itself was filed for obtaining a declaration.

to that effect and in such a situation it could not be said that he should be out of court merely because the certified copy had been filed (which he was bound to do as the plaintiff to get the relief) which copy had been admitted by the defendant. The cases relied upon by Mr. Bhargava were said not to be applicable in such a situation. It was next submitted by him that even in the case of a certified copy the requirement of Section 68 is equally applicable and for this purpose reliance was placed on *Karimullah v. Gudar Koeri*, AIR 1925 All 56 and *Gobinda Chandra v. Pulin Behari*, AIR 1927 Cal 102.

5. Lastly, counsel submitted that the application under Order 41, Rule 27 did not deserve to be allowed in the circumstances of the case as the defendant-appellant had not been shown to have acted with due diligence. Moreover, he himself admitted while in the witness-box that he had not summoned the attesting witnesses.

6. Having considered these rival contentions, in my opinion, this appeal deserves to be dismissed.

7. I am not impressed with the contention that the suit was not triable by the Civil Court. Both the courts below have given good reasons why a suit for declaration of the kind which has been sought in the instant case could not be tried by the revenue court. Further, I agree with Mr. Gaur that on the date when the suit was instituted the plaintiff was not required to claim the relief for possession inasmuch as the property was in possession of the court. In AIR 1955 All 683 a Division Bench laid down as follows:—

"The further relief contemplated in the proviso is a relief which was available to the plaintiff at the time of the institution of the suit and which he failed to pray for. If there is a change in the position of the parties during the pendency of a suit, and if by reason of this change the plaintiff becomes entitled to seek further relief, then that is not the relief contemplated in the proviso."

8. In my opinion, Section 13 of the Hindu Adoptions and Maintenance Act will only be applicable if the will were validly proved in accordance with law. It is, therefore, not necessary to examine the question with reference to Section 13 as I am agreeing with the lower appellate court that the will in the instant case was not properly and legally proved. The lower appellate Court has shown how the will in the instant case was not proved in accordance with the rule contained in Section 68 of the Evidence Act. Admittedly, no attesting witness was produced to prove the will. In my opinion, Mr. Bhargava is not correct

in contending that if a certified copy is produced of an attested document then the requirement of Section 68 is not applicable. Decisions contrary to the said contention are forthcoming in AIR 1925 All 56 and in AIR 1927 Cal 102. In the former case it was laid down:

"A certified copy is sufficient secondary evidence under Section 63 of the existence, conditions and contents of the deed but not of its execution, which must be proved as required under Section 68." In the latter case it was laid down:

"The provisions of Section 68 are mandatory and they are not controlled by Section 90.

The mere fact that the only surviving attesting witness is considered hostile by the party does not relieve him from the duty of examining him as a witness. Nor is it enough that summons and warrants had been issued upon the witness and the witness had failed to appear, but the process of the Court such as are mentioned in Order 16, Rule 10, Civil Procedure Code have got to be exhausted."

The lower appellate court has followed the law laid down in AIR 1959 SC 443 to hold that the defendant, who was the propounder of the will, failed to prove the same in the manner and on the standard of proof as laid down in the statute and the case law. None of the attesting witnesses were forthcoming nor was the scribe examined. The witnesses who were examined were shown to have been clearly interested and in such a situation where the plaintiff was hotly contesting the validity and genuineness of the will, that kind of evidence cannot be relied upon to sustain the validity and the genuineness of the will. Mr. Bhargava pointed out that the original will had been summoned by his client but nothing has been shown as to what transpired thereafter.

9. Lastly, so far as the application under Order 41, Rule 27 is concerned, I do not think that the same deserves to be allowed in the instant case. The lower appellate court has observed that the mutation case (where the original will was said to have been filed) was decided more than a year before the statement of the defendant was recorded. In such a situation the defendant cannot be said to have acted with due diligence. It was his duty to have obtained back the said paper from the court concerned and produced the same in the trial Court. It has not been shown to me as to why the application under O. 41, Rule 27 could not be made in the lower appellate court. In my opinion, there has been a clear lack of diligence on the part of the defendant-appellant and the aid of Order 41, rule 27 cannot be extended to him in such a situation. In my opinion, in none of the clauses of

Order 41, rule 27 this application deserves to be allowed.

10. I have considered the merits of the cross-objection and I am satisfied that the same also does not deserve to be allowed. There can be no denying that in case the plaintiff was held not to be in possession on the date when injunction was claimed, then he was not entitled to the same. Before an injunction can be granted it has to be shown that the plaintiff was in possession. As the situation stood on the date of the suit the plaintiff was not in possession. The possession at that point of time was in the hands of the criminal court and in such a situation also it is not clear how the plaintiff could be entitled to an injunction. Further subsequently possession was delivered to the defendant in consequence of the criminal court's verdict. Therefore, on the date when the suit was decreed by the lower appellate court the defendant happened to be in possession and the relief for injunction could not obviously be granted in such a situation. The lower appellate court seems to have left the plaintiff to claim back possession by a fresh suit. In my opinion, it is not necessary to allow the cross-objection now and it can be dismissed along with the appeal.

11. In the result, the appeal and the cross-objection are dismissed. There will be no order as to costs either in the appeal or in the cross-objection.

Appeal and cross-objection
dismissed.

AIR 1975 ALLAHABAD 398

JAGMOHANLAL, J.

Abdul Hameed Khan, Applicant v. Mujeed-Ul-Hasan and others, Opposite Parties.

Civil Revn. No. 66 of 1973, D/- 14-2-1975.*

(A) Civil P. C. (1908), Order 19, Rules 1, 2 and Order 39, Rule 1 — Application for interim injunction — Affidavits filed conflicting — Court can summon applicant for cross-examination.

Where, in a proceeding under Order 39, Rule 1 affidavits were filed by the parties and the court considered it necessary in view of the conflicting affidavits that deponent who filed affidavits should be summoned for cross-examination, it could not be said that the court had committed illegality in summoning deponent for cross-examination. AIR 1967 Guj 229 and AIR 1968 Guj 198, Distinguished. (Para 6)

*(Against order passed by S. K. Srivastava, Civil J., Bahraich, D/- 7-4-1973).

FS/GS/C79/75/RSS

Cases Referred: Chronological Paras
AIR 1968 Guj 198 = 9 Guj LR 907 2, 5
AIR 1967 Guj 229 = 7 Guj LR 597 2

S. Mirza, for Applicant; Akhtar Hus-sain, for Opposite Parties.

ORDER:— The only question that arises for decision in this Civil revision is whether or not the Court has power to summon a deponent, who has filed an affidavit in support of his application under Order XXXIX, Rule 1, Civil Procedure Code, for his cross-examination at the instance of other party.

2. No provision in the Code of Civil Procedure has been pointed out which specifically debars a court from doing so. On the other hand, the enabling provision conferring this power on the Court contained in Rule 2 of Order XIX of the Code of Civil Procedure is most generally worded. Sub-rule (1) of this Rule 2 provides:—

"Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent."

Learned Counsel for the revisionist relied in the trial Court as well as in this Court on the two decisions of Gujarat High Court — Harooobhai M. Mehta v. State of Gujarat, (AIR 1967 Guj 229) and Mavji Khimji v. Manjibhai Abjibhai, (AIR 1968 Guj 198). In my opinion none of these decisions supports the proposition canvassed on behalf of the revisionist. On the other hand these decisions go against that proposition. In the case of Harooobhai M. Mehta (supra) which was a case of writ petition filed under Article 226 of the Constitution the following material observations was made by Court at page 255 of the report:—

"There is no doubt whatsoever that this Court has power to direct any person filing an affidavit to come up for cross-examination. That power is not in dispute. In fact, the rules of this Court provide that in proper cases oral evidence may be taken. But, at the same time, it is also a fact that such a power is rarely exercised and unless the Court is convinced that in the interest of justice, such a course is necessary, the Court would not ordinarily in writ petitions enter into controversies of such types and undertake to decide them."

In the other case of Mavji Khimji (Supra) also it has not been ruled that even in an interlocutory matter like the one under O. XXXIX, Rule 1, C. P. C. the Court has no power to summon and cross-examine the deponent if it thinks it necessary to do so in the interests of justice. All that has been said is that this power to decide an interlocutory matter under Order XXXIX, Rule 1, Civil Procedure Code on the basis of an affidavit has been specifi-

cally conferred on the court independently of Order XIX, Rule 1, Civil Procedure Code and as such that power is not necessarily subject to the proviso to Rule 1 or sub-rule (1) to Rule 2 of Order XIX. In other words a party can as of right request the court to call the witness for cross-examination whose affidavit has been allowed to be read in evidence under the general power conferred on the court under Section 30 or under Order XIX, Rule 1 or sub-rule (1) of Rule 2 of the said Order.

3. Ordinarily, evidence has to be given in the manner stated in Section 3 of Evidence Act which defines the expression "Evidence", but Rule 1 of Order XIX is an exception to that section when it provides that any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable. This is a departure from the definition of "Evidence" as contained in Section 3 of the Evidence Act and in making that departure a safeguard has been incorporated in the proviso to this Rule 1 which says:

"Provided that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit."

Sub-rule (1) of Rule 2 of the same order is a further safeguard provided to the parties when evidence by affidavit is permitted by the Court instead of in the usual manner contemplated by Section 3 Evidence Act. This sub-rule provides that "upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent."

4. From the above provisions it would be evident that where the court for sufficient reasons either of its own accord or on the application of a party permits any particular fact or facts to be proved by evidence instead of the witness being examined in court it will also take into consideration the limitations and the safeguard contained in the proviso to Rule 1 and in the latter part of sub-rule (1) of Rule 2 of Order XIX. In other words, if a party bona fide desires the production of a witness for cross-examination no order shall be made authorising the evidence of such person to be given on affidavit. Similarly, where on the application of any party evidence has been permitted to be given on affidavit and the other party wants that the attendance of the deponent should be secured for cross-examination the court may ordinarily grant that request.

5. According to the Gujarat High Court decision in Mavji Khimji (Supra) these safeguards are not necessarily in-built in a proceeding relating to an interlocutory order under Order XXXIX, Rule 1, Civil Procedure Code, but even in that proceeding there is no bar to the court to summon a witness for cross-examination if it thinks it necessary to do so in the interests of justice.

6. In the present case, the learned Civil Judge has stated that in view of conflicting affidavits filed by the parties he considered it necessary that the deponent who filed affidavit on behalf of the revisionist should be cross-examined. No illegality has been committed by that Court in doing so.

7. The revision is, therefore, without any merits which is dismissed accordingly.

8. The stay order dated 25-4-1973 is vacated.

Revision dismissed.

AIR 1975 ALLAHABAD 399

T. S. MISRA, J.

Ram Charan and others, Appellants
v. Murli and others, Respondents.

Second Appeal No. 4241 of 1965. D/-
5-2-1975.*

(A) Civil P. C. (1908), Order 39, Rule 7 — Appointment of commission — Order appointing a commission covered by Rule 7 of Order 39 and not by Rule 8 or 9 of Order 26 — The order, even without giving notice to opposite party, is not illegal.

A combined reading of Rules 7 and 8 of Order 39 would make it clear that it is not obligatory on the part of the Court to issue notice to the opposite party before making an order under Rule 7. In appointing a commissioner for making inspection of any property which is the subject-matter of the suit or as to which any question may arise in the suit, the court has to bear in mind the urgency of the situation and the necessity for passing the interim order to protect the rights of the parties or to secure the interest of justice. AIR 1950 SC 222. Rel. on.

(Para 7)
Cases Referred: Chronological Paras
AIR 1950 SC 222 = 1950 SCR 621 7

V. K. S. Chaudhary, for Appellants;
Kamta Natha and S. N. Prasad, for Respondents.

JUDGMENT:— This appeal by the defendants arises in the following cir-

*(Against decree passed by Prayag Narayan, Dist. J., Farrukhabad in Civil Appeal No. 288 of 1965, D/- 28-8-1965).

ES/FS/B625/75/MBR

circumstances. The plaintiffs respondents filed the suit out of which this appeal has arisen for an injunction restraining the defendants from interfering with the possession of the plaintiffs over the alleged sahan land marked by letters GLMND in the plan given at the foot of the plaint and not to demolish any constructions of the plaintiffs existing on the said land and not to fix any door or window opening towards the said land. They also claimed damages to the tune of Rs. 25/- on account of the alleged demolition of a wall shown by letters XY in the site plan. The allegations of the plaintiff were that they were the owners in possession of the said land GLMND which was their sahan land and that they had their cattle troughs, pegs, kolhu and trees on the said land. They had also their wall at the place XY which was illegally demolished by the defendants. They alleged that the defendants had no right, title or interest in any part of the said land and were not entitled to use the same in any manner whatsoever.

2. The suit is resisted by the defendants on a variety of grounds. They alleged, inter alia, that they had built their house in their agricultural plots of land and had been using the land in dispute lying towards the west of their house as sahan. They denied that the land in dispute was the sahan of the plaintiffs. They further denied that they had demolished the alleged wall at the place XY. They claimed that the cattle troughs, pegs, trees and the alleged kolhu belonged to them and not to the plaintiffs. They also raised the plea that the suit was barred by time and also by the principles of estoppel.

3. On the motion of the plaintiffs the trial court granted a temporary injunction against the defendants and also issued a commission with the direction to visit the spot, to prepare a map on scale of the plaintiffs' house, the land in suit and to show if there existed any construction over it. The commissioner was also directed to mark the place where the plaintiffs alleged their demolished constructions existed. Pursuant to this order the commissioner visited the spot, prepared a site plan paper No. 66 Ka A1 and submitted his report 14-C.

4. On the pleadings of the parties the trial Court framed as many as eight issues. Both the parties to the suit adduced oral evidence in support of their respective contentions. On a consideration of the evidence on record the trial court held that the suit land was neither the sahan land of the plaintiffs nor was it appurtenant to the plaintiffs' house and that it had not vested in the plaintiffs. It also held that the defendant had not taken permission in respect of the sahan

land from the zamindar and they had no interest in it. It, however, held that the defendants had demolished the wall of the plaintiffs SY and were liable to pay Rs. 25/- as damages. The pleas with regard to limitation and estoppel were repelled. On these findings the suit was dismissed. Aggrieved by that decision the plaintiffs preferred an appeal. The appellate court below relying on the observations of the commissioner and his report that the houses of the defendants were of recent constructions and the chabutra of the defendants was 'quite new' as also on circumstance that the defendants had their ancestral house at another place in the village while the plaintiffs had no other house except the house in which they were living and which adjoined the land in suit and that the situation of the house of the two parties in relation to the land in dispute showed that the land in suit could not have been used by the defendants reversed the findings recorded by the trial Court and held that the plaintiffs' case of using the land in dispute as their sahan darwaza was clearly proved as against the defendants. The appellate court below also held that the plaintiffs had exceeded their rights in making the wall on other persons' land and were, therefore, not entitled to any damages. The appeal was, therefore, partly allowed and the suit was decreed for permanent injunction restraining the defendants from interfering with plaintiffs' user of the land in suit as their sahan only on that part of it which does not lie to the west of the imaginary line NX as shown in the commissioner's map. The suit with regard to relief Ja was dismissed. Aggrieved, the defendants have now come up to this Court on second appeal.

5. For the appellants, it was urged that the appellate court below had erred in placing reliance on the report of the commission (paper No. 14-C). The objection was that the order appointing the commissioner being ex parte and without giving notice to the defendants appellants was violative of Rule 18 of Order 26, Civil Procedure Code. With regard to the report, the objection was that the commissioner had exceeded his authority while giving his opinion about the age of the constructions made by the defendants.

6. It is not disputed that the order appointing the commissioner was passed ex parte on 24th January, 1964. The suit was filed on 23rd Jan. 1964. On that date the plaintiffs filed an application 6-C for appointment of a commissioner for inspection of the land in dispute and to submit his report with regard to the facts stated therein. This application was put up before the trial Court on 24th January, 1964 and was allowed. The trial Court appointed Mr. Sri Ram Pathak Vakil as commissioner and directed him

gift, the requirements of Chapter VII have to be satisfied and since there is no registered gift deed, it does not validly convey any title to the 4th defendant.

10. Under Section 129 of the Transfer of Property Act, nothing in Chapter VII relates to gifts of movable property made in contemplation of death or shall be deemed to affect any rule of Mohammadan Law. According to the Mohammadan Law, there can be a valid gift, if three essentials of the gift are satisfied. (1) a declaration of the gift by the donor, (2) the acceptance of the gift express or implied by or on behalf of the donee and (3) delivery of possession of the subject of gift by the donor to the donee. If these conditions are complied with the gift is complete. According to Muslim law it is not necessary that there should be a deed of gift in order to make it a valid gift, but of course, if there is a deed it should be registered. But if the deed is merely a memoranda of an already effected gift, then it stands on a separate footing. In view of this specific provision of Muslim Law, which is saved by Section 129, it cannot be held that the gifts amongst muslims also should satisfy the provisions of Chapter VII. There is also no justification for making any distinction between secular and non-secular gifts as has been done by the learned Judge in the above decision. Moreover after the Shariat Act 1937 (Central Act 26 of 1937) the Muslim personal law alone applies in the matter of gifts. (See *Bibi Mantran v. Md. Ishaque*, AIR 1963 Pat 229. In view of this Act, the prior decision in *Ma Asha v. B. K. Haldar* (AIR 1936 Rang 430) (FB) cannot be deemed to be the correct law. Moreover it has been held in *Ghulam Ahmed v. Mohd. Sidiq* (AIR 1974 J & K 59) (FB) by a Full Bench of Jammu & Kashmir High Court that after the amendment in 1929 in Section 129 the operation of the provisions of Chapter VII have been excluded in regard to gifts made by persons professing muslim faith and made under that law. Hence if all the formalities, as prescribed by Muslim Law, regarding the making of gifts are satisfied, the gift is valid notwithstanding the fact that it is oral and without any instrument. If there is a contemporaneous document it should be registered. But if the gift is antecedent and the deed is subsequent merely evidencing the past transaction, it does not require registration, because it does not by itself make or complete the gift. This has already been the view expressed by my learned brother Sambasiva Rao, J. in *A. Srisailam v. A. Lingamma*, (1972) 2 Andh WR (S N) 5. I do not find any precedent to support the view expressed by the learned Judge of the Kerala High

Court in (AIR 1972 Ker 27) to make any distinction between gifts which are secular and non-secular in this respect. Hence with great respect to the learned Judge, I am unable to contribute to that view. I have therefore to reject the argument of the learned counsel for the appellant, based on the above decision.

11. Coming to the argument about the truth and validity of the gift itself, I have already stated that there are three essential requisites for a valid gift under Muslim Law. The Privy Council in *Md. Abdul Ghani v. Mt. Fakhir Jahan*, (AIR 1922 PC 281) at p. 288 laid down the three tests as follows:—

"For a valid gift *Inter Vivos* under the Mohammedan Law applicable in the case, three conditions are necessary, which their Lordships consider, have been correctly stated thus. (a) Manifestation of the wish to give on the part of the donor; (b) the acceptance of the donee, either impliedly or expressly; and (c) the taking of possession of the subject-matter of the gift by donee, either actually or constructively" (*Mohammedan Law* by Syed Ameer Ali 4th Edn., Vol. 1, p. 41)." This is also the view expressed by their Lordships of the Supreme Court in *Maqbool Alam v. Khodaija*, (AIR 1966 SC 1194).

12. A Full Bench of the Andhra Pradesh High Court in *I. G. of Registration and Stamps v. T. Begum*, (AIR 1962 Andh Pra 199) (FB) also held that an oral gift followed up by a deed, which was intended to be operative as a gift deed was held liable to stamp duty as a gift and would fall under the sweep of Section 17 of the Registration Act.

13. In considering the question whether the three requirements of a valid gift have been satisfied, we have to see whether there is declaration, acceptance and possession conveyed by the donor to the donee on the date of the gift. It is no doubt true that it has been held in some cases where the donor is in constructive possession, the donor should give such possession as the property is capable of viz. symbolical possession or such possession as the property is susceptible of. It has been held where the property is in the possession of the mortgagee, the donor effects a valid gift by giving symbolical possession to the donee by himself handing over the gift deed and in that case no beat of tom tom or publication is necessary. (vide the decision of Mylord the Chief Justice and Madava Rao, J. in *A. K. Khan v. S. Khatoon*, (1973) 1 Andh WR 337 = (AIR 1974 Andh Pra 23).)

14. It was held by Viswanadhasastry, J. in *Shaik Khatum Bibi v. Maha-*

mad Zahina Bi. (1956 Andh WR 771) that where the donor and the donee are equal sharers in the house, which was in the possession of a tenant, the entering of donee's name in the Municipal registers as sole owner, with the consent of the donor, the payment of municipal taxes by donee alone after the gift, the payment of some provision made under the gift deed by the donee with the consent of the donor and the production of the title deed by the donee were held to be sufficient to constitute it as a valid gift. The learned Judge distinguished the decision in *Mohomed Aslam Khan v. Khatilul Rehman Khan*, (AIR 1947 PC 97) where the donor continued in possession even after the gift, which was proved by some diary records maintained by the donor and therefore there it was held to be not a valid gift. In *Gani Mia v. Wajid Ali*, (AIR 1935 Cal 393) it was held that the delivery of title deeds to the donee and a direction to the lessee to give possession to the donee were held sufficient to constitute a valid gift. In *Noor Jahan v. Muftikhar Dad Khan*, (AIR 1970 All 170) a recital in a gift deed about possession was held to be not conclusive, but only sufficient to give rise to a rebuttable presumption. If the subsequent conduct is inconsistent with the gift, it was held to be not a valid gift. The learned Judges in that decision preferred to an observation of Sir Barnes Peacock in *Ameeroonissa Khatoon v. Abedoonniss Khatoon*, ((1875) 2 Ind App 87 (PC)), where the profits on the property gifted were dealt with by the donor after the gift deed, to that of the decision of Tyabji, J. in *Ebrahim Alibhai v. Bai Asi*, (AIR 1934 Bom 21), where the donor took the benefit of the subject-matter like harvesting and recovering rents after the gift deed; and the decision in *Dalpheroo Mian v. Bangali Mali*, (AIR 1923 Pat 481), wherein the donor still continued to be the owner and the decision in *Sultan Miya v. Ajibakhaton Bibi*, (AIR 1932 Cal 497). Their Lordships have also referred to the decision in *Musa Miyan v. Kadar Bux*, (AIR 1928 PC 108) wherein it was held that a complete relinquishment of control over the subject is essential to complete a gift.

15. In the light of the above propositions we shall now examine whether the gift set up by the defendants has been made out. Before I examine the oral and documentary evidence adduced in support of the case of the defendants, I have to state that there is any amount of prevarication in the case set up by the 4th defendant about the gift in this case.

16. Exhibit A-2 is the notice issued by the plaintiff demanding partition, Exhibit A-3 is the reply given by the 3rd defendant, who is no other than the father

of 4th defendant, the alleged donee. In that notice the said gift has not been set up at all. On the other hand he says that all the properties of Pullu Saheb devolved upon his adopted son Shaik Mastan Saheb and his two wives. This case is quite inconsistent with not only with the case of gift in favour of 4th defendant, but also conveying of title by Pullu Saheb to 4th defendant alone to the exclusion of defendants 1 and 2. If really the two wives had succeeded to the property as heirs along with the adopted son, there cannot be any gift in favour of the 4th defendant alone.

17. In Ex. A-4, which is the reply notice given by defendants 1 and 2 on the other hand their case is that late Pullu Saheb gifted before his death, to 4th defendant, in the presence of G. Komarayya G. Seetharamulu and Shaik Abdul Shukoor and others. It is not stated in this reply that it was an oral gift. They are specific that it was only before his death. But what transpires in the evidence is that the oral gift was some time in 1966 while what was executed is just before the death, Exhibit B-29 confirming the gift. It is not therefore clear from this reply notice as to whether they were having in their mind the confirmation deed or the gift itself. At any rate they did not come forward with the plea of oral gift at all.

18. In the plaint the plaintiff has challenged the gift set upon the defendants 1, 2 and 4. In the original written statement which is the common written statement filed by defendants 1, 2 and 4, again it is stated as follows:

"It is the 4th defendant, who has been in possession of the entire estate, which belonged to late Pullu Saheb as it was gifted to him by late Pullu Saheb before his death in the presence of V. Komarayya, G. Seetharamulu, Shaik Abdul Shukoor and other elders. Ever since the 4th defendant is and has been in exclusive possession and enjoyment of all the properties in his own right as a donee."

19. Even in this written statement, the case of oral gift is absent. The only case is that of a gift before his death. Hence they were having only Ex. B-29 gift in their mind.

20. In the petition for amendment filed by the defendants 1, 2 and 4 it was also not made clear whether it is an oral gift or a written gift, the only contention made in the written statement was that the gift was made at the time of the marriage of the 4th defendant. The date of the marriage has not been given and whether it is an oral or a written gift has not also been mentioned. By this petition they wanted to introduce a confirmatory

deed executed on 5-6-1967, which is not to be found in the original written statement. In this case, the suit was filed on 7-8-1968 and the original written statement was filed on 12-10-1968. Issues were framed on 26-10-1968. Ex. B-29 was filed on 8-8-1969. I. A. 2881 of 1969 was filed on 30-9-1969 and Exs. B-3 to B-8 were filed on 6-10-1969. Even in Ex. B-29 it is not stated that it was gift made at the time of the marriage. The recital in that deed it was stated that it was an oral gift in the presence of elders and wives. Hence it is to be seen that there is no definite case of the gift for the defendants as seen from the above events.

21. I will now consider the evidence in regard to the gift itself. According to the defendants the gift was made in the presence of V. Komarayya, examined as D. W. 11 G. Seetharamulu examined as D. W. 8 and Shaik Abdul Shakoor examined as D. W. 12. If we examine the evidence of these three witnesses there is any amount of contradiction in regard to the alleged gift. One important aspect about the evidence of these three witnesses is, they are not agreed about the presence of the third defendant at the time of the marriage. Third defendant is no other than the father of the 4th defendant. D. W. 8 says that the third defendant was not present. D. W. 12 says that he was present, while D. W. 11 says that he did not see whether he was present at the marriage. If in regard to this important aspect all the three persons are not agreed, it is not known as to how any of them can be believed in regard to the reversion. D. W. 8 is a non-muslim, who is said to have attended the marriage at Nandigama. Plaintiff says in his evidence that this witness is his enemy while the defendants deny it. This witness says in the Chief examination that after the marriage Pullu Saheb went inside where the women folk were sitting he then came out with title deeds in his hand. This witness says that "he declared before all of us that 4th defendant would be the owner of all his properties from then onwards." He has also attested Ex. B-29 executed 10 or 11 days before the death. This witness does not say that the declaration was made in the presence of 4th defendant, that it was accepted by the 4th defendant and that possession was given to the 4th defendant. He says that he does not know anything about the handing over of the documents to the 4th defendant. In the cross-examination it was elicited that he did not see the title deeds being handed over by Pullu Saheb to the 4th defendant. It is suggested to him that Ex. B-29 is a false document and that he being an enemy of the plaintiff is trying to help the defendants. It was also suggested that he has not at-

tended the marriage. At any rate the evidence of this witness is not sufficient to satisfy the three requirements of Muslim law for a valid gift.

22. Coming to the evidence of D. W. 11 he is also a non-muslim. He does not speak to the oral gift at the time of marriage at all in his Chief examination. He only speaks about Ex. B-29. He has no doubt been cross-examined about the marriage, and he developed the case that after the marriage Pullu Saheb handed over some papers to the 4th defendant, he declared that the 4th defendant becomes the owner and possessor of all his properties from then onwards. He admits that he was a bit away in the pandal in the verandah and the contents of the documents were not read out. He also admits that after their return to Jaggavvapat he was told that the title deeds were registered documents, and Pullu Saheb told him that he gifted his properties to the 4th defendant. He told him at his house. It is therefore clear from what he is speaking about what has happened at the marriage is what he has heard from Pullu Saheb later on at Jaggavvapat and not what happened actually in his presence at the time of marriage at Nandigama. Moreover he is the person, who says that he has not seen the 3rd defendant at the time of marriage, which is really extraordinary. That shows that this person would not have been present at the time of marriage. He also says that some stamp papers were brought for Ex. B-29. But Ex. B-29 is only on a white paper and not on a stamp paper. It has been suggested to him that Ex. B-29 has been fabricated in order to support a false case. On a fair reading of his evidence as a whole, I am not satisfied that it is sufficient to establish the declaration of acceptance and the delivery of possession as required by muslim law to establish a valid gift.

23. D. W. 12 is the brother of the second defendant. He no doubt speaks about the gift at the time of marriage and he has also attested Ex. B-29. But the evidence of this witness cannot be believed as he is very much interested in second defendant. Moreover the conduct of this person in taking a lease of the property under Ex. A-6 from defendants 1 and 2, after the suit, in respect of an item of suit property, shows that he is not considering the 4th defendant as the owner which means that there was no gift in his favour. A reading of his evidence also does not show that he is a reliable witness. If the evidence of the above three persons is rejected, then the oral gift has not been made out.

24. We have next got the evidence of D. W. 1 who is the 4th defendant him-

self. He admits that his wife is first defendant's sister's daughter's daughter. She is also related to the second defendant. He admits that his father-in-law knows about the oral gift. He admits that D. W. 12 worked under 3rd defendant, on a monthly salary of Rs. 110/- and D. W. 12 is no other than first defendant's brother's son and brother of second defendant. He admits that there is no mutation even today in his name and the properties continued to be in Pullu Saheb's name. He does not say that he has accepted the gift.

25. Next we have got the evidence of the second defendant examined as D. W. 2. Her marriage with Pullu Saheb was just three years prior to his death. By that time she was already married to another person and was divorced. She admits that she observes *pardah*, or *Ghosha* and yet speaks about the oral gift. She admits having given a lease deed in Ex. A-6. There is enough justification for this lady in supporting the case of oral gift, because as a heir she would only get 1/8th in the estate of Pullu Saheb, whereas under the gift she is entitled to 1/3rd share of the income, throughout her lifetime without the difficulty of managing the estate.

26. The natural mother of 4th defendant has been examined as D. W. 3. She does not speak a single word about the oral gift at all. The absence of any support for the case of gift set up by the 4th defendant from his own mother is a lacuna in his case. Having examined his own mother to prove that he is the brother of Bab Jani, he should have also made her to speak about the gift if really it was true. Probably she was not willing to support this false case of gift. Moreover it should be seen that the 3rd defendant who is no other than the father of the 4th defendant has neither supported the case of a gift by filing a written statement, nor has he entered into witness box to speak about it. It may be noted that as a sharer he is entitled only to 3/8th, while in case the gift is upheld his son would walk away with the entire property to the exclusion of the plaintiff. That shows his interestedness in the 4th defendant.

27. Next we have got the evidence of D. W. 4, the Mutavalli of Nandigama. He says that Pullu Saheb made a will which is nobody's case. He is a person who tried to settle the dispute between the parties and because a settlement failed he is speaking to this version. It is put to him that he is a professional witness and always comes to Court. He was removed from the Mutavalliship and there was a complaint against him. He does not know about 3rd defendant at all.

His evidence does not support the case of the gift.

28. We have got next the evidence of D. W. 5, who is no other than the grandfather of 4th defendant's wife. It was suggested to him that he was drunk at the time of the marriage. Apart from being interested, his evidence is of no use.

29. We have next got the evidence of D. W. 6 a tailor at Vijayawada who is a cousin and co-brother of the father-in-law of the 4th defendant. He was a vakil at the time of the marriage. At the time of the marriage, Ex. A-17 was prepared. In the cross-examination he says that management of the properties were given to the 4th defendant.

30. Next we have got the evidence of D. W. 7 who is the brother of D. W. 3. He and P. W. 6 are witnesses to the marriage. He speaks to the payment of dowry of Rs. 1,616/- which is not spoken to by any other witness and as a return of which the gift was made. His evidence is of very little help apart from being interested.

31. P. Ws. 1, 2 and 6 attended the marriage and they stated that no gift was announced. According to them D. Ws. 11, 12 did not attend the marriage at all. P. W. 6 who is also one of the witnesses to the marriage says that no documents were given by Pullu Saheb to the 4th defendant.

32. There are two other circumstances, which negative the case of transfer of possession to the 4th defendant. The first one is the execution of the lease deed Ex. A-6 on 28-12-1968 by defendants 1 and 2 to D. W. 12. They are described as living by their own properties and the tiled shop leased out under that document belongs to them. Defendants 1 and 2 were to pay taxes to the Municipality and the lessee undertook to deliver vacant possession of them alone. If really possession of all the properties were made over to the 4th defendant at the time of the gift, this lease deed by defendants 1 and 2, who exercised the rights of ownership, in respect of one of the items of property, is inconsistent with any such case of gift. Secondly Pullu Saheb himself sold property under Ex. A-27 on 28-6-1966 to P. W. 6. This deed has been produced and proved by P. W. 6. It may be noted that the marriage of the 4th defendant was on 7-4-1966 when the alleged oral gift is said to have been made and the possession was delivered to 4th defendant. If really 4th defendant became the owner under the oral gift, it is not known as to how Pullu Saheb could have disposed of one of the items of his property under Ex. A-27. Moreover defendant 3 has also attested Ex. A-27.

33. As regards the possession from the date of the gift there is absolutely no evidence for the 4th defendant. According to him he carried on cultivation in 1967. In 1968 there were no rains, hence there was no cultivation and in 1969 he leased out the lands to one Radhakrishna Murthy, who has not been examined and no lease deed has been filed. In cross-examination he admits that in 1967, 1968 he and defendants 1 and 2 keep paddy in their house. He has not filed any records to show cultivation in the year 1967 and for proving that there were no crop in the year 1968.

34. D. W. 9 has been examined to show that 4th defendant is in possession. He is a neighbouring land owner. But he speaks to the possession of 5th defendant only in the year 1969. D. W. 10 is also a neighbour and he speaks to the possession of 4th defendant in 1969, 1968 and 1967. In cross-examination it was elicited that he is a broker and he appears to be a chance witness, who cannot be relied upon.

35. The house tax-receipts filed by the defendants Exs. B-14 to B-16 and B-17 to B-20 relate to the period subsequent to the death of Pullu Saheb. The land revenue paid by the 4th defendant represented by the Exs. B-22 to B-26 is only for a period after the death of Pullu Saheb. There is also absolutely no evidence to show that immediately after the oral gift as and from 7-4-1966 the 4th defendant alone was in possession of the entire property and has been enjoying the profits therefrom.

36. Moreover there does not seem to be any probability or possibility of such a gift of the entire property by Pullu Saheb to the 4th defendant at the time of his marriage. Assuming that 4th defendant was brought up by Pullu Saheb, it should be noted that Pullu Saheb had two wives, defendants 1 and 2, the second defendant having been taken as second wife only a few years before the date of the alleged gift. Without making any provision for their own maintenance and without any assurance that the 4th defendant would maintain them, it passes one's comprehension as to how Pullu Saheb could have given away the entire property by means of a gift to the 4th defendant, who is only a foster son.

37. Moreover Exs. B-3 to B-8 have been produced in the Court not by the 4th defendant alone, but by the defendants 1, 2 and 4. It may be noted that they are living together in the same house and these documents must have come from their custody. If it is the case of the 4th defendant that they were handed over to the 4th defendant alone at the time of the marriage or the alleged gift,

he should have had the exclusive possession of those documents. But we find that all the three defendants produced these documents into Court. Moreover Exs. B-3 to B-8 do not exhaust all the properties in the suit. Merely because the documents were lying in the house of Pullu Saheb and defendants 1 and 2 are supporting the case of the 4th defendant they were produced in the alleged oral gift. It would be a dangerous proposition if persons were to be allowed to set up and establish as true oral gifts merely by the possession of title deeds, which may be procured by some means or the other. Hence it is all the more necessary that the evidence adduced in support of such an oral gift must be tested by stricter standards. On a review of the whole evidence, I am not satisfied that the alleged oral gift has been made out.

38. Ex. B-29 has been styled as if it is a confirmatory deed. Even then this document does not mention about the oral gift. It merely mentions some earlier gift. If the case of an earlier gift falls on ground not to be a true one, then this document cannot have a greater force of establishing it. In this view I need not consider the other evidence about Exhibit B-29.

39. The lower Court has accepted the case of oral gift without properly addressing itself to the various aspects discussed supra. The learned Judge has not dealt with the evidence adduced in support of the gift. The lower Court has surprisingly dubbed the registered document as a fabricated one Ex. A-27. It is not clear as to what the lower Court meant by such an observation. He has not given any reason why the evidence of P. W. 6 should not be believed or any ground why the other witnesses should be disbelieved. The mere fact that the plaintiff is not able to produce the title deeds of Pullu Saheb would not be a ground to establish the gift in favour of the 4th defendant.

40. The lower Court has been merely guided by the present possession of the 4th defendant of Pullu Saheb's properties, which is not a decisive one, one way or the other. The lower Court also is more influenced by the notice issued by the plaintiff one year after the death of Pullu Saheb claiming partition. The view of the lower Court that the keeping of silence for nearly one year and allowing the 4th defendant to enjoy the property is a point against the plaintiff's case cannot be accepted. There is no question of limitation involved in this case and the fact that the claim was made after one year would not establish the oral gift. Even assuming that the 4th defendant has discharged the debts of Pullu Saheb and that he is now managing the properties of

Pullu Saheb or that he spent moneys for the ceremonies after the death of Pullu Saheb or that Panchayat Board issued notices to him to pay house tax these are not decisive of the question. The lower Court has not examined the evidence of D. Ws. independently and separately. I am not therefore in a position to agree with the findings of the lower Court about the truth, validity and the binding nature of the oral gift on the plaintiff. I therefore set aside the said finding.

41. In the above view the claim of the plaintiff to a 3/8th share of the plaint properties of Pullu Saheb having been made out he is entitled to claim partition and separate possession in this suit.

42. First defendant-first respondent died pending the appeal. The plaintiff also has been recorded as one of the legal representatives. He is therefore entitled not only to his share, but also to a proportionate share in the share of the first defendant as her legal representative.

43. The appeal is therefore allowed and the decree of the lower Court, dismissing the suit, is set aside. The plaintiff will, therefore, have a preliminary decree for partition and separate possession of his share as claimed in the plaint and also the share which has devolved upon him after the death of the first defendant together with profits from the date of the suit to be ascertained in a separate proceedings. The appellant will have his costs in both the Courts.

Appeal allowed.

AIR 1975 ANDHRA PRADESH 278

FULL BENCH

MADHAVA REDDY, A. V.

KRISHNA RAO AND RAGHUVIR, JJ.

Sajja Jaganmohan Rao, Petitioner v. Uppalapati Babu Rao and others, Respondents.

Civil Revn. Petn. No. 1109 of 1972. A. A. O. Nos. 464 of 1971 and 15 of 1972. D/- 25-4-1975.

(A) Provincial Insolvency Act (1920), Sections 28-A, 28, 52 — Pending insolvency proceedings by father of Hindu joint family, decree obtained against father and son — Attachment of son's share in joint family property in execution prior to adjudication — As consequence of adjudication, son's share in joint family property, whether vests in Official Receiver — Son's share whether could be attached by decree-holder in execution of decree against father and son — (i) Civil P. C. (1908), O. 21, R. 58; (ii) Hindu Law — Joint family — Father — Insolvency).

GS/GS/C474/75/VBB

Upon a father, who is the Kartha of a joint Hindu family consisting of himself and his sons, being adjudged an insolvent, what vests in the Official Receiver under the Provincial Insolvency Act is his self-acquired property, his undivided share in the joint family property and his power of alienation over the interests of the sons in the joint family property provided the debts of the father are not tainted with illegality or immorality. The interest of the sons or their shares as such in the joint family property does not vest in the Official Receiver. It is only the father's power to alienate this interest or share that vests in the Official Receiver. On such vesting the Official Receiver has three courses open to him with respect to the interests of the sons in the joint family property; (1) to exercise the power of the insolvent father to dispose of by private sale, (2) to apply to the insolvency Court under Sections 4 and 5 of the Provincial Insolvency Act, and (3) to apply under Section 52 of the Provincial Insolvency Act to the Court executing the decree under Section 52 for delivery of possession of the property and take proceedings for bringing the properties to sale. (Para 41)

The power of the father to dispose of his son's share in the joint family properties by private sale, however, subsists only so long as there is no disruption of the joint family status. That power comes to an end when that status is disturbed either by the institution of a suit for partition by the sons or by the attachment of the son's interest in the joint family properties by a creditor. Just as the father's power to alienate the sons' interest is extinguished on the happening of any of the above-mentioned contingencies, so also the power of the Official Receiver comes to an end, for the power of the Official Receiver in this behalf is co-extensive with that of the father. If before the exercise of this power by the Official receiver any of the above contingencies occur, i.e., the joint family status is disrupted by actual partition or by the institution of a suit for partition, or by the attachment of the son's interest by any creditor, then the Official Receiver cannot proceed to dispose of the son's interest by private sale. (Para 41)

Whether the attachment of the sons' interest is before the adjudication of the father as an insolvent or after the adjudication, it makes no difference so far as the son's interest in the joint family properties is concerned. Once there is an attachment of the son's interest by a creditor whether before or after the adjudication the Official Receiver's power to dispose of that interest or share by private sale is lost; that power could have been exercised only before the attachment.

There is no conflict in the two Bench decisions of A. P. High Court in AIR 1965 Andh Pra 451 and in AIR 1973 Andh Pra 113 in this regard. (Para 41)

The Official Receiver, however, may apply to the insolvency Court for bringing the son's interest also to sale provided the debts of the insolvent father to be discharged are proved to be not incurred for illegal or immoral purposes, for the pious obligation of the son to discharge the debts of the father incurred while he was joint which are not tainted with illegality or immorality continues even after partition. However as the attaching creditor is not forthwith entitled to possession of the son's interest in the property the insolvency Court may, notwithstanding the attachment, put the Official Receiver in possession of the son's interest in the joint family property. AIR 1965 Andh Pra 451. Approved: AIR 1973 Andh Pra 113, Expl. Case law discussed. (Para 41)

During the pendency of insolvency petition filed on 1-11-1969 by the father in a Hindu joint family, a decree was passed against the father and son, and in execution, attachment was ordered, on 16-9-1971, of the properties of both the judgment-debtors. The insolvency petition was decreed on 19-8-1971. The son raised an objection to the attachment that inasmuch as his father was adjudged an insolvent and the property had vested in the Official Receiver, the decree-holder had no right to bring his share in the properties to sale. The objection was rejected.

In execution petition filed in 1970 in another decree against 4 judgment-debtors (including the father and son, judgment-debtors in earlier decree), the Official Receiver when the properties of the insolvent had vested in him, filed a petition under Section 52, Provincial Insolvency Act for delivery of property. The decree-holder opposed that petition contending that the share of the son of the insolvent could not be delivered. Rejecting that contention the Court directed delivery of possession to the Official Receiver by its order dated 25-9-1971. (Para 43)

Held: (i) that the objection of the son of the insolvent to the attachment and sale of his interest in the joint family properties in execution of the decree against him and his father in the first case, had been rightly rejected. The decree-holder was entitled to attach the son's interest as the Official Receiver had not exercised the right of the father to bring the son's share of the properties to sale. (Para 42)

(ii) The objection raised by the decree-holder in execution proceedings in

the second case, against the father and son, were also rightly rejected. (Para 43)

Cases Referred: Chronological Paras

AIR 1973 Andh Pra 113 = (1972) 2 Andh WR 375	1. 4. 37, 41
(1971) 1 Andh WR 271	35, 37
AIR 1965 Andh Pra 52 = (1964) 2 Andh WR 435	31, 36, 37
AIR 1965 Andh Pra 451 = (1965) 2 Andh WR 256	1. 4. 33, 35, 37
AIR 1960 Andh Pra 131	26, 34
AIR 1953 SC 370 = 1953 SCR 894	24, 25, 27
AIR 1952 SC 170 = 1952 SCR 544	29
AIR 1951 Mad 713 = (1951) 1 Mad LJ 168	27
AIR 1951 Mad 1010 = (1951) 2 Mad LJ 299	27
AIR 1943 Mad 303 = (1943) 1 Mad LJ 24	31
AIR 1942 Mad 330 = (1942) 1 Mad LJ 318	18
AIR 1942 Mad 682 = (1942) 2 Mad LJ 457 (FB)	22, 23, 24, 28, 41
AIR 1939 Mad 572 = 1939 Mad WN 515 = (1939) 1 Mad LJ 889	16, 18
AIR 1937 Pat 185 = ILR 16 Pat 60 (FB)	22, 24
AIR 1936 PC 277 = 63 Ind App 384 = ILR 17 Lah 644	10, 22, 23, 24
AIR 1936 Mad 193 = 1936 Mad WN 510 = ILR (1936) 59 Mad 296	15, 18
AIR 1936 Mad 698 = 1936 Mad WN 769 = 71 Mad LJ 294	15, 18
AIR 1934 Mad 217 = 1934 Mad WN 113	15, 18
AIR 1931 Mad 118 = 33 Mad WN 607	15, 31
AIR 1928 Mad 479 (1) = 27 Mad LW 318	10, 15
AIR 1928 Mad 657 = 27 Mad LW 688 (FB)	10
AIR 1928 Mad 735 = 28 Mad LW 109 = ILR 51 Mad 417 (FB)	10, 12, 15, 31
AIR 1926 All 262 = 24 All LJ 326	10
AIR 1926 Mad 994 = ILR (1926) 49 Mad 849 (FB)	10, 15
AIR 1925 PC 18 = 52 Ind App 22 = ILR 6 Lah 1	10, 22

Challa Seetharamayya, in C. R. P. No. 1109 of 1972 for Petitioner; C. Appa Rao, (for No. 1) and Y. G. Krishna Murty and N. Venkatarayudu, (for No. 3), for Respondents In A. A. O. No. 464 of 1971.

MADHAVA REDDY, J.:— The Civil Revision Petition and the two Civil Miscellaneous Appeals came up before the Full Bench on reference by our learned brother Venkatarama Sastry, J. as he was of the view that "there is a clear and apparent conflict between the two Bench decisions reported in Sri Raja Vatsavayi Venkata Suryanarayana Jagapathi Raju Bahadur v. The Official Receiver, East Godavari, (1965) 2 Andh WR 256 = (AIR 1965 Andh Pra 451) and Manne Venkata Narayudu v. Thammineedi Subbarao,

(1972) 2 Andh WR 375 = (AIR 1973 Andh Pra 113) in regard to the rights of the attaching decree-holders in respect of the attachments effected prior to and after the adjudication."

2. The 1st respondent in the Civil Revision Petition obtained a decree in O. S. 5/71 on the file of the Subordinate Judge, Vijayawada against one Subbarapu Jagan Mohan Rao, the petitioner herein and one Subbarapu Ponniah, the 2nd respondent who is the father of the petitioner and filed E. P. 158/71 on 7-9-1971 on the file of the said Court for execution of the decree against both the judgment-debtors. In the said E. P. he sought attachment and sale of the properties of both the judgment-debtors. The attachment was ordered on 16-9-1971.

3. The 2nd respondent, judgment-debtor herein had earlier filed an insolvency petition O. P. 29/69 on the file of the Subordinate Judge's Court, Vijayawada on 1-11-1969 to adjudicate him as insolvent. Though the said petition was dismissed, on appeal the District Court, Krishna at Masulipatnam by its order dated 19-8-1971 in A. S. 10/71 adjudged him an insolvent.

4. The petitioner herein raised an objection to the attachment that inasmuch as his father, the 2nd respondent herein was adjudged an insolvent and the property had vested in the Official Receiver, the decree-holder had no right to bring his share in the properties to sale. The learned Subordinate Judge purporting to follow the decision in *Sri Raja Vatsavayi Venkata Suryanarayana Jagapathi Raju Bahadur v. The Official Receiver, East Godavari*, (1965) 2 Andh WR 256 = (AIR 1965 Andh Pra 451) and *Manne Venkata Narayudu v. Thammimeedi Subbarao*, (1972) 2 Andh WR 375 = (AIR 1973 Andh Pra 113) rejected this objection by his order dated 6-3-1972. The Civil Revision Petition is filed against this order.

5. C. M. A. 464 of 1971 is by the decree-holder in O. S. 117/70 on the file of the Subordinate Judge's Court Vijayawada who filed E. P. 362 of 1970 to execute the decree against the four judgment-debtors two of whom are judgment-debtors in E. P. 158/71 as well. The Official Receiver in whom the properties of the insolvent, Subbarapu Punnaayya, 2nd respondent, one of the judgment-debtors in O. S. 117/70 and also in O. S. 5/71 had vested, filed E. A. 1030/71 for delivery of the properties. The decree holder opposed that petition contending that the share of Subbarapu Jaganmohana Rao son of the insolvent cannot be delivered. Rejecting that contention the Court directed delivery of possession to the official Receiver by its order dated 25-9-1971. Against that order, the decree-holder who filed E. P.

362/70 preferred C. M. A. 15/72. As a consequence of the order in E. A. 1030/71, E. P. 362/70 was dismissed. Against the dismissal of the E. P. the decree-holder preferred C. M. A. 464/71.

6. The main question therefore that arises for consideration is:

"Whether consequent upon the father being adjudged an insolvent, the son's share in the joint family properties vests in the Official Receiver and whether it could be attached by the decree holder creditor in execution of the decree against the father and the son?"

Before we proceed to consider the various aspects of these questions, it may be noticed that the insolvency petition was filed by the father on 1-11-1969. Though that petition was dismissed by the Insolvency Court on appeal, it was allowed and he was declared an insolvent. By virtue of the provisions of the Provincial Insolvency Act, this order of adjudication relates back to the date of the presentation of the petition i.e., 1-11-1969. The attachment of the son's share in execution of that decree in O. S. 5/1971 was ordered on 16-9-1971 in E. P. 158/71. The Official Receiver's application for delivery of properties including the son's share was ordered on 25-9-1971. Thus the attachment of the son's share of the property in execution of the decree in O. S. 5 of 1971 was subsequent to the date of the adjudication of the 2nd judgment-debtor's father as an insolvent. The contention of the petitioner is that the attachment is not valid.

7. Under the provisions of the Provincial Insolvency Act (V of 1920) hereinafter referred to as the 'Act' if the Court does not dismiss a petition filed under Section 7 of the Act, the Court shall make an order of adjudication adjudging the debtor an insolvent. By virtue of sub-section (2) of Section 28 of the Act on the making of such an order, the whole of the property of the insolvent vests in the Court or in a receiver as provided under Section 56. On such vesting the property of the insolvent shall become divisible among the creditors, thereafter except as provided under the Act.

8. The Act does not define 'Property' as such. The definition of 'Property' in Section 2 (d) of the Act is an inclusive definition and is as follows:

" 'Property' includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit."

Thus for the purpose of the Act, not only the property of the insolvent as such, but also such other property over which or over the profits of which any insolvent had a disposing power, which he may exercise for his own benefit, is also deem-

ed to be 'property'. By virtue of sub-section (7) of Section 28, the order of adjudication relates back to, and takes effect from, the date of the presentation of the petition. In the result all the properties of the insolvent himself (except those that are exempt under the provisions of the Act) and also all such other properties over the profits of which the insolvent had disposing power which he could exercise for his own benefit on the date of the admission of the petition vest in the insolvency Court or the receiver appointed under Section 56 of the Act. While admitting a petition or at any time thereafter before adjudication, the Court has power to appoint an interim receiver under Section 20 of the Act. Section 51 of the Act declares that where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of the assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition. That section, however, declares that the rights of the secured creditor in respect of the property against which the decree is executed shall not be affected. A purchase of the debtor's property in good faith under a sale in execution is also protected against the receiver. Under Section 52 of the Act, on being informed of the presentation of the petition, the Court executing a decree is bound to deliver the property to the receiver.

9. In the case of a Hindu father being adjudged insolvent, questions have often arisen in Courts as to whether the share of the father alone vested in the Receiver or the share of the sons also vested, or only the power of the father to sell the shares of the sons, vested in the Official Receiver. The son is undoubtedly liable for the father's debt if it is not incurred for an immoral or an illegal purpose. The pious obligation of the son to discharge his father's debts exists whether the father is alive or dead.

10. The son's share also would be liable for the discharge of the father's debt even after partition. A Full Bench of the Madras High Court in *Subramania v. Sabapathi*, AIR 1928 Mad 657 (FB) considering the question whether "a simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons even after a bona fide partition has taken place between the father and the sons" was answered in the affirmative. The father has also the power to effect a transfer of any of the joint family properties including the interest of the sons to discharge such debts. In view of the definition of the property contained in Section 2 (d) of the

Act not only the property of the insolvent father vests in the Court by virtue of Section 28 (2) but inasmuch as the father has the power to alienate the son's share of the property for discharging his own debts which are not immoral or illegal, that power also vests in the Receiver upon adjudication. Considering the question whether the share of the sons as such vests in the Official Receiver on adjudication of the father as insolvent or only the power of the father to sell his son's share vests, the Privy Council in *Sat Narain v. Behari Lal*, AIR 1925 PC 18 = 52 IA 22 held that only the power of the father to sell the share of the sons, passes to the Official Receiver. Following that decision, a Bench of the Madras High Court in *Gopalakrishnavya v. Gopalan*, AIR 1928 Mad 479 (1) where the son's share of the property was attached by a creditor held that the Official Receiver cannot exercise the power of sale with respect to such property. At the same time it held that in respect of such properties which were sold by the Official Receiver prior to the attachment of the son's share by the decree-holder, the sale was valid. The decree-holder was therefore allowed to execute his decree against the properties of the son which were attached by him in execution of the decree before the Official Receiver exercised his power of sale. The Bench was, however, of the opinion that the power of the father to sell the share of the sons to discharge those binding debts which passes on to the Official Receiver as a consequence of the adjudication was subject to the same qualification as it was subject to in the hands of the father. In coming to this conclusion the Division Bench of the Madras High Court followed the earlier Full Bench decision of the same Court in *Bala Venkata Seetha Rama Chettiar v. Official Receiver, Tanjore*, AIR 1926 Mad 994 = (ILR (1926) 49 Mad 849) (FB) and the decision in *Allahabad Bank Ltd., Bareilly v. Bhagwandas*, AIR 1926 All 262. It is therefore, necessary to consider as to what are the limitations attaching to the father's power to sell the share of the sons. This position came up for consideration in several cases either in the context of a partition having been effected between the father and the son or a suit for partition being instituted or the son's share of the property in the joint family being attached by a creditor. In *Official Assignee, Madras v. Ramachandra*, AIR 1928 Mad 735 (FB) a Full Bench of the Madras High Court considered the effect of a suit for partition by sons after the adjudication of the father as an insolvent. The Full Bench reviewing the entire case law first considered as to what were the several remedies open to an official assignee against the sons. *Ramesam, J.* held:

"Now the Official Assignee has got several remedies against the sons: first, as representing creditors, or associating himself with them, he can file suits against the sons, obtain decrees and sell the sons' share also; and secondly, in the partition suit now pending at Madura, wherever it may be tried ultimately, at Madura or Madras, he can apply for the creditors to be made parties, so that the finding as to the nature of the debts may bind all and ask for a decree providing for the payment of such debts as are not illegal or immoral."

He further held:

"After the adjudication of the father as an insolvent and the vesting of his rights in the Official Assignee, the institution of a partition suit by the sons of the insolvent effects a severance of the joint family status and, therefore, the power to sell their shares by private sale, of the Official Assignee, who steps into the shoes of the father, is extinguished, although the Official Assignee by proper proceedings in the Insolvency Court may proceed against their shares."

During the course of the judgment, Ramesam, J. following the decision in *Satnarain v. Behari Lal*, AIR 1925 PC 18 observed:—

"the actual share of the sons does not vest in the Official Assignee the property of the father and his power certainly pass, but they pass on the principle of the above decision exactly as they stood in the hands of the father with all the advantages and all the burdens. One of the disabilities attached to the power is that it is extinguished on a division in status."

Such division in status is brought about by the institution of a suit for partition. Just as the father's power to alienate the son's share by private sale after the severance of the joint family is lost so too the power of the official assignee to sell the share of the sons by private sale is lost by institution of such a suit. Ramesam, J., further observed:—

"The power as passed to the official assignee cannot enlarge the nature of the power and add to it qualities which it did not possess before. All the other remedies open to the official assignee whatever they are, continue as before. The son's liabilities continue as before and they can be worked out by suitable proceedings but not by private powers of sale. Madhavan Nair, J. who agrees with Ramesam, J. also held:

"the filing of a partition suit by the sons would defeat the Official Assignee's power to sell the sons' interests in the joint family properties which accrued to him by reason of the insolvency of the father."

In *Satnarain v. Sri Kishen Das*, AIR 1936 PC 277 the Privy Council considering identical questions under the Presidency Towns Insolvency Act held that the capacity to exercise the insolvent father's power to sell the joint family properties for his antecedent debts, these not having been incurred for immoral or illegal purposes vests in the Official Assignee. Then Their Lordships went on to observe:

"But if Section 52 (2) (b) (Presidency Towns Insolvency Act) entitles the Official assignee to exercise the power in question, it is clear that such power must be exercised subject to its limitations and provisions of Section 49 (5) do not apply. Equally the provisions of Section 17 are in no way inconsistent with the exercise of the power of sale subject to its limitations. The sales by the official assignee in that case were completed before the partition suit was instituted."

In this context the Full Bench decision in AIR 1928 Mad 735 (FB) was also referred to.

11. The position therefore that emerges is that while the father's share of the joint family properties as well as his power to alienate the son's share therein so long as the joint family subsists, vests in the father to discharge the antecedent debts provided they are not tainted with immorality or illegality, upon the father being adjudged insolvent, that power vests in the Official Receiver. As the father's power to alienate the son's share after severance of the joint family is lost, the Official Receiver's power to alienate the sons' share upon the institution of a suit for partition, is lost inasmuch as even the father's power upon such a contingency is also lost too.

12. However, where the father is adjudged insolvent and the property vests in the Official Receiver on the date of the presentation of the petition and subsequent thereto a partition suit is instituted the question arises whether the power of the father to alienate the son's interest having already vested in the Official Receiver whether that power is divested or taken away by the institution of a partition suit. Ramesam, J. in *Official Assignee Madras v. Ramachandra*, AIR 1928 Mad 735 (FB) in our view correctly summed the position in this behalf thus:—

"The power to alienate, which till the institution of the partition suit vested in the Official Receiver as a consequence of the adjudication, stands extinguished by the institution of the partition suit, in the same manner as the power of the father to alienate the son's share by private sale ceases on such partition."

13. Whether the same consequence would flow from an attachment of

the son's interest in the joint family property after the father is adjudged an insolvent may now be considered. In this context, it is necessary to notice certain decisions where the son's share in the joint family properties was attached and the father is declared an insolvent.

14. We may first proceed to consider cases where the sons' interest was attached by a creditor before the father was adjudicated an insolvent.

15. Madhavan Nair, J. in *Official Receiver v. Arunachalam*, AIR 1931 Mad 118 held:

"On the insolvency of the father of a joint Hindu family it is only his own share of the family property that vests in the Official Receiver. The shares of his sons do not vest in the Official Receiver. With respect to those shares what vests in the Official Receiver is only the father's power of disposal. Where the entire property belonging to the judgment-debtor and his sons had been attached before the judgment-debtor was adjudicated as an insolvent and the petition for adjudication was presented after the date of the attachment it follows that the father's power of disposal of the sons' shares had been destroyed by the existing attachment of those shares; and the Official Receiver could not get any power to deal with the sons' shares by reason of the order of adjudication."

In coming to that conclusion, Madhavan Nair, J. followed the view expressed in *Gopalakrishnayya v. Gopalan*, AIR 1928 Mad 479(1). He also repelled the contention that after the sale is effected by the attaching creditor, the entire sale proceeds vest in the Official Receiver in the following words:

"When the power of sale is once destroyed by the existing attachment, I do not think the Official Receiver has any right to appropriate the sale proceeds accruing from the sale of the sons' shares. I do not think that the decision of the Full Bench in *In The Matter of Baluswami Ayyar*, (AIR 1928 Mad 735) (FB) which holds that the institution of a suit by the sons against their father for partition after the latter's adjudication as an insolvent extinguishes the right of the Official Assignee to alienate privately the sons' shares for the father's debts can in any way be interpreted as supporting the appellant's contention....."

A Division Bench of the Madras High Court in *Official Receiver v. Arunachalam*, AIR 1934 Mad 217 dealt with a case where the property of a Joint Hindu Family comprising of father alone (sic). But before the sale was effected in execution of the decree against the father he was adjudged insolvent. The property of the father was, however, brought to sale by the de-

cree-holder without any objection being taken by the sons. The Bench held:

".....But an attachment or sale of their shares in such circumstances will hold good till it has been established that the debt is not binding on their shares The fact that the sons' shares have now been sold cannot make any difference to the position. The sale proceeds of them represent those shares, though they have taken another form. Nor can Section 51, Provincial Insolvency Act, have any application. By that section where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition. In so far as there has been execution against the shares of the sons it is not an execution against the property of the insolvent. As to his own quarter share the sale proceeds of it have gone to the Official Receiver for the benefit of the general body of creditors."

In *Official Receiver v. Imperial Bank*, AIR 1936 Mad 193 the Madras High Court while dealing with the question whether after the attachment of son's interest in the joint family in execution of a decree, the power of the father or manager of the property to alienate it for payment of his debts ceases, the Court also considered whether there was any difference in principle between a case where the son's interest is attached because he is held liable under pious obligation rule and a case where his interest is made liable because he himself is a principal debtor. Stone, J. speaking for the Bench held: —

"We can see therefore no difference in principle....."

In both cases the son's interest is made liable. In both cases assuming the attachment has begun, the son's interest is attached. Once the son's interest is attached, then the father's right to alienate the joint family property in order to pay the father's debt is gone. Once the right is gone the power of the law to transfer that right to the Official Receiver in insolvency is gone too, because there is nothing to transfer."

In *Parameswaramma v. Venkataramayya*, AIR 1936 Mad 698, Venkatasubba Rao, J. was also considering a case where the son's share was attached before the father's adjudication. He declared:

"It has been held in AIR 1926 Mad 994 (FB) and is now settled law, that what passes to the Receiver on a father's adjudication, is not only the father's share in the property, but also his power of

disposal under the Hindu Law, over the shares of the sons; it is equally clear that when the sons' shares are attached, the attachment puts an end to the father's power of disposal. When therefore an attachment has been effected of the sons' shares before the father's adjudication, there is no power of disposal which can pass to, and vest in the Receiver."

The learned Judge also observed:

"The position cannot in law be altered by reason of the mere fact that what was immovable property has been converted into money."

We may now turn to cases where the sons' interest was attached subsequent to the father being adjudged an insolvent.

16. In *Arunachalam v. Sabaratnam*, AIR 1939 Mad 572, Leach, C. J. considered a case where a money decree was obtained on 24th September, 1931 against the father and his five sons who constituted a Joint Hindu family. Even before the decree, the father was adjudged as an insolvent. The Official Receiver sought to bring the whole of the family properties to sale for the benefit of the creditors on the ground that the son's shares in those properties were available for the discharge of the father's debts on the principle of Hindu Law that the sons are liable for their father's debts. The decree-holder instituted proceedings in execution of his decree and prayed for the attachment of the shares of the sons in the family properties and the properties were attached. He also applied to the Court to restrain the Official Receiver from proceeding to sell the shares of the sons in the attached properties. While the Subordinate Judge allowed the Official Receiver to sell the sons' share also subject to his depositing the sons' share of sale proceeds in Court and subsequently directed the same to be paid towards the satisfaction of the decree obtained by the appellant, on appeal to the District Judge, that order was reversed on the ground that the right to sell the properties had vested in the Official Receiver at the time of adjudication. On appeal to the High Court, Leach, C. J. speaking for the Bench observed:—

"The fact that the right to sell the son's shares had devolved on the Official Receiver was not the only factor."

The learned C. J. then referred to the case law on the subject and held:

"This Section (Section 28 (2)) refers only to the property of the insolvent and the prohibition against the institution of legal proceedings with regard to the insolvent's property. Although the right of an insolvent Hindu father to sell his son's share in the family property to discharge his own lawful debts vests in the Official Assignee or the Official Receiver as the

case may be, it does not follow that proceedings cannot be taken in respect of the son's interest in the family property without the leave of the Insolvency Court. The right to sell the son's interest only exists so long as the son's interest in the family property exists. If the interest has been sold or if there has been a lawful attachment, which has the same effect, there exists no property over which the power can be exercised."

Then the learned C. J. proceeded to consider whether the permission of the Insolvency Court is necessary and declared:

"The position is that while the interest of the son remains unsold or unattached, the Official Assignee has the right to sell the properties for the lawful debts of the insolvent father, but unless he exercises his right he may lose it and he loses it if the interest of the son is attached by a creditor of the son."

17. In that view the Bench reversed the decision of the District Judge and restored that of the Subordinate Judge.

18. In *Swarupchand v. Janakiramayya*, AIR 1942 Mad 330 the Bench reiterated the above position posing the question as follows:—

"The father's power to sell (son's interest in the joint family property) would continue to subsist until division. The father's insolvency does not per se affect the undivided status and till the status is severed, the power would vest in the Official Assignee. Therefore, while that status lasts, if an attachment of the son's shares takes place, the question is, what is the effect of that attachment on the vesting of the said power in the Official Assignee."

Then after referring to the decisions in *Official Receiver, Coimbatore v. Arunachalam Chettiar*, AIR 1934 Mad 217; *Official Receiver, East Godavari v. Imperial Bank of India*, ILR (1936) 59 Mad 296 = (AIR 1936 Mad 193); *Kanva-kaparameswaramma v. Venkataramayya*, 71 Mad LJ 294 = (AIR 1936 Mad 698) and *Arunachalam Chettiar v. Sabaratnam Chettiar*, (1939) 1 Mad LJ 889 = (AIR 1939 Mad 572) the Bench of the Madras High Court observed:—

"In all these cases the view has been expressed that by reason of the attachment, the father's power of disposal of the son's share ceases and therefore there can be no vesting of his power in the Official Assignee or if there was vesting, he would be divested of it."

Then examining the question as to what extent this proposition can be said to be sound in principle proceeded to consider the matter in the light of Section 64, Civil P. C. and held:

".....so long as the family is undivided the power of the father to sell the son's share is not lost. The attachment of the son's interest may prevent the alienation taking effect as against the claims under the said attachment, and when a sale of that share is effected the power may be destroyed, but the power does not cease till the sale takes place. It would be open to the father to exercise the power of sale but the alienee would get a defeasible title as the alienation under the attachment would prevail. Therefore, if the power of disposal subsisted, I do not see any reason why it could not vest in the Official Receiver subject to the same disabilities it was subject to in the father's hands at the date of vesting. During the pendency of the attachment, if the Official Receiver chooses to exercise the right of sale, the alienees will get a title which will prevail against the son though it may not prevail against the claims enforceable under the attachment, that is, if a sale takes place in pursuance of the attachment the purchaser under that sale will get an indefeasible title and the purchaser from the Official Receiver will not get any."

19. In a separate judgment in the above case, agreeing with Venkataramana Rao, J., Somayya, J., also observed:

".....As pointed out by him in all the decisions on the point the contest was between the attaching decree-holder or persons claiming under the attachment on the one hand and the Official Receiver on the other hand. In such a case, the right of the former undoubtedly prevails. But if as in the case before us, the attaching decree-holder does not bring the property to sale in pursuance of the attachment? The attachment may leave a ver not exercise the power of the father for the benefit of the creditors, subject, of course, to any right arising under the attachment. The attachment may leave a substantial surplus, property worth ten thousand may be attached for a decree for a thousand. In such a case, so long as the son has not become divided from the father, I do not see any reason why the Official Receiver standing in the place of father should not sell the property. The son at any rate should I think, be bound by the sale effected by the Official Receiver. The disability of the Official Receiver should be limited to a case where the question is between the Official Receiver and the attaching decree-holder or a person claiming under the attachment."

20. This decision to our mind in so far as it declares that notwithstanding the attachment of the son's interest the Official Receiver may proceed to sell the son's interest does not lay down the correct law. If the attachment of son's inte-

rest extinguishes the power of a father to sell then it cannot vest in the Official Receiver at all and hence he cannot sell the son's interest; consequently the question of his selling the son's interest subject to the rights under attachment does not arise. This decision too however, proceeds upon the footing that what vests in the Official Receiver is the insolvent father's share and his power of disposal over the son's share in the joint family properties.

21. Though there was a slight distinction made in the above case with regard to the consequence of vesting of the father's power to alienate the son's interest in the Official Receiver consequent upon the father being declared insolvent, all the decisions so far rendered by the Madras High Court consistently held that not only the father's share in the joint family properties but his power to alienate the share of the son in the joint family for discharging the debts incurred by the father vested in the Official Receiver. But that did not prevent a decree-holder from attaching the son's interest in the joint family as such interest did not vest in the Official Receiver. Only the father's power to alienate the son's share vested and so long as that power was not exercised by the Official Receiver, the son's share could be attached and brought to sale by a decree-holder, notwithstanding the father being declared as insolvent.

22. A Full Bench of the Patna High Court in *Biswanath v. Official Receiver*, AIR 1937 Pat 185 also took the same view and expressed it in the following words:

"When a Hindu father is adjudicated insolvent, the interest of his son or sons in the family property does not vest in the Court or the receiver, but the Court or the receiver has power to sell the joint family property including the interest of the minor son or sons of the insolvent for the payment of his antecedent debts not incurred for immoral or illegal purposes." In the course of the judgment, their Lordships considered the meaning of the word 'Property' defined under Section 2 (d) of the Provincial Insolvency Act and observed:

"This simple definition of the word 'property' is in my opinion comprehensive enough to include the right which the father has of bringing to sale his son's interest to pay his own legitimate debts. The position of the father in a Hindu Joint family is a peculiar one and if we give a restricted meaning to the word 'property' and construe it to mean only those objects and rights over which the father has an absolute power of disposal, the question as to what is the whole property of the father which vests in the Re-

ceiver under Section 28, when he has been declared insolvent, would be surrounded with many difficulties and it may even be questioned whether strictly speaking any property would vest in the Receiver."

Then after referring to the various decisions in this behalf and the provisions of Section 52 of the Presidency Towns Insolvency Act and Section 28 of the Provincial Insolvency Act, Fazl Ali, J., observed:—

"Under the old decisions it was possible to take the view that under Section 28 the whole property which the father could sell voluntarily to pay off his debts is by operation of law transferred to the Court or the Receiver. This view can no longer be taken, because it has been definitely held by the Privy Council in *Satnarain v. Sri Kishen Das*, AIR 1936 PC 277 that upon the adjudication of a Hindu father the son's interest in the family property does not vest in the Official Assignee or the Receiver."

The Privy Council in *Sat Narain v. Sri Kishen Das*, AIR 1936 PC 277 held:

"The Official Assignee has the capacity to exercise the insolvent father's power to sell the joint family properties for his antecedent debts, these not having been incurred for immoral or illegal purposes."

The Full Bench of the Madras High Court, however, struck a different note in *Ramasastrulu v. Balakrishna*, AIR 1942 Mad 682 at p. 683. After noting that there is no provision in the Provincial Insolvency Act which corresponds to Section 52 of the Presidency Towns Insolvency Act, the Full Bench held:

"Under the Provincial Insolvency Act the vesting of the property of the insolvent in the Official Receiver is governed only by Section 2 (d) and Section 28 and therefore there can be no vesting of the right of a manager of a joint Hindu family to sell family property for family necessity, unless that right can be regarded as property. The powers of a father manager are greater than the powers of a manager who is not the father of the other coparceners, because the father has power not only to sell family property in order to discharge a family liability but also the right to sell his son's interest in the family estate to discharge his own personal debts, provided that they have not been incurred for any immoral or illegal purposes. In the light of the decisions of the Privy Council to which reference has been made and will be considered in a moment a father's power to sell his son's property must be taken to be a power falling within Sec. 52 (2) (b), Presidency Towns Insolvency Act, but the power of a Manager who is not the

father of the other coparceners to sell family assets to meet a family liability is not a power which he can exercise for his exclusive benefit, and Section 52 (2) (b) may not apply in such a case. That question does not, however, arise in this appeal and therefore nothing further need be said in this connection.

If we are to have regard to the judgments of the Privy Council in the Lahore case AIR 1936 PC 277 = ILR 17 Lah 644 and AIR 1925 PC 18 = ILR 6 Lah 1 we must hold that under the Provincial Insolvency Act the manager's power to sell does not vest in the Official Receiver.

Under that Act, it can only vest if the power is regarded as property, and in the light of what is said in ILR 6 Lah 1 and ILR 17 Lah 644 with regard to the effect of Section 2 (e) and Section 17 Presidency Towns Insolvency Act, the power cannot be regarded as property. The Judicial Committee have made it abundantly clear that it is not property and that the right to sell only vests under the Presidency Towns Insolvency Act by virtue of Section 52, which as we have already indicated, has no counter-part in the Provincial Insolvency Act."

In taking that view, Their Lordships observed:

"It is very regrettable that the law of insolvency should be different in cases which fall within the Presidency Towns Insolvency Act and cases which fall within the Provincial Insolvency Act, but (they) felt the remedy is in the hands of the Central Legislature and we trust that it will bring the two Acts into line and will do so without delay....."

The Full Bench then referred to the judgment of the Full Bench of Patna High Court in *Bishwanath v. Official Receiver*, AIR 1937 Pat 185 = 16 Pat. 60 and dissented with the view expressed therein. Then after referring to the provisions of Section 2 (e) and Section 17 of the Presidency Towns Insolvency Act, their Lordships observed:

"The decisions of the Privy Council in (ILR 6 Lah 1 and ILR 17 Lah 644) undoubtedly negatived what had been regarded as being settled law but if the power of the father is not 'Property' under the Presidency Towns Insolvency Act it cannot be regarded as property under the Provincial Insolvency Act."

23. In all the judgments of the Madras High Court delivered before the decision of the Privy Council in *Satnarain v. Sri Kishen Das*, AIR 1936 PC 277 and subsequent thereto until the decision of the Full Bench in *Ramasastrulu v. Balakrishna*, AIR 1942 Mad 682 (FB) upon a father-manager of a Hindu family being declared insolvent, it was held that not only the share of the insolvent father but

also his power to alienate his sons' interest in the joint family property which was deemed to be 'Property' within the meaning of the Provincial Insolvency Act vested in the Official Receiver. But the Full Bench in *Ramasastrulu v. Bala Krishna*, AIR 1942 Mad 682 (FB) in holding that this power of the father or the manager was not 'property' within the meaning of Section 2 (d) and Section 28 of the Provincial Insolvency Act, made a clear departure from the view taken by the Courts over a considerable period. What was considered to be settled law was thus unsettled. Further while the power of the father to alienate the sons' interest was deemed to be Property under the Presidency Towns Insolvency Act, as a result of this Full Bench decision, it could no longer be deemed to be so under the Provincial Insolvency Act. However, the Full Bench itself observed that this anomalous situation requires to be remedied by the legislature. This divergence of views expressed in the Full Bench decisions of the Madras High Court and the Patna High Court required to be resolved. With a view to bring about uniformity in this behalf in the provisions of the Provincial Insolvency Act and the Presidency Towns Insolvency Act, the legislature considered introducing an amendment in the Provincial Insolvency Act as early as in 1943. The Government of India, however, postponed the same pending the termination of the war. After consultation with the Provincial Governments and the High Courts it introduced Section 28-A by way of an amendment under Section 2 of the Provincial Insolvency Amendment Act XXV of 1948. That section reads as follows:—

"28-A. The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge.

Provided that nothing in this section shall affect any sale, mortgage or other transfer of the property of the insolvent by a Court or Receiver or the Collector acting under Section 60 made before the commencement of the Provincial Insolvency (Amendment) Act, XXV of 1948, which has been the subject of a final decision by a competent Court:

Provided further that the property of the insolvent shall not be deemed by reason of anything contained in this section to comprise his capacity referred to in this section in respect of any such sale, mortgage or other transfer of property made in the State of Madras after the 28th day of July, 1942 and before the commence-

ment of the Provincial Insolvency (Amendment) Act, XXV of 1948."

24. The effect of this amendment came up for consideration before the Supreme Court in *Nageswaraswami v. Viswasundara*, AIR 1953 SC 370 at p. 373. Their Lordships held:

"There was some difference of Judicial opinion as to whether the powers of a father under the Mitakshara Law to alienate the joint family property including the interest of his sons in the same for discharge of an antecedent debt not contracted for illegal or immoral purposes vests in the Receiver on the adjudication of the father as an insolvent. Under the Presidency Towns Insolvency Act, this power was held to vest in the Official Assignee under Section 52 (2) of the Act, *Satnarain v. Sri Kishen Das*, AIR 1936 PC 277. As regards cases governed by Provincial Insolvency Act it was held by a Full Bench of the Madras High Court that the father's power to dispose of his son's interest in the joint family property for satisfaction of his untainted debts was not 'property' within the meaning of Section 28 (2) (d), Provincial Insolvency Act, *Ramasastrulu v. Balakrishna Rao*, (AIR 1942 Mad 682) (FB) while a contrary view, was taken by a Full Bench of the Patna High Court— *Vide Bishwanath v. Official Receiver*, (AIR 1937 Pat 185) (FB). The conflict has now been set at rest by the enactment of Section 28-A in the Provincial Insolvency Amendment Act of 1948 which came into force on 12-4-1958. The new section reads as follows:—

"The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge."

The language of the section indicates that its operation has been expressly made retrospective. The result, therefore, is that the power of defendant 1 to alienate the interest of his sons, defendants 2 and 3, in the mortgaged properties for satisfaction of his antecedent debts, did pass to the Receiver as 'property' within the meaning of the Provincial Insolvency Act and consequently on a sale by the Receiver the interest of defendants 2 and 3 did vest in the sixth defendant and he alone must be held competent to exercise the right of redemption."

Having regard to Section 28-A which was given retrospective effect, it is plain that the property which vests in the Official Receiver comprises of not merely the property of the insolvent as such but also his 'power to exercise and to take pro-

ceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge.' Thus by virtue of Section 28-A of the Provincial Insolvency Act, the power of the father to alienate the sons' interest for his own debts which are not tainted with illegality or immorality is now undoubtedly deemed to be the 'property' of the Insolvent.

25. It was, however, argued before us that the vesting of such a power of the father in the Official Receiver in fact vested the share of the insolvent's sons in the Official Receiver. It was urged placing reliance on the judgment of the Supreme Court in *Nageswaraswami v. Viswasundara*, (AIR 1953 SC 370) that the power of the father to alienate the sons' interest in the joint family estate is itself having been deemed to be 'property' within the meaning of the Provincial Insolvency Act, the sons' share of the property as such passes to the Official Receiver and therefore notwithstanding the subsequent attachment of the sons' interest in the joint family, the Official Receiver can proceed against the sons' share of the property. We do not agree with this contention; all that the Supreme Court in that decision declared was that the power of the father to alienate the sons' share vests in the Official Receiver as 'Property'. Moreover, while so observing the Supreme Court was not considering this particular aspect of the matter but was only dealing with the question whether Section 28-A was retrospective or prospective in its operation and held that it was 'retrospective'.

26. Reliance was also placed upon a decision of a single Judge of this Court, *Sanjeeva Rao Naidu, J. in N. Narasimhacharyulu v. Sambalah*, AIR 1960 Andh Pra 131 who took the view that

"the power of the father to alienate the interest of his sons for the satisfaction of his antecedent debts passes to the receiver as "Property". Once it has so passed Section 28 (2) of the Act debars any creditor from having any remedy over the property of the insolvent which property includes the property defined under Section 28-A."

27. The learned Judge equated the power of the father to alienate his sons' interest with the share of the sons in the joint family estate. In that view the learned Judge disagreed with the view expressed in *Puthayya v. Suramma*, AIR 1951 Mad 713 and *Seethayya v. Venkanna*, AIR 1951 Mad 1010. He did not refer to the other cases of the Madras High Court which were binding on him evidently under the impression that the Supreme

Court in *Nageswaraswami v. Viswasundara*, AIR 1953 SC 370 did not intend such a consequence. In our opinion, there is a clear distinction as pointed out in the decisions referred to earlier between the father's power to alienate the sons' interest in the joint family and the sons' interest or share as such in the joint family property. The power of the father is exercisable with respect to the sons' share and what vests in the father is not the sons' share but only the power to deal with the sons' share. It is only by virtue of the definition contained in Section 2 (d) of the Provincial Insolvency Act and Section 28-B of the Act and which is now made clear by the insertion of S. 28-A that this power of disposal of the sons' share which vests in the father, is also "deemed to be property" and vests in the Official Receiver.

28. That the power of the father to alienate the sons' interest in the joint family property is distinct from the son's share as such, is also clear from the fact that an attaching decree-holder merely attaches the son's interest and not only specific items of property as exclusively belonging to the son. It cannot be disputed that the power of the father to alienate the son's interest in the joint family ceases no sooner than the son's share is attached in execution of a decree. By such attachment what stands terminated is the father's power to deal with the son's share, though under the doctrine of pious obligation the son continues to be under a duty to discharge the father's debts notwithstanding the termination of the father's power to dispose of the son's share for satisfying those debts. But because only the right of the father vests in the Official Receiver with respect to the son's share and not the son's share of property, as such, that right of the father comes to an end by the attachment of the son's interest; likewise the Official Receiver's power also comes to an end on such attachment. The power of the Official Receiver cannot be higher than that of the insolvent father whose property vests in him. Even in *Ramasastrulu v. Balakrishna*, AIR 1942 Mad 682 (FB) the Madras High Court did not hold that the Official Receiver has any larger or greater power than that of the father in this behalf. What it held was that this power of the father could not vest as 'property' in the Official Receiver and as such irrespective of whether there was an attachment of the son's interest or not, the Official Receiver could never exercise the power of disposing of the son's interest for discharging the debts of the insolvent father.

29. It is now well settled that while the son is not personally liable for the debts of his father even if the debt is

not incurred for an immoral purpose; his obligation is limited to the assets received by him as his share of the joint family property or to his interest in the joint family estate. As laid down by the Supreme Court in *Pannalal v. Mt. Naraini*, AIR 1952 SC 170 "this pious obligation of the son to pay the debts of his father exists whether the father is alive or dead." It is open to the father during his lifetime to effect a transfer of any joint family property including the interest of his sons in the same, to pay off an antecedent debt not incurred for family necessity or benefit provided it is not tainted with immorality. It is equally open to the creditors to obtain a decree against the father and in execution of the same, put up for sale, not merely the father's but also the son's interest in the joint estate.....Even if the sons are not made parties, they cannot resist the sale unless they succeed in establishing that the debts were contracted for immoral purposes. That being the position with regard to the sons' liability, no sooner than there is a severance in joint status the power of the father to sell the sons' share quondam in the joint family comes to an end. That is not to say that the creditor who can recover the debt from the father personally and from his assets, cannot reach the sons' share at all which is under an obligation to discharge his father's debt. Only the father's power to reach the share of the son comes to an end and consequently on the adjudication of the father as an insolvent that power cannot vest in the Official Receiver either. The same consequence follows if the power of the father to alienate the son's interest is terminated or comes to an end by the attachment of the son's interest by a decree-holder.

30. We may now proceed to consider if any of the decisions of this Court lay down anything different from the above.

31. In *Subbarao v. Official Receiver, West Godavari*, (1964) 2 Andh WR 435 = (AIR 1965 Andh Pra 52) dealing with a case where the Official Receiver had filed applications under Sections 4 and 5 of the Provincial Insolvency Act on behalf of the general body of creditors who had obtained a decree both against the father, who was adjudged insolvent, and his sons and had brought the share of the sons of the insolvent in some of the joint family properties to sale. Venkatesam, J., sitting singly held:

"An attachment, whether before or after judgment, does not create any charge on the attached property. An attaching creditor is not a secured creditor. Hence, if an order of adjudication is made after attachment but before sale, the pro-

perty vests in the Official Receiver for the benefit of the general body of creditors, and the attaching creditor is not entitled to obtain satisfaction of his decree by sale of the attached property. The order of adjudication divests the rights of the attaching creditor, and remits him to the position of an ordinary creditor.

The effect of an attachment of the son's share is not to create a charge or lien in favour of the attaching creditors. But it only puts an end to the power of disposal of the father and of the Official Receiver under Section 28-A of the Provincial Insolvency Act to dispose of son's shares. It does not preclude the Official Receiver from obtaining a declaration from the Insolvency Court that the son's shares are liable for the discharge of the debts due to the several creditors which are not illegal or immoral, and have the property sold through Court."

In repelling the contentions advanced to the contrary, Venkatesam, J. observed: ".....the decisions reported in the Official Assignee of Madras v. Ramachandra Iyer, ILR 51 Mad 417 = AIR 1928 Mad 735. The Official Receiver, Coimbatore v. Arunachalam Chettiar, AIR 1931 Mad 118 and Murugappa Mudali v. The Official Receiver, Chittoor, (1943) 1 Mad LJ 24 = AIR 1943 Mad 303 all lay down that the prayers asked for by the Official Receiver can be granted under Section 4 of the Provincial Insolvency Act. They also lay down that where the father and the sons have been divided in status, the power of the father to alienate the sons' shares is not lost, that the liability of the sons can be adjudicated upon by the Insolvency Court, and that their shares can be got at by the Official Receiver."

This decision recognises that what vests in the Official Receiver with respect to the son's share of the property is the father's power of disposal of the son's share and where the father is declared an insolvent, the Official Receiver cannot exercise that right if the son's interest is attached. But the Official Receiver can certainly apply under Section 4 of the Provincial Insolvency Act for getting at the son's share and proceed to have the property sold through Court notwithstanding the attachment, provided the debts of the father are not illegal or immoral. Only the Official Receiver's right of private sale is lost just as father's right to deal with the son's share is lost by dint of the attachment of son's interest in the joint family properties. The attachment of the son's interest whether before or after adjudication terminates the power of the Official Receiver to dispose of by private sale the son's share in the joint family properties was recognised. But the ques-

tion whether there is any difference between adjudication prior to and subsequent to the attachment, did not crop up for consideration.

32. The observation of Venkatesam, J. that if an order of adjudication is made after the attachment but before sale the property vests in the official receiver for the benefit of the general body of the creditors cannot in our opinion apply to the attachment of the sons' interest where only the father is adjudged insolvent. It may apply only to a case where the interest of the insolvent father himself was attached and before it was brought to sale for the property of the insolvent vests in the Official Receiver. So far as the sons' interest in the joint family is concerned, as the father has only the power of disposal, that comes to an end with the attachment of the sons' interest by a creditor and consequently the Official Receiver also would not have any power by the adjudication of the father as an insolvent. But even so the learned Judge did not hold that the Official Receiver has a right to dispose of the sons' share by private sale. He only held that it will not preclude the Official Receiver from obtaining a declaration from the Insolvency Court that the sons' shares are liable for the discharge of the father's debts which are not illegal or immoral and for selling the properties through Court.

33. A Bench of this Court in Sri Raja Vatsavaya Venkata Suryanarayana Jagapathi Raju Bahadur v. The Official Receiver, East Godavari, (1965) 2 Andh WR 256 = (AIR 1965 Andh Pra 451) dealt with a case in which a suit for partition was instituted by the sons on 4-11-1957 after the father had filed an insolvency petition in 1954. To that suit the Official Receiver was added as a party on 15-12-1958 and a decree was passed against the insolvent as well as against the members of the joint family. The order of adjudication was made on 12-1-1958. Their Lordships held that when the creditor seeks to proceed against the son's share, the leave of the Insolvency Court is not necessary, as the Official Receiver's right to exercise the father's power to sell the sons' share for the debts of the insolvent father will be lost. If the sons' shares are attached before the Official Receiver actually exercises that power the question whether the attachment of the sons' shares was made before the filing of the insolvency petition to which date the adjudication relates back or after the filing of the insolvency petition, becomes immaterial. Therefore, the decree-holder can in execution of his decree proceed against and sell the shares of the sons of the insolvent in the joint family properties without the

leave of the insolvency Court. Their Lordships further held:

"But it must be noted that the share of the son itself in the joint family property does not vest in the Official Receiver. What vests in the Official Receiver is only the father's power to sell the son's share for discharging the father's debts which are not illegal, and immoral. But once the son files a suit for partition and thus divided in status from the father's power to sell the son's share to discharge his debts though incurred before the division in status ceases and the father could no longer sell his son's share for his debts. When the father's power itself is lost by the filing of the suit for partition by the son, the Official Receiver's power also ceases."

In the above case the son had instituted a suit for partition before the adjudication of the father.

34. Their Lordships also considered as to what would be legal position in the son's shares were attached by a creditor of the father after the father was adjudged insolvent and held:

"Similarly, the son's share may be attached even after the insolvency of the father by a creditor of the father in execution of a decree obtained by him against the father or against the father and son in respect of a personal debt of the father, unless it has been previously sold by the Official Receiver. It is not disputed that the father's power to sell the son's share for his personal debts cannot be exercised, once the son's share is attached by a creditor either of the father or of the son or both. Since the right of the Official Receiver is only co-extensive with that of the father, it necessarily follows that, if the son's share is attached by a creditor, the Official Receiver's power also to sell the son's share for distribution among the creditors is extinguished."

In this case, the Bench clearly held that so long as the Official Receiver did not actually exercise the father's right to sell his sons' shares which vest in the Official Receiver by virtue of his being declared insolvent, the sons' shares could be proceeded against by the attaching creditor without the leave of the Insolvency Court irrespective of whether this attachment is before or after the adjudication. In our opinion, the learned Judges rightly dissented from the view expressed by Sanjeeva Row Nayudu, J. in N. Narasimhacharyulu v. Sambaiah, AIR 1960 Andh Pra 131 for what vests in the Official Receiver on the father being adjudged insolvent is not the share of the son in the joint family but only his power to dispose of the son's share and that power

comes to an end with the attachment of the son's interest by a creditor.

35. Parthasarathy, J., sitting singly had to consider in *K. Krishna Dass v. Ramakotavva*, (1971) 1 Andh WR 271 a case where the decree-holder who was proceeding against the son's interest in the joint family, for the satisfaction of the decree against the son, was sought to be prevented by the creditor of the father who was adjudged insolvent by filing an application under Sections 4 and 5 of the Provincial Insolvency Act. The learned Judge held:—

"There is, therefore no precedent which warrants the conclusion that notwithstanding the attachment of the sons' shares by the creditor before the vesting order, the Official Receiver can resort to the exercise of the power of sale in respect of the sons' shares. To hold that the prior attachment yields place to the Official Receiver's power of sale, is to vest in the Official Receiver not merely the power of sale but the very shares of the sons in the coparcenary property. This, in my opinion, is a result which is incompatible with the rules of Hindu Law and the provisions of the Insolvency Act. If the attaching creditor's right is subordinated to the Official Receiver's power of disposal of the sons' shares, the resultant position is that the Court is conferring on the Receiver a right which goes far beyond the terms of Section 28-A..... If there is an attachment of the interest of the sons, the Official Receiver's power lapses....."

The learned Judge referred to the Bench decision of this Court in *Raja Vatsavaya Venkata Suryanarayana Jagapathi Raju Bahadur v. Official Receiver*, (1965) 2 Andh WR 256 = (AIR 1965 Andh Pra 451) and observed:

".....the power of disposal vested in the Official Receiver can, if at all be exercised only before it is subjected to attachment at the instance of the creditor."

36. The learned Judge also observed the pronouncement of the Division Bench must by implication be deemed to have overruled the decision in *Subbarao v. Official Receiver*, West Godavari, (1964) 2 Andh WR 435 = (AIR 1965 Andh Pra 52).

37. The only decision of this Court which remains to be considered and which is said to be in conflict with the view taken by another Bench of this Court in *Rajavatsavaya Venkata Suryanarayana Jagapathi Raju Bahadur v. The Official Receiver*, East Godavari, (1965) 2 Andh WR 256 = (AIR 1965 Andh Pra 451) and which led to this reference is *Manne Venkata Narayudu v. Thammineedi Subbarao*, (1972) 2 Andh WR 375 = (AIR 1973 Andh

Pra 113). That was a case referred by A. D. V. Reddy, J., to the Bench in the view that in *Raja Vatsavaya Venkata Suryanarayana Jagapathi Raju Bahadur v. Official Receiver*, East Godavari, (1965) 2 Andh WR 256 = (AIR 1965 Andh Pra 451) certain aspects of the question were not considered. The applicants therein had filed an application under Section 4 of the Provincial Insolvency Act in the District Court, West Godavari for a declaration that the sons of the insolvent were also liable for the discharge of their father's debt on the doctrine of pious obligation and also for a declaration that one of the creditors alone was not entitled to bring the son's share to sale and to have any preference over the general body of the creditors. The sons of the insolvent father resisted the application contending that it was not maintainable. The attaching creditor contended that the sons' interest was attached prior to adjudication of the insolvent father and claimed that the Official Receiver cannot exercise any rights with respect to the sons' share. The Bench upheld the attaching creditor's contention and dismissed the appeal. The Bench posed the question for consideration thus:

"When the father's power of disposal of the sons' shares in the joint family properties is lost or extinguished by reason of a decree-holder attaching the shares of the sons prior to the adjudication of the father, whether the Official Receiver in whom the property of the insolvent father, which comprises also the power of the father in or over the property of the undivided sons vests, would acquire any better rights in the matter of disposal of the properties under attachment prior to adjudication."

After referring to the case law on the subject, the learned Judges observed:

"The line of authority, is that the father's power to sell the sons' shares for his personal debts ceases when once his sons' share is attached by the creditor either for antecedent debts not tainted by illegality or immorality or the son's debts or both and that being the case, the Official Receiver, whose powers are only co-extensive with that of the father under Section 28-A will have no more powers than the father to deal with the sons' share for distributing it among the creditors. In other words, if the father's power stood extinguished by reason of attachment prior to adjudication, the Official Receiver, by reason of adjudication of the father will get no better or higher rights than the father."

The learned Judges expressed dissent from the view expressed by Venkatesam, J., in *Subbarao v. Official Receiver*, West Godavari, (1964) 2 Andh WR 435 =

(AIR 1965 Andh Pra 52) in so far as he declared that if the order of adjudication made after attachment but before sale, the property vests in the Official Receiver for the benefit of the general body of creditors, and the attaching creditor is not entitled to obtain satisfaction of his decree by sale of the attached property. We are also of the view that this observation of Venkatesam, J. is not correct. While approving the view expressed by Parthasarathy, J. in *K. Krishna Dass v. G. Ramakotayya*, (1971) 1 Andh WR 271 the learned Judges of the Division Bench further observed:

"The attachment of the sons' share in the joint family properties prior to the adjudication of the father as an insolvent makes all the difference in so far as the power of the Official Receiver to sell the sons' share is concerned for all that is vested in the Official Receiver is only the father's power to sell the sons' share for discharging the father's debts which are not illegal or immoral but not the share of the sons of the insolvent in the joint family properties and that power is lost when once the sons' share is attached prior to the adjudication of the father."

In making this observation, in our view, the Bench did not propose to draw a distinction between the effect of an attachment of the sons' interest in the joint family before adjudication and after the adjudication of the father as an insolvent. No doubt, the Bench observed that the attachment of the sons' share in the joint family properties prior to the adjudication of the father as an insolvent makes all the difference. By stating so what the Bench really pointed out was that if the father is adjudged insolvent before the son's interest in the joint family is attached, not only the father's share but also the father's power of disposal of the sons' share vests in the Official Receiver. But if the attachment is before adjudication only the share of the father vests in the Official Receiver and not the power of the father to sell the sons' interest for, that power of the father to dispose of the sons' interest is lost due to the prior attachment and consequently does not vest on adjudication in the Official Receiver. But after adjudication if the Official Receiver fails to exercise the power of the father to alienate the sons' interest before attachment, just as the father's power of disposal is lost, the Official Receiver's power of disposal is also lost. It is this aspect that was sought to be emphasized and that observation was not meant to strike a different note from what was held in *Raja Vatsavaya Venkata Suryanarayana Jagapathi Raju Bahadur v. The Official Receiver, East Godavari*, (1965) 2 Andh WR 256 = (AIR 1965 Andh

Pra 451). In our view, there is no real conflict in these two decisions.

38. We may now turn to the other question arising in the Civil Miscellaneous Appeals.

39. Under Section 52 of the Provincial Insolvency Act, provision is made for the Official Receiver applying to the executing Court for delivery of possession of the properties of an insolvent in the following words:

"Where execution of a decree has issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that an insolvency petition by or against the debtor has been admitted, the Court shall on application, direct the property, if in the possession of the Court, to be delivered to the receiver, but the costs of the suit in which the decree was made and of the execution shall be a first charge on the property so delivered, and the receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge."

Under Section 4 of the Act, the Court is vested with full powers to decide all questions whether of title or priority or of any nature whatsoever which may arise in any case of insolvency coming within the cognisance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property. In this behalf Section 5 of the Act vests the Court with the same powers as it has in exercise of its original Civil Jurisdiction. When the Official Receiver applies under Section 52 of the Act for delivery of possession of the insolvent's property and also of such property in respect of which the insolvent may exercise powers, the Court is bound to deliver the same. But what power the Official Receiver may exercise with respect to the son's share of the joint family property depends upon whether the debts are tainted with illegality or immorality, and whether his interest has been attached earlier in execution of a decree by any other creditor. Nonetheless, inasmuch as by mere attachment, the attaching creditor does not get a right to enter into possession of the son's share of the property, that cannot stand in the way of the Official Receiver being put in possession of that share of the property under S. 52 of the Act.

40. In *Sri Raja Vatsavaya Venkata Suryanarayana Jagapathi Raju Bahadur v. The Official Receiver, East Godavari*, (1965) 2 Andh WR 256 = (AIR 1965 Andh Pra 451) the Bench in our opinion rightly held that the Official Receiver may apply to the executing Court and the executing

Court is bound to decide whether the attached property which is sought to be brought to sale in execution of the decree is the self-acquired property of the insolvent or the joint family property in which the sons have a share. The Court was also right in holding that the Official Receiver has a right to take possession of the attached property and the attaching decree-holder in execution of the simple money decree has no right to possession of the attached property.

41. To sum up: Upon a father, who is the Kartha of a joint Hindu family consisting of himself and his sons, being adjudged an insolvent, what vests in the Official Receiver under the Provincial Insolvency Act is his self-acquired property, his undivided share in the joint family property and his power of alienation over the interests of the sons in the joint family property provided the debts of the father are not tainted with illegality or immorality. The interest of the sons or their shares as such in the joint family property does not vest in the Official Receiver. It is only the father's power to alienate this interest or share that vests in the Official Receiver. On such vesting the Official Receiver has three courses open to him with respect to the interests of the sons in the joint family property: (1) to exercise the power of the insolvent father to dispose of by private sale, (2) to apply to the insolvency Court under Sections 4 and 5 of the Provincial Insolvency Act, and (3) to apply under Section 52 of the Provincial Insolvency Act to the Court executing the decree under Section 52 for delivery of possession of the property and take proceedings for bringing the properties to sale.

The power of the father to dispose of his son's share in the joint family properties by private sale, however, subsists only so long as there is no disruption of the joint family status. That power comes to an end when that status is disturbed either by the institution of a suit for partition by the sons or by the attachment of the son's interest in the joint family properties by a creditor. Just as the father's power to alienate the son's interest is extinguished on the happening of any of the abovementioned contingencies, so also the power of the Official Receiver comes to an end, for the power of the Official Receiver in this behalf is co-extensive with that of the father. If before the exercise of this power by the Official Receiver any of the above contingencies occur, i.e., the joint family status is disrupted by actual partition, or by the institution of a suit for partition, or by the attachment of the

son's interest by any creditor, then the Official Receiver cannot proceed to dispose of the son's interest by private sale.

This view consistently expressed in the various decisions of the Madras High Court prior to the decision in Ramasastrulu v. Balakrishna, AIR 1942 Mad 682 (FB) is in our opinion, the correct view. The said position is made plain by Section 28-A of the Provincial Insolvency Act inserted by the Provincial Insolvency Amendment Act XXV of 1948 which was necessitated by a divergent note struck by the decision in Ramasastrulu v. Balakrishna, AIR 1942 Mad 682 (FB). Whether the attachment of the son's interest is before the adjudication of the father as an insolvent or after the adjudication, it makes no difference so far as the son's interest in the joint family properties is concerned. Once there is an attachment of the son's interest by a creditor whether before or after the adjudication the Official Receiver's power to dispose of their interest or share by private sale is lost, that power could have been exercised only before the attachment. In our view, there is no conflict in the two Bench decisions of this Court in Sri Raja Vatsavaya Venkata Suryanarayana Jagapathi Raju Bahadur v. The Official Receiver, East Godavari, (1965) 2 Andh WR 256 = (AIR 1965 Andh Pra 451) and Manne Venkata Narayudu v. Thahammineedi Subbarao, (1972) 2 Andh WR 375 = (AIR 1973 Andh Pra 113) in this behalf. The Official Receiver, however, may apply to the insolvency Court for bringing the sons' interest also to sale provided the debts of the insolvent father to be discharged are proved to be not incurred for illegal or immoral purposes, for the pious obligation of the son to discharge the debts of the father incurred while he was joint which are not tainted with illegality or immorality continues even after partition. However as the attaching creditor is not forthwith entitled to possession of the son's interest in the property the insolvency Court, may notwithstanding the attachment put the Official Receiver in possession of the son's interest in the joint family property.

42. In view of the conclusions we have reached above, we hold that the objection of the petitioner who is the son of the insolvent (Judgment debtor No. 2) to the attachment and sale of his interest in the joint family properties in execution of the decree against him and his father, has been rightly rejected by the Court below. The decree-holder is entitled to attach the son's interest (Judgment-debtor No. 2) as the Official Receiver had not exercised the right of the petitioner's father to bring the son's share of the properties to sale. The Civil Revi-

sion Petition No. 1109 therefore fails and is accordingly dismissed with costs.

43. The petition E. A. 1030 of 1970 filed by the Official Receiver under Section 52 of the Provincial Insolvency Act was for delivery of possession of the properties described in Schedule to E. P. 362 of 1970 filed by the respondent, decree-holder who obtained a decree in O. S. 117/70 on the file of the Subordinate Judge, Vijayawada. The objections raised by the decree-holder to that petition were, in our opinion, rightly rejected by the Court below. C. M. A. 15/72 must therefore be dismissed with costs, and it is accordingly dismissed with costs.

44. As a consequence of the order in E. A. 1030 of 1971 directing delivery of possession to the Official Receiver, the sale ordered in E. P. 362 of 1970 was stopped. E. P. 362 of 1970 is for execution of the decree in O. S. 117/70 on the file of the Subordinate Judge, Vijayawada. That decree is against four judgment-debtors including the petitioner and the insolvent. As we have held that only the insolvent father's property and the insolvent's right of disposal of the son's interest in the joint family property vests in the Official Receiver and not the share of the son as such E. P. 362 of 1970 is maintainable and can be proceeded with for attachment and sale of the son's share of the properties in the joint family and other separate or self acquired properties of the son notwithstanding the adjudication of his father as an insolvent. C. M. A. 464 of 1971 is, therefore allowed with costs and execution of the decree in O. S. 117/70 on the file of the Subordinate Judge, Vijayawada, under E. P. No. 362 of 1970 may be proceeded with as indicated above.

Order accordingly.

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RAMACHANDRA RAO AND
SHIVSHANKER, JJ.

Y. Bhagyalakshamma, Appellant v.
State of Andhra Pradesh and others, Respondents.

Writ Appeal No. 804 of 1973, D/-
10-2-1975.*

(A) Motor Vehicles Act (1939), Section 64-A (Andhra Pradesh) — Revision before Government — Death of respondent — Legal Representatives of deceased not brought on record — Order disposing revision on merits adversely to

*(Against order of Obul Reddi, J. in W. P. No. 214 of 1972, D/- 26-7-1973.

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respondent is nullity. (Constitution of India, Art. 226).

It is open to the transport authorities to bring on record the legal representatives of the deceased party. But in a case where the transport authority either original or revisional seeks to dispose of the matter on merits and the order proposed to be passed is likely to be either detrimental or prejudicial to the deceased party, it is necessary that the legal representatives of the deceased party should be brought on record. Moreover, where a party to the proceeding before the transport authority dies and an adverse order is passed against such party, it would be without jurisdiction and would be a nullity. Of course if the transport authority does not think it fit to permit the successor or the legal representative to come on record, the proceeding will automatically terminate and will have to be dismissed as abated.

(Para 7)

Hence, where during the pendency of revision before the Government under S. 64-A filed by the objector to the variation of route under S. 47 (3) and the variation of the stage carriage permit under S. 57 (3), the respondent permit-holder died and no steps were taken by the revision petitioner to bring his legal representatives on the record, the order passed by the Government in revision would be a nullity and has to be quashed under Art. 226 of the Constitution of India. AIR 1970 SC 759. Ref. to.

(Paras 7, 8)

Cases Referred: Chronological Paras
AIR 1970 SC 759 = (1969) 2 SCR 507 7
AIR 1970 Andh Pra 220 = (1970) 1 Andh
WR 161 9

K. Mangachari, for Appellant; A. Suryanarayana Murty for Govt. Pleader for Transport (for Nos. 1 to 5); O. Adinarayana Reddy (for Nos. 4 and 8); A. S. C. Bose (for No. 5) and S. Rangareddy (for Nos. 6 and 7), for Respondents.

RAMACHANDRA RAO, J.:— This Writ Appeal is preferred against the judgment of our learned brother Obul Reddi, J. (as he then was) in W. P. No. 2149 of 1972 dismissing the same. The facts giving rise to this Writ Appeal are as follows:—

2. The appellant's husband Y. Muddanna was granted a stage carriage permit for plying a stage carriage on the route Nambulpulikunta to Penugonda. The said Muddanna sought for variation on the route Nambulpulikunta to Penugonda as Nambulpulikunta to Hindupur via Penugonda. On 22-12-1967 the Regional Transport Authority, Anantapur, considered the proposal with regard to the variation under Section 47 (3) of the Motor Vehicles Act, hereinafter called

'the Act' and rejected the same. The said Muddanna had also applied under Section 57 (3) of the Act for variation of the permit. After due notification calling for objections, and after receiving the representations, the Regional Transport Authority at its meeting held on 18-5-1968 rejected the said application. Against the said order Muddanna filed a revision petition under Section 64-A of the Act to the State Transport Authority on 19-6-1968. He also preferred another revision petition to the State Transport Authority against the order dated 22-12-1967 of the Regional Transport Authority rejecting the proposal for variation on 14-9-1970. Both these revision petitions were heard together and disposed of by the State Transport Authority on 31-10-1970 allowing the revision petitions. Against the said order three of the objectors viz. Sri Janakiram Chetty, Sri B. Srikantaiah and M/s. R. P. & G. T. (P.) Ltd., Hindupur preferred revision petitions to the Government under Section 64-A of the Act. The revision petitions were purported to be filed against the order of the State Transport Authority allowing both the revision petitions. Subsequent to the filing of the revision petitions, Muddanna, who was impleaded as respondent to the revision petitions, had died on 2-11-1971. But no steps were taken to bring his legal representatives on record. The Government however, disposed of the revision petitions by a common order in G. O. Rt. 1167 Home (Transport III) Department dated 13-4-1972, allowing the revision petitions, and setting aside the orders of the State Transport Authority and restoring the order of the Regional Transport Authority.

3. Challenging this order Y. Bhagyalakshamma the widow of late Muddanna, filed W. P. No. 2149 of 1972 under Art. 226 of the Constitution. The contentions raised in the Writ Petition were that the Government should not have disposed of the revision petitions without issuing a notice to the petitioner, the legal representative of late Muddanna, and without affording an opportunity to her to make her representations, that the Government erred in taking the view that the revision petition filed by late Muddanna on 14-9-1970 before the State Transport Authority against the order dated 22-12-1967 of the Regional Transport Authority rejecting the proposal for variation under Section 47 of the Act, was barred by time and on that ground the application filed by late Muddanna for the grant of variation under Section 57 (3) was liable to be rejected, and that the State Transport Authority passed a common order in the two revision petitions preferred by late Muddanna against the orders of the Regional Transport

Authority, but only a single revision petition was filed by each of the respondents before the Government against the order of the State Transport Authority. Therefore the Government should not have interfered with the order of the State Transport Authority.

4. Our learned brother held on the first point that in a case where the permit-holder dies an application for transfer of the permit should be made by the legal representative, that in the instant case the petitioner filed an application for transfer after the death of her husband and the permit was transferred in her favour on 29-12-1971 and that she did not take any steps to come on record in the revision petition which was then pending before the Government. The learned Judge also held that the provisions of Order 22, C. P. C. are not applicable to appeals and revisions under the Act, that the appellant's husband was given notice of the revision petition filed by each of the respondents, that he had filed his representations, that the appellant did not file any further representations and therefore was not a case where it could be said that the order of the State Transport Authority was reversed without affording an opportunity to the person in whose favour the order of the State Transport Authority was made. In that view the learned Judge held that the appellant was not entitled to notice from the Government and that it was for her to file an application to come on record if she was interested.

5. On the second point the learned Judge held that under the provisions of Section 64-A the period of limitation for filing a revision petition before the State Transport Authority is thirty days, that the revision petition filed by the appellant husband on 14-9-1970 against the order of the Regional Transport Authority was barred by time and that so long as the said order of the Regional Transport Authority remained, there was no question of revising the order of the Regional Transport Authority, dated 18-5-1968 rejecting the application of the appellant's husband under Section 57 (3) of the Act.

6. On the 3rd point the learned Judge took the view that two revision petitions were filed by the appellant's husband but a common order was passed dismissing both the revision petitions, and as there was only one order relating to the variation of the route a single revision petition was maintainable.

7. Before us Sri K. Mangachary, learned counsel for the appellant challenged the view taken by the learned Judge. The learned counsel for the contesting respondents sought to sustain the

order for the reasons given by the learned Judge. But after hearing both the learned counsel we are inclined to think that the order passed by the Government in revision after the death of the appellant's husband without bringing on record his legal representatives viz. the appellant herein is a nullity. Sri A. S. C. Bose relies upon a decision of the Supreme Court in *Dhani Devi v. S. B. Sharma*, AIR 1970 SC 759 where the learned Judges made the following observations:—

"Under Section 57 an application for a stage carriage permit or a public carrier's permit must be made within the appointed time and published in the prescribed manner. The representations relating thereto must also be made before the appointed time. In the event of the death of an applicant after the expiry of the time appointed for making the applications, the person succeeding to the possession of the vehicle cannot, having regard to the lapse of time, make another application in his own right. The successor cannot obtain the permit unless he is allowed to prosecute the application filed by his predecessor and we see no reason why he cannot be permitted to do so. Where the successor is allowed to prosecute the application, the Regional Transport Authority may have to take into consideration many matters personal to the successor, such as his experiences, the facilities at his disposal for operating the services and his adverse record, if any. The matters personal to the deceased applicant can no longer be taken into account. The rival applicants should, if necessary be given suitable opportunity to file objections against the grant of the permit to the successor. Section 57 does not deal with the situation arising on the death of an applicant nor has it prescribed any time for the making of an application for substitution of the successor or for the filing of objections against the grant of the permit to him. In the absence of any statute or statutory rule, the Regional Transport Authority may devise any reasonable procedure for dealing with the situation. As stated in *American Jurisprudence* 2nd Vol. 2 (Administrative Law) Article 340, P. 155 "Where the statute does not require any particular method of procedure to be followed by an administrative agency, the agency may adopt any reasonable method to carry out its functions." (See also *Corpus Juris Secundum*, Vol. 73 (Public Administrative Bodies and Procedure Article 73, P. 399).) The Regional Transport Authority has complete discretion in the matter of allowing or refusing substitution. It is not bound to embark upon prolonged investigation into disputed questions of succession. Nor is it bound to allow substitution

if such an order will delay the proceedings unreasonably or will otherwise be detrimental to the interests of the public generally.

Under Section 57, (1) an application for a contract carrier's permit or a private carrier's permit may be made at any time, and therefore, the Regional Transport Authority can more readily allow the successor to prosecute the application filed by his predecessor. The Regional Transport Authority may similarly deal with the situation arising on the death of an applicant for the variation of the permit under Section 57 (8) or the renewal of the permit under Section 58. Likewise in the case of the death of an applicant during the pendency of an appeal under Section 64 or a revision petition under Section 64-A the appellate or the revisional authority has power if it thinks fit to substitute the successor in place of the deceased applicant in the records of the proceedings."

We do not think this case advances the argument of the learned counsel for the respondents. It is open to the Transport authorities to bring on record the legal representatives of the deceased party. But in a case where the Transport authority either original or revisional seeks to dispose of the matter on merits and the order proposed to be passed is likely to be either detrimental or prejudicial to the deceased party, it is necessary that the legal representatives of the deceased party should be brought on record. Moreover, where a party to the proceeding before the Transport Authority dies and an adverse order is passed against such party, it would be without jurisdiction and would be a nullity. Of course if the Transport Authority does not think it fit to permit the successor or the legal representative to come on record, the proceeding will automatically terminate and will have to be dismissed as abated. In the instant case the appellant's husband was the respondent in the revision petition before the Government. He died during the pendency of the said revision petition. If the revision petitioners desired that the revisions should be disposed of on merits, the legal representatives of the deceased respondent should have been brought on record. It is to be noted that the revision petitions were preferred by the contesting respondents herein and therefore if the legal representatives of the deceased respondent before the State Transport Authority were not brought on record, the revisions would abate. Therefore it is the contesting respondents who were the revision petitioners before the Government that should have taken steps to bring the appellant on record.

8. For the foregoing reasons we hold that the order of the Government passed in the revision petitions against the respondent Muddanna who was dead by the date of the passing of the order in the revision petitions, was a nullity. In the circumstances we think the proper course is to quash the impugned order of the Government and remand the matter to the Government for disposal afresh. The revision petitions will be disposed of afresh by the Government after giving notice to the petitioner herein. In this view we do not think it necessary to express any opinion on other two contentions urged by the learned counsel for the petitioner in the writ petitions. The questions whether the revision petition filed by the said Muddanna before the State Transport Authority against the order of the Regional Transport Authority dated 22-12-1967 was barred by limitation or not and whether a single revision petition lies to the Government against the common order passed by the State Transport Authority on 31-10-1970, are matters which can be considered by the Government.

9. It is contended by Sri K. Mangachary learned counsel for the appellant that the Government erred in holding that the revision petition filed by the appellant against the order dated 22-12-1967 of the Regional Transport Authority, was barred by limitation. He submits that the State Transport Authority has power to suo motu revise an order of the Regional Transport Authority, and he relies upon the decision of this court in *Motor Workers' Union v. R. Apparao*, AIR 1970 Andh Pra. 220.

10. He contends that when the State Transport Authority set aside the order of the Regional Transport Authority, it must be deemed that the State Transport Authority exercised the suo motu power of revision.

11. In the impugned order of the Government, it is stated that the revision petition filed before the State Transport Authority against the order of the Regional Transport Authority, passed under Section 47 (3) of the Act, was not within time. The question, whether the State Transport Authority could not have interfered in exercise of its suo motu power of revision, was not considered.

12. With regard to the question whether a single revision petition could have been filed against the common order by the State Transport Authority in the two Revision Petitions Nos. 156/RPS/A3/70 Item No. (4) and 77/RPS/A3/68 Item No. 4-A while it is the contention of Sri K. Manga Chary, that a single revision petition is not maintainable it is contended for the respondents, that there

were three revision petitions before the State Transport Authority and therefore the State Transport Authority must be deemed to have treated at least one revision petition as having been filed against the order under Section 47 of the Regional Transport Authority, and the other revision petitions against the order under Section 57 (3) of the Act. Alternatively it is also contended that the Government has suo motu powers of revision under Section 64-A of the Act, and therefore the Government must be deemed to have exercised the suo motu power of revision.

13. But in the order of the Government, it has not been indicated whether the Government treated the revision petitions as mentioned above or interfered in exercise of suo motu powers also. This is also a question which has to be considered by the Government.

14. The Writ Appeal is accordingly allowed, the order dated 26-7-1973 in W. P. No. 2149 of 1972 is set aside, and W. P. No. 2149 of 1972 is allowed and the impugned order of the Government quashed with a direction to the Government to dispose of the revision petition according to law and in the light of the observations contained in this order. But in the circumstances of the case, we direct the parties to bear their own costs, both here and in the writ petition. Advocate's fee Rs. 100/-.

Writ petition and appeal allowed.

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A. SAMBASIVA RAO, Ag. C. J. AND
RAGHUVIR, J.

The Tenali National Club, Petitioner v. The Govt. of Andhra Pradesh and others, Respondents.

Writ Petn. No. 2212 of 1972 and W. P. M. P. No. 3228 of 1972. D/- 26-2-1975.

(A) Andhra Pradesh (Andhra Area) Gaming Act (1930), Ss. 5, 13 — Not ultra vires Art. 14 of the Constitution. (Constitution of India, Art. 14).

The search that is permitted under Section 5 is circumscribed by very many limitations and precautions, which are clearly intended to safeguard the interests of the citizen. S. 5 thus regulates the power of search which necessarily interferes with the personal life of an individual or the affairs of an institution. This power is particularly conferred on the police, because in the system of administration they are entrusted with the responsible task of maintenance of law and order. This clearly establishes that

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instead of S. 5 being unreasonable, it is very much reasonable. (Para 5)

It is the special responsibility of the Police to maintain law and order. So, they must attend immediately to any threatened invasion of the law. Therefore, along with Magistrates, Police Officers of high ranks are also empowered to issue warrants. Moreover, Magistrates also are entrusted, by law, with the task of implementing and enforcing law. It is, therefore, difficult and even impossible to hold that an arbitrary classification is made by authorising both Magistrates and Police Officers to issue warrants of search. (Para 7)

It cannot also be said that sufficient guidelines are not stated in S. 5 (1) for the exercise of the power created therein. The presumption under S. 9 has nothing to do with the manner in which a warrant is issued and has no impact on the validity of S. 5 (1). (Para 8)

The argument that it is illegal and unreasonable to authorise a Police Officer to issue a warrant when under S. 11-A there is an inducement provided to him is wholly misconceived. The payment postulated by S. 11-A arises out of and after conviction. Secondly, the payment is not intended to be made to any Police Officer who has issued a warrant of search. It is specifically intended only to informants and Police Officers as may have assisted in the detection of the offender. Such payment cannot be said to be an inducement to a Police Officer of a high rank who issues a warrant. A Police Officer, who issues a warrant, could, by no stretch of imagination, be called an informant or a Police Officer who had assisted in the detection of the offender. (Para 9)

(B) Andhra Pradesh (Andhra Area) Gaming Act (1930), S. 5 — Game of rummy — Possibility of gambling is not altogether excluded.

Simply because what was played was only game of rummy, the possibility of gambling is not altogether excluded. That depends upon the evidence of each case. AIR 1968 SC 825, Relied on.

(Para 11)

Cases Referred: Chronological Paras
 (1970) W. A. No. 521 of 1969, D/- 20-11-1970 (Andh. Pra.) 10
 AIR 1968 SC 825 = 1968 Cri LJ 1009 11
 AIR 1964 SC 72 = (1965) 1 SCA 259 12
 AIR 1963 SC 1128 = (1963) Supp (2) SCR 127 0
 AIR 1962 SC 764 = 1962 Supp (2) SCR 149 10
 AIR 1933 Cal 8 = 37 Cal WN 24 11

R. Vasudevapillai and T. P. Sastry, for Petitioner; Govt. Pleader, for Respondent No. 1.

A. SAMBASIVA RAO, Actg. C. J. :—

The constitutionality of Section 5 of the Andhra Pradesh (Andhra Area) Gaming Act, 1930 hereinafter called the 'Act' is challenged in this writ petition on the ground that it offends Article 14 of the Constitution.

2. The petitioner is a Club represented by its Secretary. The State Government, the Deputy Superintendent of Police, Inspector of Police and Sub-Inspector of Police are respondents 1 to 4 respectively. The 2nd respondent aided by his subordinates raided the club in the midnight of 5th May 1972, entered the Card rooms made a search and seized cash, playing cards and tokens under a mediation. On the next day, the 4th respondent filed a charge-sheet against some of the members including the Secretary under Sections 8 and 9 of the Act in C. C. Nos. 301 to 305 of 1972 before the Judicial Second Class Magistrate's court, Tenali. This writ petition has been filed challenging this raid. The trial of the criminal cases has been stayed by this court pending the writ petition. The principal reliefs sought by the petitioner are (1) to declare that Sections 5 and 13 of the Act are ultra vires of the Constitution and (2) to restrain the respondents from carrying out any further search, seizure or arrest and from interfering with the lawful activities of the petitioner Club. The respondents in their counter gave a detailed description of what happened before and at the time of the raid and denied that Sections 5 and 13 are ultra vires. They asserted that when an activity comes within the mischief of the Act, they had every right to carry out searches, seizures, arrests etc. as permitted therein.

3. Sri Vasudevapillai in his arguments before us has not questioned the validity of Section 13. He has concentrated all his criticism against sub-section (1) of Section 5. His principal point is that sub-section (1), which empowers both salaried Magistrates as well as Police Officers to issue warrants to any Police Officer not below the rank of a Sub-Inspector to make searches and seizures of gaming houses, is hit by Art. 14. Magistrates, who discharge their functions in a judicial manner and Police Officers whose function is to conduct executive duties like maintaining law and order are poles apart. By no stretch of imagination could they be placed in the same class or category. Placing both such officers, who discharge totally different functions from different perspectives, in the same category is wholly repugnant to the principle and policy of Art. 14. Further, there are no guidelines in it stating as to who should exercise the powers of issuing the

warrants in what circumstances. Thus, the power delegated to the officers is uncanalized and excessive. The whole scheme of sub-section (1) is basically unreasonable. He has further submitted that sub-section (1) has been very inartistically worded leaving scope for any amount of ambiguity. When the provision is shrouded in ambiguity, it should be so construed as to safeguard the right of citizens as against arbitrary action of the State. To further strengthen his argument in this connection, he has referred to the presumption contained in Section 9 that any person found in any common gaming house during any gaming or playing therein shall be presumed, until the contrary is proved, to have been there for the purpose of gaming. When sub-section (1) of Section 5 is read and enforced in the light of this presumption, it would result in conferring arbitrary powers on the authority which gives the warrant or the officer who conducts the raid. Learned counsel has very much emphasized on the provision in Section 11-A which enables the Magistrate, who tries the case, to direct any portion of the fine levied under the provisions of the Act not exceeding one-half to be paid to informants and police officers as may have assisted in the detection of the offender. Thus the police officers have an inducement and it is positively unjust and unreasonable to entrust them with the responsibility of issuing such warrants. This is how Section 5 (1) has been assailed before us.

4. But all this attack on Section 5 (1) would appear to be futile in this case since no warrant was in fact issued by anybody for conducting the search of the petitioner club. On the other hand, the search was made by the 2nd respondent, who is Deputy Superintendent of Police, in exercise of his powers under sub-section (2) of Section 5 which enables any Police Officer having power to issue a warrant under sub-section (1) to himself exercise all or any of the powers exercisable under such warrants without issuing a warrant. It is common ground that the 2nd respondent conducted the raid in exercise of this power. Strictly speaking, therefore, the constitutional questions raised by Sri Vasudevapillai do not arise in this case. However, since quite a good deal of debate has taken place before us on that aspect, we will briefly consider it.

5. We will first consider the reasonableness of S. 5 (1). We fail to see what is unreasonable about insisting on a police officer not below the rank of Sub-Inspector of Police being permitted through a warrant to search a place. Ours is a democratic society; every citizen and as-

sociation of citizens has right of privacy. If that privacy were to be invaded indiscriminately, then there would be an end of all democratic way of life and the rule of the law. It is, however, true that no citizen or association of persons can, under the guise of privacy, do something illegal or unlawful. Even when that is suspected, an officer of the police cannot straightway walk into the place, make a raid and search. For instance, gaming which includes wagering or betting to the extent it is defined in the Act is forbidden by it. Simply because a police officer thinks that some gaming is going on in a place, he cannot make a search of it. When a person's private life is sought to be interfered with, it should be done with a sense of responsibility. That is why the search that is permitted under Section 5 is circumscribed by very many limitations and precautions, which are clearly intended to safeguard the interests of the citizen. If any search is to be conducted straightway by a police officer, he should not be below the rank of a Deputy Superintendent of Police. Such an officer is certainly an experienced and responsible person. He can either issue a warrant or conduct the search by himself. But then he cannot do either indiscriminately. He must have reason to believe that the place which is permitted to be searched is used as a common gaming house. Further the police officer authorised to make the search should not be below the rank of a Sub-Inspector. Section 5 thus regulates the power of search which necessarily interferes with the personal life of an individual or the affairs of an institution. This power is particularly conferred on the police, because in the system of administration they are entrusted with the responsible task of maintenance of law and order. Certainly, gaming, to the extent it is forbidden by the Act, becomes a problem of law and order and consequently it is one of the basic functions of the police to see that the law is not broken, by placing the power of issuing a warrant in a Magistrate. Section 5 takes equal care to see that the life of an individual is not easily interfered with. The Magistrate, who is authorised to issue a warrant, should not be an honorary one. He is required to be a salaried Magistrate. Further he should not be inferior to a Magistrate of the Second Class. So, only a Magistrate of certain status is conferred with this power of issuing warrants. Even he cannot straightway issue a warrant; he also must have reason to believe that a place is being used as a common gaming house. These circumstances clearly establish that instead of Section 5 being unreasonable, it is very much reasonable.

6. Nor do we see any illegal or unreasonable classification by authorising both salaried Magistrate not inferior to a Magistrate of the Second Class and Police Officers not below the rank of a Deputy Superintendent of Police to issue a warrant. The criticism is that officers holding two different types of posts and discharging different types of functions are placed in the same class. A police officer discharges executive functions while a Magistrate discharges judicial functions. In other words, what a police officer complains of, the Magistrate tries and decides. So, the learned counsel argues that putting both of them in the same category is arbitrary and offends Art. 14.

7. This argument is founded on a misconception. The anxiety of using the power of search in a highly responsible way is writ large in Section 5. That is why Magistrates and Police Officers not below a particular rank, that too when they have reason to believe that a place is being used as a common gaming house, are authorised to issue warrant of search. Time and again we come across cases where Magistrates are authorised to issue such warrants. But supposing a place is being used as a common gaming house in a place where there is no Magistrate, when the gaming is going on the police cannot detect it unless they make a surprise raid. It would certainly take time for them to go to the place where an officer of the rank described in sub-section (1) of Section 5 lives and get a warrant from him. Therefore, the Legislature patently thought that in addition to a Magistrate of a particular rank, a police officer not below the rank of a Deputy Superintendent should also have the power to issue a warrant or to make the search himself. It is well to recall once again that it is the special responsibility of the Police to maintain law and order. So, they must attend immediately to any threatened invasion of the law. Therefore, along with Magistrates, Police Officers of high ranks are also empowered to issue warrants. Moreover, Magistrates also are entrusted, by law, with the task of implementing and enforcing law. It is, therefore, difficult and even impossible to hold that an arbitrary classification is made by authorising both Magistrates and Police Officers to issue warrants of search.

8. Learned counsel has then pointed out that Section 5 is bad in another way, in the way in which it leaves lacuna in not providing any guidelines as to in what circumstances Magistrates should issue warrants and in what circumstances Police Officers should issue them. In the absence of these guidelines, he calls the delegation of the power excessive and un-

canalized. In these circumstances, certain latitude should be given to the officers who are charged with the duty of maintaining law and order. It would be difficult and may even result in defeating the very purpose of the law if strict rules are laid down in the statute as to when a Magistrate should issue a warrant and when a Police Officer can do it. The Legislature manifestly left it to the requirements or the exigencies of situation. It is also unwarranted to say that the delegation of power is excessive or uncanalized. The Magistrate as well as the Police Officer, who are authorised to issue warrants, should belong to a rank prescribed in the section. Further, they should have reason to believe that the place is used as a common gaming house. The person they authorise should not be below the rank of a Sub-Inspector. Sufficient guidelines are thus fixed in Section 5 (1) for exercise of the power created therein. The presumption in Section 9 has also been invoked to support this argument of uncanalized power. The presumption is that any person found in any common gaming (house) or playing therein shall be presumed, until the contrary is proved, to have been there for the purpose of gaming. This presumption has nothing to do with the issuance of a warrant. This presumption arises only when the matter comes up for trial before a court of law and it relates to burden of proof. It has nothing to do with the manner in which a warrant is issued and has no impact on the validity of Section 5 (1).

9. The last contention in this behalf is that it is unreasonable and illegal to authorise a Police Officer to issue a warrant, when under Section 11-A there is an inducement provided to him. The apprehension of the learned counsel is that when there is such an inducement, Police Officers fall a prey to it and issue unjustified warrants and consequently it is dangerous to retain the power of issuing warrants in Police Officers. This argument is, in our opinion, wholly misconceived. Section 11-A was introduced in the year 1950 and deals with payment of a portion of fine to informants and Police Officers. It empowers the Magistrate, who has tried a case of gaming, to direct any portion, not exceeding one-half, of any fine which shall be levied under Sections 4, 8 or 9 and of the moneys or proceeds of articles seized and ordered to be forfeited under Section 10 to be paid to such informants and Police Officers as may have assisted in the detection of the offender. Such a direction may be given even by a Court of Appeal, reference or revision. Sub-section (3) thereof takes the precaution that the amount shall not be sent to the District

Superintendent of Police for distribution until the expiry of three months from the date of the direction under sub-section (1) or if an appeal is presented within that period until the appeal is disposed of. It is thus very clear that the payment postulated by Section 11-A arises out of and after conviction. Secondly, the payment is not intended to be made to any Police Officer who has issued a warrant of search. It is specifically intended only to informants and Police Officers as may have assisted in the detection of the offender. We fail to see how such payment would be an inducement to a Police Officer of a high rank who issues a warrant. A Police Officer, who issues a warrant, could, by no stretch of imagination, be called an informant or a Police Officer who has assisted in the detection of the offender. Section 5 clearly says a warrant can be issued only when there is reason to believe that a place is used as a common gaming house. So, the officer, who issues the warrant, does not come within the ambit of the officer who has assisted in the detection. Thus there is no inducement to such officers who issue warrants.

10. We find no substance in any of the arguments advanced by the learned counsel for the petitioner challenging the validity of Section 5 (1). In fact a Division Bench of this Court consisting of Kumarayya, C. J. and Sriramulu, J. decided on 20-11-1970 in W. A. No. 521 of 1969 (Andh. Pra.) that Section 5 is "a reasonable provision. We may also refer to two passages in Maxwell and a few decisions relied on by the learned counsel for the petitioner. In the first place, he invites our attention to two passages in Maxwell on "The Interpretation of Statutes", Eleventh Edition. At page 221 the learned Jurist says that where the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. We neither see any manifest contradiction of the apparent purpose of Section 5 (1) nor its leading to any inconvenience or absurdity, hardship or injustice. So, this passage is irrelevant to the question. Likewise the passage at page 228 which says:

"Notwithstanding the general rule that full effect must be given to every word, yet if no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the enactment, it may, or rather it should, be eliminated. The words of a statute must be con-

strued so as to give a sensible meaning to them if possible."

We will only repeat what we have said in regard to the passage at page 221. We do not find any difficulty in giving any sensible meaning to the words or expressions used in Section 5 (1). Reference is made to Mysore State Electricity Board v. Bangalore W. C. & S. Mills, AIR 1963 SC 1128 where the wide words used in Section 76 (1) of the Electricity (Supply) Act, 1948 fell for interpretation. The Supreme Court held that even though the words used were of wide amplitude it was implicit in the sub-section that the question arising thereunder was one which arose under the Electricity (Supply) Act. While construing the provision the court observed that the literal and mechanical construction for which the petitioner contends is neither the only nor the true construction of clauses which provide for acquisition of land needed for construction of some building or work. There are two possible constructions of the clause, one a mere mechanical and literal construction based on rules of grammar and the other which emerges from the setting in which the clause appears. The Court chose the second construction as it is the better one. The same rule was reiterated by the Supreme Court in R. L. Arora v. State of Uttar Pradesh, AIR 1962 SC 764. In our opinion these decisions have no bearing on the construction of Section 5 as it leaves no doubt or ambiguity. There are no two constructions possible and there is no need to choose one of them. We have, therefore, no hesitation in rejecting the constitutional objection raised by the learned counsel.

11. It is then argued that Rummy is not a game of chance. Reliance has been placed on Saligram v. Emperor, AIR 1933 Cal 8 and State of A. P. v. K. Satyanarayana, AIR 1968 SC 825. It is true that the Supreme Court held in the latter case that Rummy, the way in which it is played cannot be simply called a game of chance and that there is no skill involved in it. At the same time, Hidayatullah, J. (as he then was) observed in para. 12:

"Of course, if there is evidence of gambling in some other way or that the owner of the house or the Club is making a profit or gain from the game of Rummy or any other game played for stakes, the offence may be brought home. In this case, these elements are missing." In the light of these observations, it is obviously for the Court, which tries the criminal case, to find out whether there was any evidence of gambling when the search was made. Simply because what was played was only game of Rummy, the possibility of gambling is not alto-

gether excluded. That depends upon the evidence of each case, as stated by the Supreme Court in the aforesaid decision. The Court while disposing of the criminal case, which has been launched, will have to decide this aspect. We can only refer in this context to the mediators' report which has been specifically referred to in the counter and a copy of which is produced before us, which shows that several amounts of money were seized not only from the players but also from the representatives of the club which might indicate that the club was making a profit out of the game that was being played. We, however, do not express any opinion on this question lest it might prejudice the prosecution and the defence in the criminal case. We have only pointed out this for the purpose of showing that it is for the criminal Court to consider and decide whether any gambling was involved and whether the petitioner club was a common gaming house.

12. Lastly it has been submitted that the raid was vitiated by lack of bona fides and was motivated by extraneous considerations. Reliance is placed on Parthap Singh v. State of Punjab, AIR 1964 SC 72. In the writ petition certain political motives are attributed to some persons in the town who are alleged to have a political grouse against this particular club. This is stoutly denied in the counter-affidavit. There is no material placed before us to show, that any extraneous considerations have prompted the 2nd respondent to make the raid. Prima facie we may once again point out that this is not a recording of any finding—the mediator's report shows that the 2nd respondent was justified in believing that the club premises were then being used as a common gaming house.

13. We cannot, therefore, strike down the raid and its evil consequences on the ground of its being vitiated by extraneous considerations.

14. These are all the points urged before us and we see no force in any of them. The writ petition is consequently dismissed with costs. Advocate's fee Rs. 100/-.

Petition dismissed.

AIR 1975 ANDHRA PRADESH 302

S. OBUL REDDI, C. J. AND
PUNNAYYA, J.

The State of Andhra Pradesh and another. Appellants v. Ch. Sampanga Rao and others, Respondents.

Writ Appeal No. 219 of 1974, D/- 31-12-1974.*

(A) A. P. Saw Mills (Regulation) Rules (1969), R. 4 (1) (a) — Rule does not discriminate between existing mill owner and new comer — It is not violative of Art. 14, Constitution. W. P. No. 4114 of 1969, D/- 29-6-1971 (Andh. Pra.), Reversed. (Constitution of India, Art. 14).

Rule 4 (1) (a) does not discriminate between a person erecting a Saw Mill after the commencement of the rules and a proprietor of existing saw mills. Therefore, it cannot be struck down as violative of Art. 14 of the Constitution. W. P. No. 4114 of 1969, D/- 29-6-1971 (Andh. Pra.), Reversed. (Para 5)

On a harmonious construction of clauses (a) and (b) of sub-rule (1) read with sub-rule (2) of Rule 4 and the form of licence prescribed under Rule 4 (2) the proviso to clause (a) covers both categories, whether one was an existing operator or a newcomer. The fact that a mill had already been established prior to the Rules came into force, does not put an existing mill-owner in any advantageous position nor does the form of licence to be obtained put a new comer in any disadvantageous position. (Para 4)

Govt. Pleader for Industries, for Appellants; P. A. Chowdary, for Respondents.

S. OBUL REDDI, C. J. :— In this writ appeal against the judgment of Parthasarathi, J. the interpretation of Rule 4 of the Andhra Pradesh Saw Mills (Regulation) Rules, 1969 is involved.

2. The respondents (writ petitioners) had established their saw mills and were operating them after obtaining licences from the Licensing Authority. The case of the respondent as presented by them in the writ petition, is that any person erecting a saw mill after the commencement of the Rules could proceed to operate the mill if the licensing authority failed to grant the licence within a period of one month from the date of the application but the proprietors of existing saw mills were denied that benefit as they cannot operate the mills unless a fresh licence was obtained by them in accordance with the Rules. It is, therefore, ne-

*(Against judgment of Parthasarathi, J. in W. P. No. 4114. of 1969, D/- 29-6-1971.)

cessary to see whether Rule 4 suffers from the vice of discrimination so as to be struck down by us as denying equal protection of laws to the respondents.

3. Rules 3 and 4 are the relevant rules and they may, therefore, be read:—

"3. No person shall instal, erect or operate a saw mill within a reserved, protected or proposed forest block or within 30 kilometres from the boundary of such forest block for cutting, converting, or sawing of timber without obtaining a licence for such installation from the licensing authority."

4 (1) (a). Any person desiring to instal, erect or operate a saw mill shall make an application in that behalf to the licensing authority;

Provided that where within a period of one month from the date of application, the applicant has not been granted the licence, the applicant may proceed to establish a saw mill, but not so as to contravene any of the provisions of the Andhra Pradesh Forest Act, 1967 or any Rules made thereunder.

(b) Every proprietor of an existing saw mill shall obtain a licence from the licensing authority within ninety days from the date of the publication of these rules.

(2) On receipt of an application, the licensing authority shall make such enquiry as he deems fit, and after satisfying himself whether or not there would be any objection to granting, the licence applied for, having regard to safeguarding the timber in any reserved, protected or proposed forest, or in any land referred to in Rule 3, may grant a licence in the form appended to these rules subject to the conditions set out therein or refuse to grant a licence."

4. Rule 3 injuncts that a saw mill shall be erected or operated within a reserved, protected or proposed forest block or within the distance referred to in that rule. It further injuncts that no person shall instal, erect or operate a saw mill without obtaining a licence from the licensing authority. Unless those two conditions laid down in Rule 3 are satisfied no person can operate a saw mill. Rule 4 provides for installation of new mills and also for operation of existing saw mills. Rule 4 (1) (a) makes it incumbent, where one is an existing proprietor of a saw mill to make an application to the licensing authority. An application could be made as provided in clause (a) of sub-rule (1) of Rule 4 either for installation, erection or operation of a saw mill. Where a mill was already in existence prior to the commencement of the Rules, all that a proprietor has got to do is to ask for a licence as provided in clause (b) of sub-rule (1) of Rule 4. The proviso to clause

(a) of sub-rule (1) according to Mr. Chowdary, learned counsel for the respondents makes a hostile discrimination between those persons who propose to establish mills subsequent to the Rules and those who had already established mills. Mr. Chowdary learned counsel for the respondents, relied upon the phraseology of that proviso which entitles a new entrant, in the event of a licence not being granted to him within one month from the date of his application, to proceed with the operation of the mill. This proviso, we are unable to agree with Mr. Chowdary, applies only to those who make applications for establishment of saw mills after the rules have been brought into force. Clause (a) of sub-rule (1) of Rule 4 speaks of not only installation or erection but also operation of a saw mill. The words "to establish" used in the proviso are comprehensive enough to take in not only installation or erection but also operation of the mill. Prima facie it may show that the proviso applies only to those who want to erect or instal saw mills after the commencement of the rules. But a scrutiny of the Rule as a whole, would show that the expression "establish" would cover operation also. Clause (b) of sub-rule (1) of Rule 4 only says that a proprietor of an existing saw mill shall obtain a licence from the licensing authority within ninety days from the date of publication of these Rules. Though it is not necessary for him to ask for a licence for erection or installation of the saw mill, it is however incumbent upon him to obtain a licence for operating a saw mill. Therefore, cls. (a) and (b) of R. 4 (1) have to be read together; and when read together, they show that, irrespective of the fact whether a person had a licence prior to the coming into force of the rules or a person desiring to establish a saw mill after the Rules came into force, he must make an application to the licensing authority. Sub-rule (2) of Rule 4 applies not only to existing saw mill owners, but also to those who seek to set up saw mills after the Rules have been brought into force; for, on receipt of an application, the licensing authority has to cause certain enquiries to be made and has to satisfy himself about the compliance of the requirements of Rule 3 in order to safeguard the timber in any reserved protected or proposed forest. The time limit of ninety days provided in cl. (b) of sub-rule (1) of Rule 4 to a proprietor of an existing saw mill is only to enable him to continue the operation of his saw mill. The ninety days' period is a grace period given to him. We may also notice the form of licence prescribed for the establishment and running of a saw mill. This form is prescribed under Rule 4 (2). Whether one is a pro-

prietor of an existing saw mill or a new comer who had made an application, the form of licence is the same for both. He has to seek a licence, as can be seen from the form "for the establishment and running of a saw mill."

The fact that a mill had already been established prior to the Rules came into force, does not put an existing mill-owner in any advantageous position nor does the form of licence to be obtained put a new comer in any disadvantageous position. We are, therefore, of the view that, on a harmonious construction of clauses (a) and (b) of sub-rule (1) read with sub-rule (2) of Rule 4 and the form of licence prescribed under Rule 4 (2) the proviso to clause (a) covers both categories, whether one was an existing operator or a new comer.

5. For the reasons recorded, we are unable to agree with the view expressed by Parthasarathi J. that Rule 4 (1) (a) is unconstitutional as offending Art. 14 of the Constitution. In this view, the respondents (writ petitioners) will be entitled to the benefit of the view expressed by us and the writ petition is disposed of accordingly. The writ appeal is allowed to the extent it relates to the constitutional validity of Rule 4. No costs. Advocate's fee Rs. 100/- (Rupees one hundred only).

Appeal allowed.

AIR 1975 ANDHRA PRADESH 304

A. V. KRISHNA RAO, J.

Sarnapudi Appanna, Appellant v. Rapanti Narsinga Rao and others, Respondents.

A. A. A. O. No. 19 of 1973, D/- 29-11-1974.*

(A) Civil P. C. (1908), Ss. 2 (2) and 96, 47 — Appeal — Restoration of execution petition dismissed for default — Order directing fresh attachment is appealable.

The real question was whether by reason of restoration of execution petition, the attachment effected in earlier execution petition stood revived. If the questions that arise relate to execution, discharge or satisfaction of the decree, then it does not matter whether such question arises before or after the decree had been executed. The question involved is covered by the definition of the decree contained in S. 2 (2), C. P. C. (1892) ILR 19 Cal 683 (PC) and AIR 1973 SC 2423, Rel. on. (Para 5)

*(Against order of Dist. J., Visakapatnam in A. S. No. 91 of 1972, D/- 5-5-1973.)

AS/DS/A313/75/MBR

(B) Civil P. C. (1908), O. 21, R. 57 — Dismissal of execution petition for decree-holder's default — Prior attachment made in earlier execution petition will not cease.

An attachment will cease only if the execution petition in which the attachment was effected was dismissed for default and not when a subsequent petition was dismissed for default. The fact that in the execution petition the decree-holder sought the attachment does not make any difference. It was superfluous and wholly unnecessary. AIR 1940 Mad 172 and AIR 1949 Mad 594, Rel. on.

(Paras 6, 8)

Alternatively, in this case, the execution petition which was dismissed for default was restored. The effect is that the attachment also stands restored. AIR 1950 Mad 740 and AIR 1935 Mad 365 (FB), Rel. on. (Para 9)

Cases Referred: Chronological Paras
AIR 1973 SC 2423 = (1974) 2 SCJ 196 5
AIR 1971 Andh Pra 336 = (1970) 2 Andh
WR 97 12
AIR 1950 Mad 740 = (1950) 1 Mad LJ 454 9
AIR 1949 Mad 594 = (1949) 1 Mad LJ 143 7
AIR 1940 Mad 172 = (1939) 2 Mad LJ 916 7
AIR 1935 Mad 365 = 68 Mad LJ 444 (FB) 10
(1892) ILR 19 Cal 683 = 19 Ind App 166 5
(PC)

K. B. Ratna Sastry, for Appellant;
M. S. R. Subrahmanyam, for Respondent No. 10

JUDGMENT:— This Civil Miscellaneous Second Appeal arises out of execution proceedings in respect of a decree obtained more than 21 years ago. On 8-12-52 one Appala Naidu obtained a decree against one Raparthi Lakshminarasimharao for money. The present respondents are his legal representatives.

2. The plaintiff (decree-holder) filed E. P. No. 44 of 1953 for sale and attachment of immovable properties of the judgment-debtor. Attachment and sale were ordered. On 24-3-1954 E. P. No. 44 of 1953 was dismissed, as the sale had to be stopped for want of bidders. In dismissing the application the executing court directed the attachment to continue for a period of six months. On 23-6-1954, the decree-holder filed again E. P. No. 162 of 1954. This E. P. also met with a similar fate. The sale had to be stopped for want of bidders and the E. P. was dismissed. Attachment was ordered to continue for six months. The decree in the meanwhile came to be transferred to the present appellant. He filed E. P. No. 379 of 1956. The property was again attached

the Transfer of Property Act or on the equitable principles should have exercised the powers to relieve the forfeiture, for the tenant was always willing to abide by the terms of the lease and to undo the damage, i.e., the breach of the covenant with respect to payment of rent. In fact, it is submitted, that the tenant has paid all the arrears and was also paying during the pendency of the litigation every month the amount ordered by the Court. There is thus a plea that the Courts below could not have passed such a decree in ejectment without relieving the defendant of the penal consequences for mere non-payment of rent. Even assuming, the learned counsel submits, as a second wing of his argument, that this is a determination of the lease under Section 106 of the Transfer of Property Act, there is no valid notice which can be the effective basis of decree in ejectment. Alternatively, it is said that once the permission was vacated by the appellate order, mentioned above, the notice was merely conditional and its operation depended upon the chance of litigation undertaken by the landlord in the High Court. Such a notice by itself was invalid. Thus, it is submitted that the first notice given on the basis of the Rent Controller's permission was either vacated by the appellate order, or was invalid because it depended upon the chance of success in litigation.

4. None of these submissions can be upheld. The cause of action for the suit is not based on the forfeiture of the tenancy, nor the permission is given to forfeit the same. As the law of property stands but for the provisions of the Rent Control Order, under Section 106 of the Transfer of Property Act where the demise is under a monthly lease the same is determinable by notice given either by the lessor or the lessee. The right is absolute and recognised statutorily. To exercise this right by virtue of the Rent Control Order the landlord has to satisfy the authorities as is provided for under clause 13 of that Order. The Controller upon the satisfaction of any of the grounds is enabled to permit the landlord to give notice determining the lease. The grounds mentioned in sub-clause (3) of clause 13 are not the grounds of forfeiture of the lease nor the permission given by the Rent Controller has the same effect. It can be well conceived that even after obtaining the permission, the lease may still continue and the landlord may not exercise the right of determination of lease by giving notice. The provisions of S. 106 of the Transfer of Property Act and the effect of the Rent Control litigation has been considered by this Court in *Wakf-E-Khas Baid Lal Bunrla Fatte v. Manager, United Transport Motor Co., Ltd., Akola*, 1974 Mah LJ 40 (41) = (AIR 1974 Bom 178) and it has been observed that apart from the Rent Act, the landlord was entitled to eject the tenant on the expiry of the period mentioned in the notice to quit. The provisions of clause 13 were in the nature of protection to the tenant

from eviction except in certain specified cases. Once the ground mentioned in clause 13 of the Order is made out, the protection was lifted.

5. The submission, therefore, that an attempt to satisfy the Rent Controller by referring to the provisions in clause 13 (3) (ii) was an attempt to forfeit the tenancy under the provision of the Transfer of Property Act, cannot be accepted. These are two independent statutory provisions. The forfeiture provided by Section 111 (g) of the Transfer of Property Act, to which a reference was made, cannot be confused with the ground that is required to be made out by the landlord for seeking permission to give quit notice. The notice mentioned in Cl. 13 (i) (a) is the notice by which the landlord can determine the lease and it is a conceivable notice under Section 106 of the Transfer of Property Act. That being the position, the reliance placed by the learned counsel on the doctrine of forfeiture of the lease and further the equity is not available. The decisions in *R. S. Lala Pradumnakumar v. Virendra Goyal*, AIR 1969 SC 1349 and *Janab Veliathi v. Smt. K. Kadarvel*, AIR 1958 Mad 232 relied are not at all apposite. There the cause of action on which the ejectment was sought was the forfeiture of the lease. The present case is not a case of forfeiture but of a valid determination by notice. Well recognised distinction between such determination of the lease and forfeiture cannot be lost sight of.

6. Similar is the position with second submission. As the facts indicate, by the ultimate order of the High Court which is not questioned in any manner to be without jurisdiction, the permission of the Rent Controller was restored. In fact during the pendency of the proceedings in this High Court, the eviction suit was stayed and the effect of the High Court's decision was to restore the permission granted by the Rent Controller on September 5, 1967. Consequently, it would follow that the notice given by the landlord on September 6, 1967 for the purpose of eviction furnished him a good cause of action to proceed with the suit once the High Court adjudged the permission given by the Rent Controller as valid one. It cannot also be accepted that such a notice was uncertain because as the learned counsel puts, it depended upon the success in the High Court. Such a plea in fact is not available. The independent proceedings started under the Rent Control Order were very much pending before the High Court. The notice was already given and the lease stood determined. Whether upon determination by that notice effective decree could be made or not merely depended upon the final adjudication as to the legality of the permission given by the Rent Controller. Once the High Court allowed the writ petition and restored the permission of the Rent Controller, it cannot be said that the notice, which was given after a valid permission, was a notice based on chance liti-

gations, or future success therein. There is no uncertainty in the notice as such. It is not in dispute that the notice is clearly indicative of the determination of the lease by the end of the tenancy month of September 1967 and that furnishes a good ground for evicting the tenant who was no more holding the property under lease after September 1967. Merely because proceedings were taken in the higher Courts, the position did not change.

7. These being the only submissions, the present appeal will stand dismissed with costs. The tenant, however, is given time to vacate the premises and hand over possession to the plaintiff by July 1, 1974.

Appeal dismissed.

AIR 1975 BOMBAY 244

(AT NAGPUR)

FULL BENCH

KANTAWALA, C. J. TULZAPURKAR
AND MASODKAR, JJ.

Subhash Ganpatrao Buty, and another
Appellants v. Maroti S/o. Krishnaji Dorlikar and others, Respondents.

Civil Appln. No. 353 of 1973, in Second Appeal St. No. 1877 of 1971 with Civil Appln. No. 354 of 1973 in Second Appeal St. No. 1875 of 1971, D/- 27-8-1974.*

(A) Limitation Act (1963), Section 12 (2) and Explanation — Exclusion of time taken for drawing up decree before application for copy — It is 'time requisite' for obtaining copy of decree — Words 'shall not be excluded' in the Explanation mean "shall be included" — AIR 1968 Bom 204, Overruled; AIR 1973 Gauhati 83 and Assam LR (1972) Assam and Naga 8 and AIR 1973 Mys 234 and AIR 1967 Madh Pra 127, Dissented from.

On a plain and grammatical construction of the Explanation to Section 12 (2) of the Act the intention of the Legislature is clear namely, that while computing the time requisite for obtaining a copy of a decree any time taken by the Court for preparation of the decree before an application for a copy thereof is made is not to be excluded, that is to say, such period will have to be included while computing the time requisite for obtaining a copy. It is also clear on a fair reading of the Explanation that irrespective of the question as to whether an application for a certified copy of the decree is made before drawing up of the decree or the same is made after the decree has been drawn up and signed, the

*(Appln. under Section 5 Limitation Act praying for condoning the delay in filing appeal).

operative part of the Explanation must come into play, that is to say, in either of the events while computing the time requisite for obtaining a certified copy, the time taken by the Court for drawing up of the decree will have to be included in the time requisite for obtaining a copy. The language of the Explanation being absolutely clear and unambiguous, there is no scope for seeking the aid of any marginal note or the recommendation of the Law Commission or the object or purpose stated in the Statement of Objects and Reasons for introducing the Explanation.

(Paras 7, 16)

The Explanation does not deal with the topic of computing the period of limitation for an appeal but in terms deals with the topic of computation of the 'time requisite for obtaining a copy of the decree' and it is in the context of this topic dealt with by the Explanation that the words "shall not be excluded" have to be construed and the natural meaning of that expression would be "shall be included".

(Para 8)

The judgment against which the appeals were preferred was delivered on 26-10-1970, the decrees were signed by the Court on 9-12-1970. Application for certified copies of the decree were made by the appellants on 6-2-1971; the copies became ready for delivery on 19-2-1971 and they were also received by the appellants on the same day and thereafter the appeals were filed by the appellants in the High Court on 1-3-1971. The question was whether the time taken by the Court for drawing up of its decree between 26-10-1970 and 9-12-1970 was to be included within the concept of 'time requisite' for obtaining the certified copy of the decree:

Held that on a proper interpretation of the relevant provisions contained in the substantive part of Section 12 (2) of the Act read with the Explanation there-to the time taken by the Court between 26-10-1970 and 9-12-1970 was 'time requisite' for obtaining the certified copy of the decree and therefore the appeals must be held to have been filed within time. AIR 1966 Pat 1 (FB) and AIR 1970 Cal 443 and AIR 1971 Cal 213 and AIR 1970 Orissa 116 and AIR 1972 All 511 and AIR 1973 Gauhati 60, Foll.; AIR 1973 Gauhati 83 and Assam LR (1972) Assam & Naga 8 and AIR 1973 Mys 234 and AIR 1967 Madh Pra 127, Dissented from; AIR 1968 Bom 204, Overruled.

(Para 7)

(B) Interpretation of Statutes — Intention of legislature — Clear and unambiguous language — Aid from Statement of Objects and Reasons cannot be sought.

It is the duty of the Court to interpret the language actually employed and to determine the intention of the legislature from such language and where there

is no ambiguity about the language actually employed, neither the recommendation of the Law Commission nor the aims and object as set out in the Statement of Objects and Reasons can be brought in aid or can be allowed to influence the natural and grammatical meaning of the statute as enacted by the Parliament.

(Para 7)

(C) Interpretation of Statutes — 'Explanation'.

The purpose of an Explanation is often to explain some concept or expression or phrase occurring in the main provision and it is not uncommon for the Legislature to accord either an extended meaning or a restricted meaning to such concept or expression or phrase by inserting appropriate Explanation. (Para 6)

(D) Limitation Act (1963). Pre. — Interpretation of statutes — Statutes of limitation. (Interpretation of statutes).

The Statutes of Limitation are in their nature strict and inflexible enactment, and ought to receive such a construction as the language in its plain meaning imports. (1874) 13 Beng LR 177 (PC), Foll.

(Para 16)

Cases Referred: Chronological Paras

AIR 1973 Gauhati 80	11
AIR 1973 Gauhati 83	11, 13
AIR 1973 Mys 234 = (1973) 1 Mys LJ 273	13
AIR 1972 All 511 = 1972 All LJ 561	10, 16
Assam LR (1972) Assam and Naga 8	11
AIR 1971 Cal 213 = ILR (1971) 2 Cal 79	9
AIR 1970 Cal 443 = 74 Cal WN 318	9
AIR 1970 Orissa 116	9
AIR 1968 Bom 204 = 69 Bom LR 633	12
AIR 1967 Madh Pra 127 = 1966 Jab LJ 348	15
AIR 1966 Pat 1 = 1966 BLJR 359 (FB)	8
AIR 1961 SC 832 = (1961) 2 SCR 918	3
AIR 1952 Bom 122 = 54 Bom LR 11 (FB)	2, 3
AIR 1936 Pat 45 = 16 Pat LT 849 (FB)	3
AIR 1927 Nag 1 = 98 Ind Cas 1057 (FB)	3, 15
(1886) ILR 13 Cal 104 (FB)	3
(1874) 13 Beng LR 177 = 20 Suth WR 375 (PC)	16

P. N. Deopujari, for Appellants; M. S. Choudhuri (for Nos. 1 to 3), for Respondents.

TULZAPURKAR, J.:— Two questions have been referred to this Full Bench by the learned Single Judge for our determination which run as follows:—

(1) What is the true and correct interpretation of the Explanation appended to Section 12 of the Limitation Act, 1963 and whether by that Explanation a litigant applying after the decree is made can exclude the time taken by the Court to prepare the decree and treat it as the

time requisite for obtaining a copy of decree under Section 12 (2) of the Act?

(2) Whether after the passing of the 1963 Act under Article 116 the starting point for limitation is the date on which actually the decree is made; or is the date of the judgment still the starting point for limitation?

2. Principally the first question centers round the true and proper interpretation of sub-section (2) of Section 12 of the Limitation Act 1963 and the Explanation thereto and the question arises under these circumstances: The above two Second Appeals were filed in this Court on 1st March, 1971, and the question is whether the appellant in each of the Appeals is entitled to get the benefit of Section 12 (2) read with Explanation thereto and can contend that the appeals are filed within the time prescribed for filing appeals. To understand the claim made by the appellants it will be necessary to set out certain dates. The judgment against which the appeals have been preferred was delivered on 26th October, 1970, the decrees were signed by the First Appellate Court on 9th December, 1970. Application for certified copies of the decree were made by the appellants on 6th February, 1971; the copies became ready for delivery on 19th February, 1971, and they were also received by the appellants on the same day and thereafter the appeals were filed by the appellants in this Court on 1st March, 1971. The question principally is whether the time taken by the Court for drawing up of its decree is to be included within the concept of 'time requisite' for obtaining the certified copy of the decree and it was not disputed before us that if this time, namely the time between the date of the pronouncement of the judgment (26th October, 1970) and the date when the decrees were prepared and signed (9th December, 1970), was included within the time requisite for obtaining a copy of the decree the appeals would be within the prescribed period of limitation, but if this period was not so included the appeals would be barred by 22 days. It may incidentally be mentioned that the appellant in each of these cases had applied for condonation of delay under Section 5 (vide Civil Application No. 353/73 and Civil Application No. 354/73) but the learned Single Judge was not satisfied that the appellants were prevented by sufficient cause from preferring their appeals within the prescribed period of limitation. In other words, the applications for condonation of delay were rejected by him and therefore the claim of the appellants that there has been no delay in presenting the appeals and the same have been filed within the prescribed period of limitation arises for our con-

sideration. Before the above question is considered under the provisions of the 1963 Act, it would be desirable to indicate what was the position of law on the aspect under consideration under the prior enactment and it would be convenient at this stage to set out the old Section 12 of the 1908 Act; sub-section (2) of that section, which would be relevant, ran as follows:—

"In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded."

There was no Explanation whatsoever appended to this provision and the phrase 'time requisite for obtaining a copy of the decree' came up for consideration in several cases before the Courts and the two words 'requisite' and 'obtaining' occurring in the said phrase were considered in a particular manner. The view consistently taken by all the courts was that the word 'requisite' did not mean merely required but it meant 'properly required' and similarly the word 'obtaining' indicated an effort on the part of the applicant to get a copy of the decree. Laying equal emphasis on both the aforesaid words and interpreting them in this manner a Full Bench of this Court in the case of Jayashankar Mulshankar v. Mayabhai Lalbhai, reported in AIR 1952 Bom 122 (FB) took the view that what has got to be excluded is the time which is properly required and the time which has got to be so excluded is the time which is necessary for obtaining a copy of the decree. It also took the view that the action on the part of the appellant in applying for a copy of the decree was not a decisive factor in considering whether time should be excluded under this sub-section or not, so it felt that it was futile on the part of the appellant to apply for a copy when in fact the original was not ready and when in fact no copy of the original could be given to him. But from this it did not follow that the whole of the time required for preparing the decree should necessarily be excluded in every case. The Court further took the view that there may be a case where the preparation of the decree was entirely left to the Court, where the intervention of the parties was not at all necessary and all the time spent for the preparation of the decree was the result of what the Court had got to do and the various steps that the Court had to take, and in a case like this, it might be that the whole time would have to be excluded. But there may also be a case where the intervention of the party was necessary in order to pre-

pare the decree; various steps might have to be taken by the parties or their lawyers before a decree could be ready and before it could be signed in such a case the Court would have to consider whether any of the time taken up for the preparation of the decree could be attributed to the fault or negligence of the appellant and if any of the time could be attributed then that time could not be excluded under Section 12 (2). Now ordinarily the distinction that has been pointed by this Court in the above decision principally relates to the position which obtains on the Original Side of this Court where the appellants or their attorneys are required to take steps for drawing up of the decree and the position which obtains in the mofussil where the parties or their advocates are not required to take such steps except by way of paying stamp duty necessary for drawing up of the decree or handing over of the folios for the purpose of drawing up of the decree and the view which this Court took was that the time properly taken for the preparation of the decree and the time which lapsed between the pronouncement of the judgment and signing of the decree should be excluded under Section 12 (2). If it is established to the satisfaction of the Court that in any particular case the whole of the time was not properly required for the purpose of preparing the decree, then such time as was not properly required would not be excluded under Section 12 (2). In other words, under the old provision of Section 12 (2) of the Limitation Act, 1908, the time requisite for obtaining a copy of the decree was regarded as having been made up of two periods, (a) period requisite for bringing the original decree into existence and (b) period requisite for preparing a copy after the decree had come into existence and that both these periods would have to be excluded if in the process of bringing into existence the original decree any steps as such were not required to be taken by the appellant.

3. The question as to what time could be legitimately deemed to be taken for obtaining a copy of the decree under the old Section 12 (2) came up for consideration before the Supreme Court in the case of Jagat Dhish Bhargava v. Jawahar Lal Bhargava, reported in AIR 1961 SC 832 and the Court pointed out that there was a sharp difference of opinion between different High Courts on the question as to how the concept of 'time requisite for obtaining a copy' was to be understood. The Court pointed out that on the question of computation of time requisite for obtaining a copy of the decree, the Full Bench of High Courts of Bombay (AIR 1952 Bom 122) (FB), Calcutta (1886) ILR 13 Cal 104 (FB), and Patna (AIR 1936 Pat 45 (FB)) had taken the view that the

trustees of a Hindu temple, applied for execution of that decree and filed a darkhast praying that the defendants be ordered to act as directed by the decree, and that, if they failed to do so, steps be taken according to law. On these singular facts Their Lordships, with reference to the provisions contained in Section 235, clause (j) which corresponds to Rule 11 of Order XXI, held that the darkhast was not in accordance with Section 235 (j) as it did not specify the mode in which the assistance of the Court was sought; therefore, it should be thrown out. Somewhat similar reasoning has been adopted by the Rajasthan High Court in the case referred to above. The decree-holders had obtained a money decree for Rs. 4,000/- and odd against one Sameldan. On his death execution proceedings were taken out against his son Khetdan (the respondent before the High Court) and the arrears were claimed, but it appears from the statement of facts that the decree-holders did not set out in execution proceedings the mode in which the assistance of the Court was required. In simple words, they did not pray that the amount be recovered by either attachment and sale of the movables or immovables or detention in civil prison etc. Another point taken was the bar of limitation which seems to have weighed with His Lordship Modi, J. who decided the case. No doubt, in passing he has referred to this alternative contention of the application being bad in law inasmuch as it failed to set out the mode of execution. In this context he referred to the provisions contained in Rules 11 to 14 of Order XXI and pointed out that Rule 11 (2) lays down the particulars which every application for execution of a decree must contain, and among these particulars, attention is particularly required to be drawn to clause (j) of the rule which requires that the mode in which the assistance of the Court is required should be stated. In other words, the decree-holder must state which of the five modes mentioned in that clause he wishes to invoke for purposes of execution. If there be any failure on the part of the applicant to comply with these provisions, then the applicant may be allowed to remedy the defect or to withdraw the application with liberty to file a fresh one.

12. Now, Order XXI, Rule 11 of the Civil P. C. deals with the application for execution and the particulars to be specified therein. Clause (j) of sub-clause (2) *inter alia* lays down that the mode in which the assistance of the Court is required should be stated and the applicant should make it clear whether he seeks the assistance of the Court by the delivery of any property specifically decreed; by the attachment and sale of any property; by the arrest and detention in prison of any person; by the appointment of a receiver, or otherwise, as the nature of the relief granted may require. Rules 12, 13 and 14 call upon the decree-holder to annex to the application an inventory of the property

sought to be attached but which is not in the possession of the judgment-debtor, and to give the description of the immovable property if it is intended to be pursued. Rule 14 further says that certified extracts from the Collector's register in certain cases should be annexed. No doubt, *prima facie* there may seem to be some substance in the argument of Mr. Verlekar, but the question is whether in view of the Supreme Court pronouncements which treat the application for restitution as execution proceedings and which do not prescribe any form as such, the application should be thrown out on this technical ground. Secondly, it will have to be considered whether taking the argument at its face value, the case could be said to be covered by sub-clause (j) (v) of Rule 11 (2) reproduced above.

13. The answer to this poser would be two-fold. In the first instance, when the application for restitution does not prescribe any specific form, a prayer simpliciter for the recovery of the property lost to the applicant is an adequate compliance and that is what has exactly happened in the instant case. Next, it is worthy to note that it is only when regular execution proceedings are taken out under Order XXI, Rule 11 comes into play. No doubt the learned District Judge, with whom I have disagreed with respects, proceeded on the basis that he could treat the original application as an application in execution or look upon the original application as a darkhast, but has rightly pointed out that technicality should not prove impediments in granting such reliefs. In the alternative it was submitted by Mr. Gangakhedkar for the respondent that his case would be governed by the 5th mode enumerated in sub-clause (j). I am afraid, it would be a far-fetched interpretation. No doubt, it is somewhat omnipotent and the decree-holder can seek assistance of the Court by simply saying that assistance should be granted as the nature of the relief would require, but he has to specify something in making such a request. He has further pointed out that when the District Judge proceeded to make this order, it does become an executable decree of the Civil Court and he may attempt to take this order with the process server to the doors of the appellant (judgment-debtor). If he pays the dues, he would be relieved of further steps. If he does not do so, he can treat the learned District Judge's order as a decree and may execute it in the regular manner contemplated by Order XXI. The latter part of his submission seems to be right and I do not think it would be proper at this stage to dismiss the entire claim of the petitioner which is perfectly just and equitable. These orders made in restitution proceedings are decrees within the meaning of Section 2 clause (2) of the Civil P. C. and even on the bare passing of such a decree in a given case the judgment-debtor may choose to obey the same and an application to take further execution proceedings may not arise. If he does not prefer to adopt such

a measure, it would be still open to the applicant to execute this order as a decree by resorting to the provisions of Order XXI of the Civil P. C. The doors of execution would be open to him till they are closed by the law of limitation. For these reasons, although on different grounds, I am disposed to dismiss the appeal.

14. In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1975 BOMBAY 242

(AT NAGPUR)

MASODKAR, J.

Gangabisan Deokaran Gattani, Appellant
v. Talakchand Waghajibhai, Respondent.

A. F. A. D. No. 80 of 1973, D/- 20-4-1974.*

(A) C. P. and Berar Letting of Houses and Rent Control Order, 1949, Cl. 13 (3) — T. P. Act (1882), Ss. 106, 111 (g), 114 — Determination of lease on grant of permission by Rent Controller — Doctrine of forfeiture not applicable in a suit for eviction, right to determine lease is absolute — Permission of Rent Controller set aside in appeal and restored in a Writ under Art. 227 — Notice given after valid permission of Rent Controller not affected — Land entitled to possession.

The grounds mentioned in clause 13 (3) are not the grounds of forfeiture of lease, nor the permission given by the Rent Controller has the same effect. Where the landlord seeks permission of Rent Controller and gives notice to the tenant under Section 106 of the T. P. Act and files a suit for possession, the determination of lease is not based on forfeiture of lease. The right of landlord to determine lease is recognised as absolute. AIR 1974 Bom 178, Rel. 07. (Para 4)

The forfeiture under Section 111 (g) of the T. P. Act cannot be confused with the ground that is required to be made out by the landlord for seeking permission to give quit notice. The notice mentioned in Cl. 13 (1) (a) of the Rent Control Order is a conceivable notice under Section 106 of the T. P. Act by which the landlord can determine the lease. AIR 1969 SC 1349 and AIR 1958 Mad 232, Dist. (Para 5)

Where, on the grant of permission by the Rent Controller under clause 13, the landlord after giving notice under Section 106 of T. P. Act, filed a suit for eviction and the permission of Rent Controller subsequently was set aside in appeal and again restored in a writ petition held, that the notice given

by the landlord after valid permission of the Rent Controller, was not affected and the landlord was entitled to decree for possession. (Para 6)

Cases Referred: Chronological Paras

AIR 1974 Bom 178 = 1974 Mah LJ 40 4
AIR 1969 SC 1349 = (1969) 3 SCR 950 5
AIR 1958 Mad 232 = 70 Mad LW 1006 5

S. G. Ghate, for Appellant; J. N. Chandurkar, for Respondent.

JUDGMENT:— This is the defendant's appeal questioning the validity of the decree in ejectment passed by the trial Court and confirmed in appeal by the District Judge, Amravati.

2. To understand the submissions made at the Bar, a few facts are necessary. The plaintiff-landlord sought permission from the Rent Controller to determine the lease on the grounds under Clause 13 (3) (ii) and (vi) of the Rent Control Order. He was permitted to give quit notice for the tenant was found to be a habitual defaulter within the meaning of Clause 13 (3) (ii) of the Order. This permission was given to the landlord on September 5, 1967, and on the very next day, the landlord served a notice under Section 106 of the Transfer of Property Act determining the monthly lease of the present defendant by the end of the month of September 1967. The tenant filed an appeal under the provisions of the Rent Control Order and the appellate Authority, on September 20, 1969 allowed the appeal and set aside the permission granted by the Rent Controller. Meanwhile, the landlord, acting upon the cause of action of determining the lease under Section 106 of the Transfer of Property Act, had filed a suit in ejectment on December 16, 1967. That suit was pending. Against the order made by the appellate authority, the landlord took the proceedings under Article 227 of the Constitution and in these proceedings obtained an order directing the stay of that suit. Eventually on July 16, 1971, the High Court allowed the writ petition, set aside the appellate order and restored the permission given by the Rent Controller. Thereafter the suit proceeded and a decree has been made in ejectment against the present appellant by the Third Joint Civil Judge (Junior Division), Amraoti, and has been affirmed in appeal by the District Judge, Amraoti.

3. Two submissions have been made on the basis of these facts. First, it is contended that as the landlord sought permission on the ground that the tenant was the habitual defaulter, he was essentially and in substance seeking permission to forfeit the tenancy or the lease of the present defendant for non-payment of rent under the terms of the lease. It is submitted that the determination of the lease, therefore, is on the cause of action of a forfeiture of a tenancy and that being the position, the Court having civil jurisdiction either under Section 114 of

* (Against order of B. C. Gadgil, Dist. J., Amravati in Civil Appeal No. 30 of 1972).

entire period taken by the Court for preparing the decree after pronouncement of the judgment should be included in computing the time requisite for a copy of the decree, irrespective of whether an application for such a copy was made either before or after the decree had been prepared but on the other hand the Full Bench of Nagpur High Court (AIR 1927 Nag 1 (FB)) had taken a different view that if an application for a copy was not made before the decree was prepared by the Court, the period between the date of the judgment and the date of preparation of the decree could not be taken as time requisite for obtaining a copy of the decree and as such should not be excluded in computing the period of limitation. Paragraphs 9 and 10 of that judgment which are material run as follows:—

"9. The answer to the question as to whether the presentation of the appeal on December 23, 1959, is in time or not would depend upon the construction of Section 12, sub-section (2) of the Limitation Act. We have already noticed that the period prescribed for filing the present appeal is 90 days from the date of the decree. Section 12, sub-section (2), provides, *inter alia*, that in computing the period of limitation "the time requisite for obtaining a copy of the decree shall be excluded." What then is the time which can be legitimately deemed to have been taken for obtaining the copy of the decree in the present case? Where a decree is not drawn up immediately or soon after a judgment is pronounced, two types of cases may arise. A litigant feeling aggrieved by the decision may apply for the certified copy of the judgment and decree before the decree is drawn up or he may apply for the said decree after it is drawn up. In the former case, where the litigant has done all that he could and has made a proper application for obtaining the necessary copies, the time requisite for obtaining the copies must necessarily include not only the time taken for the actual supply of the certified copy of the decree but also for the drawing up of the decree itself. In other words, the time taken by the office or the Court in drawing up a decree after a litigant has applied for its certified copy on judgment being pronounced, would be treated as a part of the time taken for obtaining the certified copy of the said decree. Mr. Pathak has fairly conceded that on this point there is a consensus of judicial opinion, and in view of the formidable and imposing array of authorities against him he did not raise any contention about the validity of the view taken in all these cases." (The Court referred to the Full Bench decision of the Bombay, Calcutta and Patna High Courts mentioned above and other decisions).

"10. There is, however, a sharp difference of opinion in regard to cases where an application for a certified copy of the decree is made after the said decree is drawn up. In dealing with such cases Courts have differed as to what would be the period requisite for obtaining the certified copy of the decree. The Bombay, Calcutta and Patna High Courts appear to have held that the period taken in drawing up of the decree would be part of the requisite period, while other High Courts have taken a contrary view. It is significant that though the High Courts have thus differed on this point, in every case an attempt is judicially made to do justice between the parties. With that aspect of the problem, however, we are not concerned in the present appeal."

It must, however, be stated that the case that had arisen before the Supreme Court fell within the former category mentioned in para. 9 of its judgment. It was a case where an application for a certified copy of the decree had been made by the appellant before the decree had been prepared and signed by the Judge. Obviously, therefore, the question or resolving the difference of opinion which obtained between different High Courts in a case where an application for a copy of the decree was made after the decree had been signed did not arise and in view of the Full Bench decisions referred to at the end of para. 9, the Court held that the appeal in that particular case was preferred within limitation. Though an unduly long period of five years was taken by the lower Court to draw up its decree the same was held as time requisite for obtaining the copy and was counted in favour of the appellant.

4. Having indicated what was the position under the old provisions of the 1908 Act, it would now be desirable to consider the question under the relevant provisions of the 1963 Act. Section 12 deals with the topic of exclusion of time in legal proceedings and sub-section (2) thereof which is material, runs as follows:—

"12 (2). In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded."

Omitting sub-sections (3) and (4) with which we are not concerned, we would reproduce the Explanation which again is material for our purpose; it runs as follows:—

"Explanation:— In computing under this section the time requisite for obtain-

ing a copy of a decree or an order, any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be excluded."

Contrasting the above provisions with the old provision it will appear clear that by the 1963 Act two changes have been effected. First a provision for exclusion of time requisite for obtaining a copy for preferring a revisional application has been made and secondly an Explanation which was not there has been added and having regard to the language thereof it is clear that the Explanation is germane and referable to sub-section (2) and has to be read with that provision and no other of Section 12.

5. Now on the facts of the instant case, admittedly the application for certified copy of the decree was made on 6th February, 1971, which was long after the decree had been prepared and signed by the lower Appellate Court and the question that arises for our consideration is whether in such a situation the time taken by the Court for preparation of the decree between the date of the pronouncement of judgment (26-10-1970) and the date of the signing of decree (9-12-1970) is to be included within 'the time requisite for obtaining a copy of the decree' or not, that is to say, whether the said period is to be excluded in computing the prescribed period of limitation for filing the appeal and on this question rival submissions were put before us. On behalf of the appellants Mr. Deopujari contended that reading sub-sec. (2) of S. 12 together with the Explanation the aforesaid time or period that was taken by the Courts for drawing up its decree will have to be included within the 'time requisite for obtaining a copy of the decree' so that the appellants were entitled to enlarged period of limitation for filing their appeals. It was pointed out that under sub-section (2) of Section 12 in computing the period of limitation for an appeal 'the time requisite for obtaining a copy of the decree' is to be excluded and how the time requisite for obtaining a copy of the decree is to be computed has been clearly indicated in the Explanation which states that in computing such 'time requisite' any time taken by the Court to prepare the decree before an application for a copy thereof is made shall not be excluded, which means that the same shall be included. He, therefore, urged that if this period between the pronouncement of the judgment and the signing of the decree was available to the appellants for exclusion for the purpose of computing the period of limitation for filing an appeal, the appeals filed by his clients on 1st March, 1971, were clearly within the prescribed

period of limitation. On the other hand, it was contended by Mr. Choudhary appearing for the respondent that the Explanation has to be read along with substantive provision contained in Section 12 (2) of the Act and if it was so read and if regard was had to the object for which the Explanation has been introduced in 1963, it would be clear that a duty has been cast upon the litigant desirous of preferring an appeal to make the application for a certified copy of the decree as early as possible or soon after the judgment has been pronounced, for, it was then that the period which was taken by the Court for preparing its decree after such an application has been made that could be included within the concept of the time requisite for obtaining a copy of the decree and under the Explanation the Legislature has clearly indicated that any time taken by the Court to prepare the decree before an application for a copy thereof is made should not be available to or should not count in favour of the appellant. According to him, the entire section positively deals with the exclusion of time in legal proceedings and that was clear from the marginal note as also the substantive provisions contained in sub-sections (1) to (4) of the section and it is in the context of such substantive provisions of the section that speak of exclusion of time that the Explanation will have to be interpreted and if it is so interpreted the words "shall not be excluded" occurring therein cannot be construed as "shall be included", moreover, the Explanation has undoubtedly cast a duty on the appellant to file the application for a copy no sooner judgment is pronounced and in view of this he urged that if the interpretation sought to be placed on the Explanation by the appellants is accepted it would place a non-diligent appellant at an advantage as against diligent appellant in that both would be put on the same footing in the matter of getting exclusion of time for the purpose of preferring an appeal and that would not be consistent with the object of Legislature in casting a duty on the appellant to apply for a copy no sooner the judgment is pronounced. He, therefore, urged that since in this case the applications for certified copies were made on 6th February, 1971, long after the decree had been prepared and signed by the lower Appellate Court, the period between 26th October, 1970 and 9th December, 1970, should not under the Explanation be excluded for the purpose of computing the limitation. In support of the construction which he canvassed before us he strongly relied on the recommendations made by the Law Commission on the strength of which the provisions of the old 1908 Act were recast as also on the Statement of Objects and Reasons appended to the Bill which

was placed before the Central Legislature. He pointed out that in the context of old Section 12 (2) the Law Commission had made the following recommendation in para. 37 of its Report:—

"Some Courts have taken the view that the delay in drafting the decree before an application for a copy is made should be deducted as 'time requisite'. But we think that a delay of the office before the application for a copy is made should not count in favour of the party. A suitable provision should be added to make this clear."

He further pointed out that Bill No. XI of 1962 which ultimately became the Limitation Act, 1963, was introduced in the Rajya Sabha on 15th June, 1962, with a view to implement the Law Commission's report and that in the Statement of Objects and Reasons appended to the Bill the object or purpose of inserting the new Section 12 has been stated as follows:—

"The existing Section 12 is being amended;

(i) to include application for revision within its scope;

(ii) to provide expressly that the time requisite for obtaining a copy of the judgment in the case of an application for leave to appeal is also to be excluded;

(iii) to make it clear that any delay in the office of the court in drawing up a decree or order before the application for a copy thereof is made, shall not be excluded."

Relying upon the recommendation of the Law Commission and the object with which Section 12 (2) and the Explanation thereto were enacted Mr. Chaudhary contended that the Explanation must be so construed that any time taken by the Court to prepare the decree before an application for a copy thereof is made shall not be counted in favour of the appellant, that is to say, the same shall not be excluded for the purpose of computing the period of limitation.

6. The question is really one of proper interpretation of sub-section (2) of Section 12 and the Explanation thereto. The object of all interpretation is to discover the intention of the Legislature, but such intention of the Legislature must be deduced from the language used, for it is well accepted that the beliefs and assumptions of those who frame the Acts cannot make the law. One of cardinal principles of interpretation of the statutes is when the language and grammatical construction of particular provision in the Statutes are clear and unambiguous, they should receive plain and natural meaning and in that no aid can be sought from the marginal note or the aims and objects set out in the Statement of Objects and Reasons. The Legislature must be deemed to have expressed its intention through the language of its enactments.

Thus, having regard to this principle of construction we have to approach the question as to the true interpretation of sub-section (2) of Section 12 and the Explanation thereto. There are two or three aspects of this new provision contained in the 1963 Act. In the first place, it cannot be disputed that sub-section (2) of Section 12 is a substantive provision, which deals with exclusion of 'time requisite' for obtaining a copy of the decree in computing the period of limitation for an appeal. Secondly, the Explanation is clearly referable to the substantive provision contained in sub-section (2) and to no other part of Section 12, for the Explanation speaks of the time requisite for obtaining "a copy of the decree or order" and that is dealt with substantively in sub-section (2) alone. The third aspect which becomes clear on a reading of sub-section (2) and the Explanation thereto and which is very important is that the two provisions deal with different topics or subject-matters. Whereas the substantive provision contained in sub-section (2) deals with the subject of computation of the period of limitation for an appeal the Explanation deals with the subject of computation of the time requisite for obtaining a copy of the decree or order and if this aspect that the two provisions deal with two distinct subjects is borne in mind it would, in our view, help in placing proper constructions thereon. In a sense it could be said that the phrase 'the time requisite for obtaining a copy of the decree' occurring in substantive provision of sub-section (2) is explained in the Explanation. The purpose of an Explanation is often to explain some concept or expression or phrase occurring in the main provisions and it is not uncommon for the Legislature to accord either an extended meaning or a restricted meaning to such concept or expression or phrase by inserting appropriate Explanation. It is in light of these aspects that the provisions of sub-section (2) of Section 12 and the Explanation thereto will have to be construed. The substantive provision of sub-section (2) provides that in computing the period of limitation for an appeal the time requisite for obtaining a copy of the decree shall be excluded and the Explanation which explains the concept of 'time requisite for obtaining a copy' states that in computing such 'time requisite' any time taken by the Court to prepare the decree before an application for a copy of the decree is made shall not be excluded. In other words, the plain and grammatical meaning of the Explanation, in our view, is that while computing the 'time requisite' for obtaining a copy of a decree, any time taken by the Court to prepare the decree or order before an application for a copy thereof is made shall be included. As we have stat-

ed above, the Explanation does not deal with the topic of computing the period of limitation for an appeal but explains the concept of 'time requisite for obtaining a copy of the decree' and provides that while computing such time requisite the time taken by the Court to prepare the decree before an application for a copy thereof is made shall not be excluded. The expression 'shall not be excluded' must of necessity mean that the time taken by the Court for preparation of a decree "shall be included". In other words, such time will be excluded for computing the prescribed period of limitation for an appeal, the same being regarded as properly falling within the concept of time requisite for obtaining a copy. On a fair reading of the substantive provision together with Explanation it appears to us clear that the Legislature clearly intended that a litigant desirous of preferring an appeal against a decree should get the benefit of time taken by the Court to prepare the decree before he has made an application for a copy thereof and that such time taken by the Court shall be included in the time requisite for obtaining a copy.

7. It was urged by Mr. Choudhary that the opening words of the Explanation "In computing under this section" should be taken to refer to the topic of computing the period of limitation which is substantively dealt with by sub-section (2) and if the opening words were so understood, the meaning would be clear that in computing the period of limitation under the section the time taken by the Court to prepare a decree before an application for a copy thereof is made shall not be excluded meaning thereby that such time taken by the Court to prepare the decree shall not be counted in favour of the party which would be in consonance with the Law Commission's recommendation and carry out the real intention of the Legislature. In our view, this would be a misreading of the Explanation, for the Explanation as indicated above clearly deals not with the topic of computation of period of limitation but with the topic of computing of the time requisite for obtaining a copy of a decree and it provides that while computing the time requisite for obtaining a copy of a decree any time taken by the Court to prepare a decree or an order before an application for a copy thereof is made shall not be excluded. If the legislature intended to implement and carry out the recommendation of the Law Commission and the purpose as indicated in the Statement of Objects and Reasons appropriate language could have been used while enacting the explanation the purpose could have achieved if the word "not" was omitted from the expression

"shall not be excluded" while enacting the Explanation or it could have been achieved if the opening words of the Explanation ran "In excluding under this section the time requisite for obtaining a copy of a decree" but since such language has not been employed it is the duty of the Court to interpret the language actually employed and to determine the intention of the legislature from such language and since there is no ambiguity about the language actually employed, neither the recommendation of the Law Commission nor the aims and object as set out in the Statement of Objects and Reasons can be brought in aid or can be allowed to influence the natural and grammatical meaning of the Explanation as enacted by the Parliament. In this behalf it would be useful to refer to the provisions of Section 15 (2) and the Explanation thereto. Under Section 15 (2) it has been provided that in computing the period of limitation for any suit for which the previous consent or sanction of the Government or any other authority is required, in accordance with the requirements of any law for the time being in force, the time required for obtaining such consent or sanction shall be excluded and while explaining the concept of 'time required for obtaining the consent or sanction' an Explanation has been enacted as follows:—

"Explanation:— In excluding the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be counted."

This shows how appropriate language has been used by Parliament with a view to implement the Law Commission's recommendation contained in para 44 of its report in the context of Section 15. Similarly with a view to implement the Law Commission's recommendation or carry out the purpose as stated in the Statement of Objects and Reasons in the context of Section 12 the Parliament could have likewise employed appropriate language by enacting the opening words of the Explanation to Section 12 (2) as "In excluding under this section the time requisite for obtaining a copy of a decree or an order". Instead the Explanation as enacted clearly provides that in computing the time requisite for obtaining a copy of a decree or an order, any time taken by the Court to prepare the decree or order before an application for a copy thereof is made shall not be excluded. After all the intention has to be deduced from the enactment itself and if the language of the enactment is clear and unambiguous no external aid can be sought for placing an interpretation thereon different from

what is warranted by the natural and grammatical meaning of the language used. On a plain and grammatical construction of the substantive provision contained in Section 12 (2) read with the Explanation, therefore, it appears to us very clear that under the Explanation while computing the time requisite for obtaining a copy of a decree any time taken by the Court to prepare the decree before an application for a copy thereof is made shall not be excluded, which must mean that the same shall be included. In our view therefore, the contention urged by Mr. Deopujari on behalf of the appellant deserves to be accepted that on a proper interpretation of the relevant provisions contained in the substantive part of Section 12 (2) of the Act read with the Explanation thereto the appeals must be held to have been filed within time.

8. A large number of authorities were cited at the Bar in which the question of proper construction of the Explanation to Section 12 (2) of the Limitation Act, 1963, came up for consideration before various Courts in the country. Some of these are in favour of the construction which we have put on the Explanation while there are others which have taken a contrary view and we will deal with these authorities presently. Reliance was placed by Mr. Deopujari on the Full Bench decision of Patna High Court in the case of *State of Bihar v. Md. Ismail*, reported in AIR 1966 Pat 1 (FB), where a majority view taken by the Full Bench supports the interpretation which we have placed on the relevant provisions of the Act. After referring to the state of law which obtained prior to the enactment of the 1963 Act this is what the Patna High Court (majority view) has observed with regard to Explanation to Section 12 (2) of the 1963 Act:—

"The draftsman having used the word 'excluded' at the end of each of the four sub-sections, appears to have thought fanciful to use the same word at the end of the explanation, to have as it were, a rhythmical effect. To counteract the natural meaning of 'excluded', he used another negative form in the same expression so that the real meaning will not be lost. The expression 'shall not be excluded' means undoubtedly 'shall be included'."

What is provided in the explanation "not to be excluded" (meaning to be included) is "any time taken by the Court to prepare the decree or order before an application for a copy thereof is made". If the application is made after the decree or order is prepared, then, the time taken by the Court for preparation of such decree or order cannot be more than what was actually taken for that purpose, irrespective of the date of application for

copy. If the application is made before the decree or order is prepared, in that case, the time spoken of will be the period from the date of the judgment to the date of the application. The rest of the period taken by the Court to prepare the decree or order after the application will necessarily come within the time requisite for obtaining the copy. It is only about the period preceding the application for copy filed before the preparation of the decree, there was some doubt, according to some High Courts, if that period can be said reasonably to be requisite for obtaining a copy. To remove all those doubts, the explanation has now, clearly and in simple language, provided that while computing the time requisite for obtaining a copy of the decree or order, that period shall not be excluded in other words, that period will be included within the time requisite for obtaining a copy.

If we read "shall be included" for "shall not be excluded" in the explanation, there cannot be the slightest doubt that the thing in which the inclusion is meant is the time requisite for obtaining a Copy. If the opening words of the explanation would have been 'in computing the period of limitation' as it is in sub-sections (1), (2) and (4), the meaning would have been certainly different. But the language was purposefully different and the whole explanation is about the computation of 'the time requisite for obtaining a copy of a decree or an order.'

In this case also strong reliance was placed upon the recommendation of the Law Commission as well as the object or purpose as mentioned in the Statement of Objects and Reasons for enacting the Explanation. But the contention based upon this aspect was negated by the majority judgment which observed as follows:—

"The recommendation of the Law Commission or the Objects and Reasons stated in the bill cannot alter the clear and unambiguous meaning of the actual enactment that the Parliament passed." In the concurring judgment delivered by Justice A. B. N. Sinha, the purpose of the Explanation has been explained in a particular manner. The learned Judge has observed as follows:—

"All the four sub-sections of Section 12 as also Sections 13, 14 and 15 deal with exclusion of time in computing the period of limitation, whereas the Explanation deals with connotation or meaning of the expression "time requisite for obtaining a copy of a decree or an order." There appears to be no justification for reading the words "shall not be excluded" as equivalent to saying "shall not be included". The legislature, in my view, has by inserting the Explanation sought to expand the meaning of the expression

"time requisite for obtaining a copy of a decree or an order", and it is well settled that when any word, phrase or expression in any enactment is explained by the legislature, the Act has to be applied with the authoritative explanation of that expression, phrase or word, as the case may be for the very object of the authoritative explanation is to enable the Court to understand the Act in the light of the Explanation, and the construction of the Explanation must depend upon its terms, and no theory or hypothesis as to its purpose can be entertained unless it is to be inferred from the language used."

It may however, be stated that a dissenting view was taken by Justice U. N. Sinha and the only reason why the learned Judge was not inclined to accept the construction that the words "shall not be excluded" should mean "shall be included" was the general tenor of the section and the fact that the section dealt with the topic of exclusion of time in legal proceedings as its head-note indicated. The relevant portion of the reasoning of the learned Judge may be quoted:

"It has been urged by the learned Additional Standing Counsel that the Explanation should mean that the time taken by the Court to prepare the decree before an application for a copy thereof is made "shall be included" as time requisite, as the Explanation states that it "shall not be excluded". I am not in a position to accept this contention, as Section 12 is not concerned with any inclusion of time at all. The section is concerned with exclusion of time, and, therefore, it is not possible to interpret the Explanation by holding that the expression, "shall not be excluded" means "shall be included as time requisite for obtaining a copy of the decree"."

With respect, it must be observed that though it is true that all the substantive provisions contained in sub-sections (1) to (4) of Section 12 are not concerned with any inclusion of time but provide for exclusion of time in computing the period of limitation, the Explanation in terms deals with the topic of computation of the 'time requisite for obtaining a copy of the decree' and it is in the context of this topic dealt with by the Explanation that we have to construe the words "shall not be excluded" and the natural meaning of that expression would be as we have indicated "shall be included". We are in respectful agreement with the majority view.

9. Mr. Deopujari next referred to five decisions, two of the Calcutta High Court and one each of Orissa, Gauhati and Allahabad High Courts in which similar view has been taken — similar to the

majority decision in the Patna case. In the case of *Dungarmall v. Rukma Kumar Jalal*, reported in AIR 1970 Cal 443, the Calcutta High Court has opined that the words "shall not be excluded" in the Explanation mean that the time taken to prepare the decree or order shall be included in computing the period for obtaining certified copy. It was a case where an application for a certified copy had been made after the decree in question had been prepared and the Court took the view that in that event under the Explanation the time requisite for preparing a decree or an order was not to be excluded from the time required for obtaining a certified copy, which in other words means that the same will have to be included in the time for copy and thus necessarily the period of limitation for filing an appeal would get extended. The Calcutta High Court has indicated as to how the Explanation would apply in both the cases, namely, where an application for a copy has been made before the decree is drawn up and where it has been made after the decree has been drawn up and it has observed as follows:—

"Accordingly, if after the decree or order is prepared, an application is made for copy, then under the Explanation the time required for preparation of the decree or order, shall be not excluded from the time required for obtaining a certified copy, in other words it will be included in the time for copy and thus necessarily for limitation. Again, if application is made before the preparation of the decree or order, then time under the Explanation as being the requisite for copy, will include the time between the pronouncement of the judgment and the date of application for copy, and the rest of the period as may be taken by the Court to prepare decree or order will be the time required for obtaining the copy as provided in sub-sections (2) to (4) of Section 12. The Explanation is clear and there will be no ambiguity if one remembers that while, sub-sections (2) to (4) of Section 12 of the Act relate to exclusion of time for obtaining certified copy of relevant judgment, decree or order, the Explanation concerns not with the limitation for appeal or application, but with the computation of time required for copy."

The next decision of the Calcutta High Court on which reliance was placed is reported in AIR 1971 Cal 213. (*Nrishingha Murari v. Ajit Kumar*). After quoting the Explanation given in Section 12 the Court observed as follows:—

"True effect of Section 12 is that the periods that come within each of the sub-sections in the Section have to be added to the period of limitation, that is 90 days, for ascertaining the last date for filing the appeal. Effect of the Explana-

tion is that the period that comes within it has to be added also when period under sub-section (2) is being added."

In AIR 1970 Ori 116 in the case of Koutuki Sabatani v. Raghu Sethi, this is what the Orissa High Court has observed:—

"It is legitimate to argue that if the Legislature wanted to adopt the view expressed by the Law Commission on this subject and felt the necessity, as did the Law Commission, to add an Explanation to Section 12 to resolve the conflict which then existed between the different High Courts, nothing was easier for them than to adopt the Explanation the Law Commission had suggested. But it appears to us that the Explanation which was actually added to Section 12 of the Act means just contrary to the suggestion of the Law Commission. It is argued that as in the Statement of Objects and Reasons of the new Limitation Act the reason for adding the Explanation to Sec. 12 was to make it clear that any delay in the office or the Court in drawing up of a decree or order before the application for a copy thereof is made shall not be excluded, the Explanation actually added must be interpreted in such a manner that it would be in accord with the Statement of Objects and Reasons and that therefore the correct interpretation of the Explanation should be to exclude, in computing the time requisite for obtaining a copy of the decree, the interval that elapses between the date of judgment and the date on which the application is made. The meaning to be given to an Explanation must depend upon its terms and no theory of its purpose can be entertained unless it has to be inferred from the language used. We cannot also assume a mistake in an Act of Parliament. If we do so, we would render many Acts uncertain by putting different constructions on them according to our individual conjectures. The draftsman of the Act may have made a mistake; if that be so, the remedy is for the Legislature to amend it."

Following the majority view of the Patna High Court the Court held that the time taken by the Court for preparation of a decree before an application was made for copy thereof should be included in time requisite for obtaining copies for the purpose of filing an appeal against the judgment.

10. Reference may next be made to a decision in the case of Mst. Shahahan Begum v. Zahirul Hasan, reported in AIR 1972 All 511 where the majority view in the Patna decision was approved. A contention similar to the one which was raised before us by Mr. Choudhary based on the opening phrase of the Explanation was also raised before the Allahabad High Court and it would be interesting to refer

to the relevant observations in that behalf which run as follows:

"It was urged on behalf of the respondents that the opening phrase of the Explanation, namely, 'In computing under this section' means that the method of computation contemplated by the Explanation is with regard to computing the period of limitation provided by Section 12. This is a mis-reading of the Explanation. Section 12 (2) gives the method of computing the period of limitation for an appeal. One such method of computing is to find the time requisite for the copy. The Explanation deals with the manner of computation of the time requisite for obtaining the copy only. Since the method of computing the time requisite for obtaining a copy was not mentioned in sub-section (2) of Section 12, that is why the Explanation lays down the method of calculating the time requisite for obtaining a copy for purpose of 'this Section'."

A further contention that the phrase "before an application for a copy thereof is made" occurring in the Explanation was redundant was also raised before the Allahabad High Court and the manner in which the Court dealt with this contention will be pertinent. It has observed thus:—

"It was then urged that in this view, the phrase "before an application for a copy thereof is made" is redundant in the Explanation. We are unable to agree. This phrase has been mentioned in the Explanation to emphasise and clarify the pre-existing difference of opinion between the various High Courts, which was precisely on the point as to whether the time taken in drawing up the decree prior to the making of an application was or was not liable to be included in computing the period of time requisite for obtaining a copy. The Legislature has now said that this is a part of the time requisite for obtaining a copy. This is the significance of the phrase "before an application for copy thereof is made". If this phrase had not been there, the erstwhile controversy may well have remained unresolved."

11. It might be mentioned that the Gauhati High Court has not been uniform in its view on the proper interpretation of the Explanation to Section 12 (2) of the Act. There are two decisions of that Court, which express contradictory views. In Simla Konglui Tangkhul v. Wangmazum Tangkhul, reported in AIR 1973 Gauhati 60 the Court has held that the time taken by the Court to prepare the decree from the date of judgment till the decree was signed should be included in computing the 'time requisite' for obtaining the copy although the application for a copy of the decree was made after the decree was signed in other words, in this case the learned Judge has followed the

majority view expressed in Patna decision. In another case reported in the same volume in Keshab Roy v. Malancha Debi, AIR 1973 Gauhati 83, a contrary view has been expressed, namely, that the time taken by the Court to prepare a decree or an order prior to making of the application for a copy thereof cannot be excluded in computing the period of limitation, in taking this view Goswami, J., relied upon the opinion that had been expressed by the Division Bench of that Court in an earlier case reported in Assam LR (1972) Assam and Naga 8. The Division Bench had expressed its opinion in these words:—

"It is, therefore, manifest that the time taken by the Court before an application for a copy of the decree is made shall not be taken into account in calculating the time requisite for obtaining a copy. When the New Act is applicable we have to take a fresh look at the matter. The word 'obtaining' becomes significant. Etymologically 'obtain' means 'to get'; 'to procure by effort'. Therefore the time requisite for obtaining a copy must be after the appellant or the applicant makes an effort by making an application for getting the copy. Hence giving effect to all the words appearing in the Explanation, the conclusion is irresistible that the time taken by the Court to prepare the decree or order prior to the making of the application for a copy cannot be excluded in computing the period of limitation."

It does appear from the above observations on which reliance was placed by Mr. Justice Goswami in Keshab Roy's case that the Division Bench seems to have overlooked the aspect that the Explanation does not deal with the topic of computing the period of limitation for an appeal but in terms deals with the topic of computing the time requisite for obtaining a copy and if this aspect of the Explanation as distinct from the topic dealt with in substantive provisions contained in Section 12 (2) is kept in mind, it will appear clear that the view expressed by the Division Bench on which reliance was placed by Justice Goswami would not be in accord with the language employed in the Explanation.

12. There were two or three decisions on which reliance was placed by Mr. Choudhari in support of his contention on the proper interpretation to be placed upon the Explanation to Section 12 (2) of the Act. The first important decision on which he relied was the decision of a single Judge of this Court, in the case of Sitaram Dada v. Ramu Dada, reported in AIR 1968 Bom 204, where the learned Judge has taken the view that an appellant would be entitled only to the

exclusion of the time between the date on which he applies for certified copies and the date on which those copies are ready for delivery and that the time between the date of the judgment and the date on which the decree was drawn up should not be excluded if the party has applied for certified copy of the decree after the decree is drawn. As we shall indicate presently, the entire judgment of the learned Single Judge has proceeded on what has been regarded as the object of the Explanation. Reliance was placed before the learned Judge upon the judgment of the Full Bench of this Court reported in AIR 1952 Bom 122 which had been rendered under the old Act and the learned Judge has observed as follows:—

"In that case the Full Bench has taken the view that it is not necessary for an applicant to apply for a copy of the decree which is not in existence and which is neither prepared nor signed by the Judge. According to the learned Chief Justice, who delivered the judgment of the Full Bench, it would be futile for the appellant to apply for a copy when the original itself is not ready, because there can be no copy without the original. Now, the view taken by the Full Bench as regards the necessity for making an application for a copy of a document which is not yet ready is, in my opinion, not good law today by reason of the Explanation to Section 12 of the Limitation Act. The object of the Explanation is to require the appellant to apply for a copy of the decree even if the decree is not ready. That is why the Explanation says in terms that the time taken by the Court to prepare the decree before an application for a copy thereof is made shall not be excluded. In other words, the Explanation contemplates that the period between the date of the application for a certified copy of the decree and the date when the copy is ready can alone be excluded. If a party applies for a certified copy of the decree after the decree is drawn up, the time between the date of judgment and the date on which the decree was drawn up cannot be excluded, because under the Explanation the time taken by the Court to prepare the decree before the application for a copy thereof is made shall not be excluded. In my opinion therefore, the appellants will not be entitled to the exclusion of the entire period between the date of judgment and the date when certified copies of the judgment and decree were ready for delivery. They are entitled only to the exclusion of the time between the date on which they applied for certified copies and the date on which those copies were ready for delivery."

The learned Judge has also indicated the evil which was sought to be combated

by the enactment of Explanation in the new Act and this is what he has observed in that behalf:

"Permitting a litigant to wait for making an application for certified copies until the decree is drawn up leads in most cases to delay and the Legislature wanted to combat this evil. It therefore, provided by the Explanation to Section 12 that the time taken by the Court to prepare the decree or order before an application for a copy thereof is made shall not be excluded."

With great respect, the entire reasoning of the learned Judge seems to be based upon the object with which the Explanation came to be enacted and again with respect it may be pointed out that the aspect as to what topic is dealt with by the Explanation seems to have been overlooked. It may be that the object of the Explanation was to require an appellant to apply for a copy of the decree even if the decree was not ready. But even if that be the object, the question is as to what is actually provided for by the Explanation. It is true as has been stated in the above quoted observations that by the Explanation the Legislature has provided that 'the time taken by the Court to prepare the decree or order shall not be excluded' but such time shall not be excluded from what? Not from the prescribed period of limitation but the same shall not be excluded from the 'time requisite for obtaining a copy'. If such time taken by the Court to prepare the decree is not to be excluded while computing the time requisite for obtaining a copy of the decree, it must mean the same shall be included within the time so requisite and the same shall be excluded under sub-section (2) in computing the period of limitation for an appeal. On the point of construction of the Explanation to Section 12 (2), therefore, it is not possible for us to accept the view taken by the learned single Judge in the Bombay decision referred to above.

13. There are three more decisions which have taken a view similar to the one taken by the learned Single Judge of this Court in the aforesaid decision. One of such decisions is reported in AIR 1973 Gauhati 83 which we have already dealt with above. The second one is the decision of the Mysore High Court in the case of Krishnappa v. Ramchandrasa, reported in AIR 1973 Mys 234. The Division Bench of Mysore High Court in this case decided the question arising under the Explanation to Section 12 (2) of the Act on the basis of undisputed position of law which arose on a consideration of certain provisions of the Civil Procedure Code and the Limitation Act. The Court pointed out that it was indisputable that period of limitation

for an appeal against a decree began to run from the date of decree, that the Limitation Act did not specify which that date should be, whereas the Civil Procedure Code expressly stated that the decree shall bear the date of the judgment and the legal position involved in the Rule contained in the Civil Procedure Code flew directly from the fact that under the Civil Procedure Code an appeal lay only against the decree and decree itself constituted the final adjudication of matters in dispute in a suit and the judgment was merely a statement of reasons in support of the decree and the decree whenever it might have been prepared and signed cannot possibly be made to bear a date other than the date of the judgment. It further pointed out that it was equally clear that the period that was excluded (other than the day on which the judgment complained of was pronounced) by sub-section (2) of Section 12 of the Limitation Act was only one period, and the said period was described as "the time requisite for obtaining a copy of the decree" and not for preparing a decree or preparing a copy of the decree. The Court proceeded to observe as follows:—

"The effect of these two propositions is that there are no two periods for exclusion nor two dates for the commencement of the limitation and the only period which is capable of being excluded is the period which is related to conduct or attempt on the part of the appellant to obtain the copy of the decree. The commencement of that period can only be the date on which the appellant takes the first step for obtaining a copy of the decree and that step could only be the making of an application for certified copy.

Once the appellant makes such an application the mere fact that he has made an application but has not been furnished with a copy, without any default on his part, is sufficient to entitle him to secure exclusion of the period from computing the period of limitation for appeal."

14. It is on the basis of the aforesaid reasoning that the Mysore High Court did not accept the majority view expressed in the Full Bench decision of the Patna High Court in the case of The State of Bihar v. Md. Ismail. After referring to the view of the learned single Judge of this Court in AIR 1968 Bom 204, the Mysore High Court held that the real purpose of the Explanation to Section 12 was to clarify that in computing the time requisite for obtaining a copy of the decree the time taken by the Court for preparation of the decree could never be excluded. The party was entitled to exclude only the period which was directly related to his attempt to get the certified

copy and not any other period. The Explanation did not envisage that there were two periods of exclusion nor two dates for the commencement of the limitation. With great respect it may be pointed out that even in this case the aspect that the Explanation deals with the topic of computation of the time requisite for obtaining a copy and the same did not deal with the topic of computation of limitation for filing an appeal seems to have been overlooked. In our view, the Explanation makes it very clear that any part of the time taken by the Court for preparation of the decree before the date of an application for a copy thereof is made has not to be excluded while computing the time requisite for obtaining a copy. In this view of the matter, it would be difficult for us to subscribe to the view taken by Mysore High Court.

15. The last decision to which reference was made by Mr. Choudhary was the decision of Madhya Pradesh High Court in *Chunnilal Balaji v. State of Madhya Pradesh*, reported in AIR 1967 Madh Pra 127. It is unnecessary to discuss this decision in detail but it will suffice to point out that the Madhya Pradesh High Court has followed the earlier view taken by the Judicial Commissioner, High Court, Nagpur in the case of *Umda v. Rupchand* reported in AIR 1927 Nag 1 (FB) and it has taken the view that while enacting the Explanation to Sec. 12 (2) of the Act the Legislature seems to have accepted that view expressed in the said Nagpur decision. In other words, the question of proper interpretation of the Explanation inserted for the first time in the New Act of 1963 has not been considered afresh.

16. Having regard to the aforesaid discussion we are clearly of the view that on a plain and grammatical construction of the Explanation to Section 12 (2) of the Act the intention of the Legislature is clear, namely, that while computing the time requisite for obtaining a copy of a decree any time taken by the Court for preparation of the decree before an application for a copy thereof is made is not to be excluded, that is to say, such period will have to be included while computing the time requisite for obtaining a copy. It is also clear on a fair reading of the Explanation that irrespective of the question as to whether an application for a certified copy of the decree is made before drawing up of the decree or the same is made after the decree has been drawn up and signed, the operative part of the Explanation must come into play that is to say, in either of the events while computing the time requisite for obtaining a certified copy the time taken by the Court for drawing up of the decree will have to be included in the time requisite

for obtaining a copy. The language of the Explanation being absolutely clear and unambiguous, in our view, there is no scope for seeking the aid of any marginal note or the recommendation of the Law Commission or the object or purpose stated in the Statement of Objects and Reasons for introducing the Explanation. As has been pointed out by Allahabad High Court in AIR 1972 All 511 it is quite possible that this particular Explanation could be said to have been inserted for the purpose of resolving the erstwhile controversy which obtained in the case law which prevailed under the old Act, the controversy being whether the time taken in drawing up the decree prior to the making of an application was or was not liable to be included in computing the period of time requisite for obtaining a copy. We are conscious that the interpretation which we have placed upon the Explanation is in teeth of the recommendation of the Law Commissioner and the object stated in the Statement of Objects and Reasons for introducing the Explanation to Section 12 (2), but having regard to the language employed, which is very clear and unambiguous, it is our duty to give the plain and natural meaning to such language, for the proposition has been well enunciated by the Privy Council in the case of *Luchme Buksh Roy v. Runjeet Ram Panday*, reported in (1874) 13 Beng LR 177 (PC) that Statutes of Limitation are in their nature strict and inflexible enactment, and ought to receive such a construction as the language in its plain meaning imports. While dealing with the contention raised before it that the particular case ought to be decided upon an equitable construction and not upon the strict words of the Statute the Privy Council has observed as follows:

"It has been said that this case ought to be decided upon an equitable construction, and not upon the strict words of the Statute, but their Lordships think that Statutes of Limitation, like all others, ought to receive such a construction as the language in its plain meaning imports. Statutes of Limitation are in their nature strict and inflexible enactments."

17. In view of the above discussion, our answer to the first question referred to us will be in favour of the appellants.

18. In view of the decision which we have reached on the first question, it is, we think, unnecessary to deal with or discuss the second question that has been posed for our decision.

19. In the result, the appeals will have to be registered and they may be placed for admission before the learned Single Judge taking Admission matters.

Reference answered.

AIR 1975 BOMBAY 257

(AT NAGPUR)

FULL BENCH**KANTAWALA, C. J., TULZAPURKAR
AND DHARMADHIKARI, JJ.**

Sushilabai Ramchandra Kulkarni, Appellant v. Narayanrao Gopalrao Deshpande and others, Respondents.

A. F. O. D. No. 59 of 1968, D/- 22-8-1974.

**(A) Hindu Succession Act (1956),
Section 6, Proviso and Explanation 1 —
Effect — Coparcenary consisting of father
and son — Share of mother on death of
son — Share of daughter on death of
mother.**

The effect of the proviso read with Explanation 1 thereto is that when there is an heir of the nature specified in the proviso, the share of the deceased coparcener has to be determined on the assumption and deemed fiction that a partition of the property has taken place immediately before his death as the Explanation points out that such legal fiction has to be given effect to irrespective of the fact whether the deceased coparcener is entitled to claim partition or not.

(Para 10)

It cannot be disputed that devolution by testamentary or intestate succession of the property of the deceased coparcener in coparcenary property cannot take place unless his share therein is determined or specified. How that share is to be determined is laid down in the Explanation and that is on the footing that immediately before his death a partition has been effected and he has been allotted a share. Explanation 1 provides for machinery for determining the quantum of such shares in the joint family property but the severance is implicit in the language of the proviso itself. Case law discussed.

(Paras 11, 17)

In the instant case N had a wife L. N had a daughter and he adopted a son S. S died on 29-12-1956 leaving him surviving his adoptive father N, adoptive mother L and his widow. L died on 13-4-1957. The daughter of N brought a suit for partition and separate possession of her share in movable and immovable property. N died during pendency of the suit making a will whereby he disposed of his interest in the family property in favour of a Society. Proceeding on the assumption that the fiction in the Explanation 1 of Section 6 should be carried to a narrow extent only with a view to implement the purpose for which it was introduced and having regard to the facts of the case:

Held that (i) upon a partition taking place immediately before the death of

son S, L became entitled to 1/3rd in the interest of joint family property.

(Para 30)

It cannot be disputed that so far as coparcenary in the present case was concerned it consists of only two coparceners viz., N and his adopted son S. Now if a partition was deemed to have taken place immediately before S's death, then naturally that partition could only be effected between N and S i.e., between father and son. If that was so, independently of the provisions of Section 6 under pure Hindu Law the mother was entitled to receive a share equally to that of a son i.e., upon such severance of the share of S, not only S was entitled to 1/3rd share but mother was equally entitled to one-third share on the footing that there was a partition between N on the one hand and S on the other. Thus the right conferred upon a mother under Hindu Law is not affected by any of the provisions contained in the Act, as partition is provided in Section 6 for determining the interest of the deceased coparcener.

(Para 11)

(ii) that the plaintiff was entitled to 1/4th share in the suit property. L was also one of the female heirs specified in Class I of the Schedule to the Act. If that was so, upon S's death his 1/3rd interest in the property was not to go by survivorship to his father N but was to be governed by intestate succession in accordance with the Act because he did not die leaving a Will. The heirs who were entitled to inherit S's property upon his death were those who are specified in Class I to the Schedule of the Act. So far as the present case was concerned, the widow and mother were the two heirs so specified. Thus 1/3rd share which came to S upon partition would be equally divided between his widow and his adoptive mother L. Thus L had obtained 1/3rd share in the joint family property as a result of partition and she also in addition thereto obtained 1/6th share in the joint family property as an heir of S. Thus she was entitled to 1/2 share in the joint family property and upon her death this 1/2 share was equally divided between her husband N and her daughter, the plaintiff. Thus the plaintiff on the facts of the present case was entitled to 1/4th share in the suit property.

(Paras 12, 30)

Cases Referred: Chronological Paras

AIR 1974 Guj 23 = 14 Guj LR 328 22

AIR 1973 Andh Pra 58 25

AIR 1973 Delhi 160 = 75 Pun LR (D) 78 23

AIR 1973 Madh Pra 169 = 1972 Jab LJ 917 24

AIR 1972 All 179 = 1971 All WR (HC) 889 27

AIR 1971 Andh Pra 363 = (1971) 2 Andh WR 43 (FB) 25

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16
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(1900) ILR 27 Cal 551 = 4 Cal WN 764

15
(1880) ILR 3 All 88 14

A. S. Bobde, R. G. Kulkarni, M. P. Deshmukh and V. A. Bobde, for Appellant; P. G. Palshikar and V. G. Palshikar (for No. 1), B. B. Ranade and S. S. Trivedi (for No. 2) and D. B. Najbile (for Nos. 3 to 7), for Respondents.

KANTAWALA, C. J.:— The Division Bench of this Court has referred to the Full Bench the following two questions for determination:

(1) Is the scope of the fiction in the Explanation of Section 6 of the Hindu Succession Act, 1956 as wide as was held in Rangubai v. Laxman, 1966 Mah LJ 240 = (AIR 1966 Bom 169), and whether the view taken in Rangubai's case that as a result of the notional partition contemplated by the proviso to Section 6 of the Hindu Succession Act, the shares of persons other than the deceased coparcener also become fixed as if a partition had taken place during the lifetime of the deceased coparcener is correct?

(2) On the facts found in this case to what share is the plaintiff entitled in the suit property?

2. The plaintiff filed a suit for partition and separate possession of her share in movable and immovable property referred to in the plaint. Plaintiff Sushilabai is the daughter of one Narayanrao. Narayanrao had a wife by name Laxmibai, Narayanrao adopted a son by name Shridhar. Shridhar died on December 29, 1956, leaving him surviving his adoptive father Narayan, adoptive mother Laxmibai and his widow Shantabai. Laxmibai died on April 13, 1957. The suit was instituted on April 3, 1961. During the pendency of the suit Narayanrao died on March 11, 1965, making a will whereby he disposed of his interest in the family

property in favour of Samarth Charitable Society, a Society registered under the Societies Registration Act.

3. The trial Court partially decreed the suit giving the plaintiff 1/8th share in the estate belonging to the family. This quantum of share was determined on the footing that Shridhar the adopted son had 1/2 share in the family property and the adoptive father Narayanrao had the remaining half share therein. On Shridhar's death his interest in the family property was divided equally between his widow Shantabai and his adoptive mother Laxmibai. Thus, according to the trial Court, upon Shridhar's death, Shantabai became entitled to 1/4th share in the family property i.e., half share in Shridhar's property and Laxmibai became equally entitled to 1/4th share in the family property. On Laxmibai's death in the year 1957 her interest in the family property was divided equally between the plaintiff, her daughter and her husband Narayan. Thus upon the finding of the trial Court the plaintiff became entitled to 1/8th interest in the family property and passed a decree accordingly. Aggrieved by the decision of the trial Court the plaintiff preferred an appeal.

4. The contention on behalf of the plaintiff was that when Shridhar died, his share should be considered to be 1/3rd in the joint family property and from the remaining 2/3rd, 1/3rd would be the share of his adoptive father Narayan and the remaining 1/3rd would be the share of adoptive mother Laxmibai, that on the death of Shridhar 1/3rd share that would have been allotted to him in the joint family property would on his death be inherited equally by his mother Laxmibai and by his widow Shantabai as both of them are the female heirs specified in Class I to the Hindu Succession Act, hereinafter referred to as 'the Act'. Thus, the submission was that on the death of Shridhar, Laxmibai's share would come to 1/3rd plus 1/6th i.e., 1/2 share in the family property and that on the death of Laxmibai, the plaintiff as the daughter became entitled to 1/2 share in Laxmibai's estate. Thus she became entitled to 1/4th share in the whole of the joint family property. On the other hand, on behalf of the contesting defendants, the contention was that in a notional partition as provided under Section 6 of the Act Laxmibai will not be entitled to any share on the footing of a partition but under the proviso to Section 6 she will be entitled to 1/2 share in the 1/3rd share which will be allotted to Shridhar immediately before his death. Thus, according to the contesting defendants, Laxmibai will be entitled to only 1/6th share in the entire family property and upon her death the plaintiff would be entitled to 1/12th share therein. As there was no

appeal on behalf of the defendants, the decree passed by the trial Court giving the plaintiff 1/8th share in the family property was not sought to be disturbed.

5. When this appeal came up for hearing before the Division Bench several decisions were cited before the Court which showed that there was a conflict of legal opinion between the view taken by this Court in *Rangubai Lalji v. Laxman Lalji*, (1966) 68 Bom LR 74 = (AIR 1966 Bom 169) and the view taken by the other High Courts and the Division Bench considered it necessary to refer the above two questions for determination by the Full Bench. On interpretation of Section 6 of the Act there is a possibility of difference of opinion on the question whether upon partition of the share of the deceased coparcener the remaining coparceners continue to be joint or become separate. So far as that question is concerned, it will be relevant to decide only when the coparcenary consists of more than two members and one of the members of the coparcenary dies. We do not propose to decide that larger question as in this case the coparcenary consists of only two male members, namely Narayanrao the adoptive father and his adopted son Shridhar and we propose to confine ourselves only to the facts of the present case and do not express any opinion on the larger question that may possibly arise upon the interpretation of Section 6 of the Act.

6. Mr. Bobde on behalf of the plaintiff contended that when one of the coparceners dies, his share in the coparcenary property goes by survivorship to the remaining surviving coparceners under the Hindu Law, that when coparcenary subsists and no partition is claimed, no coparcener can predicate that he has definite share in the coparcenary property and that when the coparceners have separated, their property goes by succession to others. His submission was that upon proper interpretation of Section 6 of the Act, a moment before the death of Shridhar a notional partition took place as a result of which Narayanrao, Laxmibai and Shridhar each became entitled to 1/3rd share in the joint family property, that upon the death of Shridhar his 1/3rd share in the joint family property devolved upon Laxmibai his mother and Shantabai his widow equally. He submitted that it is not necessary for us to go into the larger question that upon proper construction of the provisions of Section 6 of the Act upon the death of a coparcener leaving him surviving a female relative specified in Class I of the Schedule or a male relative specified in that Class who claims through such female relative, when the interest of the deceased in the Mitakshara coparcenary becomes separate, the other surviving coparce-

ners become separate inter se. He only confined his submission to the facts of this case when the coparcenary consisted of father and son and the question arises as to what is the share of the mother upon the death of her son having regard to the provisions of Section 6. On behalf of the contesting defendants Mr. Palshikar has contended that the provisions of Section 6 of the Act do not effect severance of joint status at all, that the Section primarily recognises the rule of survivorship in respect of coparcenary property upon the death of a coparcener, that the proviso to that section merely provides for an exception when the deceased coparcener has left surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, that when such is the case special provision is enacted to the proviso read with Explanation 1 with regard to law of succession and no alteration is made to the normal rule of partition which should prevail and govern in accordance with the normal Hindu Law. In enacting this Act, according to Mr. Palshikar, the intention of the Legislature was only to codify the law relating to intestate succession among Hindus qua the deceased coparcener and not the law relating to partition. He submitted that neither under the proviso nor under Explanation 1 to the section there is severance of joint status between deceased Shridhar and his father Narayanrao. Only the interest of Shridhar in the coparcenary property goes by testamentary or intestate succession. In view of the fact that he died without leaving a will, his interest in the coparcenary property, which would have been allotted to him as if on a partition immediately before his death, has to be determined but there is nothing in the statute to show that a partition or severance in status came into effect upon or prior to the death of Shridhar.

7. The Act was enacted with a view to amend and codify the law relating to intestate succession among Hindus. It came into force on June 17, 1956. Section 6 of the Act provides for devolution of interest in coparcenary property and its provisions are as under:—

"When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative the interest

of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1. For the purpose of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2. Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

8. Prior to enactment of this Act a coparcener having undivided interest in the coparcenary property had no right to make testamentary disposition in respect thereof but by Section 30 of the Act such right was, for the first time, conferred upon a coparcener even though there was no partition prior to the date of his death. The main part of Section 6 of the Act normally recognises and reiterates the rule of survivorship in respect of devolution of interest by survivorship upon the death of a coparcener in favour of surviving members of the coparcenary. Even under the proviso when there are no female or other heirs of the class specified therein, the rule as to survivorship has to prevail but if the deceased coparcener dies leaving him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of such deceased coparcener in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under the Act and not by survivorship. Shridhar left him surviving his adoptive mother Laxmibai and his widow Shantabai. Thus in view of the proviso his interest in the coparcenary property is not to devolve in accordance with the rule of survivorship but his interest in that coparcenary property is to devolve by intestate succession as he died without leaving a Will. It was urged by Mr. Bobde that it is implicit in the very language of the proviso to Section 6 that when devolution is by testamentary or intestate succession qua that deceased coparcener there is severance of status in the coparcenary property. On the other hand, the argument of Mr. Palshikar is that this is only a departure qua the rule of devolution of interest. Ordinarily upon the death of a coparcener his interest in the joint family property will go by survivorship to the remaining coparceners, while in the pre-

sent case as there was a female heir, the rule of survivorship was not attracted but the property was to devolve by testamentary or intestate succession. Such is the rule of succession but it has no effect of effecting severance in the joint family status.

9. Ordinarily under Shastric Hindu Law the interest of a coparcener in the Mitakshara coparcenary is undivided. The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by the Mitakshara law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he as a member has a definite share e.g., one-third or one-fourth. His interest is a fluctuating interest, capable of being enlarged by death of any coparcener in the family. Thus, it is only on a partition that he becomes entitled to a definite share. When there is a female heir or a male heir of the nature specified in the proviso, the language of the proviso lays down that the interest of the deceased coparcener would devolve by testamentary or intestate succession under the law. The very devolution of interest of the deceased coparcener by testamentary or intestate succession presupposes that at the moment of his death the share or interest of such a coparcener in the coparcenary property is either determined or is defined or is specific. If the share is defined or specific, then it cannot be a fluctuating type of interest which an undivided coparcener is normally possessing in the Hindu undivided family. How effect is to be given to this rule of devolution by testamentary or intestate succession is made explicit in Explanation 1 to the section. Under the Explanation for the purposes of the section the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. It cannot be disputed that partition in accordance with law consists of numerical division of the property. In other words, it consists in defining the shares of the coparceners in the joint family property. The Explanation undoubtedly lays down a legal fiction and as regards effect to be given to the legal fiction two views are possible. One view as laid down by T. L. Venkataraman Aiyer, J., in *Commr. of Income-tax Delhi v. S. Teja Singh*, AIR 1959 SC 352 is that it is a rule of interpretation well settled that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can

operate. This view is based upon the observations of Lord Asquith in *East End Dwellings Co. Ltd. v. Finsbury Borough Council*, 1952 AC 109. Those observations are to the following effect:—

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

If the legal fiction contained in Explanation 1 is to be extended as laid down in this principle, then it is possible to urge that upon a coparcener dying leaving a female heir or other heirs as specified under proviso to Section 6 not only the share of the deceased coparcener is separated a moment before his death but, there is also a partition amongst the surviving coparceners as in a partition under Hindu Law. The other view as regards legal fiction is that the legal fiction cannot be stretched off beyond the purpose for which it was enacted. This view is based upon the decisions of the Supreme Court in *State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory*, 1954 SCR 53 at p. 81-82 = (AIR 1953 SC 333 at p. 343) and *Bengal Immunity Co. Ltd. v. State of Bihar*, (1955) 2 SCR 603 at p. 646 = (AIR 1955 SC 661 at p. 680). For the purpose of the present case we do not propose to decide whether the legal fiction created by Explanation 1 has to be given full effect as stated in the earlier view and we are prepared to proceed on the assumption that it should not be stretched beyond the purpose for which it was enacted.

10. The effect of the proviso read with Explanation 1 thereto is that when there is an heir of the nature specified in the proviso, the share of the deceased coparcener has to be determined on the assumption and deemed fiction that a partition of the property has taken place immediately before his death as the Explanation points out that such legal fiction has to be given effect to irrespective of the fact whether the deceased coparcener is entitled to claim partition or not. It is well settled that there is no presumption that when one person separates from the other coparceners that the latter remain united. An agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact. It is open to non-separating members to remain joint

and to enjoy as members of a joint family what remained of the joint family property after such a partition. No express agreement is necessary for this purpose but the intention to remain joint may be inferred from the way in which their family business was carried on after their former coparcener had separated from them or it may be inferred from other conduct indicating such an intention. These principles are stated in brief in more than one decision of the Supreme Court. In *A. Raghavamma v. A. Chenamma*, AIR 1964 SC 136 the Supreme Court has laid down the principle as shown by the head-note (f) in that case:

"The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but where it is admitted that one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the other side too that because one member of the family separated himself there has been separation with regard to all. It would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other coparceners or that they remained united. The burden is certainly on the person who sets up partition to prove the said fact."

A similar view has been reiterated by the Supreme Court in *Girijanandini Devi v. Bijendra Narain*, AIR 1967 SC 1124.

11. As Shridhar left him surviving his adoptive mother Laxmibai and his widow Shantabai, the quantum of the share which will devolve by intestate succession under the proviso to Section 6 has to be determined as provided in Explanation 1. This Explanation lays down that Shridhar shall be deemed to be entitled to a share in the family property that would have been allotted to him if a partition of the property had taken place immediately before his death. It is not disputed that if a partition had taken place immediately before the death of Shridhar, he would have been entitled to 1/3rd share in the property. The question, however, arises whether the remaining 2/3rd share is to remain with Narayanrao or is to be divided between Narayanrao and his wife Laxmibai equally. Under Shastric Hindu Law a wife cannot demand a partition but if a partition does take place between husband and his son, she is entitled to receive a share equal to that of his son and to hold and enjoy that share separately even from her husband. The question that arises in this

case is whether this right to claim a share equal to that of a son upon a notional partition as contemplated by Explanation 1 is taken away or is to be given effect to. It cannot be disputed that devolution by testamentary or intestate succession of the property of the deceased coparcener in coparcenary property cannot take place unless his share therein is determined or specified. How that share is to be determined is laid down in the Explanation and that is on the footing that immediately before his death a partition has been effected and he has been allotted a share. Explanation 1 provides for machinery for determining the quantum of such shares in the joint family property but the severance is implicit in the language of the proviso itself. It cannot be disputed that so far as coparcenary in the present case is concerned it consists of only two coparceners viz., Narayanrao and his adopted son Shridhar. Now if a partition is deemed to have taken place immediately before Shridhar's death, then naturally that partition can only be effected between Narayanrao and Shridhar i.e., between father and son. If that is so, independently of the provisions of Section 6 under pure Hindu Law the mother is entitled to receive a share equally to that of a son i.e., upon such severance of the share of Shridhar, not only Shridhar is entitled to 1/3rd share but the mother is equally entitled to one third share on the footing that there is a partition between Narayan on the one hand and Shridhar on the other. Thus the right conferred upon a mother under Hindu Law is not affected by any of the provisions contained in the Act, as partition is provided in Section 6 for determining the interest of the deceased coparcener.

12. Laxmibai is also one of the female heirs specified in Class I of the Schedule to the Act. If that is so, upon Shridhar's death his 1/3rd interest in the property is not to go by survivorship to his father Narayanrao but is to be governed by intestate succession in accordance with the Act because he did not die leaving a Will. The heirs who were entitled to inherit Shridhar's property upon his death are those who are specified in Class I to the Schedule of the Act. So far as the present case is concerned, the widow and the mother are the two heirs so specified. Thus 1/3rd share which came to Shridhar upon partition will be equally divided between his widow Shantabai and his adoptive mother Laxmibai. Thus, Laxmibai in addition to 1/3rd share she gets on the partition, will also be entitled to 1/6th share in the family property as the heir of Shridhar.

13. That such is the correct position in law is recognised by a number of judicial decisions which gave effect to the

right of a female person under Hindu Law. In Parappa Ningappa v. Mallappa, 58 Bom LR 404=(AIR 1956 Bom 332) (FB) the Full Bench of this Court has taken the view that under Hindu Law, in a suit by a son for partition and separate possession of his share after getting aside the alienation of joint family property made by his father, the mother, who is a party is entitled to a share, if the Court comes to the conclusion that the alienation is not for a purpose binding upon the family consisting of the father, mother and sons. Two approaches were presented to the Full Bench and the question arose which of the two approaches should be accepted in case of a widow. The one approach is the approach that an alienation, however unauthorised, is valid until it is challenged, that the right to challenge is restricted to the coparceners and it is only those who can challenge the alienation who can claim their shares in the joint family property as not having been affected by the alienation, the rest of the joint family property being validly alienated to the alienee. The other approach is that the wife has an interest in the joint family property, however inchoate that interest might be, and that interest must be protected as much in a suit for partition at the instance of her son as in a suit for partition whether at the instance of the alienee or at the instance of her own son which suit has been necessitated by unauthorised alienation by her husband. The Full Bench held that although the wife has no right to challenge the alienation as her right in the family property is inchoate and has not come into existence because there is no partition, because of the legal fiction her share in the joint family property cannot be alienated by her husband when the alienation is not supported by legal necessity. In other words, what the alienee gets is strictly the share of the alienor not augmented by the inchoate share of his wife. The alienee would have the right which the father would have to a partition and what would come to him upon the partition being made. Therefore, notionally and fictionally such a partition should be effected and what share would come to the father on such a partition being made ought to be decided and that is the share that would pass to the alienee. Thus, in this case even before the partition was effected of the joint family property on a suit by a son to challenge the validity of alienation made by the father the right of the wife to share the property was recognised and it was held that her share in the property was to be determined at the date of the alienation.

14. A similar right under Hindu Law was recognised by the Full Bench of Allahabad High Court in Bilaso v. Dina

Nath, (1880) 3 ILR All 88. The Full Bench took the view that a Hindu widow, entitled by the Mitakshara law to a proportionate share with sons upon partition of the family estate, can claim such share, not only quoad the sons, but as against an auction purchaser at the sale in the execution of a decree of the right, title and interest of one of the sons in such estate before voluntary partition. At page 90 it is observed as under:—

"In an undivided family consisting of mother and sons, the mother is only entitled to maintenance so long as the family remains undivided in estate; but in case a partition is made the law gives her a right to an assignment of a share in the property left by her husband equal to a son's share. The right the mother has is a right to participate in the property left by her husband, and it has been described as a latent and inchoate right of participation which becomes effective when separation takes place. Such being the right of the mother, and the son's obligation towards her in respect of the assignment of a specific share of the property on partition, we have to see what position the purchaser in execution of the right, title, and interest of a member of an undivided family takes."

It was held that the auction purchaser was not entitled to the share which would have been allotted to a Hindu widow if a partition had taken place.

15. A similar view was taken by Ameer Ali, J., in *Amrita Lall Mitter v. Manick Lal Mullick*, (1900) ILR 27 Cal 551. A Hindu mother is entitled under the law to be maintained out of the joint family property, and if anything is done affecting that right, as for instance by the sale of any particular share by any of her sons, her right comes into existence. A purchaser from one of the sons has the same right and takes it subject to the same liabilities as those of the person from whom he purchased. Even in this case the right of a Hindu mother to share in the property was also recognised though no partition had taken place prior to the institution of the suit.

16. The right of a wife to a share on a partition between her husband and son was reaffirmed also by the Nagpur High Court in *Radhabai v. Pandharinath Bapu*, ILR 1942 Nag 534 = (AIR 1941 Nag 135). Under the Mitakshara laws a wife is entitled to a share on a partition between her husband and her sons, and she can sue for her share if she has not been assigned a share in the partition provided she has not assented to or acquiesced in the partition or waived her rights. This decision clearly recommends that a Hindu female who under Shastric Law will have a right of share upon a partition can assert that right if events have

taken place which may jeopardise that right even prior to partition.

17. The construction that we have placed upon the provisions of Section 6 is in conformity with the intention of the legislature if regard be had to the legislative history conferring larger rights upon female heirs than those conferred under pure Shastric Hindu Law. By the Hindu Law of Inheritance (Amendment) Act, 1929, female heirs like son's daughter, daughter's daughter and sister became entitled to share as heirs in all parts of India where Mitakshara law prevailed. Prior to this enactment, female heirs were recognised as heirs only in Bombay and Madras and not in other parts of the country. By Hindu Women's Rights to Property Act, upon the death of a Hindu his widow was entitled to a share either in the joint family property or separate property. She was also given a right to claim a partition though under the law the interest obtained by her as a result of partition was to be a limited interest which was available to a female. By the Hindu Adoptions and Maintenance Act, 1956 right to adopt as well as maintenance has been conferred upon a Hindu female. Looking to the legislative history, qua the rights of a Hindu female, the provisions of the Act should be so construed as will further the intention of the legislature in enlarging the rights available to a female under Hindu Law. We are not putting in the present case strained construction upon the provisions of Section 6. As stated earlier, having regard to the language of the proviso itself when there is a female heir or other heirs of the type specified in the proviso, the share or interest of a deceased coparcener in the coparcenary becomes severed as it is to go or devolve by testamentary or intestate succession. How that share is to be computed is to be determined in the manner provided by Explanation 1. The Explanation 1 presupposes the legal fiction that immediately before his death the partition has taken place in the family and his interest in the joint family property has been ascertained and such share will thereafter go by testamentary or intestate succession as provided in the Act. Such being the scheme of the Act, if severance takes place upon the death of a coparcener leaving such female heirs or other heirs specified in the proviso, to ascertain his interest, the construction should not be put upon the language of the section so as to curtail the rights which a Hindu female may have under Shastric Hindu law. We are merely affirming the right which the mother has when partition takes place between father and son. Such right is conferred upon her by pure Hindu law and as the notional partition takes place upon the death of Shridhar a moment prior to his

death, Laxmibai, has to be given 1/3rd share as a result of that partition. In addition thereto she will be entitled to claim her share as an heir of adopted son Shridhar.

18. A large number of decisions have been cited before us where the provisions of Section 6 of the Act have come up for consideration. So far as this High Court is concerned, the provisions of Section 6 have been considered in three of the reported decisions to which our attention has been drawn. The first is the decision in the case of Shirambai v. Kalgonda Bhimgonda, (1964) 66 Bom LR 351 = (AIR 1964 Bom 263). In this case the provisions of Section 6 as well as Section 4 of the Act came to be considered and upon interpretation thereof the Division Bench of this Court consisting of Patel and Chitale, JJ., took the view that the interest of a Hindu Mitakshara coparcener available for division under Section 6 of the Act will be such share in the property as would be allotted to him if a partition of the property had taken place immediately before his death amongst the coparceners according to the rules of Hindu Law with the qualification that the rule of Hindu Law providing a share to the mother and maintenance and marriage expenses of the daughters must be treated as abrogated in view of Section 4 of the Act. Section 4 (1) (b) of the Act provides that save as otherwise expressly provided in this Act, any other law in force immediately before the commencement of the Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in the Act. The Division Bench accepted the contention urged that the rule of the Mitakshara Law that on a partition the mother is entitled to a share (a limited estate) and that daughter's maintenance and marriage expenses should be provided is for the reason, that they do not have any share in the family property as such nor are they entitled to succeed to the husband and father respectively. After the Hindu Succession Act came into force they are entitled to succeed to a share on the death of husband and father and under Section 4 that rule of partition must be deemed to have been abrogated. The Division Bench rejected the contention urged on behalf of the appellant in that case that as the explanation to Section 6 defines the interest of the coparcener to be the share that the father would have got on a partition it amounts to an express saving of that rule of partition for the obvious reason that it does not enjoin actual partition and does not enable the mother to reduce her share into possession. The explanation, according to the Division Bench, is intended to be of general application and cannot be treated as saving the above said rule of partition.

In the opinion of the Division Bench, to uphold the contention would produce most unjust results which could never have been intended by the Legislature.

19. The correctness of the decision of the Division Bench in Shirambai Patil's case was doubted by Chandrachud, J., when the appeal in the case of Rangubai Lalji Patil v. Laxman Lalji Patil came up for hearing and he referred that appeal for decision by the Division Bench. As a result of the reference by Chandrachud, J., the matter came up for hearing before the Division Bench consisting of Patel and Bal, JJ., and the decision of the Division Bench is reported in Rangubai Lalji Patil v. Laxman Lalji Patil, (1966) 68 Bom LR 74. Patel, J., who delivered the judgment in the earlier case in Shirambai's case was a party to this decision and he declined to follow that decision and took a contrary view on the ground that in Shirambai's case the matter was not fully argued and the Division Bench was not in a position to consider all the pros and cons of the matter. In Rangubai's case a Hindu coparcenary consisted of the husband, his wife and his adopted son. The husband died after coming into force of the Hindu Succession Act and his widow filed a suit claiming a half share in the coparcenary property. The Division Bench took the view that on the interpretation of Section 6 of the Act on a partition during the lifetime of the husband the widow would have been entitled to one-third share and on succession to a further one-sixth share and therefore her share in the property would be one-half share. The scheme of Section 6 together with Explanation 1 was considered and the Division Bench took the view that for the purposes of Explanation 1 to the proviso of Section 6 of the Act, when the interest of the deceased coparcener is to be determined, the Court should first determine what is the property available for partition and then partition the coparcenary property setting aside the share of the widow in which she is entitled to her own right and divide the share of the deceased coparcener amongst the heirs. The decree must make proper provisions for the maintenance and marriage expenses of the daughters and award the widow her due share in the coparcenary property and divide the property of her husband amongst the heirs. At page 82 it is observed as under:

"Section 6 recognises the Hindu Law of survivorship but by the proviso creates an exception and provides for devolution of the interest of the deceased coparcener if he died intestate and left any of the female heirs specified in Clause 1 or a male relative specified therein claiming through such female relative. Probably, if the Explanation had not been there,

there would not have been any difficulty in accepting the interpretation suggested in Dinshaw Mulla's principle of Hindu Law and by other text writers. The difficulty has been created by reason of the Explanation which defines the interest of such Hindu Mitakshara coparcener. According to the Explanation the interest is "deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death." The question is, what was intended by the Legislature when it enacted this Explanation. The intention of the Legislature is to be found from the words used giving them their ordinary meaning. The explanation enacts, in effect, that there shall be deemed to have been a partition before his death and such property as would have come to his share would be divisible amongst his heirs. It introduces a legal fiction of a partition before his death, since without such fictional partition his share cannot be possibly determined."

The Division Bench thereafter considered the provisions of Section 7 of the Act and further observed, "It would, therefore, appear from the scheme of Sections 6 and 7 that the Legislature intended that it shall be deemed that there was a partition in fact and substance and that such property as would be available to the deceased would be divisible among his heirs. Undoubtedly the latter part of the decision points out that the legal fiction of partition and separation of the share of the deceased coparcener at his death must be carried to its logical conclusion. On this aspect of the matter we do not propose to express any opinion and we have proceeded on the assumption that the object of the fiction was to quantify the share of the deceased coparcener and the point of time at which such quantification has to be made. Proceeding on that footing, partition has taken place a moment before the death when there are two coparceners viz., father and son and one of them dies. When such a partition takes place, even though notionally, a female, who under the Shastric Hindu Law is entitled to a share, will be entitled to claim such share not by reason of the provisions of the Act and under pure Hindu Law. There is nothing in the provisions of the Act which denies such a right to a Hindu female.

20. The provisions of Section 6 also came to be considered by a Single Judge of this Court in *Govindram Mithamal Sindhi v. Chetumal Villardas*, (1970) 72 Bom LR 653 = (AIR 1970 Bom 251). It may be stated at the outset that while the question was considered by the single Judge his attention was not drawn either to the decision of the Division Bench in *Rangubai's case* or the earlier decision of the Division Bench in *Shirambai's case*.

The scheme of Section 6 is considered by the learned Judge and he has taken the view that Section 6 is introduced in the Hindu Succession Act for the purpose of effecting a change in the normal mode in which the joint family property used to pass from one person to another in a joint Hindu family. In a joint Hindu family possessing joint family property, the male members form a coparcenary. When a coparcener dies, his right, title and interest in the joint family property go by survivorship to the other coparceners. This normal mode in which the property passed from person to person in a joint Hindu family was sought to be changed by introducing a certain type of succession in the case of the interest of the coparceners in the joint Hindu property. Section 6 in the first instance speaks of Mitakshara coparcenary possessing property. The opening substantive part of Section 6 provides that when a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act. The normal devolution by survivorship, which was a distinguishing feature of the Mitakshara coparcenary, is sought to be maintained even by the Hindu Succession Act. However, there is a proviso added to this section which carves out a case when the family consists of certain types of members. Then the learned Judge considered the language of the proviso read with Explanation 1 thereto and further observed that if the deceased had left behind him any female relative specified in that class in Class I of the Schedule or a male relative specified who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship. This is provided by the proviso. How the interest of the deceased in the Mitakshara coparcenary property shall be determined for the purpose of devolution, whether testamentary or intestate contemplated by the proviso, is provided in Explanation 1. While discussing this case a further question arose before the learned Judge whether having regard to the provisions of Section 6 a full partition of the family property takes place or it is a piecemeal partition with respect to the interest of the deceased and what is the effect in either case on the entire family property or the interest and rights and liabilities inter se between the other coparceners in the family. That question, however, was not decided by the learned Judge and the learned Judge has

merely chosen to confine his decision to the facts of the case which arose for consideration in that litigation and did not express any opinion as regards generalisations relating to the theory of partition. In this case the real question that arose for decision was whether the heirs who were entitled to inherit the joint family property by reason of the provision of the proviso were necessary parties to the suit upon the death of a coparcener whose interest in the property devolved upon them by testamentary or intestate succession and the learned Judge took the view that upon the death the interest of such a deceased coparcener ceased to have the character of joint family property and as such unless the heirs who inherited the property were brought on record their interest in the property was not represented and the frame of the suit was defective, if such heirs were necessary parties to the suit and the suit was liable to be dismissed if they were not brought on record.

21. Two other High Courts in this country have taken a view upon the construction of Section 6 which is similar to the one taken by the Division Bench of this Court in Rangubai's case. In *Ananda v. Haribandhu*, AIR 1967 Ori 194 the Division Bench of Orissa High Court took the view that Explanation 1 to Section 6 introduced a radical change. In that case one of the coparceners named Joydeb died and it is stated that though in fact Joydeb's interest in the coparcenary property had not been carved out, a legal fiction was introduced that the interest shall be deemed to be the share in the property which would have been allotted to him, if a partition of the property had taken place immediately before his death. It postulates that in order to fix the interest of Joydeb, a partition immediately before his death must be taken to have occurred. If that is the legal hypothesis, it follows as a logical corollary that plaintiff No. 2, who was the third wife of the deceased, must be allotted a share in that partition amongst the father and the two sons. Though undoubtedly it was a case of more than two coparceners and the question arose upon the death of one, the view taken was that a female heir, who was entitled to a share upon a partition for separation of the interest of the deceased coparcener, was entitled to a share which Shastric law has conferred upon her.

22. A similar view has been taken by a Single Judge of Gujarat High Court in *Vidyaben v. Jagdishchandra Nandshankar Bhatt*, AIR 1974 Guj 23. The learned Single Judge who decided that case followed the decision of the Division Bench of this Court in Rangubai's case and that of the Orissa High Court above

referred to. In the case before the Gujarat High Court the deceased coparcener was survived by wife, son and four daughters. Upon the death of the coparcener the property would be divided in three parts, 1/3rd going to the widow in her own right as she would have been entitled to a share equal to that of a son and husband had partition taken place immediately before the death of her husband; the son would get 1/3rd share and the remaining 1/3rd share i.e., the interest of the deceased in the property would be equally divided among all the six heirs. This was a case where there were only two coparceners as in the case of Rangubai where upon separation of the share of the deceased coparcener having regard to the provisions of the proviso to Section 6 the wife was allotted a share on such partition having regard to the provisions of pure Hindu Law.

23. Our attention has been invited to a large number of cases where there are some observations which go to indicate somewhat contrary view. It will be useful to refer to these cases and consider whether any of the said decisions is likely to be of any assistance in deciding the narrow issue to which we propose to confine our decision. In *Kanahaya Lal v. Smt. Jumna Devi*, AIR 1973 Delhi 160, a question arising under Section 6 of the Act came up for discussion. It may be stated at the outset that the decision of the Division Bench of this Court in Rangubai's case was not cited before the Court. Upon analysis of the provisions of Section 6 the Division Bench of Delhi High Court took the view that the Mitakshara coparcenary property has been allowed to devolve by survivorship on the surviving members of the coparceners and not by way of succession under the Act, but an exception has been carved out of this rule of law by the proviso that if the deceased dies, leaving behind him a surviving female relative specified in Class I of the Schedule (the other part is not material) which would include a widow and the daughters, then the rule of law is that the interest of the deceased in the Mitakshara coparcenary shall devolve by succession (testamentary or intestate) under the provisions of the Act and not by survivorship. To work out the right, an explanation has been added which provides for a notional partition in the family at the time of the death of the deceased and then the share which would, upon a partition, have been allotted to the deceased just before his death, would constitute the property which would be inherited by the heirs in accordance with the provisions of Section 8 of the Act amongst the heirs specified in First Schedule. This was a case where there were more than two coparceners in the family and one of the coparceners

died leaving heirs specified in the proviso. There are no direct observations on the question whether upon separation of the share of the deceased coparcener, in order that it may devolve on his heirs by testamentary or intestate succession the remaining coparceners remain united or become separate. Only in para. 10 of the judgment the quantum of shares are merely stated on the footing that a female who upon separation of the share may get a share equal to that of a son has not been allotted that share.

24. In *Chandradatta v. Sanatkumar*, AIR 1973 Madh Pra 169 a single Judge of Madhya Pradesh High Court had an occasion to consider the scheme of Section 6 of the Act. He has taken the view that the provisions contained in Section 6 merely incorporate the concept of a notional partition for the limited purpose of enabling succession and computation of the interest of the deceased coparcener which otherwise would have devolved by survivorship and also for the ascertainment of the share in that interest of the heirs specified in Class I of the Schedule. Subject to such carving out of the interest of the deceased coparcener, the other incidents of the coparcenary are left undisturbed and the joint family continues without disruption. It is not correct to think that in a case where the proviso to Section 6 comes into play, the status of the joint family is disrupted on the death of a coparcener. The purpose of the legal fiction introduced by these provisions is limited. The observations in this case are obiter and for the purpose of deciding the issue before the learned Judge it was not necessary to consider this question. That was a case in which a decree passed against the father during his lifetime in a suit in respect of pre-partition debt came to be executed after his death against the shares obtained by the sons on partition and a question arose as regards the remedy of the decree-holder. The learned Judge took the view that his remedy was not by way of a separate suit. In such execution proceeding the son is at liberty to show that the property in his hands is not liable to pay the debts of his father. All these questions fall within the purview of Section 47. That was a case where the father died leaving more than one son.

25. Our attention is invited to the decisions of Andhra Pradesh High Court; one decision of the Full Bench in *P. Govinda Reddy v. Golla Obulamma*, AIR 1971 Andh Pra 363 and the other a decision of the single Judge in *Yethirajulu Neelaya v. Mudummuru Ramaswami*, AIR 1973 Andh Pra 58. In both the cases the question that primarily arose for consideration was whether a suit that was instituted during the lifetime of a coparcener was liable to be continued in the absence

of heirs of a coparcener who died during the pendency of the suit being brought on record. In the decision of the Full Bench in *P. Govinda Reddy's* case a mortgage was executed in favour of one Potalpati Nagi Reddy. Reddy the mortgagee died in 1960 leaving him surviving his widow, four sons and two married daughters. His eldest son Govinda Reddy thereafter brought a suit against the heirs of the deceased mortgagor, on the last day of limitation for enforcing the mortgage. A question arose in this case whether the female heirs who were entitled to inherit the property having regard to the provisions of the proviso to Section 6 of the Act were necessary parties to the suit and the Full Bench of Andhra Pradesh High Court took the view that it was so and in their absence the suit was liable to be dismissed. In that case within the period of limitation an application to bring the female heirs on record was not made and that was regarded as fatal to the suit. While considering this question the Court undoubtedly considered scheme of Section 6 of the Act. Even before the Full Bench the decision of the Division Bench of this Court either in *Rangubai's* case or in *Shirambai's* case was not cited. While considering the provisions of Section 6 the Full Bench pointed out that Explanation 1 introduces out of necessity a legal fiction for ascertainment of interest of the deceased coparcener. His interest according to it will be deemed to be the share that would have been allotted to him if there was a partition immediately before he died irrespective of the fact whether he could claim such partition or not on that day. The need for the legal fiction arose out of impelling necessity for according to Mitakshara Law so long as there is no partition no coparcener can predicate that he has got a definite share in the coparcenary property. The legal fiction was designed for a limited purpose, namely for computation of the interest of the deceased coparcener for purposes of devolution of the same on his heirs so that there may be no difficulty in giving effect to the proviso. In the opinion of the Full Bench, Section 6 of the Act has nothing to do with the disruption of the joint family status. The coparcenary will continue notwithstanding the death of a coparcener until partition is effected. Till then the Karta of the joint family will be in charge of the management of the coparcenary property and will be entitled to exercise all powers which he enjoys by virtue of his position. The effect of Section 6 in the coparcenary, if at all, is that in case the proviso applied to the devolution of the interest of the deceased that interest or specified share will be taken in pursuance of the legal fiction, out of the coparcenary property

in so far as the heirs of the deceased are concerned and will be available for allotment to them. Otherwise the coparcenary will continue as ever. For the purpose of the case it was unnecessary to consider whether the remaining coparceners remained separate or became united. What was relevant to be considered was when the share or interest of a deceased coparcener in the coparcenary property devolved in the manner laid down in the proviso upon the heirs specified therein, whether such heirs were necessary parties to the suit and whether such heirs even though they were not the members of the coparcenary would have been represented by a Kartha. That question was answered by holding that such heirs were necessary parties in their own right and the Kartha could not represent them. Following this decision a similar view has also been taken by a Single Judge in *Yethirajulu Neelayya v. Mudumuru Ramaswami*, AIR 1973 Andh Pra 58. It may however be pointed out in this case that even though the heirs of the deceased coparceners were not brought on record the continuance of the suit did not suffer from any infirmity by reason of absence of the heirs as it was a suit by at least some of the co-owners against the trespassers.

26. We may incidentally refer to a decision of the Calcutta High Court which has been referred with approval by the Full Bench of Andhra Pradesh in AIR 1971 Andh Pra 363. In this case Mudumuru's family consisted of the father and his three minor sons. One of the minor sons died during the pendency of the litigation after the Act came into force leaving the mother as the only heir. As the mother was a female heir as specified in the proviso to Section 6 the provisions of the proviso were attracted and she inherited the property which would have been allotted to the minor son on a partition immediately before his death. The single Judge of the Calcutta High Court in *Narayan Prasad Ruia v. Mutuni Kohain*, AIR 1969 Cal 69, took the view that the mother was a necessary party to the suit and in her absence the suit suffered from infirmity. But there are certain observations in this judgment of Mr. Justice Bijayesh Mukherji which it would be useful to refer. In para. 4 of the judgment he observed as under:—

"A karta of joint family property is quite an understandable concept. But a karta for a divided property, of property partitioned, notionally though, appears to be incomprehensible. So, old karta theory cannot help matters forward for the petitioner before me and Narayan Prasad Ruia as karta cannot represent his deceased son's mother and necessarily his wife upon whom devolves the share of the pro-

perty after partition. The very nexus of the joint family property is gone." (underlining is ours.)

Though there are no distinct observations on the question whether the remaining coparceners continued to be separate or joint, a prima facie observation is made that the nexus of the joint family property is gone. However, on the facts, as the mother of the deceased minor was necessary party continuance of the suit was regarded as suffering from infirmity. In *Karuppa Gounder v. Palaniammal*, AIR 1963 Mad 245, the Division Bench of Madras High Court considered the effect of the proviso and Explanation 1 to Section 6. According to the Division Bench, the intentment of this provision is very clear. It is that persons entitled to succeed to the interest of a deceased coparcener under the Act shall not be subject to the hazard of the fluctuating fortunes of the family. The Act itself determines what the share of the heir shall be and it specifies it clearly to be that share on partitions, if partition had been effected immediately before the coparcener's death. Though factually no partition may have taken place, the quantum of the share of the female heir is effectively determined by this provision and no curtailment of that share is permissible on footing of the existence of the joint family or of the valid exercise of the power of the father to make a gift. Here also the question whether upon separation of the share of the deceased in order that it may devolve by testamentary or intestate succession under the proviso to Section 6 rendered the rest of the members of the coparcenary united or separate was not considered.

27. A similar question came to be considered by Allahabad High Court in the matter arising under the Estate Duty Act in the case of *Controller of Estate Duty U. P. v. Smt. Anari Devi Halwasiya*, AIR 1972 All 179. The deceased in that case was entitled to 1/4th share in the property if a partition was effected as contemplated in Explanation thereto. The Division Bench has, inter alia, observed that 1/4th interest of the coparcenary property representing the interest of the deceased coparcener was carved out for the purpose of intestate succession. The balance of the coparcenary property, representing 3/4th of the original property, continued to remain joint. That was also a case where there were more than two coparceners and reliance was placed in this case upon the decision of the Privy Council in *Pratapmull v. Dhanbeti Bibi*, AIR 1936 PC 20. The Privy Council held that in a suit instituted by a son for the partition of joint family property impleading his mother and other members of the family as defendants the mother does not become owner of the share allotted to her by the preliminary decree until

the preliminary decree is carried out and there is a division by metes and bounds. It may be pointed out that the decision of the Privy Council was given at the time when the Hindu Succession Act was not in force and actually notwithstanding the decision of the Privy Council, in *Munnalal v. Rajkumar*, AIR 1962 SC 1493 after referring to this decision the Supreme Court has pointed out that Section 14 of the Hindu Succession Act effected a change in law and once a preliminary decree was passed declaring the quantum of share of each of the persons entitled to the share on a partition and if thereafter a female person entitled to such share died, having regard to the provisions of Section 14 of the Act such interest was regarded as the property of the deceased Hindu female.

28. The last case to which our attention was drawn was the decision of Mysore High Court in *Commr. of Income-tax, Mysore v. Smt. Nagarathanamma*, (1970) 76 ITR 352 (Mys). The Division Bench has taken the view that on the death of the karta of a Hindu undivided family after the coming into force of the Hindu Succession Act, 1956, his share in the income that accrued from firms in which he had been a partner as karta, devolves by succession on his own heirs, and is not assessable as income of the Hindu undivided family. For the purpose of computation or determination of the share of the male Hindu, Explanation 1 to Section 6 of the Hindu Succession Act assumes that a notional partition in the family had taken place immediately before his death. The joint family, notwithstanding the death of one of its male members, continues for the purpose of income-tax, but the share of that joint family is diminished to the extent of the share of the member dying. This was also a case where the coparcenary consisted of more than two members and continuance of the joint family property was considered on that footing.

29. In none of the cases where a view has been taken that notwithstanding separation of the share of the deceased coparcener having regard to the proviso to Section 6 of the Act, the remaining coparceners continued to be joint a question was considered relating to a coparcenary consisting of only two members. We are in the present case concerned with the simple case of that nature. The coparcenary consisted of the members viz., father Narayanrao and son Shridhar, Shridhar died after the coming into force of the Act leaving him surviving his heirs under the Act his mother Laxmibai and his widow Shantabai. Then undoubtedly in view of the provisions of Section 6 Shridhar's share has to be separated and it devolved by intestate succession as he

did not leave any will. Such severance is effected by the language of the proviso to Section 6 itself and it is unnecessary for that purpose even to refer to the provisions of Explanation 1 thereto. If Shridhar's share is severed, then, automatically having regard to the provisions prevailing under Shastric Hindu law upon a partition taking place between father and son the mothers' right to claim a share equal to that of a son automatically springs up. That being the position, immediately before Shridhar's death a notional partition having taken place in view of the provisions of Section 6, Laxmibai, as a result of that partition, will be entitled to 1/3rd share in the joint family property. The remaining 2/3rd share will be divided as under: 1/3rd will go to Narayanrao and 1/3rd coming to the share of Shridhar will devolve by intestate succession as provided under the Act. Thus Laxmibai as a result of this partition gets 1/3rd share. She is also an heir of Shridhar and as an heir of Shridhar she is entitled to half the interest in the share of Shridhar. So in addition to 1/3rd share obtained by her on a partition she will be entitled to 1/6th share as such heir of Shridhar. The total interest thus obtained by Laxmibai in view of the provisions of Section 6 and the provisions prevailing under pure Hindu Law will be 1/2. Upon the death of Laxmibai in 1957 half the interest in the share left by Laxmibai will go to her husband Narayanrao, and the remaining half will go to her daughter Sushilabai, the plaintiff. Thus, Laxmibai's half share in the joint family property will be divided as under: 1/4th of it will go to Narayanrao, her husband and the remaining 1/4th will go to her daughter Sushilabai, the plaintiff. Thus, in our view, having regard to the facts and circumstances of the present case Shushilabai, the plaintiff is entitled to 1/4th share in the property and she is entitled to have a partition and separate possession thereof secured to her.

30. Question No 1 referred to us is divided in two parts. The first part of question No. 1 relates to the scope of the fiction in the Explanation of Section 6 of the Act and the question requires us to answer whether the scope of the fiction is as wide as was held in *Rangubai v. Laxman*, (1966) 68 Bom LR 74. As we have pointed out in our judgment, it is not necessary for the purpose of this case to express any opinion on this part of the legal fiction. The whole of our judgment is based upon assumption that the fiction should be carried to a narrow extent only with a view to implement the purpose for which it was introduced. Proceeding on that footing, having regard to the facts of this case as there were only two coparceners and one of them died, then if any person other than the coparceners is entitled to a share

as a result of severance of the share of the deceased coparcener, the share of such other person will become fixed. Thus, on the facts of this case, upon a partition taking place immediately before the death of Shridhar, Laxmibai became entitled to 1/3rd interest in the joint family property. So far as question No. 2 is concerned, Laxmibai has obtained 1/3rd share in the joint family property as a result of partition and she is also in addition thereto obtained 1/6th share in the joint family property as an heir of Shridhar. Thus she is entitled to 1/2 share in the joint family property and upon her death this 1/2 share is equally divided between her husband Narayanrao and her daughter, the plaintiff. Thus the plaintiff on the facts of the present case is entitled to 1/4th share in the suit property.

31. Having regard to the questions referred to us plaintiff Shushilabai is entitled to 1/4th share in the property in which she is entitled to claim a share. If there are other questions if any, to be decided in this appeal, the same will be considered by the Division Bench in the light of the quantum of share of Shushilabai, the plaintiff, determined by us in this case and appropriate directions will be given and decree will be passed while disposing of the appeal.

32. The question of costs of hearing of this appeal will be dealt with by the Division Bench while disposing of the appeal.

Order accordingly.

AIR 1975 BOMBAY 270

(AT NAGPUR)

TULZAPURKAR AND SHIMPI, JJ.

Gopal Shioram Bhankhed, Petitioner
v. Smt. Sagirabegum, Respondent.

Special Civil Appln. No. 850 of 1971,
D/- 13-12-1974.

(A) Berar Regulation of Agricultural Leases Act (24 of 1951), Sections 9, 8 (1) (g) and 19 — Notice by landlord under Section 9 (1) terminating lease on ground of personal cultivation — Protected tenant challenging notice — Revenue Officer passing order under Section 9 (4) rejecting tenant's application — Lease effectively terminated — Order under Section 8 (1) (g) terminating the tenancy is not necessary.

A notice under Section 9 (1) by itself, would not be sufficient to effectively terminate the lease of a protected tenant without an order having been obtained under Section 8 (1) (g), but in cases where a notice under Section 9 (1) is followed by an application by the tenant under Section 9 (3) challenging the notice on the

grounds available to him and an appropriate order is passed by the Revenue Officer under Section 9 (4) rejecting the tenant's challenge to the notice, the lease of the protected tenant would be effectively terminated even if the words to the effect "the tenancy of the petitioner has been terminated" are absent in the Revenue Officer's order who has merely passed an order upholding the validity of the notice on the ground that it was bona fide and has rejected the application of the tenant, under Section 9 (3). The order passed by the Revenue Officer under Section 9 (4) would obviate the necessity of obtaining yet another order under Section 8 (1) (g). (Case Law discussed) Special Civil Appln. No. 929 of 1965, D/- 21-9-1966 (Bom). Approved. (Paras 10, 11, 15) Cases Referred: Chronological Paras 1971 Mah LJ 818 = 74 Bom LR 651 13, 14 1967 Mah LJ 670 = 69 Bom LR 734

1, 12, 13, 14
(1966) Spl. Civil Appln. No. 929 of 1965,
D/- 21-9-1966 = 1967 Rev. Rul. Note
(D) 15 1, 5, 8, 11, 14
AIR 1966 SC 557 = 1965 Mah LJ 850

10, 11, 12, 13, 14
AIR 1962 Bom 147 = 1961 Nag LJ 636
(FB) 8, 9, 10, 13

AIR 1959 Bom 72 = 1958 Nag LJ 535 12

B. V. Gaikwad, for Petitioner; S. N. Kherdekar and A. M. Bapat, for Respondent.

TULZAPURKAR, J.:— This matter has been referred to a Division Bench by Mr. Justice Masodkar since he felt that there was an apparent conflict between a decision delivered by Mr. Justice Padhye on 20th/21st September, 1966, in *Madhav v. Shripat*, (Special Civil Appln. No. 929 of 1965) (Bom) and the view taken by Mr. Justice Deshmukh in *Baburao v. Shionath*, (1967 Mah LJ 670), and the petition involved a question as to what would be the correct position applicable to this class of cases where a protected tenant had taken proceedings under Section 9 (3) of the Berar Regulation of Agricultural Leases Act, 1951 (hereinafter referred to as the Berar Act 1951) to challenge the notice served upon him by his landlord under Section 9 (1) of the said Act.

2. The facts giving rise to the present petition may be stated. The respondent is a landlady of certain field, bearing survey number 3, admeasuring 29 acres 19 gunthas, situated at mouza Karak, in tahsil Yeotmal. The petitioner has been a tenant of this land since 1956 onwards and admittedly was a protected lessee within the meaning of that expression as given in the Berar Act 1951. The respondent landlady served a notice dated 14th December, 1957 on the petitioner-tenant under Section 9 (1) of the said Act terminating the latter's tenancy in respect of the aforesaid land on the ground that she needed the land for personal cultivation.

tion. Under Section 9 (3) of the said Act, an application was made by the petitioner-tenant before the Revenue Officer (Sub-Divisional Officer, Yeotmal) challenging the aforesaid notice on the ground that the notice was not bona fide and that the same should be declared to be of no effect. It was the case of the petitioner-tenant that the landlady did not have the means to cultivate the land personally and she was also in possession of more than 50 acres of land, and therefore, the notice was not bona fide. The Sub-Divisional Officer held an enquiry and on the material placed before him came to the conclusion that the holding of the landlady was not as suggested by the petitioner-tenant, that she was in a position to cultivate the fields and had the intention to cultivate the land at home. By his order dated 30th September 1958 passed under Section 9 (4) of the Berar Act 1951 he held that the notice given by the landlady to the petitioner-tenant was bona fide and he rejected the petitioner's application.

3. The petitioner-tenant carried the matter in appeal to the Deputy Collector, but that appeal was dismissed on 25th February, 1959. The respondent then filed an application under Section 19 (1) of the Berar Act 1951 for possession of the land on 24th April, 1960. It appears that in the meantime the new Bombay Tenancy (Vidarbha Region) Act, 1958 (hereinafter referred to as the Tenancy Act 1958) had come into force on 30th December, 1958 by which the Berar Act 1951 was repealed. The Naib Tahsildar to whom the respondent's application was transferred for disposal dismissed the same on 8th December, 1960, on the ground that in view of the repeal of the Berar Act 1951 and in view of the provisions of Section 132 (3) (a) of the Tenancy Act 1958, the provisions of the new Act were applicable and the provisions of Section 38 of that Act had not been complied with by the respondent. Against the dismissal of her application on 8th December, 1960, the respondent preferred an appeal, but that appeal was dismissed by the Sub-Divisional Officer on 10th October, 1961. These orders passed by the Naib Tahsildar and the Sub-Divisional Officer remained unchallenged at the hands of the respondent as no further proceedings were taken by her by way of revision to the Maharashtra Revenue Tribunal.

4. In 1965, the respondent filed a suit in Civil Court, being Civil Suit No. 4 of 1965, for possession of the field against the petitioner-tenant on the ground that she was entitled to recover possession as the tenancy of the petitioner-tenant had been duly terminated by reason of the service of the notice dated 14th December, 1957, upon the peti-

tioner-tenant and the order passed by the Revenue Officer on 30th September, 1958, under Section 9 (4) of the Berar Act 1951 declaring her notice to be bona fide. The petitioner contended that he was a tenant of the suit land and his tenancy was subsisting. In view of this contention raised by the petitioner, the relevant issue was referred by the Civil Court to the Tenancy Court under Section 125 of the Tenancy Act 1958.

5. Following the decision of this Court in *Madhav v. Shripat*, in Special Civil Appln. No. 929 of 1965 (reported in 1967 Rev. Rul. Note (D) 15) the tenancy Naib Tahsildar held that the combined effect of notice under Section 9 (1) and the order of the Revenue Officer (Sub-Divisional Officer) under Section 9 (4) of the Berar Act, 1951 was that the lease to the petitioner was effectively terminated as on 1st April 1958. He accordingly answered the issue referred by the Civil Court against the petitioner by his order dated 14th October 1968. The petitioner-tenant preferred an appeal, being Revenue Appeal No. 157/59(B)/68-69, and the Special Deputy Collector, who heard the appeal, confirmed the finding of the Tenancy Naib Tahsildar and dismissed the appeal on 31st July, 1969. The petitioner carried the matter in revision to the Maharashtra Revenue Tribunal, Nagpur, being Revision Application No. Ten-A-1435 of 1969, but that revision application was also dismissed by the Tribunal on 20th October, 1970. Against the said decision of the Maharashtra Revenue Tribunal the petitioner has filed the present Special Civil Application to this Court.

6. The principal question that arises for our consideration in this application is as to whether the petitioner's tenancy of the land in dispute was effectively terminated as on 1st April, 1958 by reason of the notice that was served by the respondent on the petitioner under Section 9 (1) of the Berar Act 1951, and by reason of the order that was passed by the Revenue Officer (Sub-Divisional Officer) on 30th September, 1958, under Section 9 (4) of the said Act, holding the said notice to be bona fide and valid.

7. Mr. Gaikwad on behalf of the petitioner contended before us that having regard to the provisions of Sections 8, 9 and 19 of the Berar Act 1951, the tenancy of the petitioner in respect of the suit land could not be regarded as having been effectively terminated simply because a notice under Section 9 (1) of the said Act has been served by the respondent-landlady on the petitioner, which was followed by an order passed by the Revenue Officer under Section 9 (4) of the said Act, but it was absolutely essential that an order terminating the protected lease of the protected tenant ought to

have been obtained from the Revenue Officer by the respondent under Section 8 (1) (g) of that Act and since no such order under Section 8 (1) (g) had been obtained from the Revenue Officer, the tenancy of the petitioner could not be said to have been effectively terminated and no right to obtain possession of, the land became vested in the respondent.

8. On the other hand, it has been contended by Mr. Kherdekar, appearing for the respondent, that reading Sections 8, 9 and 19 of the Berar Act, 1951, together, it was clear that the entire scheme as envisaged by these provisions contemplated two classes of cases, one where a notice simpliciter under Section 9 (1) of the Berar Act 1951 has been served by the landlord on the tenant without any further proceedings being taken by the tenant under Section 9 (3) of the Act, and the other where after service of notice by the landlord on the tenant under Section 9 (1); the tenant has challenged such notice under Section 9 (3) and an order is passed by the Revenue Officer under Section 9 (4) of the Berar Act 1951 and according to Mr. Kherdekar, it is only in the former class of cases that an order under Section 8 (1) (g) of the Act would be necessary before the tenancy of a protected lessee could be effectively terminated, and if the case were to fall under the latter class it was not necessary for the landlord to obtain yet another order under Section 8 (1) (g) of the Act. According to him, if a notice under Section 9 (1) of the Act was served by a landlord upon the tenant terminating the tenancy on the ground that the leased land was required by him for personal cultivation and if upon service of the notice the tenant made an application to the Revenue Officer under sub-section (3) of Section 9 challenging the notice on the ground that the same was not bona fide and if such an application was disposed of by the Revenue Officer by passing an appropriate order thereon under Section 9 (4), the order passed by the Revenue Officer under Section 9 (4), if the tenant's application is rejected by holding the notice to be bona fide and valid, must by necessary implication mean that the tenancy had been ordered to be terminated by the Revenue Officer. In such a situation, Mr. Kherdekar urged, there was no necessity for the landlord again to resort to Section 8 (1) (g) of the Berar Act 1951 and obtain an order from the Revenue Officer terminating the Tenancy. According to him, in this manner the provisions of Section 8 (1) (g) and Section 9 of the said Act could be harmoniously given effect to. In support of his contention Mr. Kherdekar strongly relied upon a Full Bench decision of this Court in *Jayantraj v. Hari*, 1961 Nag LJ 636 = (AIR 1962

Bom 147) (FB) and Mr. Justice Padhye's decision in *Madav v. Shripat*.

9. It may be stated that the scheme of the Berar Act 1951 and particularly of the provisions of Sections 8, 9 and 19 thereof was considered by the Full Bench in *Jayantraj's* case (cit-supra). After referring to the provisions of Sections 8, 9 and 19 the Full Bench has observed (vide para. 8) as follows:

"The position, therefore, was that in order to obtain possession of his land from a protected lessee, the land-holder had first to obtain an order from the Revenue Officer for the termination of the lease under Section 8, and thereafter make an application under sub-section (1) of Section 19 for ejecting the protected lessee. After receiving the latter application, the Revenue Officer had to make a summary inquiry; and thereafter make an order for restoring possession of the land to the land-holder. It may be noted here that the order which, under this section the Revenue Officer could make in favour of a land-holder, is referred to as an order for "restoring" possession of the land. If this Section 19 is read along with Section 8, and in particular sub-section (3) of Section 8, it will be clear that the Legislature regarded both the proceedings under Section 8 and Section 19 as being parts of the of one proceeding, which is described in some places as, a proceeding for termination of a lease and in others as a proceeding for ejectment. The proceeding commenced with an application under Sub-sec. (1) of Sec. 8 and ended with an order under sub-sec. (3) of Sec. 19. The application under sub-sec. (1) of Sec. 19 was only a second step in the proceeding initiated under sub-section (1) of Section 8 to obtain back the possession of the land. Even though, therefore, a separate application had to be made under sub-section (1) of Section 19, the proceeding under this sub-section was a part or continuation of the proceeding under Section 8. In other words, the proceeding under Section 8 did not come to an end until an order had been made under sub-section (3) of Section 19."

As regards the position under Section 9 read with Section 19 of the Berar Act 1951, this is what the Full Bench has observed, (vide para. 9):—

"Sub-section (1) of Section 9 of the Berar Regulation of Agricultural Leases Act gave a right to the land-holder to terminate the lease of a protected lessee by giving him three month's notice in writing, if he required the land for cultivating it personally. Sub-section (2) stated that the land-holder would not be entitled to terminate the lease of the protected lessee on the ground that he wanted the land for personal cultivation, unless the area held by him and available

whether the matter could be heard more advantageously by two or more Judges of this Court, then can it be said that there has been usurpation of jurisdiction by the learned Judge in a matter in which he had no jurisdiction? How the matter should be disposed of is a matter of regulating the procedure of the Court. The learned Judge has been given certain powers for regulating the procedure of the matter in certain manner. If the learned Judge erroneously exercises such discretion, in our opinion, no question of conditions precedent not being fulfilled or usurpation of jurisdiction arises.

10. Therefore, the order in question in our opinion also does not involve any question of jurisdiction.

11. We are, therefore, of the opinion, that the order in question is not a final order from which an appeal lies.

12. On the question of the propriety of the order we have no doubt that the revenue took an ill advised step. As mentioned herein before if the anxiety of the revenue was to have a speedy disposal of the matter, that was not proved by the action taken. As we mentioned before liberty was given to the revenue authorities to complete the proceedings, if they were so advised, so that realisation of the revenue might not be ultimately delayed. But as we understand, no steps had been taken since the 11th April, 1973, up to this date. Thus far need be said about the anxiety of the revenue for speedy realisation of the dues: The grounds upon which the application had been made for directing a reference are contained in paragraphs 9 and 10 of the petition. In paragraph 9 it has been stated that in the said case a very large amount of revenue was involved and the points involved were of such a nature that the matter would be canvassed by either party in the court of appeal. It was further stated that a good deal of expenses and time would be saved if the matters were referred to and disposed of by a Division Bench of this Court. In paragraph 10 of the petition it was stated that in the event of the revenue succeeding in the said cases, the said matters would have to go through the whole gamut of the proceeding under the Wealth Tax Act, 1957 or the Income-tax Act, 1961, resulting in the ultimate disposal of the cases after the delay of several years. It was further stated that the said cases involved huge revenue and the points were similar. It is difficult to appreciate the grounds upon which the reference to a larger Bench was sought for in the application made by the revenue. The grounds seem to be (i) that a large amount of revenue was involved; (ii) the points involved were of such a nature that the matter would be canvassed by either party in the Court of appeal; (iii) that the matters will have to be ultimately disposed of through the whole gamut of the proceedings under the Wealth-tax Act, 1957 or the Income-tax Act, 1961; (iv) the

said group of cases involved similar question which could be advantageously heard by a Division Bench of this Court. If we take the last point, if there was any similarity in respect of these cases these matters could have been heard one after the other or together. This is done normally and would have been done in this case. It is, however, difficult to appreciate the view about similarity of the points involved in a re-opening. The main point to be decided in each case is whether the conditions of clause (a) or (b) of Section 17 have been fulfilled, and this will depend upon the facts and records of each particular assessments. The learned Judge has relied on this view of the matters as one of the grounds for making the reference. We will assume that this case involved the question of reopening on the basis of the report of the Director of Inspection (Investigation) as referred to hereinbefore. But even assuming that that is the position, it is difficult to discover the point of similarity, so far as the disposal of the applications under Article 226 of the Constitution were concerned. In order to determine whether for the purpose of Article 226 of the Constitution the reopening was proper or not, it would be necessary to determine whether in some cases the report of the Director of Inspection could be treated as information or whether as a result of the contents of the report it could be said that the assessee in certain cases were guilty of suppressing relevant and material facts at the time of original assessments. This will involve the examination of the facts of each case to determine whether either of these two conditions were fulfilled. Thereafter the consideration of action being without jurisdiction or mala fide, if any or ulterior purpose will arise. Therefore, it is difficult to appreciate the similarity of the points. It may be that ultimately the question of a large amount of revenue would be involved but it was nowhere suggested that the cases involved the question of such a complexity either of law or of facts which could be more advantageously disposed of by a larger bench. Indeed, the principles upon which the reopening has to be made under Section 148 of the Income-tax Act, 1961, or under Section 17 of the Wealth Tax Act, 1957, are now settled by numerous decisions of the Supreme Court or different High Courts. Sometimes the application of the principles to different facts of cases present some difficulties and they are examined in the light of the facts of each case. It is not suggested that the cases were of such a nature where either any complex principle of law was involved or any complexity of facts was involved in any of these cases. The learned Judge in his judgment has referred to some of the grounds why according to him he was making this order of reference, namely, grounds (a) to (h) in the judgment. Leaving aside the principles and the history of the case the learned Judge seems to have

relied in this case on the nature of the transactions, the correctness of the price of the shares, and the genuineness of the investments which should be decided as early as possible. Even assuming that that has to be so, it is difficult to appreciate how the disposal of an application under Article 226 of the Constitution could either determine the nature of the transactions or the correctness of the price of the shares or the genuineness of the investments. All that an application under Article 226 of the Constitution could decide was whether the particulars of the transactions were disclosed in such a manner as to amount to full and true disclosure or whether in view of the report of the Director of Inspection it could be said that information had come to the possession of the revenue entitling the revenue to reopen the assessments. The learned Judge has also referred that there would be a large number of writ petitions in connection with other assessment years in connection with similar assesses and there would be larger number of appeals or references in connection with other assessment years in respect of one assessee trustee or the other and similarly a large number of writ applications or appeals would arise. Even assuming that that is so and the apprehension of the revenue or the learned Judge was true but even then it is not possible to resolve or solve this apprehension in one way or the other or help in the final solution of this apprehension by the disposal of an application under Art. 226 of the Constitution by a larger bench. It is stated that a large amount of money might be payable to the revenue. That could also not be resolved in this application. Furthermore for that protection of the revenue if any kind of security was needed, the revenue could have moved otherwise which the revenue did not do in this case. Reading the judgment as a whole it appears to us that, costs and delay, seem to be two main factors which have influenced the learned Judge in making the order of reference in question. According to the rules of our High Court normally a matter should be heard by a learned single Judge. But if it is a case of such complexity either because of the facts involved or of law involved that it should be more advantageously heard by a larger Bench then the learned Judge could report accordingly. This procedure in our opinion ought not to be circumvented only on the ground that costs and delay would be affected. If that is so, it is unfortunately true that in the procedure as enjoined by our rules for all normal cases certain amount of costs and delay would be involved. But the High Court has framed the rules as these are and the procedures cannot be circumvented only on the ground of costs and delay because if that is the principle of making a reference to a larger Bench, then there will be no justification of keeping many or most of the writ petitions before a learned single Judge or any or most of the suits before a learned single

Judge. If it is viewed from that angle only, it would certainly be in every case less expensive and less dilatory to be heard by a Division Bench than to go to appeal from the learned single Judge. These two grounds mentioned before cannot be the criterion for making a reference under Rule 2, Chap. V of the Original Side Rules. As we read the rule, we are of the opinion that the rule was meant to be exercised in such cases where the learned Judge hearing the matter was of the opinion that because of the complexity of the points of law involved or of facts involved it would be more advantageous to the matter in question, in these special cases reference under Rule 2, Chapter V normally could be made. The importance of expression "advantageous to the matter" in the rule has to be borne in the matter, it was not advantage to the parties. Therefore, we are of the opinion that the grounds upon which the learned Judge has exercised his discretion were not proper grounds. We must, observe that the rule enjoined advantage to the matter to be the test. But even if an appeal lay in view of the delay caused by the ill advised step of the revenue and in view of the procedural wrangle following therefrom we would not have interfered with the order made by the learned Judge. We are of the opinion that interference with the order made now would be less advantageous to the matter and not in the interest of justice. The matter should be heard as expeditiously as possible. The other 31 matters might be disposed of after the disposal of this matter. In the aforesaid view of the matter we would not have in any event interfered with the order of the learned Judge even though we disagree with reasonings of the learned Judge. We are, however, of the opinion that the grounds upon which the learned Judge made the impugned reference are not the proper grounds. The appeal, however, fails and is accordingly dismissed. As a mark of our disapproval of the conduct of the respondents, the respondents would pay the costs of the appeal to the appellants.

R. N. PYNE, J. — I agree.

Appeal dismissed.

AIR 1975 CALCUTTA 354

K. J. SEN GUPTA AND
R. BHATTACHARYA, JJ.

Sardarmull Kankaria, Appellant v. State of West Bengal, Respondent.

A. F. O. D. No. 61 of 1963, D/- 3-7-1974.

(A) Calcutta Improvement Act (5 of 1911) (as amended by Act 32 of 1955), Sch., Para 9 — Declaration under S. 6, Land Acquisition Act made prior to amendment — Effect on compensation. AIR 1959 Mad 16,

ES/FS/B914/75/JHS.

Dissented from. (Land Acquisition Act (1894), Ss. 6, 23).

Where land is acquired and taken possession of, the right of the owner to claim compensation for acquisition must be deemed to have accrued as soon as the declaration under Section 6 is published. In the instant case as Section 6 declaration was made on 4-8-1955 i.e. before the amendment, which came into force on 21-10-1955, the claimant is entitled to compensation as allowed by the unamended Calcutta Improvement Act including solatium under Section 23 (2) of the Land Acquisition Act. AIR 1964 Guj 82 and AIR 1963 Guj 50 Rel. on; AIR 1959 Mad 16, Dissented from. (Para 9)

(B) Calcutta Improvement Act (5 of 1911) (as amended by Act 32 of 1955), Sch. Para 9 — Provision disallowing solatium under S. 23 (2) of Land Acquisition Act — Provision offends Art. 14 of Constitution — AIR 1973 Cal 478, Followed — (Constitution of India, Art. 14) — (Land Acquisition Act (1894), S. 23 (2).) (Para 10)

Cases Referred :	Chronological	Paras
AIR 1973 Cal 478 = 77 Cal WN 618		10
AIR 1968 SC 1425 = (1969) 1 SCR 90		10
AIR 1965 SC 1017 = (1965) 1 SCR 614		10
AIR 1964 Guj 82 = (1964) 5 Guj LR 329		6
AIR 1963 Guj 50 = (1963) 4 Guj LR 326		6
AIR 1960 SC 1203 = (1961) 1 SCR 128		5
AIR 1959 Mad 16 = (1958) 2 Mad LJ 330		7
AIR 1953 All 595 = 1953 All LJ 445		5

G. K. Deb, for Appellant, Nanigopal Das, for Respondent.

R. BHATTACHARYA, J.:— This appeal is by the claimant Sardarmull Kankaria against the valuation arrived at by the President Calcutta Improvement Tribunal in a Reference under Section 18 of the Land Acquisition Act 1894. The premises No. 19, Chhattawalla Gules appertaining to the Calcutta Improvement Trust Scheme No. LXVI in award No. 40 of the Calcutta Municipality was acquired. Notice under Section 43 (2) of the Calcutta Improvement Act was published on 9th October, 1952. Declaration under Sec. 6 of the Land Acquisition Act was published on 4-8-1955. Notice under Section 9 (1) of the Land Acquisition Act was served on 26-6-1956. The claim petition was filed before the Land Acquisition Collector on 6-7-1956. The award was made on 19-8-1959 and the Reference petition under Section 18 of the Land Acquisition Act was filed on 24-8-1959 claiming an increase in the market value of the premises acquired and the statutory allowance of 15 per cent. with interest on the additional amount of compensation to be awarded.

2. Before the Tribunal the claimant prayed for solatium at the rate of 15 per cent. on the valuation made by the Collector but the Tribunal turned down the claim as untenable after amendment of the Calcutta

Improvement Act in 1955. Against that decision the present appeal has been preferred.

3. Mr. G. K. Deb appearing on behalf of the appellant has urged two points before us. It has been contended first that the amendment of the Calcutta Improvement Act in 1955 will not affect the claimant's right to solatium under Section 23 (2) of the Land Acquisition Act, 1894 as the right to receive solatium accrued before the said amendment. The second ground of challenge is that the amendment of the Calcutta Improvement Act barring solatium is ultra vires the Constitution. Mr. Nanigopal Das learned Advocate has appeared for the respondent.

4. The first point for consideration is whether the right to get statutory allowance under Section 23 (2) of the Land Acquisition Act had accrued to the claimant before the amendment of the Calcutta Improvement Act in 1955. The amendment of the said Act came into operation on the 20th October, 1955. There is no dispute that according to the Act the market value is to be determined with reference to the date of publication of the declaration under Section 6 of the Land Acquisition Act. The amendment of the Calcutta Improvement Act in 1955 has refused statutory allowance to be paid under Section 23 (2) of the Land Acquisition Act. There is no question about the fact that the amendment has no retrospective effect. In this case, the declaration under Section 6 of the Land Acquisition Act was published on 4-8-1955 and the notice under Section 9 (1) of the said Act was served on 26-6-1956 after the amendment of the Calcutta Improvement Act. The Tribunal has held that the relationship of the vendor and the vendee "arises at the stage of Section 9." Let us now consider the relevant provisions of the Land Acquisition Act. Section 4 of the Act relates to publication of preliminary notification and powers of the officers thereupon. "Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose," a notification under S. 4 is published. Practically, this is an introductory notice. Section 5-A of the Land Acquisition Act allows an opportunity to the persons interested to file objections to the acquisition referred to in the notification under Section 4. Section 6 of the Land Acquisition Act is important. It says that after the consideration of the objections under section 5A of the Act, if the Government is satisfied that there is need for acquisition of the land for a public purpose or for a company, a declaration shall be made to that effect subject to the proviso to sub-section (1) of S. 6 which says as follows :

"provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of the public revenues or some fund controlled or managed by a local authority."

Sub-section (2) says that in this declaration shall be published specific particulars of the land sought to be acquired as stated therein. Sub-section (3) of S. 6 is significant. It says,

"The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a company, as the case may be; and, after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing."

From the reading of Section 6 as a whole it is clear that the Government makes a firm declaration, a sure decision for acquiring the lands in question, after taking necessary steps and having ready fund for payment of compensation after acquisition.

5. In this connexion, reference may be made to the case of Babu Barkya Thakur v. State of Bombay, reported in AIR 1960 SC 1203. There it is held as follows:

"It is only under Section 6 that a firm declaration has to be made by Government that land with proper description and area so as to be identifiable is needed for a public purpose or for a company. What was a mere proposal under Section 4 becomes the subject-matter of a definite proceeding for acquisition under the Act."

Regarding the effect of Section 5-A read with Section 6 of the Land Acquisition Act, we may, for convenience, refer to the case of Mowasi v. State of Uttar Pradesh, reported in AIR 1953 All 595 where we get as follows:

"It is only when it is finally determined that the land is needed for a public purpose, and that the compensation-money is chargeable wholly or partly against the public revenues or some fund controlled or managed by a local authority or the funds of some company, that a declaration can be made which becomes final and cannot be questioned."

6. There cannot be any doubt that after due consideration as to the need for public purpose and having some source of money to the compensation to persons interested, the Government becomes determined and makes a firm declaration for the acquisition of the land under Section 6 and as a result thereof the owner of lands in question cannot refuse to deliver the lands. He cannot then make a building on the land with profit to himself and he cannot make any profitable transaction out of that land and then when the land is ultimately taken possession of in pursuance of the Land Acquisition proceeding, all his investment in the land building or otherwise subsequent to the proceeding will bear no fruit. For all practical purposes, the Land Acquisition proceedings start with Section 6 culminating in taking possession of the land by the Collector. Reference may be made in this connexion to the case of Mangal-bhai Patel v. State of Gujarat, reported in AIR 1964 Guj 82. It says in paragraph 24 with reference to Patel Gandhal Somnath v. State of Gujarat, (AIR 1963 Guj 50). "That decision makes it clear that acquisition pro-

ceedings can only be said to have commenced when a declaration is made under Section 6 of the Act." We may also, in this connexion, look to the decision in AIR 1963 Guj 50 where it has been held as follows:

"The notification under Section 6 is expropriatory in character and has serious consequence on persons interested in the land since they would be deprived of their interest in the land without their consent and against their will."

7. The right to compensation accrues to the person interested in the land as soon as declaration is made or the acquisition proceedings start as then his right and interest in the land is fettered or affected by such declaration and he acquires a right to claim compensation for the land. If the land is ultimately taken possession of in connexion with that land acquisition proceedings, the owner or the person interested gets compensation for the land so acquired. But if for any reason the land is not taken possession of but the proceedings initiated are given up, his right to claim compensation for land may cease or is frustrated and he may not get compensation for land but his right to claim compensation in that case too must be deemed to have accrued because of the damage he has suffered for the curtailment of his right in the land due to land acquisition proceedings and the declaration. The addition of proviso to sub-section (1) of S. 6 means that Government takes a decision to pay compensation for land before issuing notification under Section 6 of the Land Acquisition Act. It is evident, therefore, that if the land acquisition proceedings culminate in the taking of possession of the land from the persons interested, the right to compensation ripens into the fruitful result of getting compensation. The right to claim compensation is not the same thing as getting compensation after the completion of the acquisition proceedings with the delivery of possession of land taken by the Government when the title to the land completely vests in the Government. The case of the State of Madras v. Balaji Chettiar, reported in AIR 1959 Mad 16 relied on by the Tribunal has also been considered by us but with great respect to the Division Bench of the Madras High Court in question, I cannot share the same view with regard to the proposition of law enunciated therein. The acquisition of land, as in the instant case, cannot be a case of an ordinary vendor and vendee, but it is a case of acquisition of land by compulsion under the law and this is why the Land Acquisition Act provides for 'compensation' and not the price of the land so acquired. The right to claim compensation arises as soon as the right of the owner of the person interested in the land is affected adversely or his right is fettered by the firm declaration under Section 6 of the Land Acquisition Act.

8. According to the President of the Tribunal "the relationship of purchaser and vendor" arises at the stage of Section 9. Sec-

tion 9 simply speaks about giving notice of the intention of taking possession of the lands in respect of which a declaration has already been made in connexion with the acquisition and invites claims. Two things are clear. Claims are invited after the right to compensation accrues to the persons interested in land. Secondly, the claims are invited before the possession of the land is taken by the Government. There is no doubt that with the taking of possession the land vests in the Government and the acquisition is complete. Evidently the right to claim compensation accrues before the stage of Section 9 in the acquisition proceedings which commence from the declaration under Section 6. Of course, the Government can under Section 48 of the Land Acquisition Act give up the proceedings to withdraw from the acquisition of any land before the possession of the same is taken. As we have already seen, the acquisition proceeding ends with the taking of possession after which the Government cannot avoid liability to pay compensation for land but must be bound to pay the same.

9. In view of the discussions above, it is held that if any land is acquired and taken possession of, as in the instant case, the right of the owner or the person interested in the land to claim compensation for such acquisition must be deemed to have accrued as soon as the declaration under Section 6 of the Land Acquisition Act is published. In this case the declaration was made on 4-8-1955 before the amendment of the Calcutta Improvement Act came into force on 20-10-1955. The claimant-appellant is, therefore, entitled to claim compensation as allowed by the unamended Calcutta Improvement Act including solatium under Section 23 (2) of the Land Acquisition Act.

10. Coming to the second point regarding the validity of the amendment of the Calcutta Improvement Act in 1955 on the question of solatium there is already a decision of this Court in the case of the State of West Bengal v. Asitendra Nath, reported in AIR 1973 Cal 478 decided by a Division Bench of this Court constituted by Gupta and Chanda, JJ. Two appeals from the judgment of the Tribunal under Section 72 of the Calcutta Improvement Act were heard by their Lordships. There the question that arose was whether the provisions of the Calcutta Improvement (Amendment) Act of 1955 (West Bengal Act XXXII of 1955) disallowing the statutory allowance under section 23 (2) of the Land Acquisition Act was ultra vires the Constitution due to the infringement of Article 14 of the Constitution. In the main judgment Gupta, J. discussed the decisions of two Supreme Court cases, viz., one reported in AIR 1968 SC 1425 and the other reported in AIR 1965 SC 1017. The first case related to the Madras City Improvement Trust Act having similar provisions to refuse solatium under Section 23 (2) of the Land Acquisition Act and the Supreme Court found a clear case

of discrimination, as it infringed the guarantee of equal protection of law. Relying on the principles of the two Supreme Court decisions, Gupta, J. has held that the provisions of the amendment Act of the Calcutta Improvement Act refusing solatium under Section 23 (2) of the Land Acquisition Act ultra vires the Constitution and void, as it infringes Article 14 of the Constitution. Accepting that decision we find that the contention as raised by Mr. Deb is sound. The claimant-appellant, in view of our findings above, is entitled to statutory allowance at the rate of 15 per cent. under Section 23 (2) of the Land Acquisition Act.

11. In the result, the claimant-appellant shall get solatium at the rate of 15 per cent. on the compensation awarded by the Collector. The claimant shall also be entitled to get interest on the excess amount of solatium at the rate of 6 per cent. per annum from the date of possession till payment is made or deposited. We allow 4 months time from the date of drawing up of the decree to the respondent to pay the said amounts to the appellant failing which the latter will be at liberty to execute the decree.

12. The appeal is thus allowed with costs. The judgment of the Calcutta Improvement Tribunal in Case No. 28 of 1962 (V) is hereby set aside. Hearing fee is assessed at 7 gold mohurs.

SEN GUPTA, J.:— I agree.

Appeal allowed.

AIR 1975 CALCUTTA 357

A. N. SEN AND HAZRA, JJ.

Haridas Mundhra, Appellant v. Mahabir Prasad Juthalal and others, Respondents.

A. F. O. O. No. 76 of 1973, D/- 6-9-1974.

(A) Presidency Towns Insolvency Act (1909), S. 9, Cl. (e) — "His property" — J. D's shares and dividend thereon in hands of receiver — Whether property. (Civil P. C. O. 40, R. 1).

They money (dividend on the shares owned by the judgment-debtor) in the hands of the receiver which was attached by the creditors is the 'property' of the judgment-debtor within the meaning of the words "his property" in Section 9 (e) of the Act.

(Para 22)

The receiver is an officer of the Court. He is not the owner of the property which he takes into his possession. Where the dividend or the money has been realised by the receiver in execution of a decree on shares owned by the judgment-debtor, the receiver is holding the same for payment of his judgment-debts in the suit in which he was appointed; but till payment out of it has been made by him, the dividend realised by him does not cease to be the property of

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the judgment-debtor. The money is held by the receiver for payment of the judgment-debts of the judgment-debtors so the money is held for his benefit. (1877) 5 Ch D 740, Ref. (Para 24)

The definition of the word 'property' under Section 2 (e) of the Act is wide enough to include the money of the judgment-debtor in the hands of receiver at the date of attachment by the decree-holders. AIR 1925 PC 18, Rel. on. (Para 26)

Where the receiver was appointed to collect the amount of dividend of certain shares of the judgment-debtor and then to pay the dividends so collected and the receiver had collected certain amount and was holding the same, but he had not made payment after such collection:

Held: Till he made the payment he was holding the amount which belonged to the judgment-debtor subject to further order of the Court. AIR 1952 Mad 540, Distinguished. (Para 31)

(B) Interpretation of Statutes — Inclusive definition — Interpretation.

The words used in an inclusive definition denote extension and cannot be restricted in any sense. AIR 1960 SC 610, Foll. (Para 23)

(C) Civil P. C. (1908), S. 47, O. 21, R. 2 — Executability of decree — Arbitration Act (1940), S. 21 — Arbitration in execution proceedings — Execution of money decree — J. D. approaching D. H. for accepting lesser amount in final settlement of decree — Dispute as to quantum of lesser amount and mode of payment, referred to arbitration — Award providing that in default of payment of any two instalments, J. D. was to pay entire decretal amount to D. H. — No payment made by J. D. — Decree held did not become unexecutable by reason of award.

At the stage of execution of a money-decree, the judgment-debtor approached the decree-holders for accepting a lesser amount in full and final settlement of the decree. But as the decree-holders and the judgment-debtor could not agree to the amount, the dispute as to the quantum of the lesser amount that the judgment-debtor would pay in full and final satisfaction of the decree and as to the mode in which the lesser amount would be paid by the judgment-debtor were referred to arbitration. The award was made with regard to the dispute relating to satisfaction or discharge of the decree. The award provided that if certain amount (which was much less than decretal amount) was paid within certain time and by certain instalments, the decree-holders would accept the same in full and final settlement of the decretal dues. The award further provided that in default of payment of any two instalments within the stipulated time, the judgment-debtor was to pay the entire decretal amount with interest to the decree-holders. The judgment-debtor did not pay any

amount in terms of the award. The decree-holders therefore applied for leave to execute the decree. Question arose whether by reason of the award, the decree became unexecutable:

Held, that the award meant that if the judgment-debtor did not pay two instalments of the awarded amount then the decree would not be taken as satisfied or discharged and, in that case, his liability to pay the entire decretal amount with interest thereon would remain. The decree and the right to execute the decree were not the subject-matter of the dispute and were not within the scope of dispute referred. The liability to pay under the decree was already there. (Para 42)

It was for the judgment-debtor to take recourse to the legal effect of the award to prove before the executing court that, by reason of the award, the decree was satisfied or discharged. (Para 44)

There was another aspect of the matter. The judgment-debtor in the instant case did not inform the Court any payment or adjustment under the award or that any payment or adjustment should be recorded or certified by the executing Court. Till this was done, the decree held good as valid, subsisting and executable and the executing Court under Order 21, Rule 2 of the Code would execute the money-decree. AIR 1967 SC 1193, Rel. on. (Paras 47 and 49)

(B) Presidency Towns Insolvency Act (1909), S. 13 (4) (b) — Bankruptcy proceedings to extort money from the debtor.

The Court will not permit the bankruptcy proceeding to be used for an inequitable purpose such as to extort money from the debtor. (Para 60)

In course of the proceeding, the parties agreed to adjourn the matter in order to enable the judgment-debtor to make part-payment of the debts due by him. But the judgment-debtor failed and neglected to pay:

Held that it could not be held that the judgment-creditors in the instant case, were guilty of attempted extortion or that the creditors should be precluded from bringing Insolvency Proceedings. (1895) 1 QB 812, Distinguished. (Para 61)

Cases Referred:	Chronological	Paras
AIR 1973 SC 1406 =	(1973) 2 SCC 189	52
AIR 1972 SC 2219 =	(1973) 1 SCR 383	46
AIR 1971 SC 1691 =	1971 Tax LR 952	20
1971 Lab IC 521 =	(1971) 2 Lab LJ 162	19
(Cal)		
AIR 1970 SC 833 =	(1969) 2 SCR 244	32,
		43
AIR 1967 SC 1193 =	(1967) 1 SCR 147	48
AIR 1965 SC 920 =	(1965) 1 SCR 254	53,
		56
AIR 1964 SC 1223 =	(1964) 5 SCR 1098	53,
		56
AIR 1963 SC 385 =	(1963) 2 SCR 285	52
AIR 1963 Cal 25		32
AIR 1963 Mad 217 =	(1963) 1 Mad LJ 113	32

(1962) Unreported Decision, D/- 11-10-1962
(Cal), M/s. Uttam Dugal & Co. v. Union of
India 43
AIR 1961 SC 1077 = (1961) 3 SCR 792 45
AIR 1960 SC 610 = (1960) 2 SCR 866 23
(1960) Suit No. 610 of 1958, D/- 17-3-1960
(Cal) 3
AIR 1957 SC 599 = 1957 SCJ 574 20
AIR 1954 Cal 506 = 58 Cal WN 819 52
AIR 1953 SC 65 = 1953 SCR 377 52
AIR 1952 Mad 540 = (1953) 1 Mad LJ
71 28, 30
AIR 1950 Cal 174 = 54 Cal WN 322 20
AIR 1949 PC 302 = 54 Cal WN 55 52
AIR 1949 Pat 126 = ILR 27 Pat 502 20
AIR 1948 Cal 165 = 82 Cal LJ 278 52
(1939) 43 Cal WN 1194 = ILR (1939) 2
Cal 434 19
AIR 1928 Cal 861 = 32 Cal WN 1107 52
AIR 1925 PC 18 = 52 Ind App 22 20, 25,
26
AIR 1921 PC 23 = 48 Ind App 45 52
(1895) 1 QB 812 = 64 LJQB 521 60, 61
(1877) 5 Ch D 740 = 36 LT 442 19, 24
9 Morr 193 60

HAZRA, J.:— This appeal has been preferred by Haridas G. Mundhra (shortly called 'Haridas Mundhra') against the order of adjudication made by Ajoy K. Basu, J. on 6-3-1973 in an insolvency petition presented by his creditors.

2. On June 19, 1959, a decree was passed by the Bombay High Court in Suit No. 1182 of 1954 in favour of Bai Kamla Bai, Mahabir Prasad Juthalal, Shyam Sundar Juthalal and Kailash Pat alias Arun Kumar Juthalal against Haridas Mundhra for the sum of Rs. 5,09,715.98 P. and interest on the principal sum of Rs. 3,50,000/- at the rate of 4 per cent. per annum and costs. The decree-holders and/or the heirs of the decree-holders transmitted the said decree to this Court for execution.

3. By an order dated March 17, 1960 passed in Suit No. 610 of 1958 in Brahma-putra Tea Co. v. S. B. Industries Development Co. Ltd. and Haridas Mundhra, this Court appointed Mr. S. K. Acharyya, Barrister-at-Law as Receiver over 2005 ordinary shares of Haridas Mundhra with directions to collect the said dividend in respect of such shares. The said Receiver took possession of the said 2005 shares and collected diverse sums of money declared as dividend on the said shares and also the bonus shares issued in respect of the said shares.

4. On an application of the decree-holders, R. M. Datta, J. by an order dated January 27, 1971 granted leave to the decree-holders to attach and otherwise proceed against all moneys lying in the hands of S. K. Acharyya, as Receiver to the extent of the decretal amount mentioned in the decree passed by the Bombay High Court.

5. On or about June 3, 1971, the decree-holders applied for execution of the said decree by attachment of the moneys

and shares belonging to the judgment-debtor Haridas Mundhra lying with Mr. S. K. Acharyya, Receiver to the extent of Rupees 6,71,715.80 P. and further prayed that the said order for execution to be made for the benefit of all the decree-holders including the heirs of the decree-holders who had since died. On June 4, 1971, a notice under Order 21, Rule 22 of the Code of Civil Procedure was issued upon the judgment-debtor Haridas Mundhra. The said notice was duly served upon him, but he did not appear. On February 9, 1972, an order for attachment was passed as prayed for in column 10 of the Tabular Statement. On January 29, 1972 Bai Kamala Bai one of the decree-holders died and the heirs and legal representatives were brought on record.

6. On June 8, 1972, a notice of attachment was issued by this Court under Order 21, Rule 52 of the Code of Civil Procedure for attachment of moneys belonging to the judgment-debtor Haridas Mundhra lying in the hands of Mr. S. K. Acharyya, Receiver. The notice of attachment was served upon the receiver Mr. S. K. Acharyya by the Sheriff of Calcutta and the attachment was levied on June 19, 1972. On September 15, 1972 an insolvency petition was filed in this Court by the said judgment-creditors and/or heirs of judgment-creditors (hereinafter called creditors) for adjudging Haridas Mundhra an insolvent. The act of insolvency mentioned in the petition for order of adjudication is that the said Haridas Mundhra has allowed his properties, namely, the amount of money belonging to him and lying in the hands of the receiver Mr. S. K. Acharyya to be attached or to remain attached for a period of more than 21 days in execution of the said decree passed by the Bombay High Court. It is stated that the attachment is still subsisting.

7-8. On February 23, 1973, Haridas Mundhra, residing at 18-A Loudon Street, Calcutta, affirmed and filed his affidavit in opposition to the said petition. The case of Haridas Mundhra in his affidavit, is inter alia, as follows:—

The petition is mala fide and not maintainable. The petition has been made on deliberate suppression of facts. The shares and moneys alleged to have been attached do not belong to him at all. The said shares were the subject-matter of Suit No. 610 of 1958 instituted in this Court by Brahma-putra Tea Co. Ltd. against S. B. Industrial Development Co. Pvt. Ltd. and himself (Haridas Mundhra) and a decree was passed in that suit inter alia, declaring that the said shares along with other shares which had been pledged by him stood charged for the payment of the dues of the said Brahma-putra Tea Co. Ltd. By an order dated March 17, 1960 passed by this Court in execution of the decree in Suit No. 610 of 1958, Mr. S. K. Acharyya, Barrister-at-Law was appointed receiver to collect the said dividends on the

said shares. He sold his right, title and interest in all the shares of Turner Morrison and Co. Ltd. belonging to him to his wife Sm. Yashoda Devi Mundhra, for valuable consideration. Since then he has no personal interest in the said shares.

9. The applicants have deliberately suppressed from this Court that pursuant to the passing of the decree dated June 19, 1959 in Suit No. 1182 of 1954, the decree-holders and Haridas Mundhra had agreed to refer the matter to the arbitration of Mr. Sailendra C. Sen, Attorney-at-Law, since deceased. Not only the matter in connection with the decree dated June 19, 1959 passed in Suit No. 1182 of 1954 in the Bombay High Court was referred to but also the matter concerning another decree dated April 25, 1961 passed in Suit No. 218 of 1955 in the Bombay High Court was also referred to the said Sri Sailendra C. Sen for arbitration and for finally giving an award on the matters. By his letter dated December 19, 1969, the said Sri Sailendra C. Sen for arbitration and for finally giving an award on the matters. By his letter dated December 19, 1969, the said Sri Sailendra C. Sen forwarded to Haridas Mundhra as also to the applicants copies of the two awards made by him in respect of the above two matters.

10. His further case is that pursuant to the said two awards, he approached Shri Vishnu Dayal Jhunjhunwala representative of the decree-holders in or about end of 1969 and explained to him his difficult financial position and other involvements and also pointed out that the decree-holders' previous application for adjudicating him as an insolvent in respect of the decree passed on April 26, 1961 had failed as his appeal thereto had been allowed and the proceedings had abated against him. It is stated by him that it was thereafter agreed that the said award in respect of the decree dated April 28, 1961 was not to be given effect to. It was also agreed that in respect of the second decree dated June 19, 1959 passed in Suit No. 1182 of 1954, the instalments due to the said award will commence from November 30, 1972, the other terms remaining the same, i.e., that the previous time gaps for the subsequent instalments would be the same.

11. His further case is that on or about January 13, 1973 he met Shri Jhunjhunwala, the representative of the decree-holders and explained his financial difficulties which were still continuing and requested him to grant further time and to reduce the total amount payable by him under the said award. His further case is that although under the said award a total sum of Rs. 1,75,000/- was payable by him, the said Shri Jhunjhunwala, who was authorised to agree on behalf of judgment creditors agreed to reduce the same to Rs. 1,00,000/-, out of which Rs. 20,000/- was to be paid on June 30, 1973 and Rs. 5,000/- on every alternative month thereafter. According to Haridas

Mundhra, it was further agreed that in order to show his bona fide he would also deposit 5000 shares of British India Corporation Ltd. belonging to him, which was agreed to be returned after payment of the first instalment of Rs. 20,000/- payable by the end of June, 1973.

12. He says that in view of the said arrangements and/or agreements and specifically in view of having accepted the said 5000 shares of British India Corporation Ltd., the decree-holders are estopped from proceeding in the above matter in the manner sought to be done. So, according to him the application is misconceived.

13. The learned trial Judge considering the points urged by the learned counsel on behalf of Haridas Mundhra held, inter alia, that in fact there was no real sale of shares by Haridas Mundhra, and the property and title of the shares remained with the judgment-debtor Haridas Mundhra. The learned Judge further held that in the petition for adjudication the award of Sailendra C. Sen, since deceased has not been suppressed as the entire facts about arbitration has been mentioned in column 5 of the tabular statement filed by the petitioners. The learned Judge observed that the award itself says that in default of two instalments, the entire decretal sum will be payable viz., if there is a default in payment of instalments as mentioned in the award the decree will be revived and in this case, Haridas Mundhra has failed to pay any sum in respect of the instalments and, therefore, in the view of the learned Judge, the decree has been revived. The Learned Judge was satisfied that there was a debt in respect of the decree and the judgment-debtor has committed an act of insolvency by allowing the attachment to continue beyond 21 days and the property in respect of these shares were the judgment-debtor's property.

14. The learned Judge was of opinion that act of insolvency set out in the petition has been committed by Haridas Mundhra and passed the order of adjudication.

15. In the appeal before us against the order of the learned judge it is not disputed that Haridas Mundhra is a debtor. Money decree has been duly passed by the Bombay High Court in favour of the respondents or their predecessors-in-interest. There are other money decrees also. The debts of Haridas Mundhra are real debts and his liability to pay the debts is admitted.

16. The question in this appeal is whether the debtor Haridas Mundhra has committed an act of insolvency within the meaning of Section 9 of the Presidency Towns Insolvency Act, 1909 (Act III of 1909) (hereinafter called the Act) and whether the learned Judge was right in passing the order of adjudication adjudging him an insolvent.

17. The petition by the creditors has been made under Section 9, sub-section (e) of the Act. Section 9, sub-section (e) reads:

"S. 9. Act of Insolvency, A debtor commits an act of insolvency in each of the following cases namely:

** ** **

(e) if any of his property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money.

* * *

18. The first point which arises in the appeal is whether the money in the hands of the receiver S. K. Acharyya which has been attached by the creditors is the money or property of the debtor Haridas Mundhra.

19. Mr. Somnath Chatterjee with Mrs. Munjula Bose appearing for the debtor Haridas Mundhra contended that it is not his property. Mr. Chatterjee referred to Kerr on Receivers, 13th Edition at page 134 and submitted that in appointing a receiver the Court appoints an officer of its own to take possession of the property over which he is appointed. He also referred to page 145 of the same book and relied on the English decision of Taylor v. Eckersley, (1877) 5 Ch D 740 and submitted that possession of the receiver has taken the money out of the order and disposition of Haridas Mundhra. Mr. Chatterjee referred to the definition of the word 'property' in Section 2, sub-section (e) of the Act. He stressed on the words "over which or the profits of which any person has a disposing power" and submitted that as Mr. Acharyya, the receiver took possession of the shares and realised the dividend or money, Haridas Mundhra had no disposing power over the same and so it was not his property. He also cited 1971 Lab IC 521 = (1971) 2 Lab LJ 162 (Cal) and submitted that a bonus payable to an employee is not property which vests in the Official Assignee. He mentioned the case of In re: Ignatius Rodrick, reported in (1939) 43 Cal WN 1194, where before Pankridge, J. it was conceded that a pension payable by the Government is not property of the insolvent within the meaning of Section 7 of the Presidency Towns Insolvency Act, which vests in the Official Assignee on the making of an order of adjudication and the learned Judge held: "This is in accordance with Section 2 (e) of the Act, by which 'property' includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit."

20. On this point the argument of Mr. S. K. Gupta, the learned counsel for the respondents is as follows:

Mr. Gupta referred to Section 2 of the Act and stressed on the words "unless there is anything repugnant in the subject or context" mentioned in the beginning of the section. He also referred to the definition of the word "property" in Section 2 (e) and

submitted that the definition of "property" as defined in that section is an "inclusive definition." It says:

"'property' includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit."

Mr. Gupta contended that the words "which he may exercise for his own benefit" in the section signify that the cases of trustees, agents executors and administrators, who have no beneficial interest and may not use property for their own benefit are not included. But otherwise, if any property may be used for the benefit of any person, he has disposing power over it and the same is included within the meaning of the word. Mr. Gupta submitted that the money in the hands of the receiver Mr. S. K. Acharyya is the property of the judgment-debtor Haridas Mundhra. Mr. Gupta contended that the definition of property in Section 2 (e) should not be imported in Part III of the Act relating to administration of property. He submitted that Section 46 relates to debts provable in insolvency. He relied on the decision of Sat Narain v. Behari Lal, reported in 52 Ind App 22 = (AIR 1925 PC 18). He referred to Section 60 of the Code of Civil Procedure as the property liable to attachment and stresses on the words "belonging to the judgment-debtor or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf." He also referred to Order 21, Rule 52 of the Code of Civil Procedure relating to attachment of property in custody of Court or public officer and submits that if mere appointment of receiver would make the property not attachable, then Order 21, Rule 52 of the Code would be nugatory. He submitted that the receiver is not the owner of the property. He relied on the case of Province of West Bengal v. Bholanath Sen reported in AIR 1950 Cal 174 and submitted that the security deposit can be attached in execution of the decree and that the effect of security deposit does not take away entirely the disposing power of the depositor. He also referred to AIR 1949 Pat 126 (P. C. Lal Choudhury v. Commr. of Income-tax) and submitted that a mortgagee is not the owner because even in regard to a mortgage in English form, the legal estate still vests in the mortgagor and the income of the property belongs to the mortgagor. He also referred to AIR 1957 SC 599 (Amar Singh v. Custodian, Evacuee Property, Punjab) at page 605 and submitted that vesting of the property in the Custodian of evacuee property does not mean that ownership of the property is lost. He referred to AIR 1971 SC 1691 (Ahmed G. H. Ariff Etc. v. Commr. of Wealth Tax Calcutta), as to the definition of the word 'property' under the Wealth Tax Act.

21. Mr. Gupta submitted that it is dangerous to bring the conception of 'property' divisible among creditors in Sec. 52 of the Act while interpreting the meaning of the word 'property' in other sections of the Act. He also pointed out that under Section 27 of the Security Control Act (Act 42 of 1956) Haridas Mundhra has title to the shares and the dividend. The receiver collected the dividend on the shares which belong to Haridas Mundhra. Any suspension of the power of disposal by the appellant Haridas Mundhra by reason of the appointment of the receiver will not make it any less the property of Haridas Mundhra.

22. On the point whether the money in the hands of the receiver which was attached by the creditors is the property of the judgment-debtor, I am inclined to accept the argument of Mr. Gupta that it is the property of Haridas Mundhra within the meaning of the words "his property" in Section 9 (e) of the Act. I am giving my reasons as hereunder:

23. The meaning of the word 'property' in Section 2 (e) of the Act is that it includes any property over which or the profits of which he has disposing power which he may exercise for his own benefit. The word 'includes' in Section 2 (e), gives the word 'property' wider denotation. The words used in an inclusive definition denote extension and cannot be restricted in any sense. It is appropriate to quote here the dictum of the Supreme Court in the case of *State of Bombay v. Hospital Mazdoor Sabha* reported in AIR 1960 SC 610. At p. 614, paragraph 10, of the report Gajendragadkar J. observed as follows:

"It is obvious that the words used in an inclusive definition denote extension and cannot be treated as restricted in any sense. (Vide: Stroud's 'Judicial Dictionary' Vol. 2, p. 1415). Where we are dealing with an inclusive definition it would be inappropriate to put a restrictive interpretation upon terms of wider denotation."

24. Mr. S. K. Acharyya as receiver in execution of the decree in Suit No. 610 of 1958 is holding certain money or property. The receiver is an officer of the Court. He is not the owner of the property which he takes into his possession. Then who is the owner of the same at the date of attachment? The dividend or the money has been realised by the receiver on shares owned by Haridas Mundhra. The receiver is holding the same for payment of judgment debts of Haridas Mundhra in the suit in which he was appointed but till payment out has been made by him the dividend realised by him does not cease to be the property of the judgment-debtor, Haridas Mundhra. The money is held by the receiver for payment of the judgment debts of Haridas Mundhra, so the money is held for the benefit of Haridas Mundhra. The English case of *Taylor v.*

Eckersley (reported in (1877) 5 Ch D 740), relied on by the learned counsel for the appellant deals with the question as to the effect of appointment of receiver and possession of the receiver in a chancery action. The headnote of the decision runs thus:

"In an action to enforce an agreement by B, an innkeeper, to give a bill of sale of his furniture and effects, A. obtained the appointment of a receiver, who entered into possession on the 16th of March 1876, and served the customers. During the night B. absconded and next day (the 17th of March) filed a liquidation petition, under which a receiver was appointed in bankruptcy. The two receivers remained in joint possession:—Held, that the case did not fall within the provisions of the Bills of Sale Act 1854, and that the possession of A's receiver had taken the goods out of the order and disposition of B. at the time of his bankruptcy; and accordingly that the title of A prevailed over that of B's trustee in bankruptcy."

25. In that case it was held that title of A. prevailed over B the trustee in bankruptcy. Question of priority of title between A and trustee in bankruptcy was determined in that case. That is a different aspect of the matter. In the instant case all that is necessary to see is whether any property of the debtor Haridas Mundhra has been attached in execution of the decree of the Bombay High Court and for this purpose I must consider the definition of the word "property" given in the Act. I am quoting here the observation of the Privy Council in *Sat Narain's case* reported in 52 Ind App 22 at p. 30 = (AIR 1925 PC 18 at p. 22). It runs thus:

"Their Lordships are of opinion that the question to be decided in this appeal must be decided on the wording of the Presidency Towns Insolvency Act, 1909, and on that Act alone. Cases which have arisen under Section 266 of the Code of Civil Procedure, 1882, or under Section 60 of the Civil P. C., 1908, depended on different considerations, and decisions in cases under those sections are likely to mislead a Court which has to construe the Presidency Towns Insolvency Act, 1909."

26. In my view, the definition of the word 'property' under Section 2 (e) of the Act is wide enough to include the money of Haridas Mundhra in the hands of receiver at the date of attachment. The meaning of the word 'property' in part III of the Act relating to administration of property and proof of debts has to be understood with reference to the definition in Section 2 where the said definition will apply "unless there is something repugnant to the subject or context." In this connection it is appropriate to quote the observation of the Privy Council in *Sat Narain's case*: 52 Ind App 22 at p. 38 = (AIR 1925 PC 18 at p. 26) which is as follows:

"But the definitions in S. 2 are only to apply "unless there is something repugnant in the subject or context"; and it is necessary therefore to consider the effect of the definition of 'property' contained in that Section in relation to the subject-matter which is being dealt with and the other sections of the Act."

27. In the instant case the creditors say that only traceable asset of Haridas Mundhra which they could attach is the money of the debtor Haridas Mundhra in the hands of the receiver. The power of disposal of the property by Haridas Mundhra may be absent temporarily by reason of the appointment of the receiver, but it is his property which is attachable with leave of the Court.

28. Mr. Chatterjee then submitted that the order dated March 17, 1960 has the effect of payment out of money by the Receiver and so, Haridas Mundhra ceases to be the owner of the money in the hands of the Receiver. On this point Mr. Chatterjee relied on a judgment of a single Judge of the Madras High Court in the case of V. T. Ranga Bashyam Chetty v. Sambandam Chetty reported in AIR 1952 Mad 540. Mr. Gupta on the other hand submitted that the order dated March 17, 1960 is a general order and no payment out of any money has been made by the Receiver. The order dated March 17, 1960 has not been included in the paper book. But Mrs. Manjula Bose, the learned counsel for Haridas Mundhra handed over a copy of the order to us during the argument. The said order dated March 17, 1960 by A. N. Ray, J. (as he then was), was passed in Suit No. 610 of 1958. By the said order, the learned Judge appointed Mr. S. K. Acharyya, Barrister-at-Law as the Receiver to collect the dividend on 2005 shares of Turner Morrison and Co. Private Ltd. standing in the name of Haridas Mundhra and others in execution of the decree in that suit. It was further ordered that the said Receiver

"do receive the said dividend as aforesaid It was further ordered that the said Receiver do pay the said dividend so collected (less costs of realisation and the commission payable to him as his remuneration) to the plaintiff company in part satisfaction of the decretal dues"

29. Now what is the effect of the order dated March 17, 1960? Has it the effect of payment out of the money in the hands of Receiver? The order was that the Receiver should realise the dividend on the shares. After the order, the Receiver realised the dividend. But has he paid out? At no stage in the execution proceeding it is stated that the Receiver has paid out any sum out of the dividend realised by him. The decree-holders in the suit in which Receiver was appointed did not ask for payment out.

30. In Ranga Bashyam Chetty's case reported in AIR 1952 Mad 540 relied on by

Mr. Chatterjee, what happened was that by a decree in a suit the applicant became entitled to a certain sum out of the entire sums standing in the credit of that suit. He asked for payment out of a particular amount being the balance of the amount to which he was entitled to. The learned Master passed an order ordering payment out. Thereafter, an order for attachment of the money standing to the credit of the applicant in that suit was issued by the Court of Small Causes in execution of another decree in another suit. The attachment was subsequent to the order of payment out. Though the attachment was subsequent to the order for payment out a cheque was issued in favour of the applicant in pursuance of the order. The contention on behalf of the applicant in that case was that once an order has been made for payment out, there is no fund in Court available for attachment and that the order of attachment must have been returned with the endorsement that there was no fund in Court available for attachment. Krishna-swami Nayudu, J. on the facts of that case, held at page 541 of the report (AIR 1952 Mad 540):

"Further, once, an order for payment out has been made, it must be treated that the property in these moneys has passed to the person in whose favour the order has been made; and from that date of the order, the person, who has got the payment out order in his favour, becomes the owner of the moneys, notwithstanding that he may not have got actual possession of the same."

31. In my view, the Madras case is distinguishable from the facts of this case. In the Madras case, there was certain fund in Court and payment out was made out of the funds lying in Court. In the order dated March 17, 1960, the receiver was appointed to collect the amount of dividend of certain shares of Haridas Mundhra and then to pay the dividends so collected. The receiver has collected certain amount and is holding the same, but he has not made payment after such collection. Till he makes the payment he is holding the amount which belongs to the judgment-debtor subject to further order of the Court. There is no order for payment out of any particular sum in this case as in the Madras case. The attachment was made on notice to the judgment-debtor and to the receiver. It is not stated by the receiver that he paid out the money or that the money in his possession is not the money of Haridas Mundhra or that there is no money of Haridas Mundhra in his hands liable to attachment. In my view the order dated March 17, 1960 did not have the effect of divesting the rights and interests of Haridas Mundhra in respect of the dividend collected and returned by the Receiver at the date of attachment.

32. The next question raised in the appeal is that the decree of the Bombay High Court was not executable and the order of attachment in execution of such a decree can-

not be made. Mr. Chatterjee argued that claim under the decree of the Bombay High Court in Suit No. 1182 of 1954 has merged in the award dated December 9, 1969 made by the arbitrator Mr. S. C. Sen. Mr. Chatterjee referred to the case of Satish Kumar v. Surindra Kumar reported in AIR 1970 SC 833 and submitted that the award is not a mere waste paper. He also submitted that the question of validity of attachment can be gone into by the Insolvency Court and referred to the case of R. M. Subramaniam v. N. Sundaram Iyer reported in AIR 1963 Mad 217 and the case of In re: a Debtor reported in AIR 1963 Cal 25. Mr. Chatterjee argued that the Court has no power to make the order of attachment as the decree has become "non est" by reason of the award.

33. Mr. S. K. Gupta on the other hand argued that the decree of the Bombay High Court was valid, operative and executable. The decree has not been affected by the award.

34. In view of the argument made by Mr. Chatterjee, the question which has to be considered is whether by reason of the award, the decree of the Bombay High Court has become inexecutable. The point taken by Mr. Chatterjee is not that there is no decree of the Bombay High Court, but that the decree of the Bombay High Court has merged in the award and so there is no executable or operative decree.

35. The decree of the Bombay High Court is dated June 19, 1959. After the said decree, the decree-holder took steps to execute the decree. At that stage the judgment-debtor Haridas Mundhra approached the decree-holder to accept a lesser sum in full and final settlement of the decretal amount. The decree-holder and judgment-debtor could not agree to any figure and both the decree-holders and the judgment-debtor approached Mr. Sailendra C. Sen, who had been the Solicitor for the parties, with a request to him to arbitrate in the dispute. An arbitration agreement was entered into between the decree-holders on the one hand and Haridas Mundhra on the other, wherein all disputes between them regarding the quantum of the amount which will be payable by the judgment-debtor Haridas Mundhra to the decree-holder in full and final settlement of their claim under the decree and the mode of payment thereof were referred to arbitration of Mr. Sailendra C. Sen. This will appear from a copy of the arbitration agreement dated June 1, 1969 which was placed before us by Mr. Gupta in course of his argument, we considered the same as admittedly the arbitration agreement was entered into before the parties and the learned counsel for both parties relied on the same. The award dated December 19, 1969 annexed to the affidavit of Haridas Mundhra also mentions that the arbitration agreement was made on June 1, 1969 between Bai Kamala Bai and others as decree-holders and Haridas Mundhra as

judgment-debtor and that the dispute between them was regarding the quantum of the amount which would be payable by the judgment-debtor to the decree-holder in full and final settlement of their claim under the decree dated June 19, 1959 passed in Suit No. 1182 of 1954 in the Bombay High Court and the mode of payment thereof.

36. The scope of the dispute and difference between the decree-holders and the judgment-debtor Haridas Mundhra and the scope of the reference to the arbitrator will appear from the said arbitration agreement and the award. I will quote here the relevant portion of the award of Mr. Sailendra Sen.

"I award that if Sri Haridas Mundhra pays to the decree-holders a sum of Rupees 1,75,000/- (Rupees One Lakh and Seventy-five Thousand) only with interest thereof @ 6 per cent. per annum from the date hereof in the manner following, that is :—

(a) Rs. 35,000/- with interest at the aforesaid rate by 15th February, 1970;

(b) Rs. 50,000/- with interest at the aforesaid rate by 15th April 1970;

(c) Rs. 50,000/- with interest at the aforesaid rate by 15th June, 1970; and

(d) Rs. 55,000/- with interest at the aforesaid rate by 15th August, 1970;

Then and in such case the decree-holders will accept the same in full and final settlement of their decretal dues in the said Suit No. 1182 of 1954 hereinbefore mentioned.

I further award that in default of payment of any two instalments with interest within the stipulated time the judgment-debtor Sri Haridas Mundhra shall pay to the decree-holders the entire decretal amount of Rs. 5,09,715.08 with interest @ 4% per annum on Rs. 3,50,000/- from 19th June, 1959 (being the date of the decree) till repayment thereof as provided in the decree dated 19th June, 1959 in the said Suit No. 1182 of 1954 in the High Court at Bombay mentioned above.

I further direct that each party will bear and pay its costs.

Dated this 19th day of December, 1969.
Sd/- S. Sen, Arbitrator."

37. It was stated before us that although the award was filed on August 6, 1970, by Mr. S. C. Sen, till the month of July 1973 everybody was under the bona fide belief that the award was not filed. Admittedly, the judgment-debtor Haridas Mundhra has not paid any instalment in terms of the award.

38. Thus, it appears that the decree of the Bombay High Court was sought to be executed by the decree-holders and at the execution stage the judgment-debtor, Haridas Mundhra approached the decree-holders for accepting a lesser amount in full and final settlement of the decree. But as the decree-holders and the judgment-debtor could not

agree to the amount, the dispute as to the quantum of the lesser amount that the judgment-debtor will pay in full and final satisfaction of the decree and as to the mode in which the lesser amount would be paid by the judgment-debtor were referred to arbitration. The award was made with regard to the dispute relating to satisfaction or discharge of the decree.

39. It seems to me that with regard to the existence of the decree or the right to execute the decree there was no scope for raising any dispute and no dispute was raised. The decree-holders who have obtained the decree from the Bombay High Court have right to execute the decree and to adopt whatever mode of execution which law allows them for execution of money decree, whether the judgment-debtor Haridas Mundhra likes it or not. With regard to this matter there was no dispute but the dispute was raised with regard to the discharge or satisfaction of the decree. Very often real trouble begins after the decree-holder obtains a money decree. How to realise the decretal amount, the fruits of the judgment? It may be that a decree-holder may decide to accept a lesser sum in discharge or satisfaction of the decree, if the judgment-debtor makes payment or really wants to pay. In the instant case, the judgment-debtor Haridas Mundhra did not say that he will not pay but approached the decree-holders to settle the matter by accepting less than the decretal amount and by instalments. Here the parties could not agree as to what that lesser sum would be and what would be the mode of payment of the instalments. These matters were referred to arbitration by the parties and the arbitrator gave his award relating to discharge or satisfaction of the decree.

40. The arbitrator has awarded that if certain amount, namely, Rs. 1,75,000/- (which is much less than the decretal amount of Rs. 3,50,000/-) is paid within certain time and by certain instalments, the decree-holders will accept the same in full and final settlement of the decretal dues.

41. Now, after the award, the decree-holders who have right to execute the decree have applied for leave to execute the decree of the Bombay High Court by attachment of money in the hands of Receiver. At the execution stage, it is for the judgment-debtor, Haridas Mundhra to take the plea that the decree has become satisfied or settled or adjusted by reason of his payment in terms of the award. But this was not done by the judgment-debtor, obviously because he has not paid any amount in terms of the award. The award further provides that in default of payment of any two instalments within the stipulated time, the judgment-debtor shall pay the entire decretal amount with interest thereon to the decree-holders.

42. This part of the award in my view, means that if the judgment-debtor does

not pay two instalments of the awarded amount then the decree will not be taken as satisfied or discharged and in that case his liability to pay the entire decretal amount with interest thereon would remain. The decree of the Bombay High Court cannot be the subject-matter of the dispute. The liability to pay under the decree is already there. But with regard to the amount and the mode of discharge or satisfaction of the decree which is the subject-matter of the dispute, the arbitrator in this part of the award says that if there is a default in payment by the judgment-debtor in certain manner, the decree will not be settled or discharged. In my view the decree of the Bombay High Court and the right to execute the decree are not the subject-matter of the dispute and are not within the scope of reference.

43. Mr. Chatterjee strongly relied on the observation of the Supreme Court in Satis Kumar's case reported in AIR 1970 SC 833, where the Supreme Court observed:

"The award is not a mere waste paper, but has some legal effect. It is final and binding on the parties and cannot be said that it is waste paper unless it is made a rule of the Court."

In that case question arose whether an award given under the Arbitration Act on a private reference requires registration under Sec. 17 (1) (b) of the Registration Act if the award affects immovable property over the value of Rs. 100/-. The Supreme Court in that case followed its previous unreported decision in M/s. Uttam Dugal and Co. v. Union of India decided on 11-10-1962, where the following observations were made by the Supreme Court:

"The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced no action can be started on the original claim which had been the subject-matter of the reference."

In this connection I shall quote the observation of Hegde, J. at page 337 of the report (AIR 1970 SC 833):—

"The award does create rights in that property but those rights cannot be enforced until the award is made a decree of the Court. It is one thing to say that a right is not created, it is an entirely different thing to say that the right created cannot be enforced without further steps."

44. All judgments should be confined to the facts of the case which is before the Court. But so far as the dictum of the Supreme Court in that case which is of

general nature the question is how far the same is applicable under the facts of this case. In this case, the award is that the judgment-debtor shall pay by certain instalments and if those instalments are paid, the decree will be taken as satisfied. Having regard to the judgment of the Supreme Court, this award is not a mere waste paper, but has some legal effect. It is for the judgment-debtor to take recourse to the legal effect of the award to prove, before the executing Court that by reason of the award the decree is satisfied or discharged.

45. Mr. Gupta in this connection referred to a decision of the Supreme Court in the case of Kashi Nathsa Yamosa Kabadi v. Narsingasa Bhaskarasa Kabadi reported in AIR 1961 SC 1077 at p. 1083 where the Supreme Court observed as follows:

"It may be sufficient to observe that where an award made in arbitration out of Court is accepted by the parties and it is acted upon voluntarily and a suit is thereafter sought to be filed by one of the parties ignoring the acts done in pursuance of the acceptance of the award, the defence that the suit is not maintainable is not founded on the plea that there is an award which bars the suit but that the parties have by mutual agreement settled the dispute, and that the agreement and the subsequent acts of the parties are binding."

46. Mr. Gupta also invited our attention to a later decision of the Supreme Court in Padmaraja v. Dhanavathi reported in AIR 1972 SC 2219 at p. 2223, where Hegde, J. observed:—

"After the coming into fore of the Arbitration Act, 1940, all awards had to be compulsorily made decrees of the Courts if they were to have any force."

47. There is another aspect of the matter which has been argued by Mr. Gupta. Under Order 21, Rule 2 of the Code of Civil Procedure, unless a payment or adjustment is certified or recorded, the Court executing the decree shall not recognise the same. The judgment-debtor in the instant case did not inform the Court any such payment or adjustment under the award or that any payment or adjustment should be recorded or certified by the executing Court. Till this is done, the executing Court under Order 21, Rule 2 of the Code will execute the money decree. Therefore, the attachment was validly made by the executing Court.

48. In the case of M. P. Shreevastava v. Mrs. Veena, reported in AIR 1967 SC 1193, the Supreme Court held that Order 21, Rule 2 of the Code prescribes a special procedure for recording adjustment of a decree, or for recording payment of money paid out of Court under any decree. The principle of Section 47 of the Code is that all questions relating to execution, discharge or satisfaction of a decree and arising between the parties to the suit in which the decree is

passed, shall be determined in the execution proceeding, and not by a separate suit.

49. In my view, the decree of the Bombay High Court has not merged in the award. If payments were made in terms of the award of the private arbitrator, the judgment-debtor could have informed the executing Court of such payment or adjustment of the decree for recording the same as certified. As the judgment-debtor Haridas Mundhra did not make any payment in terms of the award and as no payment or adjustment has been recorded or certified the executing court would not recognise the award. So far as the judgment-debtor Haridas Mundhra is concerned the award has lost its force by reason of the non-payment of the awarded amount in terms of the award, so far as the decree-holders are concerned, the decree of the Bombay High Court still holds good as valid, subsisting and executable. In view of the above matter I do not agree with the observation of the learned Judge in the Court below that as Haridas Mundhra has failed to pay any sum in terms of the award the decree has been revived.

50. Mr. S. K. Gupta then argued that the judgment-debtor Haridas Mundhra cannot raise the plea that the decree has become invalid or not executable by reason of the award on the doctrine of *res judicata* or principles analogous thereto.

51. Application for leave to attach the property was made on notice to the receiver and to Haridas Mundhra. They did not choose to appear and order was passed granting leave to attach and otherwise proceed against the moneys in the hands of the Receiver. The application for execution of the decree on tabular statement was made on notice to the judgment-debtor and order for attachment was made in terms of col. 10 of the tabular statement. The decree-holders put the decree on execution on notice to the judgment-debtor. The judgment-debtor Haridas Mundhra did not appear. He was given opportunity to raise the points which he wanted to raise now. The court would have decided the said points if Haridas Mundhra raised the same but this was not done. If any objection was made to the attachment on the ground that the property was not liable to attachment, the executing court would have proceeded to investigate the claim or objection. This was not done. No appeal was preferred against the order of attachment. Therefore the judgment-debtor Haridas Mundhra is estopped from raising the plea that the decree was not executable.

52. Mr. Gupta cited the case of Raja of Ramnad v. Velusami Tevar, reported in 48 Ind App 45=(AIR 1921 PC 23) and argued that no appeal was brought against the order of attachment and, therefore, it stands as binding between the parties. He also relied on the case of Shivaraj Gopalji v. Ayissa

Bi, reported in 54 Cal WN 55 = (AIR 1949 PC 302) and submitted that it would be contrary to the principle of *res judicata* to allow Haridas Mundhra to raise the same plea over again which he could have raised before the executing court. He also relied on the case of *Kanak Prova Devi v. Dharendra Nath Roy*, reported in AIR 1928 Cal 861 = (32 Cal WN 1107) and the case of *Aswini Kumar v. Karamat Ali*, reported in AIR 1948 Cal 165 and submitted that the order passed in execution proceedings implied an adjudication that the decree was executable and as this order had stood unchallenged either by way of review or by way of appeal, the judgment-debtor was precluded from raising the plea of limitation. He also relied on a decision of the Supreme Court in the case of *Mohanalal v. Benoy Krishna*, reported in AIR 1953 SC 65 and the case of *Nirmal Enem Horo v. Jahan Ara Jaipal Singh*, reported in AIR 1973 SC 1406 on the principle of constructive *res judicata* and also the case of *Newton Hickie v. Official Trustee of West Bengal*, reported in AIR 1954 Cal 506 and unreported decision of this court by G. K. Mitter, J. (as he then was) in the matter of Arbitration between *Khardah Co. Ltd. v. Morgan Walker & Co.* He also cited the decision of *Vithal Yeshwant v. Shikandarkhan*, reported in AIR 1963 SC 385.

53. Mr. Chatterjee on this point submitted that the principle of *res judicata* cannot apply because Insolvency Court can always go behind the decree. Mr. Chatterjee referred to the case of *State of Punjab v. Rattan Singh*, reported in AIR 1964 SC 1223 and the case of *The Official Receiver Kanpur v. Abdul Shakoor*, reported in AIR 1965 SC 920. Mr. Chatterjee submitted that the question before the Insolvency Court is not merely whether factually there was attachment or not, but the question is whether there was valid attachment of the property of the debtor.

54. Although there may be some force in the argument of Mr. Gupta, in the view of the matter which I have already taken, it seems to me that it is not necessary to go into the question of *res judicata* raised by Mr. Gupta.

55. The principle of law is well established that an Insolvency Court is not precluded from enquiring into the question whether a debtor is a real debtor who is liable to pay the sums said to be payable by him. It is well established that the Insolvency Court can both at the time of hearing of the petition for adjudication of a person as an insolvent and subsequently at the stage of the proof of debts reopen the transaction on the basis on which the creditor has secured the judgment of a Court against the debtor. The court has that right independently of the conduct of the debtor or of the creditor or anyone else. The Court is not estopped from the conduct of the parties, but has the right to enquire into the debt to see whether there is a real creditor. The Court exercising juris-

diction under the Insolvency Act, can go behind the judgment and enquire whether, notwithstanding the judgment, there was a good debt. In doing so the Insolvency Court does not set aside the judgment, the Court goes round the judgment.

56. The above principle has been affirmed by the Supreme Court in AIR 1964 SC 1223 and AIR 1965 SC 920 cited by Mr. Chatterjee. But it is not necessary, in the instant case, to go into the question of real nature of the debt. All parties are proceeding on the basis that Haridas Mundhra is a debtor and that there is a real judgment-debt. The only question is whether Haridas Mundhra has committed an act of insolvency. The act of insolvency here is attachment of the property of Haridas Mundhra for not less than 21 days in execution of the money decree of the Bombay High Court. Execution means the process for enforcing the decretal amount or the process to give effect to the judgment-debtor which the judgment-debtor is bound to pay in any of the modes for execution stipulated under the Code of Civil Procedure. The decree-holders have complied with the procedure for attachment of the money decree. The judgment-debtor had notice at every stage of the execution proceeding, but did not raise any objection that there was no executable decree or that this was no valid attachment. No appeal was preferred against the order of attachment passed by the Court.

57. Even if I accept the argument of Mr. Chatterjee, that validity of the attachment can be gone into by the Insolvency Court, in the aforesaid view of the matter which I have taken it seems to me that there was not only "de facto" attachment in execution of the money decree of the Bombay High Court for much more than the statutory period of 21 days but the attachment was valid in law. So, the requirements of Section 9 (e) of the Act have been complied with.

58. Mr. Chatterjee then argued that the application by the decree-holders has not been made bona fide. The object of the petitioning creditors is to obtain money by putting pressure. He submitted that the Insolvency petition was taken out on September 15, 1972. In the affidavit-in-opposition Haridas Mundhra stated that on January 13, 1973, he met Shri Jhunjhunwalla, the representative of the decree-holders and explained to him his financial difficulties and requested him for further time be granted to him under the award.

59. In the affidavit-in-reply affirmed by Biswanath Agarwalla, on March 1, 1973 on behalf of the decree-holders it is stated that during the second week of January 1973 the deponent had a talk with Mr. Jhunjhunwalla in his presence when it was agreed by and between the deponent and Mr. Jhunjhunwalla that the deponent would pay a cash

sum of Rs. 50,000/- within the end of that week and if he pays the said sum of Rupees 50,000/- in accordance with the agreement as aforesaid then the petitioning creditors would agree for a long adjournment of the pending petition in order to accommodate the deponent to pay the balance decretal dues inclusive of interest amounting to Rs. 6,77,760.08 p. in terms of the notice dated February 9, 1972. It is also stated that the deponent however failed and neglected to pay the said sum of Rs. 50,000/- or any part thereof by the end of the said week. In view of the said affidavits Mr. Chatterjee argued that this agreement shows that the petitioning creditors wanted to put pressure on the judgment-debtor to realise the money.

69. Under Section 13, sub-section (4) (b), of the Act the Court shall dismiss the petition if the debtor appears and satisfies the Court that he is able to pay his debts or that he has not committed an act of Insolvency or that for other sufficient cause no order should be made. The Court will not permit the bankruptcy proceeding to be used for an inequitable purpose such as to extort money from the debtor. In the case *In re Otway* reported (1895) 1 QB 812 relied on by Mr. Chatterjee, the debtor had a life interest which ceased on bankruptcy, in the income of certain property. He had no other property. He proposed to insure his life and to set aside half his income for the purpose of keeping up the insurance, and paying his creditors a composition of 10s. in the pound. The petitioning creditor did not agree to this proposal, and a receiving order was made on his petition. On appeal, it was held by Lord Esher, M. R. that the fact that the effect of a receiving order would be to deprive the debtor of the only asset available for the payment of a composition to his creditors was a sufficient cause why no order should be made. The petitioning creditor endeavoured to obtain 25£ from the debtor as a condition for agreeing to an adjournment of the petition. At page 813 of the report, Lord Esher, M. R. observed:

"It seems to me that both points taken and made out are against the propriety of this petition being allowed to stand. One point is that the petitioning creditor holds out his hand, and says, 'If you will give me 25£ I agree to an adjournment,' is it an honest proceeding on the part of the petitioning creditor in a bankruptcy that he should be putting into his pocket 25£ in this manner? The case cited to us, *In re: Atkinson, Ex Parte Atkinson* (9 Morr 193) decides that such a transaction is a fraud on the other creditors and a fraud on the Bankruptcy Court. Though this petitioning creditor did all he could to commit a fraud he did not do it effectually, because the 25£ was not forthcoming; but he did all he could to get the money; and in so doing he was committing a fraud, and on that ground, and that

ground alone, he could not be allowed to go on with the petition."

61. In my view, the said observation of Lord Esher, M. R. should be confined to the facts of that case. The Insolvency Court may dismiss a petition for any sufficient cause. What is sufficient cause will depend upon the circumstances of each case. In the case of *In re: Otway*, (1895) 1 QB 812 the Court was satisfied that the debtor's sole asset (which he had proposed to pay a composition to his creditors) would be destroyed by his bankruptcy and further, the petitioning creditor had improperly attempted to extort costs from the debtor. So the petition was dismissed by the learned Master of the Rolls. But on the facts of this case, it does not seem to me that the creditors are guilty of extortion or abuse of the process of Court. In the instant case, in course of the proceeding, the parties agreed to adjourn the matter in order to enable the judgment-debtor to make part-payment of the debts due by him. But the judgment-debtor failed and neglected to pay. I do not think that the judgment-creditors in the instant case, are guilty of attempted extortion or that the creditors should be precluded from bringing Insolvency proceeding.

62. In view of the above matter I am unable to accept the argument of Mr. Chatterjee on this point.

63. I agree with the order passed by the learned Judge.

64. This appeal will, therefore, be dismissed with costs. Certified for 2 Counsel.

A. N. SEN, J.:— I agree.

Appeal dismissed.

AIR 1975 CALCUTTA 368

SANKAR PRASAD MITRA, C. J. AND
SALIL KUMAR DATTA, J.

Collector of Customs and Central Excise, West Bengal and others, Appellants v. Hindustan Motors Ltd. and another, Respondents.

Appeals Nos. 47 and 72 of 1973, D/- 14-3-1975.

(A) Customs Act (1962), Ss. 110 (2) and 124 (a) — Seizure of goods — Notice before confiscation — Period for — Extension of by ex parte order — Validity.

When goods seized under Section 110 are proposed to be confiscated, a notice to the owner of goods showing grounds for the confiscation, has to be given within six months. This period cannot be extended by the Customs Authorities by an ex parte order for, the power under the proviso to Section 110 (2) is quasi judicial or at any rate one requiring a judicial approach. Consequently, an opportunity of being heard has to be given before orders for extension of that period are

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made. AIR 1972 SC 689, Rel. on; Appeal No. 122 of 1969 (Cal), Considered.

(Para 25)

(B) Evidence Act (1872), S. 115 — Waiver — Submission to Court's order — When does not amount to waiver — (Customs Act (1962), Ss. 40 and 124).

The Collector of Customs had passed an ex parte order extending the period of notice under Section 110 (2). The High Court on writ petition set aside that order and directed the release of goods. The Customs Authorities filed appeal and applied for stay of order setting aside the ex parte order. The owners respondents resisted this application for stay and insisted on the release of the goods. The Appellate Court put the respondents on terms. The effect of the Appeal Court's order was that the respondents could take advantage of the Trial Court's order for release of the goods provided that they furnish a bank guarantee and also undertook to renew the guarantee as and when required till the disposal of the appeal. The respondents submitted to this order. This not being an order by consent in the strict sense, did not amount to waiver of any right of the respondents. AIR 1974 SC 150, Disting.

(Para 32)

(C) Customs Act (1962), Ss. 110 (1) and 124 (a) — Notice under S. 124 (a) — Necessity when arises — Seizure and prohibition — Difference.

An order of Customs Authorities asking the owner of goods not to remove them except with permission may amount to prohibitory order but when there was an overt act of sealing the packed and repacked goods, that amounted to exercise of dominion over the goods and it was an act of seizure of goods within the meaning of Section 110 (1) requiring notice to be given under Section 124 (a). (Para 34)

(D) Limitation Act (1963), S. 3 — Injunction — Exclusion of period for computation.

It is well established that where any proceedings are stayed for a period by an order of Court or by injunction issued by any Court that period should be excluded in computing any period of limitation laid down by law. But where no order of injunction was ever passed against the Customs authorities but it was against the Enforcement Directorate which conducted the searches under Section 19 (d) of the Foreign Exchange Regulation Act and seized certain documents, nor were the Customs Authorities parties to the application under Article 226, it was not open to the Customs Authorities to contend that the order of injunction passed against the Enforcement Directorate saved the period of limitation prescribed by Section 110 (2) of the Customs Act, 1962. AIR 1975 SC 67, Disting. (Para 36)

(E) Imports and Exports (Control) Act (1947), S. 3 — Violation of — Effect — Pro-

visions of Customs Act will apply — (Customs Act (1962), S. 11).

If any goods are imported in violation of the provisions of Section 3, they would be deemed to be imported in violation of Section 11 of the Customs Act, 1962 and all the provisions of the Customs Act would be applicable.

Held, that on the basis of alleged importation without licence the Customs authorities were within their rights to issue the notice to show cause. AIR 1971 SC 170, Disting. (Para 53)

(F) Customs Act (1962), S. 47 — Order by mistake — Effect.

Even where the Customs Authorities by mistake permitted the owner of the seized goods to clear them, yet it is the duty of the owner to obey the law. If the owners had no rights to import goods without a valid licence, they cannot be heard to say that because of the order under Section 47 steps cannot be taken against him under other provisions of the Customs Act. (Para 66)

Cases Referred : Chronological Paras
AIR 1975 SC 67 = 1975 Tax LR 33 28, 36
AIR 1975 Mad 43 = (1974) 2 Mad LJ 88 45
AIR 1974 SC 150 = 1975 Cri LJ 540 28,

32
AIR 1972 SC 689 = (1971) 3 SCR 802 25
AIR 1971 SC 170 = (1971) 2 SCR 681 46,

53
(1969) Appeal No. 122 of 1969 (Cal) 45
AIR 1965 Cal 478 = 1965 (2) Cri LJ 465 46
AIR 1961 Cal 616 = 1961 (2) Cri LJ 635 64
AIR 1937 PC 114 = 1937 AC 610 65

G. P. Kar with P. K. Das, for Appellants; R. C. Deb with S. Chatterjee, Mrs. H. Deb Barman, R. N. Bajoria and P. L. Khaitan, for Respondents.

SANKAR PRASAD MITRA, C. J.:— This appeal and Appeal No. 72 of 1973 arise out of the judgment and order of Sabyasachi Mukharji, J., D/- 13-7-1972 on an application under Article 226 of the Constitution. The petitioners before the trial court were Messrs. Hindustan Motors Ltd. and Rajendra Prasad Jhunjhunwala, Vice-President (Finance) of the Hindustan Motors Ltd. The respondents were the Collector of Customs and Central Excise, West Bengal, several Customs Officials and the Union of India. In this judgment we propose to cover both the appeals. The appellants in the present appeal are the respondents in Appeal No. 72 of 1973. Let us discuss the relevant facts of the case. On December 15, 1967, an import licence was issued in favour of Hindustan Motors Ltd., for importing primary nickel. Items Nos. 1 and 2 of this licence are— (1) 'Country from which consigned' and (2) 'Country of origin.' Against the aforesaid items there are blank spaces and thereafter the words 'All countries excluding Union of South Africa and South West Africa' have been printed. In the first blank space against 'Country from which consigned' the following countries have been type-written "USSR, Poland, GDR, Czechoslovakia, Yugoslavia, Rumania,

Hungary, Bulgaria." In the blank space against 'Country of origin' the word 'do' has been typed in. From a plain reading of the licence, therefore, there can be no doubt that the goods are to be consigned from one of the countries the names whereof have been typed out and the goods must have as their origin one of the same countries.

2. In March, 1969, 21 drums of primary nickel were shipped from Bulgaria against orders placed by Hindustan Motors Ltd. They also opened the letter of credit in terms of the licence. The goods were cleared by them from the Bonded Warehouse after full payment of customs duty from time to time.

3. Between October 4, 1969 and October 22, 1969 there were searches and seizures by the Enforcement Directorate of the Central Government of Documents at, inter alia, the factory premises, the office premises of Hindustan Motors Ltd., and the residence of some of the officers of the said company under Section 19-D of the Foreign Exchange Regulation Act, 1947.

4. On November 7, 1969 the Customs Authorities effected a seizure of 9 drums of primary nickel under Section 110 of the Customs Act, 1962.

5. Between October 15, 1969 and November 29, 1969 on diverse dates the Enforcement Directorate served notice under Section 19-E of the Foreign Exchange Regulation Act for examination of persons and for documents.

6. On December 4, 1969 Hindustan Motors Ltd., and some of its officers moved an application in this court under Article 226 of the Constitution against the aforesaid search and seizure by the Enforcement Directorate. The Customs authorities were not parties to this application. The application was marked as CR No. 7477 (W) of 1969. P. K. Banerjee, J. issued a Rule and an interim order in terms of clause (d) of the prayers in the petition. The clause was as follows:

"Injunction restraining the respondents, their servants and agents from acting upon and/or enforcing and/or taking any proceedings under or in connection with the said illegal search and seizure and/or any of the said notices Nos. SIC8/68-69/DG/OM/5/69/70/136 dated 7th November, 1969 to petitioner No. 2, SIC8/68/69/143 dated 18-11-1969 to

DG/OM/5/69-70

petitioner No. 4 and SIC/68/69/DG/OM/5/69-70 dated 29-11-1969 to petitioners Nos 2, 3 and 5 under Section 19-E of the said Act, and/or stay of operation of the same pending the disposal of this application."

7. It is obvious that the order of injunction was directed against the Enforcement Directorate only.

8. On December 23, 1969 the Enforcement Authorities moved an application in

CR No. 7477(W) of 1969 for vacating the interim order of injunction. The court did not vacate the order but restricted the order of injunction to the petitioners to the said Rule only.

9. Between January 15, 1970 and March 16, 1970 Civil Rule No. 7477(W) of 1969 was heard by P. K. Banerjee, J.

10. On May 4, 1970 the Collector of Customs and Central Excise, made an ex parte order under Section 110 (2) of the Customs Act, 1962 extending the time for issue of show cause notice by a period of six months from May 6, 1970 in the matter of seizure of 9 drums of nickel as aforesaid. This order extending the time was challenged in the application before Sabyasachi Mukharji, J.

11. On May 8, 1970 P. K. Banerjee, J. discharged the Civil Rule No. 7477(W) of 1969, but his Lordship stayed the operation of the order for a period of six weeks and the ad interim order of injunction previously made was also continued. Extensions of the said order were subsequently granted till July 9, 1970.

12. On May 13, 1970 Hindustan Motors Ltd., wrote to the Collector of Customs and Central Excise for release of the seized consignment of primary nickel on execution of bond.

13. In July, 1970 an appeal was preferred against the order of P. K. Banerjee, J. dated 8-5-1970 in Civil Rule No. 7477(W) of 1969. The appeal was marked as FMA 280 of 1970.

14. On July 9, 1970 the Deputy Director, Enforcement Directorate, wrote to the Assistant Collector of Customs informing him of the dismissal of the Writ petition in Civil Rule No. 7477(W) of 1969 and of the appeal pending in this court, as well as of the interim order of injunction that was passed. The Deputy Director suggested that the seized goods should not be released on bond and advised the Customs Authorities to apply for being added as a party to the proceedings against the Enforcement Directorate.

15. The Collector of Customs and Central Excise made an application on September 10, 1970 in FMA 280 of 1970 for being added as a party and for directions on the Enforcement Authorities to deliver and return the documents to them.

16. On October 28, 1970 the Assistant Collector of Customs and Central Excise issued a show cause notice requiring Hindustan Motors Ltd., to show cause why the seized goods (9 drums of primary nickel) should not be confiscated under Section 111 (d) of the Customs Act, 1962 and why penalty should not be imposed under Section 112 of the Act. The notice was issued under the provisions of Section 124 (a) of the Act. This notice has also been challenged in the application before Sabyasachi Mukharji, J.

17. On December 28, 1970 Hindustan Motors Ltd. gave its reply to the show cause notice denying the allegations made.

18. On March 24 and 25, 1971 the appellate court delivered judgment in FMA 280 of 1970. The appeal was allowed in part. The judgment and order of the trial court was set aside. The Rule was made absolute except in so far as it related to the notice under Section 19-B of the Foreign Exchange Regulation Act, 1947.

19. On May 7, 1971 Hindustan Motors Ltd., and Jhunjhunwala filed the application under Article 226 of the Constitution, challenging, inter alia, the seizure dated November 7, 1969, the extension order dated May 4, 1970 and the show cause notice dated November 28, 1970 mentioned above. A rule nisi was issued on that application and certain interim orders were passed. This was the application which was finally heard by Sabyasachi Mukharji, J.

20. After the disposal of FMA 280 of 1970 the application of the Customs Authorities in that appeal for being added as a party and for directions on the Enforcement Directorate to make over the seized documents was heard on May 20, 1971. Since the appeal had already been disposed of, liberty was only given to the Customs Authorities to intervene, if so advised, in the appeal before the Supreme Court.

21. We have already said that the application of Hindustan Motors Ltd. and Jhunjhunwala under Article 226 of the Constitution against the Customs Authorities was heard by Sabyasachi Mukharji, J. and judgment was delivered on July 13, 1972. By this judgment Sabyasachi Mukharji, J. has, (1) upheld the order of seizure dated November 7, 1969; (2) set aside the order dated May 4, 1970 and directed the respondents to return the goods seized and to withdraw the prohibitory order; and (3) upheld the show cause notice dated October 28, 1970 as being not without jurisdiction. The respondents, i.e., the Customs Authorities were given liberty to proceed with the show cause notice and the petitioners it was stated, would be entitled to take any valid defence in respect of the same. It was stated further that the respondents would decide the show cause notice in accordance with law. Writs in the nature of Mandamus and Certiorari were issued accordingly. The Rule was made absolute in part to the extent indicated above.

22. Appeal No. 47 of 1973 by the Collector of Customs and Central Excise, West Bengal and others is directed against the order of Sabyasachi Mukharji, J. setting aside the order of the Collector of Customs and Central Excise dated May 4, 1970 extending the time for issue of the show cause notice by a period of six months.

23. Appeal No. 72 of 1973 by Hindustan Motors Ltd., and Jhunjhunwala is directed against the order of Sabyasachi Mukharji, J. upholding the order of seizure dated November 7, 1969 and the show cause notice dated October 28, 1970.

24. We will first deal with the order setting aside the order of extension dated May 4, 1970. Section 110 of the Customs Act, 1962 is in the following terms:—

"110. Seizure of goods, documents and things—

- (1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer;

- (2) where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized;

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Collector of Customs for a period not exceeding six months.

* * * *

25. Section 124 of the Customs Act, 1962 is as follows:—

"124. Issue of show cause notice before confiscation of goods etc.—

No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person—

- (a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

* * * *

We have seen that on May 4, 1970 the Collector of Customs and Central Excise made an ex parte order under Section 110 (2) of the Customs Act, 1962 extending the time for issue of the show cause notice by a period of six months from May 6, 1970. This order was set aside by Sabyasachi Mukharji, J. The principal ground for setting aside the order is that it was passed ex parte. The learned trial Judge has relied principally on the Supreme Court's decision in *Asst. Collector of Customs v. Charandas Malhotra*, AIR 1972 SC 689. In this judgment the Supreme Court considered the scope of Section 110 (2) and of Section 124 (a) of the Customs Act, 1962. The Supreme Court has said that the power under the proviso to sub-section (2) of S. 110 is quasi-judicial or at any rate one requiring a judicial approach. Consequently, says the Supreme Court, an opportunity of being heard ought to have been given to the respondent before orders for extension were made.

26. If we apply this decision of the Supreme Court to the facts of this case there can be no doubt that the ex parte order of May 4, 1970 was invalid; but learned counsel for the Customs Authorities relied on a Divi-

sion Bench judgment of this court in Appeal No. 122 of 1969 (Cal) to which I was a party. The Division Bench held that under certain circumstances an *ex parte* order could be made but in view of the Supreme Court's judgment referred to above it is not necessary to go into this question.

27. The next argument of Mr. G. P. Kar, learned counsel for the Customs Authorities is that Hindustan Motors Ltd. and the other petitioner have waived their right to contend that the notice under Section 110 (2) was not served. In support of this contention Mr. Kar says that during the pendency of the present appeal his clients made an application for stay of the order of Sabyasachi Mukharji, J. setting aside the *ex parte* order of May 4, 1970. An order for stay was passed *ex parte* on February 19, 1973. On April 4, 1973 the respondents (in Appeal No. 47 of 1972) appeared before the court and obtained an order for release of the goods in their favour upon their furnishing bank guarantee for Rs. 2,20,000/- and upon a further undertaking that the guarantee would be renewed as and when necessary till the disposal of the appeal.

28. In support of this contention Mr. Kar has relied on two decisions of the Supreme Court, viz., *M/s. Lokenath Tolaram v. B. N. Rangwani*, AIR 1974 SC 150 and *The Director of Inspection of Income-tax (Investigation), New Delhi v. Pooran Mall and Sons*, AIR 1975 SC 67.

29. In the first case the appellants filed a writ petition in the Bombay High Court as certain textile goods had been seized from their possession. They challenged the legality of the order of the Excise Authority granting extension of time to serve notice under Section 124 (a) of the Customs Act, 1962, after expiry of the period of six months from the date of seizure. They also prayed for return of the seized goods. During the pendency of the petition the appellants, in pursuance of consent orders, deposited certain securities with the Excise Authorities and executed bonds in their favour and obtained release of the said goods. The appellants also agreed that in the event of their failure in the writ petition the securities deposited shall be treated as sale proceeds of the said goods and treated as goods so seized for the purpose of any adjudication proceedings. The appellants further agreed that they shall not raise any contention in the adjudication proceedings that the said proceedings will not be valid on the ground that the goods had been released to the appellants or were not available for confiscation or imposition of fine in lieu of confiscation. The Supreme Court has held:

- (i) that after the appellants had obtained release of the goods in accordance with the terms of the said agreement embodied in the consent terms, the goods went out of the province of application of Section 110 of the Act

for extension of time for serving a notice.

- (ii) that the consent terms operated as a waiver of notice for extending time within six months of seizure of goods; and,
- (iii) the appellants had no locus standi to ask for release of the goods because the bank was in possession of the goods as the pledgee and the Excise Authorities seized the goods from the possession of the Bank.

30. The third point decided by the Supreme Court is not relevant for our purposes. But Mr. G. P. Kar strongly relies on the first two points mentioned above and urges that on the facts of the present appeal also there has been a waiver by reason of the order that the respondents herein obtained for the release of the goods.

31. The second case of the Supreme Court referred to above does not appear to us to be relevant at all. We shall refer to this case in another connection in this judgment.

32. We do not agree with Mr. Kar that the principles which the Supreme Court enunciated in *Lokenath Tolaram's case* (AIR 1974 SC 150) can be applied to the facts of this case. Here Mr. Justice Sabyasachi Mukharji passed an order setting aside the order of extension granted on the 4th May, 1970, and directing the release of the goods. The Customs Authorities felt aggrieved by this order. They came up on appeal. In the appeal they asked for an order that the operation of the Trial Court's order be stayed. The respondents resisted this application for stay and insisted on the release of the goods. The Appeal Court put the respondents on terms. The effect of the Appeal Court's order is that the respondents can take advantage of the Trial Court's order for release of the goods provided that they furnish a bank guarantee for Rs. 2,20,000/- and provided further that they undertook to renew the guarantee as and when required till the disposal of the appeal. The respondents submitted to this order. This was not an order by consent in the strict sense. Such an order cannot, in our opinion, amount to waiver of any right of the respondents.

33. The second contention of counsel for the Customs authorities has been that a distinction should be made between a seizure of goods under Section 110 (1) of the Customs Act, 1962 and a prohibitory order under the said sub-section as envisaged by the proviso thereto. It is submitted that under proviso to sub-section (2) an order for extension of time is necessary provided that the goods have been seized. In the instant case the goods had not been seized but merely a prohibitory order in terms of the proviso to Section 110 (1) was passed. In these premises there was no necessity for an order for extension of time.

34. This argument, *prima facie*, appears to be attractive. But it would not be

necessary for us to express our opinion, one way or the other. We have looked into the order of seizure dated the 7th November, 1969, at pages 23 and 24 of the Paper Book. It is true that in this order the Inspector of Customs says: "That it is not practicable to seize such goods" and that "in the exercise of powers vested in me under Section 110 (1) of the Customs Act, I do hereby order that you the owner of the said goods shall not remove, part with or otherwise deal with the said goods except with my prior permission." But when we turn to the next page, i.e. page 24, we find a different picture altogether. There are two witnesses to this document, viz., one Pannalal Banik and one Gorennath Kapore. Before these two witnesses, 5 original drums and 4 drums repacked in local drums were sealed with the seal of the Assistant Collector of Customs, West Bengal, Calcutta. This overt act of sealing the packed drums amounts to exercise of dominion over the goods. In other words, it is an act of seizure of the goods within the meaning of Section 110 (1) of the Customs Act 1962. Moreover, in all the affidavits on behalf of Customs Authorities which have been shown to us it appears that their case is that the goods were actually seized. It is not, therefore, a prohibitory order in terms of the proviso to Section 110 (1). There is no dispute that when goods have been seized a notice to show cause under Section 124 (a) is to be served within six months provided that the period may be extended on sufficient cause being shown.

35. The last argument of Mr. G. P. Kar is that by reason of the order of injunction against the Enforcement Directorate which we have discussed above the time for issuing the Show Cause Notice did not run at all.

36. Mr. Kar relies on the Supreme Court judgment in Director of Inspection of Income-tax (Investigation), New Delhi v. Pooran Mall & Sons, AIR 1975 SC 67. In that case the Supreme Court has said that it is a well-established principle of judicial procedure that where any proceedings are stayed for a period by an order of Court or by injunction issued by any Court that period should be excluded in computing any period of limitation laid down by law. There can be no question that when an order of injunction is passed against one of the parties to the litigation, the aforesaid principle would apply. But in the instant case no order of injunction was ever passed against the Customs Authorities at any stage of the proceedings. The order of injunction was against the Enforcement Directorate which conducted the searches under Section 19-D of the Foreign Exchange Regulation Act and seized certain documents in course of the search. The Customs Authorities were not parties to the application under Article 226, marked CR No. 7477(W) of 1969. There was no bar at any stage to the Customs authorities taking any

steps or proceedings under the Customs Act, 1962. In fact the Customs Authorities applied to be added as party to the appeal being Appeal No. FMA 280 of 1970 but that application also was not ultimately allowed. On these facts, in our opinion, it is not open to the Customs Authorities to contend that the order of injunction passed against the Enforcement Directorate saved the period of limitation prescribed by Section 110 (2) of the Customs Act, 1962. We are unable to uphold this contention of learned counsel for the appellants.

37. In the result, Appeal No. 47 of 1973 is dismissed.

38. There will be no order as to costs.

39. We now proceed to deal with Appeal No. 72 of 1973 (Hindusthan Motors Ltd. v. Collector of Customs and Central Excise, West Bengal).

40. In this appeal the appellants have challenged the order of seizure dated the 7th November, 1969 and the notice to show cause dated the 28th October, 1970. The seizure was made under the provisions of Section 110 (1) of the Customs Act, 1962, which provides that if the proper officer "has reason to believe" that any goods are liable to confiscation under the said Act, he may seize the goods.

41. Counsel for the appellants has urged that the condition precedent for the exercise of power under Section 110 (1) is "reason to believe." There must be objective reasons for forming this belief. According to counsel the condition precedent in the instant case is absent. Our attention has been drawn to paragraphs 2, 3 and 4 of the affidavit of Rampriya Lahiri, Inspector of Customs and Central Excise, West Bengal, affirmed on the 15th September, 1971, at pages 106-107 of the paper book. We set out below the paragraphs relied on:

"2. That on 7th November, 1969, acting on an information that a consignment of contraband primary nickel ostensibly from Bulgaria was lying in the premises of the factory of M/s. Hindustan Motors Ltd. I went to the factory of the aforesaid company at Uttarpara in Hooghly District and detected a consignment of 9 drums of primary nickel all of foreign or U. S. A. origin and weighing about 6210 Kgs. valued at Rs. 2,16,428 (approximately).

3. That when I asked the factory authorities to produce the documents as to the actual source of supply of the goods and lawful importation of the consignment of primary nickel they could not produce any. Thus the fact of this prior information and my detection of the goods admittedly of foreign or U. S. A. origin, the illicit importation of which could not be established by the Factory Authorities, were sufficient reasons for me to believe that the goods were illegally imported and were liable

to confiscation under the Customs Act, 1962.

4. That upon forming this belief I seized the said goods on that date namely the 7th November, 1969 under Section 110 of the Customs Act, 1962 and served an order on M/s. Hindustan Motors Ltd. not to remove, part with or otherwise deal with the said goods except with my permission."

42. The order of seizure is at page 21 of the paper book which also says that the officer concerned had reason to believe that the goods specified in the schedule were liable to confiscation.

43. It has been argued before us that the above affidavit of Rampriti Lahiri does not disclose any materials on which a reasonable man could come to the finding that the goods were liable to confiscation. Rampriti Lahiri has not said whether he made any investigation as to the origin of the goods. The contention is that he had initial lack of jurisdiction in effecting the seizure under Section 110 (1) of the Customs Act, 1962. In the application under Article 226 tried by Mr. Justice Sabyasachi Mukharji, a challenge was thrown to this act of seizure on the ground that he had no reason to believe that the goods were liable to confiscation but in his affidavit he has not been able to produce materials to sustain this belief.

44. We are unable to agree with these contentions. In his affidavit Rampriti Lahiri, in our opinion, has disclosed sufficient reasons for formation of his belief. He received an information that a consignment of contraband primary nickel ostensibly from Bulgaria was lying in the Premises of Hindustan Motors Ltd. He went to the premises, detected a consignment of foreign or USA origin valued at Rs. 2,16,428 approximately. He called upon the factory authorities to produce documents to show the country of origin of the goods. The factory authorities could not produce any documents. He, therefore, had reasons to believe that these goods were illegally imported and seized the goods under the provisions of Section 110 (1). It seems to us that on the facts stated by him it cannot be urged that he had no objective reasons to believe to satisfy the condition precedent in Section 110 (1) of the Customs Act, 1962. We overrule the appellant's contention that the seizure was bad or illegal.

45. The next attack was on the show-cause notice. It is stated on behalf of the appellants that if the original seizure was bad and the extension order was also bad, the show cause notice would be bad. We have held that the extension order should be set aside but we do not think that the seizure was bad. Mr. Justice Sabyasachi Mukharji has held that in spite of the order of extension being set aside it would be open to the Customs Authorities to issue a show-cause notice. The learned Judge has relied on a

judgment of this Court in Appeal No. 122 of 1969 as well as on the case reported in AIR 1975 Mad 43. Since the point is covered by a Division Bench judgment of this Court, it has not been taken before us. But the appellant's counsel made it clear that he was not making any concessions. We accept the view of Mr. Justice Sabyasachi Mukharji that if the seizure was good, a notice to show-cause could be given.

46. The next argument is that a distinction should be maintained between goods imported in breach of the conditions of a licence and those imported without any licence. If goods are imported in breach of the conditions of licence, the Customs Authorities have no jurisdiction to adjudicate on the same, vide, AIR 1971 SC 170, (Addl. Collector of Customs Cal. v. M/s. Best & Co.) affirming a judgment of a Division Bench of this Court reported in AIR 1965 Cal 478. If, however, the goods have been imported without any licence, the relevant provisions of the Customs Act would be attracted. They would be attracted by reason of the provisions of the Imports and Exports (Control) Act 1947, The Imports (Control) Order, 1955 read with the Customs Act of 1962.

47. Section 3 (1) (a) of the Imports and Exports (Control) Act 1947 provides as follows:—

"3. Powers to prohibit or restrict imports and exports.—

(1) The Central Government may by order published in the Official Gazette, make provisions for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order;

(a) the import, export, carriage coastwise or shipment as ships' stores of goods of any specified description;

48. Then sub-section (2) of S. 3 prescribes that all goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited under Section 11 of the Customs Act, 1962 and all the provisions of that Act shall have effect accordingly.

49. Section 11 of the Customs Act is in the following terms:—

"11. Power to prohibit importation or exportation of goods:—

1. If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, the import or export of goods of any specific description."

50. It appears clear, therefore, that if any goods are imported in violation of the provisions of Section 3 of the Imports and

Exports (Control) Act 1947, they would be deemed to be imported in violation of Section 11 of the Customs Act, 1962 and all the provisions of the Customs Act would be applicable. There is no dispute in the instant case that a restriction on the import of primary nickel was imposed under clause 3 of the Imports (Control) Order 1955 which was passed in exercise of powers conferred by the relevant provisions of the Imports and Exports (Control) Act 1947.

51. Before us counsel for the respondents did not dispute the propositions that if importation be made without any licence the Customs Act would be attracted. But he says that, if an importation be made in breach of the condition of licence the Customs Act would not be attracted.

52. On behalf of the appellants it is argued before us that a plain reading of the show-cause notice would show that the complaint of the Customs authorities was not that primary nickel was imported without licence but that it was imported in breach of the conditions of licence. The show-cause notice is at page 55 of the paper book. We intend to set out the relevant portions of this notice. These are as follows :—

"It appears that the goods mentioned in the schedule below have been imported into India without a valid import licence, as required under Notification No. 17/55 dated 7-12-1955, issued under Section 3 (1) of the Imports and Exports (Control) Act, 1947, for the following reasons :

- (i) That an information was received from a reliable source to the effect that some of the conditions of the Import Licence No. P/RM/2161212 dated 15-12-1967 under which a consignment of 21 drums of primary nickel imported had not been complied with by M/s. Hindustan Motors Ltd. Uttarpara, Hooghly
- (ii) It appears that the Import Licence No. P/RM/2161212 dated 15-12-67 was not valid to cover the importation of 21 drums of primary nickel valued at Rs. 5 lakhs which were from U. S. A. and the seized goods, therefore, appeared to be liable to confiscation under Section 111 (d) of the Customs Act, 1962 and would also appear liable for personal penalty under Section 112 of the Customs Act 1962."

53. Learned Counsel for the appellants has submitted to us that it is clear from the terms of the show-cause notice that the Customs authorities were complaining of a breach of the conditions of licence No. P/RM/2161212 dated 15-12-1967 and in view of the Supreme Court's decision, reported in AIR 1971 SC 170, no provision of the Customs Act could be applied to this case. We do not agree with counsel for the appellants. We have already referred to certain terms of the

licence. The licence related to consignments from, USSR, Poland, GDR, Czechoslovakia, Yugoslavia, Rumania, Hungary and Bulgaria only. The licence also stated that the countries of origin of the goods consigned must also be the same. From the notice to show-cause it appears that the allegation of the Customs authorities is that the goods that were imported were of USA origin and as such imported without a valid import licence. We do not express any opinion as to the correctness of this allegation. But there can be no doubt that on the basis of alleged importation without licence the Customs authorities were within their rights to issue the notice to show cause.

54. The last contention of learned counsel for the appellants is based on Section 47 of the Customs Act, 1962. This section is in these terms :—

"47. Clearance of goods for home consumption :

Where the proper Officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption."

55. Our attention was also invited to Section 130 which confers on the Central Board of Revenue constituted under the Central Board of Revenue Act 1924 powers of Revision. This section says inter alia, that the Board may of its own motion or on the application of any aggrieved person call for and examine the record of any proceeding in which an officer of Customs has passed any decision or order under this Act not being an order passed in Appeal under Section 128 for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may pass such orders thereon as it thinks fit. In other words, an order passed under Section 47 can be revised by the Central Board of Revenue under Section 130 of the Act.

56. In the instant case Cl. iv (paragraph 1) of the show-cause notice says :—

"That on importation at the Port of Calcutta the subject consignment was warehoused by them in their Bond at Uttarpara Factory under W. R. Bill of Entry No. 1, dated 1-4-1969 and that the goods were ultimately cleared for home consumption in four instalments as under :

....."

57. In paragraph 1' of the petition, at page 6 of the paper book it is stated inter alia that : "The Customs authorities after satisfying themselves that everything was in order allowed the said goods which were 21 drums in all to be cleared for home consumption in 4 instalments on payment of customs duty."

58. In paragraph 14 of the affidavit of Kamakshya Ranjan Ghose, Assistant Collector of Customs, West Bengal, affirmed on the 15th

September, 1971, it is stated that the goods were allowed to be cleared through mistake and ignorance of facts which were subsequently discovered after clearance.

59. Counsel for the appellants has strongly urged that the goods were allowed to be cleared for home consumption after the proper officer was satisfied that those were not prohibited goods. If the order permitting clearance under S. 47 had been revised under Sec. 130 the matter might have been different. But so long as that order stood unrevised there was no scope for issuing a notice to show cause under Section 124 (a). It is urged further that it is no longer open to the Central Board of Revenue to revise that order under Section 47 because the period of limitation of two years from the date of the order under sub-section (2) of S. 130 has already expired.

60. This is an argument which was never made before the trial court and Sabyasachi Mukharji, J. had no opportunity of considering it. The point has not been taken in the grounds in paragraph 10 of the petition. Our attention was drawn to clauses (l) and (y) of these grounds. Clause (l) says:

"The goods were imported under a valid licence and were allowed to be cleared by the Customs Authorities. Consequently, there was no infringement of any order issued under Section 3 (1) of the Imports and Exports (Control) Act, 1947 during the course of the import of the said goods."

Clause (y) says:

"For that no penalty could be imposed under Section 112 of the said Act if the goods could not be confiscated under Section 111 of the said Act."

These grounds do not indicate the appellants' contention that in view of the order passed under Section 47 of the Customs Act, 1962, the notice to show cause under Section 124 (1) could not be given.

61. This point has not also been taken in the grounds of appeal. We were referred to clauses (f) and (j) of these grounds. Clause (f) is as follows:

"For that the learned Judge failed to appreciate that the appellant No. 1 had the import licence for importing the goods and that the said goods were duly cleared by the Customs Authorities after the importation against the said licence and after receiving the full duty in respect thereof and that it could not be said that the said imports were made without any licence. The learned Judge further failed to appreciate that what was in effect alleged in the said notice to show cause was that the condition of the said import licence as to the country of import had been violated."

Clause (j) runs thus:

"For that the learned Judge should have held that no proceedings for imposition of any penalty under Section 112 of the Customs Act, 1962 could be taken in respect of the said

goods as no order of confiscation could be passed in respect of the same."

We do not think that any of these grounds can be relied on in support of the contention that by virtue of an order under Section 47 the notice to show cause is bad.

62. Since this point is being taken for the first time in appeal without mentioning the same either in the grounds in the petition or in the grounds of appeal we are of opinion that the appellants should not be allowed to take it at this stage.

63. But assuming that the argument can be entertained, we are unable to sustain it.

64. Section 89 of the Sea Customs Act, 1878 provided as follows:

"89. Clearance for home consumption.—When the owner of any goods entered for home consumption, and (if such goods be liable to duty) assessed under Section 87, has paid the import duty (if any) assessed on such goods and any charges payable under this Act in respect of the same the Customs Officer may make an order clearing the same; and such order shall be sufficient authority for the removal of such goods by the owner."

This section came up for consideration in the case of Lakshminarayan Ramniwas v. Collector of Customs, reported in AIR 1961 Cal 616 before D. N. Sinha, J. as His Lordship then was. The learned Judge held that it was not the scheme of the Sea Customs Act that a personal penalty could not be imposed under Section 167 (8) after the goods had left the customs barrier, even though an order had been obtained under Section 89. The learned Judge appears to be of the view that whether the importer has committed an offence under Section 167 (8) has nothing to do with the passing of the goods beyond the customs barrier. If the offence has been committed while the goods are within the customs barrier, it cannot cease to be an offence, just because the goods have been removed beyond the customs barrier. If an offence has been committed under Section 167 (8) there is no estoppel on the part of the Sea Customs authorities from taking action under it, even though the goods might have passed the customs barrier after an order has been made under Section 89 of the Sea Customs Act.

65. We have noted the difference in language between Section 89 of the Sea Customs Act, 1878 and Section 47 of the Customs Act, 1962 but the purport of both the sections is clearance of goods for home consumption. Sinha, J. however has relied on a Privy Council judgment which in our opinion provides the complete answer to the argument based on Section 47 advanced before us on behalf of the appellants herein. This is the case of Maritime Electric Co. Ltd. v. General Dairies Ltd., 1937 AC 610 = AIR 1937 PC 114. The New Brunswick Public Utilities Act prohibited any public utility company from making any greater or less charge for its services than that prescribed for the time being

under the Act. By the negligence of its servants, an electricity company rendered and was paid an account based upon erroneous meter reading, so that the consumers were charged for only one-tenths of the electricity actually used. In an action to recover the balance of nine-tenths the Privy Council rejected a plea of estoppel. Lord Maugham delivering the judgment of the Privy Council has observed:

"* * * where, as here, the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence which, under certain special circumstances, can be invoked by a party to an action; it cannot, therefore, avail, in such a case, to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law."

66. In the present case the Customs Authorities have stated that the appellants were permitted to clear the goods by mistake. It was the duty of the appellants to obey the law. If the allegations of the Customs Authorities be correct they had no right to import goods without a valid licence. They should not be heard to say that because of the order under Section 47 steps cannot be taken against them under the other provisions of the Customs Act. This contention of counsel for the appellants is, therefore, overruled.

67. In the result, this appeal is dismissed. There will be no order as to costs. The respondents would be at liberty to proceed with the show cause notice and the appellants would be entitled to take any valid defence in respect of the same. The respondents would decide the show cause notice in accordance with law.

S. K. DATTA, J.:— I agree.

Appeals dismissed.

AIR 1975 CALCUTTA 377

SALIL KUMAR DATTA, J.

Rathindra Nath Bose, Petitioner v. Jyoti Bikash Ghosh and others, Opposite Parties.

Civil Revn. Case No. 3471 of 1973, D/- 7-7-1975.

(A) Civil P. C. (1908), Ss. 94 (c), 104, 105, 115, 151, O. 39, Rr. 1 and 2 and O. 43, R. 1 — Inherent power of Court to issue injunction apart from O. 39 — Order issuing injunction under S. 94 (c) read with S. 151 — Not appealable — High Court's power in revision.

GS/GS/C536/75/KSB

A suit for declaration that plaintiffs were joint tenants and for issue of permanent injunction restraining the landlord from executing a decree for possession obtained against one of them was dismissed for default. Pending an application for restoration of the suit under Order 9, Rule 9, C. P. C. the plaintiffs applied for an ad interim injunction under Section 94 (c) and (e) read with Section 151, Civil P. C. and an ad interim injunction was issued restraining the landlord from executing the decree till the disposal of the application under Order 9, Rule 9. On appeal by the landlord against that order the ad interim injunction was vacated on merits after overruling the objection of the plaintiff as to the maintainability of the appeal. The plaintiff tenant filed a revision against the appellate order.

Held (1) that although the circumstances contemplated in Order 39, Rules 1 and 2 did not exist in the case so as to warrant the issue of injunction under Section 94 (c) read with Order 39, the trial Court had jurisdiction to issue such injunction in exercise of its powers under Section 151, Civil P. C. even apart from the provisions of Order 39 of the Code, and, therefore, the order for injunction must be taken to be made under Section 151 of the Code. AIR 1962 SC 527, Applied.

(Para 10)

(2) that although the order for injunction was purported to be passed under Section 94 (c) and was erroneous on that ground, the error did not render it a nullity as the Court had jurisdiction to pass it under Section 151 simpliciter and, therefore, the order was not appealable in view of the provisions of Sections 104 and 105 read with Order 43, Rule 1. AIR 1953 SC 23, Rel. on.

(Para 11)

(3) that even if the order is considered to be an order under Section 94 apart from Order 39, no appeal is provided against an order passed under Section 94. (1913) 17 Cal WN 318, Rel. on.

(Para 12)

(4) that the High Court will only set aside the appellate order which was passed without jurisdiction in an incompetent appeal by the defendant and will not enter into the merits of the trial Court's order which was not brought before it directly in revision by the defendant in accordance with law. AIR 1953 Cal 34 and (1957) 61 Cal WN 308 and AIR 1941 All 215, Distinguished.

(Para 14)

(B) Civil P. C. (1908), S. 141 and O. 9, R. 9 — 'Proceedings in any Court of civil jurisdiction' — Meaning of — Proceedings under O. 9, R. 9 — Section 141 does not apply. AIR 1960 Cal 203, Dissented from.

"Proceedings in any court of civil jurisdiction" as contemplated by Section 141 covers original matters like probates, guardianships, divorce, insolvency and so forth. This provision includes original matters which originate in themselves and not those which spring up from a suit or from other proceeding or arise in connection therewith. A proceeding under Order 9, Rule 9, Civil P. C. is not such a proceeding within the meaning of S. 141.

(1895) 22 Ind App 44 (PC) and AIR 1927 Cal 534, Rel. on; AIR 1960 Cal 203, Dissented from. (Para 12)

Cases Referred: Chronological Paras
AIR 1962 SC 527 = 1962 Supp (1) SCR 450 9

AIR 1960 Cal 203 = 63 Cal WN 883 12
(1957) 61 Cal WN 308 13

AIR 1953 SC 23 = 1953 SCR 136 11

AIR 1953 Cal 34 = 56 Cal WN 858 13

AIR 1952 Cal 560 9

AIR 1941 All 215 = 1941 All LJ 230 13

AIR 1927 Cal 534 = 31 Cal WN 576 12

AIR 1917 Cal 657 = ILR 43 Cal 148 8

(1913) 17 Cal WN 116 = 16 Cal LJ 77 12

(1913) 17 Cal WN 318 = 17 Ind Cas 361 12

(1911) 15 Cal WN 725 = 8 Ind Cas 26 12

(1895) 22 Ind App 44 = ILR 17 All 106 (PC) 12

Somnath Chatterjee, Sohan Lal Saraf, Pulak Rajan Mondal and Nigam Kumar Chakravarty, for Petitioner; Shyama Charan Mitter, Ashok Kumar Sengupta, Shyama Prasanna Roy Chowdhury and Pradip Kumar Guha (for Nos. 1 and 2), Joyanta Mitra (for No. 4), R. C. Deb and Samar Kr. Dutta (for No. 6), for Opposite Parties.

ORDER:— This Rule has been obtained against the order passed on appeal by the Additional District Judge, 1st Court, Alipore, dissolving the injunction granted by the trial court. The facts in short are as follows:

2. Opposite parties Nos. 1 and 2, the landlords who purchased the suit premises in 1966, instituted Title Suit No. 137 of 1968 against opposite parties Nos. 7 and 8 for recovery of possession of premises No. 7-A, Nafar Kundu Road, Calcutta, P. S. Bhowanipore, which, it was alleged, the said opposite parties held as monthly tenants. The ground for eviction was the plaintiffs' reasonable requirement of the suit premises for own use and occupation. The suit was decreed on February 14, 1969. The cousins of the defendants filed Title Suit No. 73 of 1969 on February 26, 1969 for a declaration that they and the opposite parties Nos. 7 and 8 were joint tenants of the suit premises and also for permanent injunction restraining the landlords from proceeding with execution of the decree for possession. They also filed a petition for ad interim injunction, which was dismissed and was affirmed on appeal. The order was challenged by the said plaintiffs of T. S. No. 73 of 1969 in revision in C. R. 3152 of 1969. This Rule was discharged by this Court on January 21, 1970 with direction that the suit should be heard within three months and the execution of the decree was allowed after May 7, 1970.

3. On July 20, 1971 Title Suit No. 73 of 1969 was dismissed for default. On August 17, 1971 an application for restoration of the suit under Order 9, Rule 9 of the Code of Civil Procedure was filed registered as Misc. Case No. 78 of 1971. The plaintiffs thereafter filed an application under Section 151 in the

said proceeding for injunction restraining the decree-holder landlords from executing the decree and this application was dismissed on August 28, 1972. Thereafter, on August 30, 1972 the plaintiffs filed a petition under Section 94 (c) and (e) read with Section 151 of the Code before the trial court for an injunction restraining the landlords from executing the decree and an ad interim injunction was granted thereon. The application, treated as an application under Section 94 (c) and (e) of the Code was thereafter allowed on contest by order dated February 7, 1973 and the landlords were restrained by an injunction from proceeding with their Title Execution Case No. 59 of 1972 in execution of the decree obtained by them as aforesaid till the disposal of the application under Order 9, Rule 9 registered as Misc. Case No. 78 of 1971. The landlords preferred an appeal against the said decision and the appellate court held that the learned Munsif is to be deemed to have exercised jurisdiction under Order 39 while passing the order under Section 94 (c) of the Code and the appeal before him as such was maintainable under provisions of Order 43, Rule 1, Clause (r). On merits it was held that the plaintiffs failed to make out a prima facie case and mere joint possession, if true, would not show that there was joint tenancy of the premises. The Court further held that the balance of convenience would be against the landlords if the injunction was sustained as they instituted the suit for recovery of possession for their own use and occupation in 1967, while the plaintiffs were not actually residing at the suit premises. The appeal was accordingly allowed and the injunction granted by the trial court was vacated. The petitioner, who is one of the plaintiffs, in Title Suit No. 73 of 1969, moved this Court against this appellate order and obtained the present Rule.

4. Mr. Saraf, learned Advocate appearing for the petitioner submitted that the appeal against the order of the learned Munsif, was not maintainable in law. The order passed was clearly under Section 94 (c) and (e) and not under Order 39, Rule 1 or 2 as Order 39 applies only to proceedings in suit. No appeal lies against an order under Section 94 (c) or (e) and the landlords' only remedy was to move in revision against the order of the learned Munsif. On merits also, it was submitted that as the plaintiffs with their families were residing for over a long time in the suit premises, if the injunction is vacated, it would cause great hardship to them as they would thereby be strained.

5. Mr. Joyanta Mitra, learned Advocate for the opposite party No. 5, a co-plaintiff, while supporting the petitioner, submitted that Order 39, Rules 1 and 2 in terms had no application to the proceeding in the facts of the case, even if it was considered applicable. He further submitted that injunction is available apart from Order 39 under Section 94 (c) and (e).

6. Mr. R. C. Deb, appearing for opposite party No. 6 another co-plaintiff, sub-

mitted that Order 39 applies only to proceedings in suit which are pending and proceeding under Order 9, Rule 9 is not a proceeding in suit. The appellate order was thus clearly without jurisdiction and there was no scope or authority in law for deeming it to be an order under Order 39.

7. Mr. S. C. Mitter, learned Advocate appearing for the landlords opposite parties Nos. 1 and 2 contended on the other hand that Section 94 cannot be exercised independently of the Rules which are contained in Order 39. Section 94 creates jurisdiction while Order 39 is the procedure through which such power can be exercised. It was further submitted that Section 94 and Order 39 are complementary. Accordingly, the order of the learned Munsif being under Section 94 read with Order 39 was subject to appeal under provisions of Order 43. It was further submitted that proceeding under Order 9, Rule 9 is in the nature of an original proceeding and provisions of Section 141 of the Code would apply thereto. Accordingly, Order 39 which provides the procedure for issue of injunction would be applicable in proceeding under Order 9, Rule 9. It was further submitted that on merits even, the petitioner had no case, as the premises remained at times vacant and most of the members of the plaintiffs' family had been living elsewhere, while the landlords were being put to great inconvenience and hardship by the mala fide proceedings for all these years. It was further submitted on authorities that even in revision, even if the appeal is not maintainable the Court is competent to pass the order like the order of the appellate Court to secure justice in the facts of the case.

8. Section 94 provides :

"94. Supplemental proceeding.— In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—

- (c) grant a temporary injunction
- (e) make such other interlocutory orders as may appear to the Court to be just and convenient."

Words "if it is so prescribed" are of great significance as they govern all the various clauses (a) to (e) of Section 94. Section 2 which provides for definition in clause (16) defines "prescribed" as "prescribed by the rules." The rules are contained in the First Schedule to the Code as stated in Section 121. As to such rules it was said in *Mani Mohan v. Ramtaran Mandal*, AIR 1917 Cal 657 as follows :

".....that the Code consists (i) of that which is termed 'the body of the Code and (ii) of the rules. The body of the Code is fundamental and is unalterable except by the Legislature; the rules are concerned with the details and machinery and can be more readily altered. Thus it will be found that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised."

In Mulla's Code of Civil Procedure, it is stated that the Section 94 summarises the general powers of the Court in regard to interlocutory proceedings, while the details of procedure have been relegated to Schedule I.

9. In *Monohar Lal Chopra v. Hiralal*, AIR 1962 SC 527, the Court approving the view taken in *Chinese Tannery Owners' Association v. Makhan Lal*, AIR 1952 Cal 560 observed in paragraph 18 as follows :

".....The Courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of Order 39, Civil P. C. There is no such expression in Section 94 which expressly prohibits the issue of temporary injunction in the circumstances not covered by Order 39 or by any rules made under the Code The effect of the expression 'if it is so prescribed' is only this that when the rules prescribe the circumstances in which temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interest of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule....."

The Supreme Court thus laid the following propositions :

(i) There is nothing in Section 94 which expressly prohibits issue of temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code.

(ii) Court has inherent power to issue injunction in circumstances not covered by Order 39 or any rules under the Code.

(iii) "If it is so prescribed" in Section 94, means the circumstances prescribed in rules under the Code, and the rules include O. 39, so that an injunction under Section 94 is circumscribed to circumstances contemplated under the Rules.

10. In the light of the above proposition it is now to be seen if the circumstances as contemplated in Rules 1 and 2 of O. 39 did exist warranting issue of injunction under provisions of Section 94 (c). It is obvious that, no circumstance as contemplated in the said Rules did exist as to warrant issue of injunction under the said order in the case before us, so that it cannot be said that the injunction under Section 94 which is circumscribed to circumstances of Order 39, or any other order or rules, was or could be validly issued as was purported to be done by the trial court. Even so the trial court was not wholly without jurisdiction as it could issue injunction under Section 151 in the circumstances not covered by Order 39 or other Rules and the order of the trial court is to be taken accordingly as one under Section 151.

11. Now an order under Section 151 simpliciter is not appealable as was held in *Keshardeo v. Radha Kissen*, AIR 1953 SC 23. It was observed that under the Code of Civil Procedure certain specific orders mentioned in Section 104 and Order 43, Rule 1 only are appealable and no appeal lies from

any other order (vide Section 105). The order made under Section 151 is not included in the category of appealable orders. In the case before us it appears to me that the order of the trial court is to be taken as an order under Section 151 and not under any other provisions of the Code, even if it was stated to be under Section 94, which was obviously an error. This error did not render the order a nullity as the trial court had the power and jurisdiction to pass such order under provisions of Section 151 of the Code.

12. Mr. Mitter, however, submitted that even if the order was not under S. 94, the trial Court usurped the jurisdiction under Section 94 in passing the order and as such an appeal would lie if the order had been passed with jurisdiction, and an appeal cannot be defeated, on the ground that the order was made without jurisdiction. Reliance was placed on the decision in *Maharaj Kumar Bideswari Charan v. Thakur Lakpat Nath*, (1911) 15 Cal WN 725, followed in *Ramjit Missir v. Ramador Singh*, (1913) 17 Cal WN 116. In the above decisions the orders were without jurisdiction though such jurisdiction was usurped by the courts. In the case before us the order of the trial court was however not without jurisdiction as being a valid order in so far as jurisdiction is concerned, being one under Section 151 and accordingly the proposition of law laid down in the above case would have no application. In this view, I am unable to hold that the order of the trial court was one under Section 94 read with Order 39. Even if it was so the order was under Section 94 though it could be issued in the circumstances contemplated under Order 39. Even then, such order would be and continue to be an order under Section 94.

In this connection reference may be made to the decision in *Sito Mahton v. F. F. Christian*, (1913) 17 Cal WN 318, in which it was held that the order on the defendant to furnish security for working a mine was an order under Section 94 (c) and not Order 39, Rule 1 of the Code and as such it was not appealable. In that view of the matter also, even if the order is considered to be an order under Section 94, apart from Order 39, no appeal is provided against an order passed under that section.

It was contended that the proceedings under Order 9, Rule 9 was in the nature of an original proceeding as was held in the case of *Salil Kumar v. S. N. Ghose*, 63 Cal WN 883 = (AIR 1960 Cal 203) and the procedure of the Code is applicable to it as provided in Section 141, so that the order of the trial court would be one under Order 39 though in a proceeding and not in suit and thus appealable. It would however appear that "proceedings in any court of civil jurisdiction has been held to be original matters like probates guardianships and so forth as observed in *Thakur Pershad Fakirullah*, (1895) 22 Ind App 44 (PC) or divorce, insolvency.

This provision includes original matters which originate in themselves and not those which spring up from a suit or from other proceeding or arise in connection therewith. This was the view taken in the Bench decision of this Court in *Sarat Krishna Bose v. Bisweswar Mitra*, AIR 1927 Cal 534. The contention of Mr. Mitra is thus not tenable.

13. Mr. Mitter further contended that even if the appeal is not maintainable, the revision case and thus the whole matter is before the Court, which should pass appropriate orders in the circumstances in modification of the Trial Court's order if necessary. Reference was also made to the decision in *Jatindra v. Krishnadhan*, 56 CWN 858 = (AIR 1953 Cal 34). In this decision the Court was of the opinion that the question of the value of the subject-matter of the suit was specifically raised in the Courts below and in order to determine the Rule itself, it was necessary to investigate this question. In this context it was said that the Court is perfectly competent to see that proper orders are made when the matters come in revision before this Court. In the case of *Kantilal v. Azizul*, (1957) 61 CWN 308 the Court was considering the legal effect of the decision of an incompetent Tribunal, which, it was held, can have no legal validity as contended. Reference was also made to the decision in *Ratiram v. Niader Mal*, AIR 1941 All 215 in which it was held that once the High Court is seized of the revision, then it becomes its duty to cast its eye not merely on one part of the proceeding, but the whole of them.

14. I am afraid I am unable to accept the decisions warranting the proposition that High Court in revision can upset an order which has not been challenged before it in accordance with law. In all the cases cited as above the order impugned was validly brought under challenge before this Court in revision, when it passed appropriate orders on the subject-matter at issue. In revisional jurisdiction the High Court can pass appropriate order in the circumstances of a case, but before it can be so done, the impugned order of the Court below must be legally and validly brought up before this Court in such revision case. Unless it is so, this Court cannot pass orders in any proceeding when the impugned order is not brought before it in accordance with law. In the case before us the impugned order, the appeal therefrom being incompetent, was in effect without legal challenge and the revisional powers of the Court does not extend to correct the order passed when the party disputing the propriety of the order has not legally moved against it, the matter coming to the Court at the instance of the other party on the other ground about maintainability of the appeal from the impugned order which appeal is found to be incompetent.

15. In this view of the matter, I do not propose to enter into the merits of the case, as such probe will not be permissible in law.

16. The Rule accordingly must be and is made absolute and the appellate order dated September 13, 1973 passed in Misc. Appeal No. 140 of 1973 by the Additional District Judge, 1st Court, Alipore is set aside, as being without jurisdiction. I further direct that the records be sent down at once to the Court of the learned Munsif, 2nd Court, Alipore, for hearing and disposal of Misc. Case No. 78 of 1971 and after disposal of the said Misc. Case records may be sent up to this Court, as it is said there are other Rules pending in connection with the connected proceedings. I express my desire that within two months from the receipt of the records, the proceeding under Order 9, Rule 9 should be heard and disposed of during which period the records will lie there, to be sent upon the expiry of the said period.

17. There will be no order as to costs in this rule.

Rule made absolute.

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SABYASACHI MUKHARJI, J.

Rabindra N. Das, Plaintiff v. Santosh Kumar Mitra and others, Defendants.

Suit No. 1507 of 1965, D/- 18-2-1975.

(A) Evidence Act (1872), S. 74 (2) and S. 76 — Private trust deed registered — Certified copy is not admissible in evidence under S. 76.

It cannot be said that a private deed of trust which has been registered is a private document of which public record is required to be kept and as such a certified copy of the deed cannot be admissible in evidence under Section 76. AIR 1943 PC 83 and (1886) 14 Ind App 71 (PC), Rel. on. (Para 5)

(B) Evidence Act (1872), S. 65 (c) — Registered private deed of trust — Proof of — Admission of certified copy as secondary evidence — Matters to be considered stated.

In order to admit the certified copy of a registered private deed of trust as secondary evidence in proof of the original document it is important to bear in mind the nature of the document, the evidence about the search and enquiries made about the original and the evidence about its loss. (1870) 14 Moo Ind App 453 (PC) and AIR 1958 Andh Pra 418 and AIR 1968 Cal 532 and AIR 1966 Cal 13 and AIR 1959 Andh Pra 568 and AIR 1946 PC 24, Ref. (Para 6)

(C) Evidence Act (1872), S. 114 (e) — Registered private deed of trust — Certified copy can be accepted as correct copy under S. 114 (e).

On the presumption of regularity under Section 114 (e) a certified copy of a registered private deed of trust issued by the Registrar of Assurance can be accepted as the correct copy of the original document. (Para 6)

(D) Deed — Construction — Trust deed — Principles governing construction indicated. — (Trusts Act (1882), S. 3).

The principles governing the construction of a trust deed are (1) the entirety of the document must be read as a whole (2) the document must be so read as to give effect to the predominant intention of the settlor or the maker of the document and (3) the document must be construed in such a manner as to make it workable and operative.

(Para 8)

(E) Civil P. C. (1908), O. 22, R. 5 and S. 11 — Death of plaintiff — Order for substitution is not interlocutory (Obiter).

An order for substitution on the death of the plaintiff under Order 22, Rule 5 is not in the nature of an interlocutory order and is conclusive and binding. AIR 1933 Cal 325 and AIR 1968 Punj 293 and AIR 1960 SC 941 and AIR 1964 SC 993, Ref. (Para 9)

Cases Referred :	Chronological	Paras
AIR 1968 Cal 532		6
AIR 1968 Punj 293 = 69 Pun LR 1012		9
AIR 1966 Cal 13		6
AIR 1964 SC 993 = (1964) 5 SCR 946		9
AIR 1960 SC 941 = (1960) 3 SCR 590		9
AIR 1959 Andh Pra 568 = (1959) 2 Andh WR 357		6
AIR 1958 Andh Pra 418 = 1958 Andh LT 440		6
AIR 1946 PC 24 = 48 Bom LR 293		6
AIR 1943 PC 83 = 1943 All LJ 292		5
AIR 1933 Cal 325 = 36 Cal WN 1138		9
(1886) 14 Ind App 71 = ILR 14 Cal 486 (PC)		5
(1870) 14 Moo Ind App 453 (PC)		6

A. N. Ray, for Plaintiff; P. K. Roy and B. K. Chatterjee, for Defendants.

ORDER :— This suit was originally instituted by one Asit Kumar Sarkar and Debasis Sarkar claiming to be trustees in respect of premises No. 49B, Sashi Bhusan Dey Street, Calcutta against the defendants. Thereafter, Rabindra Nath Das was substituted in the place and stead of the original plaintiffs. About the substitution I will deal later. The case of the plaintiff is that premises No. 49B, Sashi Bhusan Dey Street, Calcutta, originally belonged to one Smt. Provabati Biswas (since deceased) who during her lifetime by a deed of settlement and/or trust dated 2nd of July, 1946 had settled the said premises for the purposes and/or trust for the benefit of the persons and for the objects therein mentioned in the said deed of trust. About the said deed of trust I will also deal later on. According to the plaintiff the original trustees, viz., Smt. Provabati Biswas and Shri Pradyut Kumar Sarkar acted as trustees and gave effect to the said trust. The original defendants Nos. 1 and 2 are brothers of Smt. Provabati Biswas and at all material times the original defendant No. 1 was a tenant in respect of two rooms on the first floor of the premises under the said trustees and after the death of Smt. Provabati Biswas

under the said Pradyut Kumar Sarkar, as the sole surviving trustee. On the 29-5-53 it is stated Smt. Provabati Biswas died intestate and since her death Pradyut Kumar Sarkar acted as the sole surviving trustee in respect of the said premises. It was further stated that upon the death of Smt. Provabati Biswas one Kshitish Chandra Mitra purported to claim title to the said premises by setting up a will of Smt. Provabati Biswas. It is further the case of the plaintiff that until 22nd July, 1964 the entire second floor of the premises had been in possession of one Biswarup Sengupta as a tenant under the trustees and after the death of Provabati Biswas under the said Pradyut Kumar Sarkar. The said Biswarup Sengupta according to the plaintiff duly surrendered the tenancy and vacated the said room on or about 30th May, 1959. Thereupon Kshitish Chandra Mitra objected to the right of the said Pradyut Kumar Sarkar to take possession of the second floor from the said Biswarup Sengupta and threatened to take forcible possession thereof and to institute the criminal proceedings against Pradyut Kumar Sarkar. Thereupon, an agreement was arrived at on or about 31st May, 1959 which has been set out in paragraph 9 of the plaint. A writing dated 31st May, 1959 has also been annexed. The application for probate of the will referred to hereinbefore was contested by Pradyut Kumar Sarkar and the original defendant No. 1 Satyendra Kumar Mitra and upon contest the said testamentary suit was dismissed on 19th May, 1964 and probate of the will was refused. On 6th of November, 1956 the said Pradyut Kumar Sarkar as sole surviving trustee instituted a suit against the original defendant No. 1 in the Small Causes Court, Calcutta for ejectment of the original defendant and for recovery of the possession of the two rooms on the first floor of the said premises from the original defendant No. 1 of which the original defendant No. 1 had been a tenant. On the 15th February, 1959 a decree was passed by the Court of Small Causes Court, Calcutta in favour of said Pradyut Kumar Sarkar against the said original defendant No. 1 for delivery of vacant possession of the two rooms on the first floor of the said premises by the original defendant No. 1 to the said Pradyut Kumar Sarkar. Thereupon an application for execution of the said decree was made which is still pending according to the plaintiff. It is the case of the plaintiff that on or about 22nd July, 1964 the defendants Nos. 1, 2, 3 and 4 in collusion and conspiracy with each other wrongfully and illegally broke open the said padlock on the doors of the rooms of the second floor and trespassed therein and took forcible and illegal possession of the said second floor and were still continuing to be in such possession. The original defendant No. 1 Satyendra Kumar Mitra died intestate during the pendency of the suit. The present defendant No. 1 Santosh Kumar Mitra and the defendants Nos. 3, 4 and 5 are the sons of the original defendant No. 1. The defend-

ant No. 6 is the daughter's daughter of the original defendant No. 1 and the defendant No. 7 is the husband of the defendant No. 6 and grand son-in-law of the original defendant No. 1. Pursuant to the provisions contained in the said deed of settlement according to the plaintiff the said Pradyut Kumar Sarkar in exercise of his power and/or right of nomination by a registered deed of appointment dated 21st November, 1964 duly nominated and/or appointed the original plaintiffs Asit Kumar Sarkar and Debasis Sarkar to be the successors to act as trustees in respect of the said premises. On or about 21st November i.e. on the date of the said nomination said Pradyut Kumar Sarkar died. Since the death of said Pradyut Kumar Sarkar the original plaintiffs according to the plaintiff became the trustees of the said premises and again on the 28th April, 1965 the defendants in collusion and conspiracy with each other wrongfully and illegally trespassed into and took possession of the room on the 3rd floor of the premises according to the plaintiff by forcibly breaking open the said padlock. It is further stated that after the institution of the suit on the 6th January, 1969 Asit Kumar Sarkar died intestate without nominating and/or appointing anyone to act as trustee in his place and since his death the original plaintiff No. 2 Debasis Sarkar became the sole surviving trustee under the said Deed of Settlement. Thereafter by a registered deed of nomination and appointment dated 14th March, 1969 the original plaintiff No. 2 Debasis Sarkar appointed and/or nominated, Dwijendra Nath Basu as trustee in his place and stead under the said deed of settlement and/or trust dated July 2, 1946 with immediate effect from the execution of the said deed. By an order dated 21st April, 1970, the death of Asit Kumar Sarkar was recorded and the said Dwijendra Nath Basu was brought on the record as the plaintiff by an order in this suit. Again on the 21st April, 1970 on the application of the said Dwijendra Nath Basu the heirs of the original defendant No. 1 Satyendra Kumar Mitra who died on the 30th October, 1969 were substituted. Thereafter, on the 28th December, 1968 (sic) the said Dwijendra Nath Basu who was a Hindu governed by the Dayabhaga School of Hindu Law died intestate and unmarried, leaving him surviving only brother Dipak Kumar Basu and his only sister Preeti Rani Basu as his only heirs and legal representatives under the Hindu Succession Act, 1956 without nominating or appointing any trustee to the said trust estate. It is stated that by a registered deed of nomination and/or appointment of trustee dated 7th April, 1973 the said Dipak Kumar Basu and Smt. Preeti Rani Basu as the heirs and legal representatives of the said Dwijendra Nath Basu since deceased under the authority of law had appointed the plaintiff Rabindra Nath Das as a trustee to the said trust estate and trust premises and by virtue of the said appointment Rabindra Nath Das is acting as such trustee.

2. The plaintiff claims mesne profits and/or damages at the rate of Rs. 10/- per day for the 2nd floor and Rs. 2/- per day for the third floor until delivery of possession and claims possession of the said premises from the defendants.

3. There are four different sets of written statements on behalf of the defendants but the defence taken is more or less identical. Reference, therefore, can only be made to the written statement on behalf of the defendant No. 2. In the said written statement it has been denied that Provabati Biswas in her lifetime by a deed of settlement settled the premises as alleged. It is stated that from the records of the suit No. 1748 of 1953 which was instituted by Smt. Provabati Biswas it appeared that it was alleged by the said Smt. Provabati Biswas that she had requested Prodyut Kumar Sarkar to have a power of attorney for the purpose of recovering the rents, issues and profits on behalf of the said Provabati Biswas. On the 2nd July, 1946 the said Prodyut Kumar Sarkar fraudulently made or induced the said Provabati Biswas to sign a document on the representation that the same was a power of attorney. The said Provabati Biswas, it is alleged who had no knowledge of the English language, relied upon the said representation made by Prodyut Kumar Sarkar and signed the document; and it was only in the beginning of January, 1953 that the said Provabati Biswas came to know for the first time of the aforesaid fraud practised upon her and thereupon instituted the suit. The defendants denied that the document described as deed of trust, copy whereof was annexed to the plaint, was ever intended to be acted upon. It was further denied that the trustees or any of them ever acted as trustees or gave effect to the said trust. It was further stated that the original defendants Nos. 1 and 2 were brothers of Smt. Provabati Biswas. It was denied that the defendant No. 1 was a tenant in respect of the two rooms in the first floor of the premises No. 49-B, Sashibhusan Dey Street or that after the death of Smt. Provabati Biswas, the original defendant No. 1 became a tenant under Prodyut Kumar Sarkar as a trustee or at all. It has been denied that after the death of Smt. Provabati Biswas, Prodyut Kumar Sarkar became the sole surviving trustee or could have acted as such. It has been stated that Biswarup Sengupta was a tenant of a portion of the said premises No. 49-B, Sashibhusan Dey Street under the original defendants Nos. 1 and 2 after the death of Sm. Provabati Biswas. It has been denied that Biswarup Sengupta was a tenant of the premises in respect of the second floor at any time under the trustee. It has been denied that Prodyot Kumar Sarkar ever took possession of the premises from Biswarup Sengupta as alleged in the plaint or could have taken possession. The alleged disputes between Kshitish Chandra Mitra and Prodyot Kumar Sarkar were also denied and the arrangement about the room which had

been referred to in the plaint was also denied by the defendants. The defendants in particular denied about any writing dated 31st March, 1959 as alleged in the plaint. It was denied that Prodyot Kumar Sarkar was or could have been the sole surviving trustee or he had any right to institute any suit against the defendant No. 1 for recovery of possession or that the original defendant No. 1 was a tenant under Prodyot Kumar Sarkar. The allegation about the breaking open of the padlock on the 22nd July, 1964 and taking possession on that date in collusion and conspiracy is also denied by the defendants. It is denied that Prodyot Kumar Sarkar had any power of authority or any right under the provisions of the said deed of trust, which is challenged by the defendants as fraudulent, illegal and void document or there could have been any nomination or appointment under the said alleged deed of trust. The quantum of mesne profits claimed is also denied and disputed.

4. As mentioned hereinbefore, after the institution of the suit on the 21st of April 1970 the original defendant No. 1 was substituted by Dwijendra Nath Basu as the plaintiff, and after his death without any appointment, by virtue of the appointment made by Dipak Kumar Basu and Priti Rani Basu, the present plaintiff was substituted by an order made by A. K. Sarkar, J. on 3rd September, 1973. The said order of Sarkar, J. is the subject-matter of an appeal. I would refer to this aspect of the matter when dealing with the issues raised in this suit. In short, therefore, the two questions that arise for determination in this suit are, namely, whether the plaintiff has the legal title over the premises No. 49-B, Sashibhusan Dey Street to act as a trustee and claim possession in respect thereof; and secondly, whether the present plaintiff has been properly appointed. If these two issues are determined, then the defendants' possession, in my opinion, in view of the pleadings and the evidence adduced in this case would be wrongful, because if the plaintiff is the lawful owner of the premises in question and as the defendants are not claiming right or possession either by virtue of any leave or licence of the lawful owner or by virtue of an agreement for tenancy, their possession and occupation would be unlawful and they would be liable to deliver up possession to the lawful owner. On the pleadings, however, the following issues were settled:

1. Did Prodyot Kumar Sarkar become a trustee by the document dated the 2nd July, 1946 executed by Sm. Provabati Biswas?
2. Did the said Provabati Biswas or Prodyot Kumar Sarkar act as trustees or give effect to the said alleged trust as claimed in paragraph 2 of the plaint?
3. Did Prodyot Kumar Sarkar take possession of the 2nd floor of the said premises as alleged in paragraph 7 of the plaint?

4. Was there any agreement or arrangement as alleged in paragraph 9 of the plaint?
5. Did the defendants Nos. 1, 2, 3 and 4 trespass into and take forcible and illegal possession of the 2nd floor of the said premises as alleged in paragraph 17 of the plaint?
6. Was the purported nomination or appointment of his successors by the said Prodyot Kumar Sarkar as alleged in paragraph 21 of the plaint valid and legal?
7. Was the nomination and/or appointment of Dwijendra Nath Basu by Debashish Sarkar as trustee valid or lawful?
8. Is the present plaintiff a lawfully and validly appointed trustee of the said purported trust?
9. Are the defendants the lawful owners of the premises No. 49-B, Sashibhusan Dey Street, Calcutta?
10. To what relief, if any, is the plaintiff entitled?

5. I propose to deal with issues Nos. 1, 6, 7 and 8 together because these, in my opinion, are the most material issues in this case and would be decisive of the questions involved in this suit. The first issue, therefore, that requires consideration is whether Prodyot Kumar Sarkar became a trustee by the document dated 2nd July, 1946. The execution of a document on that date by Sm. Provabati Biswas is not denied. But it has been alleged by the defendants that the said document had been executed by Provabati Biswas without knowing the purport thereof and was produced fraudulently. The onus is entirely on the defendants on this aspect of the matter. No evidence on this issue was adduced by the defendants to establish that the said document had been procured fraudulently or was executed without understanding the purport thereof. The next questions are: what is the document that was executed by Sm. Provabati Biswas, and what is the effect thereof. The plaintiff has annexed a copy of the said document. In dealing with the said copy annexed with the plaint, the defendants have averred as follows—“The defendant denies that the document, copy whereof has been annexed to the plaint, was ever intended to be acted upon.” Therefore, it appears to me that the defendants were not really denying that the copy was a correct copy of the document executed by Sm. Provabati Biswas. The defendants’ contention was that the document was never intended to be acted upon. On behalf of the plaintiff a certified copy of the said document has been tendered in evidence and marked as Ext. H. The said document was a registered document and this is a certified copy of the said registered document duly certified by the Registrar of Assurance. The said document is also P. D. 1. The question therefore, arises, whether this certified copy can be relied upon or can be admitted in evidence. My attention was

drawn to Section 74 sub-section (2) of the Evidence Act. Sub-section (2) of S. 74 provides what are the public documents and Section 76 permits certified copies of public documents to be admissible in evidence. The question, therefore, is whether the deed of trust in the instant case could be described as a private document of which public records are kept. In view of the observations of the judicial committee in the decision in the cases of Gopal Das v. Sri Thakurji, (AIR 1943 PC 83 at p. 87) and in view of the decision in the case of Krishna Kishori Chowdharani v. Kishori Lal Roy, ((1886) 14 Ind App 71 (PC) at p. 74) in my opinion, it cannot be said that the Ex. H, a private deed of trust which has been registered, is a private document of which public record is required to be kept and, therefore, as such it cannot be admissible under S. 76 of the Evidence Act. As the Judicial Committee noted the original had to be returned to the party concerned.

6. The next question is whether under Section 65 (c) of the Evidence Act evidence has been given to make the certified copy admissible in this case. Section 65 (c) of the Evidence Act provides that secondary evidence might be given of the existence, condition or contents of a document in a case where the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time. It is, therefore, necessary to refer to the relevant evidence on this point. One Jagadish Chandra Sil gave evidence on behalf of the plaintiff. In answer to question No. 3 he stated that he was a pleader and he did some work in connection with the execution of the deed of trust on behalf of Sm. Provabati Biswas and also had filed many suits in the Small Causes Court on her behalf. He was shown the certified copy of the trust deed dated 2nd July, and in answer to Q. 4 he stated that he had prepared the trust deed in the year 1946. In answer to Q. 10 he had stated that as far as he could recollect he had collected the original deed from the Registration office and handed the same over to her. In cross-examination he was asked whether he had the draft with him and he could not say that the draft was with him. He further stated in answer to Q. 15 that he was not in a position to say whether the document that was shown to him was a correct reproduction of the draft. He reiterated the same position in answer to Q. 16. Rabindra Nath Das, the present trustee, also gave evidence about the loss of the original in answer to Questions 8 to 11 and in answer to Questions 102 to 105 and again in Questions 150 to 152. In answer to Q. 11 the present plaintiff has stated that he personally went to Debashish and also to his friend Asit and enquired from them about the original deed and they had told him that the original deed was in their custody but they had lost it. He was asked in Q. 105 as to when for the first

time he came to know of the Ext. H and he stated — when he became a trustee. It appears that Asit died on 5th January, 1969 and Debasish is still alive. Counsel for the defendant criticises strongly that Debasish was not called and it was urged that it was improbable that Asit would have discussed about Ex. H with Rabindra Nath Das before he had become a trustee. The question in these circumstances, is, whether there is sufficient cogent evidence to admit the certified copy of the original deed of settlement. In this connection reliance was placed on several decisions, namely :

(1870) 14 Moo Ind App 453 (PC), (Ram Gopal Roy v. Gordon Stuart & Co.); AIR 1958 Andh Pra 418, (Ananta Raghuram v. Rajah Bom-madevara); AIR 1968 Cal 532, (M/s. Parekh Brothers v. Kartick Chandra Saha); AIR 1966 Cal 13, (Biswanath Agarwalla v. Sm. Dhapu Debi); AIR 1959 Andh Pra 568, (Smt. Bobba Suramma v. Smt. Peddireddi Chandramma); AIR 1946 PC 24, (Anand Behari Lal v. M/s. Dinshaw & Co. Bankers Ltd., Lucknow).

Now in order to admit secondary evidence in proof of a document of this nature it is important to bear in mind the nature of the document, the evidence about the search, the evidence about the enquiries made and the evidence about the loss of the original. In this case it is undisputed that the deed of trust which was executed was also registered. That point is not controverted. It is further apparent from the evidence of Jagadish Chandra Sil that he had the document registered. Ex. H is a certified copy issued by the Registrar of Assurance of the said deed. The fact that on that date 2nd July, 1946 a deed was executed cannot also now be disputed and it is apparent from the conduct of Sm. Provabati Biswas herself in instituting a suit challenging the execution of the said document. It is nobody's case that any other deed or document had been executed on that date. In the background of the aforesaid facts I am of the opinion that on the presumption of regularity under Section 114 (e) of the Evidence Act the certified copy issued by the Registrar of Assurance should be accepted as the correct copy of the deed executed on the 2nd July, 1946. If that is so, then the evidence about the loss of the original will have to be adjudged in the light of the factors noted hereinbefore and on a consideration of all the facts and circumstances, I am of the opinion, that this certified copy should be admitted in the evidence as a copy of the deed of 2nd July, 1946.

7. The next question, therefore, is what is the effect of the said deed. In view of the controversy it is necessary for me to refer to the relevant portions of the said deed. The said deed begins by stating :

"This deed of settlement made this second day of July of the year one thousand Nine hundred and fortysix between Sreematy Provabati Biswas widow of Nripendra Krishna Biswas, deceased, by caste Kayastha, by re-

ligion Hindu, by occupation landlady, at present residing at 49B, Sashi Bhusan De Street in the town of Calcutta, hereinafter called the Settlor, which expression shall unless repugnant to the context include her heirs, successors and legal representatives of the one part the said Sreematy Provabati Biswas widow of Nripendra Krishna Biswas, deceased, hereinafter called the first trustee. Prodyot Kumar Sircar son of Charu Chandra Sirkar, by caste Kayastha, by religion Hindu, by profession merchant at present residing at No. 10, Thakurdas Palit Lane in the town of Calcutta, hereinafter called the second trustee, the expression trustee shall unless excluded by or repugnant to the context, shall include her or his or their successor or successors in office of the other part."

Thereafter the deed recites the different clauses wherein sometimes Prodyot Kumar Sirkar has been referred to as a 'second trustee'. The deed then recites as follows :

"* * * (4th page) the said trust premises with all their appertanances rights and privileges unto and to the use of the said trustees upon trust that the said trustees shall stand possessed of the said trust premises upon, the trust following that is to say during the lifetime of the settlor out of the income, rents, issues and profits of the said trust premises to pay and discharge all Municipal rates and taxes revenue and other outgoings that may from time to time be imposed and enforced upon be payable in respect of the said trust premises, secondly to carry out and execute all necessary repairs make such additions and alterations as are necessary to keep the said properties in proper and tenatable condition, thirdly to arrange for and to bear the costs of residence and maintenance of the settlor herself and pay costs of all religious social and customary needs of her family and fourthly to pay Rs. 5/- in every month to Hindu distressed widows and fifthly to pay to the settlor during her lifetime the balance and the residue of the said income, rents issues and profits for her absolute use and benefit and This Indenture further witnesseth that trustees jointly or separately will be entitled to settle or evict tenants and realise rents from tenants and other issues and properties and give valid discharge of the same but the second trustee will not be able to do any act which is expressly forbidden by first trustee (settlor) and this Indenture further witnesseth that after the death of the settlor all necessary costs and expenses for the funeral and sradh ceremony of the settlor (5th page) are to be paid by the second trustee in charge of the trust premises from the income of the trust properties and after paying those costs and expenses and subject to the trust hereby created and to the charges and payments provided for herein the surviving trustee for the time being of these presents shall hold or stand possessed of the said trust premises for charitable pur-

poses that is to say after meeting the costs and expenses mentioned, on the first and second items for payment of taxes revenue and other necessary and compulsory outgoings and the costs of repairs etc., the balance and residue of the income, rents, issues and profits of the trust premises will be spent by the surviving trustee in the following way viz., the surviving trustee will have the right to draw from the residue of the income Rs. 20/- per month for his personal expenses for which he will not be accountable to any person the residue after such payment will be spent by the surviving trustee for helping Hindu distressed widows or children by granting them monthly or occasional help or other charitable purposes. This Indenture further witnesseth that if during the lifetime of the settlor the second trustee dies or expresses his intention in writing not to act then and only in that case Benimadhab Mitra, son of Satyendra Kumar Mitra by caste Kayastha, by religion Hindu, by occupation student at present residing at Barukhali, P. O. Barukhali District Dacca will be appointed as the Joint trustee * * * (6th page)."

8. The argument on behalf of the defendants, is, that the right of Prodyot Kumar Sarkar to name the successor was dependent upon he being the surviving trustee of the settlor and he had the right to nominate only one trustee by the use of the expression 'named as successor' in singular. The principles upon which the deed or a document of this nature has to be construed are well settled. These are firstly, the entirety of the document must be read as a whole; secondly, the document must be so read as to give effect to the predominant intention of the settlor or maker of the document; thirdly, the document must be construed in such a manner as to make it workable and make it operative. Bearing the aforesaid principles in mind we have to remember that the expression trustee or trustees have been used in this case meaning his or their successors in office unless such expression was repugnant to the context. It is true that the expression 'surviving trustee' is not a happy expression in the sense that thereby it means one who survives the settlor but the right has been given after the settlor. In my opinion, the expression surviving trustee means the trustee who outlives the settlor and acts as trustee after the death of the settlor. In that light, in my opinion, it would not be proper to restrict the right of nomination where the expression trustee has been defined to mean his heirs or successors. In that view of the matter, I am unable to accept the contention that Prodyot Kumar Sarkar was not competent to nominate Ashis Kumar Sarkar or Debasis Sarkar jointly as trustees for the execution of the deed dated the 21st November, 1964. Counsel for the defendant made a point that the said deed had been executed on a date when Prodyot

Kumar Sarkar died; but this point is of no consequence; this deed has been proved before me. It was witnessed by a solicitor of this court who has given evidence about the execution of this document. I find nothing in the record to hold that this document was not executed. After such appointment Asis Kumar Sarkar died without making any appointment. If that is so, then Debasis became the sole surviving trustee. Even if the contention of counsel for the defendant be accepted that Prodyot Kumar Sarkar had no right to appoint two trustees as successors the one being invalid, Debasis Sarkar was competent as such to act as trustee.

9. The next appointment was on the 14th March, 1969. Debasis Sarkar appointed Dwijendra Nath Basu. I am of the opinion, that the said appointment was valid in terms of the power given in the original deed dated the 2nd July, 1946. After the death of Dwijendra Nath Basu, Priti Rani and Dipak Kumar Basu as his heirs had appointed the present plaintiff as the trustee. The said appointment also is, in my opinion, in consonance with the power given in the deed dated 2nd July, 1946. In that view of the matter I am of the opinion that Prodyot Kumar Sarkar had been appointed validly and had become a trustee under the deed of 2nd July, 1946 and the nomination of successor of Prodyot Kumar Sarkar as stated in paragraph 21 was valid and legal. Therefore, nomination or appointment of Dwijendra Nath Basu by Debasis Sarkar was legal and valid and the appointment of plaintiff was legal and valid. There is, however, one aspect of the matter and that is to say that after the death of Dwijendra Nath Basu as mentioned before, on an application made the present plaintiff was substituted by an order of A. K. Sarkar, J. It was therefore, contended on behalf of the plaintiff that after such order of A. K. Sarkar, J. issues Nos. 7 and 8 were no longer open for agitation in the suit. It was contended on the analogy of the decisions in the case of Umesh Chandra v. Memanga Chandra, 36 Cal WN 1138=(AIR 1933 Cal 325) and in the case of Ram Parkash v. Shamkari, AIR 1968 Punj 293 that this question was no longer open for determination in this suit. On the other hand, it was contended by counsel for the defendant on the analogy of the decisions in the case of Satyadhyay Ghosal v. Deorajin Debi, AIR 1960 SC 941 and in the case of Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993 that an order for substitution being in the nature of an interlocutory order was not conclusive and binding. I am of the opinion that an order for substitution on death, under Order 22, Rule 5 of the Code of Civil Procedure, was not in the nature of interlocutory order. In the premises I am inclined to the view that after the order of A. K. Sarkar, J. this question is no longer open in this suit. In any event, in the view I have taken, I need not decide this question.

10. In the view I have taken, other issues are of no consequence, because as mentioned before, if the plaintiff is the lawful owner of premises No. 49B, Sasi Bhushan Dey Street and as the defendants have not set up any title, whether Prodyot Kumar Sarkar acted as trustee or not are not relevant for determination of the controversy in this case. Therefore, in my opinion, this issue need not be answered. The plaintiff, therefore, is clearly entitled to ask for possession.

11. The next important point is the claim for mesne profit. The plaintiff has claimed mesne profit at the rate of Rs. 250/- per month, but the basis of his evidence is rather unsatisfactory. On behalf of the defendants it was suggested in QQ. Nos. 146 to 149 to Rabindra Nath Das that the rental of the second floor would be Rs. 60/- per month and it was suggested that the mesne profit would be Rs. 60/- per month and of the room on the third floor is Rs. 15/- per month. I am of the opinion that the plaintiffs are entitled to mesne profit on the basis suggested by the defendants. It must be noted that so far as defendants Nos. 1 (a), 1 (b) and 1 (c) are concerned they have not resided at the aforesaid premises. Therefore, they cannot be liable for claim of mesne profit.

12. In the premises, there will be a decree in terms of prayers (a), (b) and (c) of the Plaint and a decree against defendants Nos. 2 to 7 for mesne profit at the rate of Rs. 60/- per month from 22nd July, 1964 for the second floor of premises No. 49B, Sashi Bhushan Dey Street until possession is given and Rs. 15/- per month in respect of the third floor room until delivery of possession is given from 28th April, 1965.

13. In view of the fact that the defendants are related to the original settlor, I direct that parties will pay and bear their own costs.

14. There will be a stay of operation of this order for four weeks.

Order accordingly.

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SALIL KUMAR DATTA, J.

Bimal Kumar Gayen and others, Appellants v. Amiya Gopal Mondal and others, Respondents.

A. F. A. O. No. 69 of 1965, D/- 14-8-1975.

(A) Civil P. C. (1968), S. 47, O. 23, R. 3 — Consent decree — Executability — Decree on compromise between lessee and lessor — Provision regarding recovery of possession of suit property in certain eventualities — Provision extraneous to suit — Decree, held inexecutable.

HS/HS/D97/75/SSG

In view of Order 23, Rule 3, a suit can be adjusted by lawful agreement or compromise only in respect of matters connected with or embraced within such proceeding and not of matters extraneous to it. The decree to be passed is to be in accordance with such compromise or agreement in so far as it relates to the suit. If however a compromise or agreement is entered into on matters relating to the suit as also on matters beyond the scope and ambit of the suit forming the consideration of the compromises, the Court may pass a decree recording such compromise or agreement but the decree will in effect be in so far as it relates to the suit and will be operative and executable to that extent. In respect of matters extraneous to the suit, the provisions of the decree will be and amount to an agreement between the parties binding and conclusive on them, to be enforced in a separate suit or proceeding, if considered necessary by any of the parties. (1907) ILR 34 Cal 456; AIR 1919 PC 79 and AIR 1932 Bom 466, Followed.

(Para 5)

Where, therefore, a suit by a lessee against his lessor for permanent injunction restraining the lessor from interfering in any way the lessee's possession of the disputed tank was decreed on compromise between the parties and the terms of compromise contained an admission of lessee of the lessor's title to the tank and a further grant of lease to the lessee by the lessor with provision for recovery of possession in certain eventualities, these provisions regarding the creation of lease as also of the recovery of possession of the suit property in certain contingency were clearly extraneous to the suit and could not be enforced in execution of the decree though they could form the basis of a separate suit on a concluded and binding agreement. The mere fact that the terms of the compromise provided for execution of the decree would not per se enable the lessor to execute the decree if it was otherwise inexecutable in law. Hence, the decree was clearly inexecutable in so far as it sought to recover possession of the disputed tank.

(Paras 7 to 9)

Cases Referred:	Chronological	Paras
AIR 1932 Bom 466	= 34 Bom LR 849	6
AIR 1919 PC 79	= 24 Cal WN 177	6
(1907) ILR 34 Cal 456		6

Shyama Charan Mitter and Amar Nath Roy Choudhury, for Appellants; Padmabindu Chatterjee and Abja Keshab Chatterjee, for Respondents.

JUDGMENT:— The only point in this appeal is whether the decree is executable.

2. The plaintiff judgment-debtor filed the Title Suit, being Title Suit No. 231 of 1956, praying for permanent injunction restraining the defendants from dispossessing him from the disputed tank or otherwise interfering with his possession and enjoyment thereof. This suit was decreed on a solenama entered into by and between the plaintiff and

the contesting defendant No. 1. The material provisions of the solenama broadly are as follows:

- "(a) The plaintiff admits the disputed tank to be the khas property of defendant No. 1.
- (b) The defendant No. 1 grants lease of the disputed tank to the plaintiff for a period of seven years at an annual rent of Rs. 750/-.
- (c) On the expiration of Chaitra, 1369 B. S. the plaintiff will vacate the disputed tank and make over peaceful possession thereof to the defendant No. 1 and in default the defendant No. 1 will be entitled to recovery of possession of the said tank in execution of the decree.
- (d) If the defendant No. 1 fails to use the tank for his own exclusive business purpose (rearing fish spawns), then the plaintiff will be entitled to further lease for such terms and conditions as may be agreed."

It appears that the suit was decreed on the aforesaid solenama against the defendant No. 1 and the solenama was made a part of the decree. The decree was subsequently registered.

3. The defendant No. 1 transferred his interest in the suit property to the appellant before us who put the said decree in execution in Title Execution Case No. 60 of 1963. The judgment-debtor-respondent No. 1 filed an objection under Section 47 of Code of Civil Procedure contending that the decree was not executable giving rise to Misc. Case No. 57 of 1964. The learned Munsif overruled the objection against the execution of the decree and dismissed the Misc. Case. On appeal the learned Appellate Court allowed the objection and dismissed the execution case. The present appeal is against this decision.

4. Mr. Shyama Charan Mitter, learned Advocate appearing for the appellant, has contended that the appellate court's judgment was vitiated by misconception of the terms of the decree. It was held by the said court that there was no stipulation that the decree-holder would be entitled to recovery of possession of the suit tank by execution of the decree in the event amicable possession was not delivered on the expiry of the agreed period. Mr. Mitter drew my attention to the express provisions of the decree which provided that in the event of the failure of the judgment-debtor to make over peaceful possession thereof the defendant No. 1 would be entitled to recovery of possession in execution of the decree. In view of the erroneous misreading of the provisions of the decree, it was submitted that the judgment under appeal should be set aside.

5. The court's power to record a compromise and pass a decree on such compromise has been provided in Order 23, Rule 3 of the Code of Civil Procedure. The provisions of the said rule are as follows:

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

It appears from the above provisions that the Court is entitled to record a compromise when a suit is adjusted wholly or in part by any lawful agreement or compromise. This obviously indicates that the suit can be adjusted by lawful agreement or compromise only in respect of matters connected with or embraced within such proceeding and not of matters extraneous to it. The decree to be passed is to be in accordance with such compromise or agreement in so far as it relates to the suit. If however a compromise or agreement is entered into on matters relating to the suit as also on matters beyond the scope and ambit of the suit forming the consideration of the compromise, the Court may pass a decree recording such compromise or agreement but the decree will in effect be in so far as it relates to the suit and will be operative and executable to that extent. In respect of matters extraneous to the suit, the provisions of the decree will be and amount to an agreement between the parties binding and conclusive on them, to be enforced in a separate suit or proceeding, if considered necessary by any of the parties.

6. The Courts however have not taken a uniform view in regard to the enforceability of a consent decree when such decree embraces matters which do not relate to the suit. As has been noticed by Mulla, according to Allahabad and Madras decisions such terms can be enforced in execution of a decree and it is not open to the party against whom the decree is sought to be executed to object to the decree on the ground that it contains matters foreign to the suit. Our High Court has said that such terms cannot be enforced in execution of a decree but they may be enforced as a contract by a separate suit. In *Jasimuddin Biswas v. Bhuvan Jelini*, (1907) ILR 34 Cal 456, it was held that though the compromise contained provisions about execution of a *kabuliyat* and *patta* by the parties the Court executing that decree would not have been empowered under it to compel the defendants to execute a *kabuliyat* in favour of the plaintiff or to accept a lease on the terms agreed to. At the same time the Court observed that there was no reason for not passing a decree for damages or rent at the rate agreed to by the parties in the compromise decree in a subsequent suit instituted for recovery of rent. In *Hemanta Kumari v. Midnapur Zamindari Co.*, 24 Cal WN 177 = (AIR 1919 PC 79) it was observed as follows:—

".....a perfectly proper and effectual method of carrying out the terms of

this section (similar to Order 23, Rule 3) would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement. it may be that as decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents."

In interpreting this judgment it was held in *Vishnu v. Ramchandra*, AIR 1932 Bom 466 that while it will be proper for the decree to recite the whole agreement, the operative part of the decree should be confined to the subject-matter of the suit and any agreement forming the consideration of the compromise as to matters extraneous to the suit can be enforced in a separate suit.

7. In this case before us the plaintiff instituted a suit for injunction restraining the defendant No. 1 from interfering with his possession of the suit property held under his tenancy. In this suit, as we have seen, the terms of the compromise contained an admission by the plaintiff of the title of the defendant No. 1 to the suit land with a further grant of lease to the plaintiff by the said defendant with provision for recovery of possession in certain eventualities. These terms, viz., creation of a lease and the provisions for recovery of possession clearly in my opinion were outside the ambit of the suit although they formed a concluding agreement between the parties and it is also to be noted that this decree was duly registered. In this view of the matter though the plaintiff was liable to deliver vacant possession to the defendant No. 1 under certain conditions this provision could not be the operative provision of a decree in the suit which was brought by the plaintiff for reliefs claimed for his benefit. Under the provisions of the compromise the plaintiff became a judgment-debtor while the defendant No. 1 became the decree holder although the plaintiff came to court as a suitor to protect interference with his possession of the suit property. I am, therefore, of the opinion that these provisions regarding the lease as also of the recovery of possession of the suit property in certain contingency were clearly extraneous to the suit and could not be enforced in execution of the decree though they could form the basis of a separate suit on a concluded and binding agreement.

8. The mere fact that the terms of the compromise provide for execution of the decree will not per se enable defendant No. 1 to execute the decree if it is otherwise inexecutable in law. It may be noted in this connection that although the appellate court's reasoning for allowing the appeal was the absence

of the provisions for execution in the compromise petition the court also entered into the question of extraneous matters incorporated in the decree and the conclusion was against the decree-holder.

9. In the above state of affairs, I am of opinion that the decree was clearly inexecutable so far as it sought to recover possession of the disputed tank and the appellate court was justified in dismissing the execution case.

10. For these reasons this appeal fails and is dismissed.

11. There will, however, be no order for costs.

12. Leave under clause 15 of the Letters Patent is asked for and is granted.

Appeal dismissed

AIR 1975 CALCUTTA 389

A. N. SEN AND JANAH, JJ.

Jogendra Nath Naskar, Appellant v. Official Receiver and others, Respondents.

Appeal No. 223 of 1963, in Ex. Or. Suit No. 6 of 1957, D/- 24-12-1974.

(A) Hindu Law — Religious and charitable endowment — Alienation of debuttar property operating under scheme framed by Court — Permissibility — Lease in violation of term of scheme — Effect. (i) Civil P. C. (1908), S. 92; (ii) Transfer of Property Act (1882), S. 105.

Under the Hindu Law an alienation of debuttar property can only be made on the ground of legal necessity and it can be made by all the Shebait acting jointly. The Shebait cannot delegate their authority to any other person or a particular Shebait or some Shebait. But the position becomes different when the debuttar estate is operating under a scheme framed by the Court. In such a case the provisions of Hindu Law regarding the rights of the Shebait acting jointly is modified to the extent as provided for in the scheme. (Para 8)

Under certain clauses of the scheme framed by Court in respect of a debuttar property it was intended that there should be 5 members in the managing committee except when the circumstances made it impossible to have 5 members. The scheme made it imperative for the vacancy to be filled up with the least possible delay. The question arising in course of election of a new member was required to be decided at the meeting called for the purpose of filling up the vacancy. No general meeting of Shebait for the purpose of filling up certain vacancies was called and the vacancies were not filled up. At any rate under the term of the Scheme, even if the continuance of the remaining members of the committee was premissible, they could not grant lease for

more than three years which affected the debuttar property permanently.

Held that the remaining members were not competent to execute the lease for more than three years. Such leases would be invalid. (Para 12)

(B) Hindu Law — Religious and charitable endowment — Scheme framed by Court for management of debuttar property — Meetings of shebais — Scheme prescribing particular mode of service of notice — Failure to serve in accordance with that mode — Meeting, even if held, was rendered invalid. (Civil P. C. (1908), S. 92). (Para 12)

(C) Evidence Act (1872), S. 101 — Legal necessity — Debuttar property — Alienation of — Party desiring Court to uphold alienation must prove that it was for legal necessity — (Hindu Law — Religious and charitable endowment) (Para 13)

(D) Hindu Law — Religious and charitable endowment — Debuttar property — Alienation of — Legal necessity — What constitutes.

In order to constitute legal necessity there must be such a pressure upon the estate that without the alienation in question the estates could not have been preserved. It is impossible to give a precise definition of 'benefit to the estate' or 'necessity' applicable to all cases. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things will obviously be benefits. Necessity does not mean actual compulsion but the kind of pressure which the law recognises as serious and sufficient. The alienation in order to be one for legal necessity, must be for the preservation of or for the benefit to the estate. AIR 1917 PC 33; AIR 1922 PC 356 and AIR 1966 SC 1011, Rel. on. (Para 13)

Prior to the execution of the disputed leases the income of the debuttar estate in question was Rs. 300/- per month and although repeated directions were given in the meeting to the managing committee to reduce the expenses nothing was done by the managing committee. The managing committee was directed to frame a scheme for reducing the expenses and for improvement of the estate for consideration by the general body of the Shebais but this direction was not complied with by the managing committee. The question about existence of legal necessity was at issue.

Held that it could not be said that there was such a pressure upon the debuttar estate that without the leases in question the debuttar estate could not be preserved at all. (Para 13)

(E) Hindu Law — Religious and charitable endowment — Debuttar property — Legal necessity — Enquiry into existence of — Bona fide enquiry — Implications. (Transfer of Property Act (1882), S. 38).

Bona fide enquiry implies that one must act with reasonable care and must act in good faith in entering into the transaction. (Para 14)

The leases were granted by certain members of the managing committee of a debuttar estate in violation of a term of the scheme framed by the Court. The lessees, without making any independent enquiry as to the competency of those persons to grant the leases and without inspecting or referring any document or books of accounts, merely relied upon the verbal statements of the shebais;

Held that such enquiry could not be called bona fide enquiry about the existence of the legal necessity. (Para 14)

(F) Civil P. C. (1908), O. 40, R. 1 — Power of Receiver under — Ambit of — Suit for protection of deity's interest and for preservation of deity's property — Maintainability.

The Receiver has no independent cause of action in him. Under the provisions of Order 40, Rule 1, Civil P. C. a Receiver is competent to enforce the cause of action of somebody else. He sues in a representative character. General law gives certain rights either to the deity or to the Shebais or to both. Order 40 gives the entirety of that right to the Official Receiver. The Official Receiver represents the deity as well as the collective rights of the Shebais to sue. When the receiver is enforcing the cause of action of the owner itself the person against whom relief is being claimed is alone a necessary party. The right of action of the deity and the right of action of all the Shebais are represented by the Receiver. The suit in which the Receiver has been appointed is an administration suit and the circumstances are such that the administration of the debuttar estate has devolved upon the Court. In these circumstances the Court may pass any order for proper representation of the deity. After the appointment of the Receiver the management of the debuttar estate is in the hands of the Court and as such the Court has power to grant permission to the Receiver to file a suit for the protection of the deity's interest and for preservation of the deity's property. Representation by the Receiver in such a case is more complete than in the case of appointment of a next friend by the Court. Case law discussed. (Para 15)

(G) Civil P. C. (1908), O. 1, R. 9 — Necessary parties—Suit by Receiver challenging certain leases made by the managing shebais in violation of scheme framed by Court — All shebais are not necessary parties — AIR 1925 PC 139, Distinguished. (Para 17)

(H) Civil P. C. (1908), O. 1, R. 3 — Suit by Receiver in respect of debuttar property — Receiver not claiming any interest adverse to that of deity — Implication of deity as defendant, held to be proper — AIR 1965 SC 1812, Applied; AIR 1952 Cal 763; (1972) 76

CWN 1016; AIR 1925 PC 139 and AIR 1937 Cal 338, Followed. (Para 17)

(I) Civil P. C. (1908), O. 20, R. 12 — Suit by Receiver challenging leases of debuttar property — Prayer also for enquiry into damages suffered by deity—Leases found to be void—Court must direct enquiry for ascertaining mesne profits — Judgment of Mallick, J. in Ext. Ord. Suit No. 6 of 1957, D/- 19-6-1963 (Cal), Reversed. (Para 18)

Cases Referred: Chronological Paras

(1972) 76 Cal WN 1016	17
AIR 1969 SC 267 = (1969) 1 SCR 589	12
AIR 1967 SC 436 = 1966 Supp SCR 270	15
AIR 1966 SC 1011 = (1966) 2 SCJ 220	12,
	13
AIR 1965 SC 1812 = (1965) 3 SCR 283	17
AIR 1960 Cal 741	15
AIR 1955 Cal 624 = 59 Cal WN 779	15, 16
AIR 1952 Cal 763 = 89 Cal LJ 224	17
AIR 1947 Cal 213 = 50 Cal WN 14	16
AIR 1937 Cal 338 = 41 Cal WN 728	17
AIR 1935 Cal 94	14
AIR 1927 Cal 244 = 44 Cal LJ 522	15
AIR 1925 PC 139 = 52 Ind App 245	16, 17
AIR 1922 PC 356 = 49 Ind App 342	13
AIR 1917 PC 33 = 44 Ind App 147	13
(1911) 15 Cal WN 793 = 10 Ind Cas 350	14
(1909) 36 Ind App 148 = ILR 36 Cal 1003 (PC)	12
(1904) 31 Ind App 203 = ILR 32 Cal 129 (PC)	15
(1880) 8 Ind App 8 = ILR 6 Cal 843 (PC)	14
(1856) 6 Moo Ind App 393 (PC)	12

Sankar Das Banerjee in support of the Appeal; Standing Counsel, for the Official Receiver.

JANAH, J.:— This appeal is directed against the judgment and decree dated June 19, 1963 passed by Mallick, J. in Title Suit No. 79 of 1952 of the 8th Court of the Subordinate Judge, Alipore, which, on transfer to this Court was registered as Extraordinary Suit No. 6 of 1957. The said suit was instituted by the respondent No. 1, the Official Receiver, challenging the alienation of certain debuttar properties.

2. By a Deed executed on January 18, 1806, one Raja Pitambar Mitra established and consecrated the deity Sri Sri Iswar Baldeo Jew Thakur, and by another Deed dated May 17, 1824, his wife Sm. Nandarani Dasi established and consecrated the deity Sri Sri Gopal Jew Thakur. The debuttar estate consisted of a large number of valuable properties, both land and premises, in and around Calcutta. The alienations challenged in the suit were by way of long leases granted by 3 persons consisting the committee of management under a scheme framed by this Court in an administration suit being, suit No. 1528 of 1926. The scheme was framed in the said suit and a preliminary decree was passed on March 30, 1934, and the final decree was passed on January 28, 1939, confirming

the report of the Official Referee dated March 7, 1938.

3. On December 4, 1950 a second suit for administration of the same debuttar estate was instituted in this Court, being Suit No. 4575 of 1950, by one Ashalata Majumdar, one of the shebaitis of the aforesaid deities, as a next friend of the said deities. All the other shebaitis were impleaded as defendants in that suit. Allegations have been made in the plaint in that suit that the debuttar estate was not being administered in accordance with the scheme framed in Suit No. 1528 of 1926, that out of 5 members constituting the managing committee, one died and one resigned, and no steps were taken to fill up the vacancy as provided in the scheme, that the remaining members of the managing committee were administering the debuttar estate illegally and contrary to the scheme, that the said 3 members granted long leases of the debuttar properties and were otherwise guilty of various acts of mismanagement and dereliction of duty and that the scheme had become infructuous and it had inherent defects. On these allegations it was prayed that a new scheme be framed, that the surviving members of the managing committee elected in 1943 be removed from the management and that the debuttar estate be administered by the Court. In the said suit the Official Receiver was appointed Receiver in respect of the entire debuttar properties by an order dated December 30, 1950. By another order dated December 20, 1951 leave was granted to the Official Receiver to institute suit or suits in the Court of competent jurisdiction to set aside or avoid the leases granted by the said 3 members of the managing committee in favour of Hem Chandra Naskar and Jogendra Nath Naskar. Pursuant to the leave granted the suit out of which this appeal arises was instituted by the Official Receiver as a Receiver appointed in the suit No. 4575 of 1950 for a declaration that the 3 leases dated May 3, 1946, November 29, 1946 and December 26, 1946 in favour of Hem Chandra Naskar and Jogendra Nath Naskar or either of them are void and not binding on the debuttar estate. There is also a prayer for cancellation of the said leases. The properties covered by the said 3 leases are outside the original jurisdiction of this Court. The suit was instituted in the court of the Subordinate Judge at Alipore on 1st May, 1952. Subsequently by an order of this Court under clause 13 of the Letters Patent the suit was transferred to this Court. Pursuant to the leave granted on April 28, 1952 another suit was instituted by the Official Receiver being suit No. 1654 of 1952 for cancellation of another lease in favour of the same lessees and for a declaration that the same was not binding on the debuttar estate. Most of the properties covered by the said lease are situated within the original jurisdiction of this Court. The defendants impleaded in both the suit are the deities in respect of whose estate the Official Receiver was ap-

pointed as Receiver, the two lessees, Hem Chandra Naskar and Jogendra Nath Naskar, and the 3 members of the managing committee who granted the leases, namely, Khagendra Lala Mitra, Sachindra Lala Mitra and Abani Ghosh. During the pendency of the suit Hem Chandra Naskar and Sachindra Lala Mitra died. It is alleged that after the death of Rajendra Lala Mitra who during his lifetime was acting with the consent of the other shebait as the person in management of the debuttar estate dispute arose amongst the descendents of Raja Pitambar Mitra which ultimately led to the institution of the suit No. 1528 of 1926. It is alleged that after the death of Subodh Lala Mitra and the resignation of Jogendra Lala Mitra, two members of the managing committee elected in December, 1943 the remaining 3 members were guilty of violation of the provision of the scheme in not filling up the vacancy and they unlawfully purported to continue to act as the managing committee. It is further alleged that the disputed leases were granted fraudulently without any legal necessity in breach of the scheme at an abnormally low rent. The grantors obtained a selami on the said 3 leases amounting to Rs. 10,000/-, Rs. 5,000/- and Rs. 5,000/- respectively. The 3 members and the lessees have been charged with collusion and conspiracy to deprive the debuttar estate. The capacity and the authority of the grantors who granted the leases has also been challenged. It is pleaded that the leases were void ab initio as the grantors had no authority to grant leases on behalf of the defendant deities. The grants were made in direct contravention of the scheme framed by this Court. It is alleged that no general meeting was called and the procedure prescribed in the scheme had not been observed for obtaining the approval and sanction of the shebait to grant the leases. The lessees were alleged to have obtained the leases with full knowledge of the breach of trust and the want of authority on the part of the grantors and also with full knowledge of the illegality of the transaction.

4. A voluntary statement was filed on behalf of the defendant deities supporting the plaintiff's case. Two written statements were filed, one on behalf of the lessees Hem Chandra Naskar and Jogendra Chandra Naskar, and another on behalf of Khagendra Lala Mitra in which the plaintiff's claim was disputed and all allegations of fraud, conspiracy and collusion were denied. The defendants asserted that the grant of the leases was made in accordance with the scheme after obtaining of the approval of the shebait at a general meeting duly convened and held for that purpose. It was stated that the vacancy caused by the death of Subodh Lala Mitra and the resignation of Jogendra Lala Mitra could not be filled up for reasons beyond the control of the members of the committee and that the remaining 3 members were com-

petent to function without the vacancy being filled up. On behalf of the lessees it has been further asserted that they were bona fide transferees for value without notice of the defect in the title of grantors, if any, and as such their title as lessees is fully protected in law. The lessees were alleged to be for the benefit of the debuttar estate. The Receiver's competency to file the suit and his locus standi has also been disputed. It is contended that the suit is bad for non-joinder and mis-joinder of parties and of causes of action. The suit is said to be barred by limitation and finally, it is pleaded that the suit is false and mala fide and has been instituted at the instance of the previous lessee Sri Sankarsen Ltd. and or Rohinindra Lala Mitra and Mrigendra Lala Mitra, two of the shebait with a view to harass the defendants Khagendra Lala Mitra because of personal animosity.

5. A large volume of evidence both oral and documentary was tendered on behalf of the parties. The learned Judge in the trial court found that the leases granted by the 3 members of the managing committee of shebait were in violation of the scheme framed by this Court, and as such the leases were invalid. On the question of fraud, collusion and conspiracy between the said 3 members and the lessees the learned Judge held that the pleading with regard to fraud and collusion lacked sufficient particulars, and therefore, he did not allow the plaintiff to agitate that question. The learned Judge further found that there was no legal necessity justifying the alienation of the debuttar estate and further that the lessee did not make bona fide enquiry about the existence of legal necessity and he accordingly held that the leases were not binding upon the debuttar estate. On these findings the learned Judge decreed the suit.

6. One of the lessees namely, Hem Chandra Naskar having died in the meantime the other lessee Sri Jogendra Nath Naskar has filed the present appeal against the decision of the trial Court.

7. Mr. Sankardas Banerjee, learned Counsel appearing in support of the appeal has, in the first place, contended that in the facts and circumstances of the present case it was perfectly competent for the 3 members of the managing committee to grant leases and such alienation of debuttar property was not contrary to the scheme framed by this Court. In order to appreciate the argument advanced by Mr. Banerjee it would be convenient to refer to the provisions of the scheme. Clause (2) of the scheme provides: "A committee shall be formed consisting of 5 shebait for the purpose of management of the debuttar estate." Clause (3) provides that the committee shall be formed by election by ballot by the shebait, each shebait having one vote. Out of 5 members to be elected 3 shall be elected from the 3 branches of Janmejoi, Haralal and Gopimohan, and the other 2 shall be elected as representatives of the general

body. Clause (4) in its various sub-clauses makes provisions with regard to the mode of formation of committee and its tenure. It provides, inter alia, that the existing committee for the time being under the signature of the managing shebait shall at least two calendar months prior to the expiry of the term of office issue notices to all the shebait intimating that anyone desirous of seeking election for any one of the seats on the committee must write to the managing shebait intimating his intention to do so. Upon receipt of letters from the shebait in reply to such notices the managing shebait shall place the same before the committee. Then the date of election has to be fixed by the managing committee and the notice intimating the date of election has to be served upon all the shebait. It is provided that if there be no candidate for election from a particular branch that seat will be treated as a general seat along with the other two general seats. Rules have been laid down for election of the chairman, method of voting, qualification of a voter, opening of the ballot box and declaration of the result. By clause (5) the first committee was constituted consisting of the following members:

Sri Pulin Krishna Mitra,
Sri Subodh Lala Mitra,
Sri Robindra Lala Mitra
Sri Khettar Lal Mitra, and
Sri Satya Prosad Dutta.

Clause (6) provides for vacancies in the committee and is in the following terms:

"6 (1) If a member of the committee during its tenure is unable to attend six successive meetings (sic) illness, or is convicted of an offence involving moral turpitude or commits misfeasance or misconduct in the performance of worship or in the management of the properties of the Thakur, or becomes an apostate or a lunatic or an insolvent, or if he or she dies, the other members of the committee shall upon notice in writing to the member of the Committee in respect of whose seat the election is to take place (except in the case of his or her death) and to all other shebait, within a fortnight of the happening of such event, convene an extraordinary general meeting of the shebait for the purpose of removing of the said member, (except in the case of his or her death) and/or for electing a member in his or her place and the aforesaid rules as to eligibility of the candidate and the procedure to be followed at the meeting for general and special seat will be applicable to such extraordinary general meeting convened for the purpose aforesaid.

(2) If any dispute arises as to any of the above reasons for the vacancy, the decision of the majority of the shebait at the general meeting so convened shall be final.

(3) Upon the happening of the event as aforesaid, not earlier than six months prior to the expiration of the term of office of the

particular committee, the shebait at the general meeting so convened as aforesaid for the purpose of electing a member of the committee, shall, if they so consider fit by a majority of votes of those present at the meeting, be entitled to declare that the vacancy need not be filled up for the remaining period of the term of office of the particular committee."

Clause (7) enumerates the powers of the committee. It provides that the committee will be in charge of all movable and immovable properties of the debuttar estate, it shall take steps for improvement of the estate, it shall not be entitled to borrow money for any purpose except upon a resolution passed by a majority of 3/4th votes of shebait present at such general meeting to be convened by the committee by requisition in writing. The amount to be spent for the puja has been mentioned in the schedule annexed thereto and marked 'X'. But if the income increases or decreases then with the consent and approval of the majority of the shebait which is to be ascertained at a general meeting of the shebait to be called by the committee, the committee shall be entitled to reduce or increase the puja expenses as the case may be. Clause (8) provides for the appointment of a managing shebait by election from amongst the members of the committee. He is to be guided in all respects by the direction of the committee and subject to such guidance do everything in connection with the management and performance of the puja. The managing shebait is responsible for realisation of rent and profits of the properties and keeping of accounts. Clause (9) makes provisions for appointment of staff for carrying out the work of the debuttar estate and it provides that "if the committee wants to increase or decrease the salaries of the staff the committee shall be able to do so with the consent and approval of the majority of the shebait to be ascertained at a general meeting of the shebait." Clause (14) provides that a general meeting of the shebait shall be called at the commencement of every budget year and a summary of the account of the realisations made and expenses incurred in the preceding budget year shall be placed before that meeting. It further provides that the committee "shall also place a budget showing how the committee propose to spend the income during the current year and such direction as may be given by a majority of the shebait present at the meeting so convened shall be observed and carried out by the committee and the managing shebait." Clause (15) provides that "if any dispute arises as to the validity or authenticity of the proxy the decision of the majority of the shebait present at the meeting shall be final". Clause (16) provides that notices of general or extraordinary general meeting shall be signed by the managing shebait under direction of the committee. There shall be kept in the office a

book in which the Shebait shall enter their respective addresses. All notices to Shebait shall be sent to such addresses as are respectively entered by them in the book as aforesaid. If any shebait fails to enter his address in the book to be so kept as aforesaid, and in consequence of such failure the notice of meeting is not sent to his correct address, the shebait in default shall not be entitled to raise any objection. Sub-clause (b) of Cl. 17 which is very important reads as follows:

"17 (b) The committee shall not be entitled to sell or mortgage of the properties of Thakur, nor shall they be entitled to grant a lease of any of the properties for a term exceeding three years at a time. If the committee wants to grant a lease for a term exceeding three years, the committee shall be empowered to do so with the sanction and consent of the majority of the Shebait to be ascertained in a general meeting of the Shebait held specially for the purpose."

Clause (19) provides that the Shebait who are at present occupying portion of the buildings of the Thakur or the compound adjoining the Thakurbati may continue in occupation of the said portions "provided however that the Shebait by a 4th majority of votes of those present at a General or Extraordinary general meeting of the Shebait may take such action in regard thereto as they may consider to be beneficial to the interest of the Thakurs". Lastly, Clause (21) provides that the scheme is liable to alteration without recourse to a suit by means of a resolution of the general body of the Shebait passed in that behalf and an order obtained from this Court on application made in this suit by such Shebait or Shebait as may be authorised in that behalf by such resolution.

8. The question which requires consideration, therefore, is whether the managing committee consisting only of 3 members is competent to grant long leases exceeding 3 years in view of the provisions contained in the aforesaid scheme. Under the Hindu Law an alienation of debuttar property can only be made on the ground of legal necessity and it can be made by all the Shebait acting jointly. It is well settled that the Shebait cannot delegate their authority to any other person or a particular shebait or some Shebait. But the position becomes different when the debuttar estate is operating under a scheme framed by the Court. In such a case the provisions of Hindu Law regarding the rights of the Shebait acting jointly is modified to the extent as provided for in the scheme. In the present case, therefore, an alienation of the debuttar property could be made by the members of the managing committee of Shebait provided it was done in terms of the scheme. It was contended by Mr. Banerjee, learned Counsel on behalf of the appellant that the managing committee consisting of 3 members was competent to function inasmuch as in Title Suit

No. 63 of 1946 filed for a declaration that the scheme framed in Title Suit No. 1528 of 1926 was not working smoothly and for framing of a new scheme, an order of injunction was passed restraining all the Shebait from interfering with the possession of the debuttar estate by the present managing committee. The said order was made absolute by Order No. 70 dated 10th December, 1948 as would appear from Exhibit 07(a). It was also contended that under clause 6 (3) of the scheme read with clause 4 (14) of the scheme the managing committee of 3 members was competent to act as there was a quorum. It was said that the leases were granted by the managing committee after approval of the majority of the Shebait at the extraordinary general meeting held on February 24, 1946 and February 27, 1946. It was further contended that there was no express prohibition in the scheme itself that the managing committee consisting of 3 members cannot function because of 2 vacancies remaining unfilled up. Mr. Banerjee referred to the evidence of several witnesses for the plaintiff and submitted that it would be evident from the deposition of the said witnesses that the practice was that the priest Sri Dwijapada Bhattacharyya, was given a copy of the notice convening the meeting. Sri Dwijapada Bhattacharyya went round to the Shebait and informed them about the proposed meeting. It was submitted that the shebait never took exception to this practice. Mr. Banerjee referred to Exhibit Q. (1) which is the proceeding of the extraordinary general meeting held on the 14th July, 1946 in support of his contention that the priest informed about the meeting, that he personally took the notice to the Shebait but they refused to sign. Mr. Banerjee commented on the fact that the priest Dwijapada Bhattacharyya who was the most material witness in this regard was not examined by the plaintiff.

9. The first question to be considered, therefore, is whether the committee of 3 members could grant the disputed leases. An examination of the scheme, particularly the provisions of the different sub-clauses of clause 4 and also clause 6 of the scheme would show that it was intended that there should be 5 members in the committee except when the circumstances make it impossible to have 5 members. The scheme makes it imperative for the vacancy to be filled up with the least possible delay. It provides that questions arising in course of election of a new member must be decided at the meeting called for the purpose of filling up the vacancy. It was therefore the duty of the committee to call a general meeting within 15 days of the vacancy for the purpose of filling up the vacancy as provided in Cl. 6 (1). In the present case the first elected committee of 5 members came into existence on December 5, 1943 and it had a life of 3 years. The term of the first elected committee would have expired on December 4,

1946. In the meantime Subodh died on March 3, 1945 (See Ext. M) and Jogendra resigned on August 24, 1945 (See Ext. D). It is admitted that no extraordinary general meeting for the purpose of filling up the respective vacancy was called as provided in clause 6 (1) of the scheme, and the vacancies were not filled up. In answer to Q. 479 Khagendra admitted that the vacancies were not filled up. He tried to put forward an explanation for not filling up the vacancy but the explanation sought to be put forward by him is hardly acceptable. In his cross-examination Khagendra has made contradictory statements and has not been able to give any satisfactory explanation as to why the vacancies were not filled up. In answer to Q. 43 Khagendra stated that Sushil was repeatedly asked to attend the meeting but he did not do so. This statement is falsified by Exhibit 'P' which is a minute of the adjourned general meeting held on 25th March, 1945 which shows that Sushil Mitra joined the meeting on that day. Moreover, Sushil himself filed a petition of objection in the Sealdah Suit in which he categorically denied the case of the appellant. Ext. 'P' shows that the general body of Shebaitis at a general meeting passed a resolution to the effect that an Extraordinary general meeting should be called to fill up the vacancy but no such extraordinary general meeting was called, and without an extraordinary general meeting being called Khagen's evidence to the effect that no one was willing to join the managing committee cannot be accepted. On a proper construction of the scheme it must, therefore, be held that only a committee of 5 members is competent to act. This would be quite clear from clauses 2, 3 and 17 (b) of the scheme. Even at the cost of representation of 3 different branches of the Shebaitis the scheme contemplates to have a committee of 5 members. It provides in clause 6 (3) that if there is a vacancy within 6 months of the expiry of the term of the committee the continuance of the remaining members for filling up the vacancy is subject to the direction of the general body and is not automatic. Further the scheme lays stress on filling up the vacancy within the shortest possible time, and all disputes in that behalf must be resolved at the meeting itself. It is clear, therefore, that the scheme does not contemplate a gap unless the circumstances are such that it is absolutely unavoidable. Learned standing Counsel appearing on behalf of the plaintiff respondent contended that even under such circumstances if the committee continues with the vacancy remaining unfilled up its function must be confined to routine business and it cannot take any action under clause 17 (b) of the scheme which affects the debuttar estate permanently. It was further contended that the injunction order passed in the Alipore Suit and Sealdah Suit would not confer any authority on the committee if otherwise the committee had no authority to act under the

terms of the scheme. In the view we have taken this contention advanced on behalf of the respondent must be accepted.

10. On the question whether any meeting was held to obtain the sanction of the lease by the majority of the Shebaitis as contemplated in clause 17 (b) of the scheme it is to be noticed that the minutes of the 3 meetings covering the 3 leases are the meetings dated February 24, 1946 (Ext. 0005), February 25, 1946 (Ext. 0006) and February 27, 1946 (Ext. 011 (A)) respectively. The leases recite the meetings of the shebaitis where consent of the majority of the Shebaitis in support of the leases is supposed to have been taken. The first lease, Ext. R, dated May 5, 1946 recites the minutes of the meeting dated 24th February, 1946. The second lease, Ext. T, dated 29-11-1946 recites the minutes of the meeting dated 27th February, 1946. These minutes are in loose sheets of paper. Originally the date 24th February was typed out and it is subsequently erased and changed to 27th. The pleadings of the defendant on this point are to be found in paragraph 18 of the written statement filed on behalf of the appellant and paragraph 13 of the written statement filed on behalf of Khagendra. The defendant's case, therefore, is that all the 3 leases are covered by the minutes dated 24th February, 1946 and 27th February, 1946. In suit No. 1654 of 1952 out of which appeal No. 222 of 1963 arises, and which is heard analogously with this appeal, the defendants in their written statement have referred to resolution in the meetings of the general body of the Shebaitis on four different dates viz. 9-7-1944, 24-2-1946 9-11-1947 and 7-12-1947. The minutes of the meeting dated 9th July, 1944 have nothing to do with the grant of sanction of any of the leases. The minutes of the meeting dated 9-11-1947 and 7th December, 1947 are referred to in the 4th lease. Therefore, only minutes referred to in the written statement of the defendant in suit No. 1654 of 1952 are the minutes of the meeting dated 24th February, 1946. It is significant to note that no other dates covering the 3 leases in question have been mentioned. In Suit No. 48 of 1948 filed in the Munsif's court at Sealdah, Khagendra in his written statement referred to the minutes dated 24th February, 1946, 27th February, 1946 and 7th December, 1947. The original minutes were not annexed to the written statement of Khagendra and Abani (See Ext. 011 (b)). From these facts it is clear that none of the defendants in their pleadings had relied on the minutes of 25th February, 1946 at any time. But in the application filed before the District Judge of 24 Paraganas for permission to lease out the debuttar property the minutes of 25th February, were annexed (See Ext. N2). It is curious to note that the minutes of the meeting dated 27th February, 1946 were not originally disclosed. Khagendra in his evidence has stated about the minutes dated 24-2-1946, 25-2-1946, 16-11-1947 and 7-12-1947. He is

definite that there are 3 meetings covering all the 4 leases. Hence there are only 2 meetings covering the 3 leases in the present appeal. In answer to Q. 741 Khagendra in his evidence stated that he was not definite with regard to the dates of the meetings but said that 3 meetings were held. In the next question when he was specifically asked about the meeting of 25th February, 1946 with reference to paragraph 13 of his written statement he had to admit that it was not mentioned in his written statement. The first lease, Ext. R and the third lease, Ext. W recite the minutes dated 24th February, 1946. The Second lease, Ext. T recites the meeting dated 27th February, 1946. Khagendra, therefore in his evidence contradicted the recital in the second lease. Counsel for the appellant invited Khagendra to say that the recital in the second lease is a mistake and the correct date should be 25th February, 1946 (See Qs. 345-350). It thus appears that Khagendra tried to make out a case which is not the case in any of the pleadings either of the appellant or of Khagendra himself. Moreover, Khagendra does not lead any evidence to prove that there was any meeting by which the general body of Shebaita granted any authority to the 3 transferor Shebaita to execute the second and the third leases. It is significant to note that the minutes of the meeting dated 25th February, 1946 substantially covered the same ground as the minutes of the meeting dated 24th February, 1946 and yet it contains no reference to the minutes of the earlier meeting namely 24th February, 1946. It is also significant to note that in the application for permission filed before the District Judge, 24 Parganas, the meeting of 24th February, 1946 is nowhere mentioned. In answer to Q. 597 onwards Khagendra had to admit that the meeting of 24th February, 1946 was not mentioned but his explanation was that his lawyer knew everything before whom all facts were placed. Before us an application was filed on behalf of the appellant under Order 41, Rule 27 Code of Civil Procedure for reception of additional evidence of a Deed of Rectification said to have been executed on February 28, 1948 by Khagendra Lala Mitra, Sachindra Lal Mitra and Abani Kumar Ghose in favour of the Naskars. It is stated in the said application that in the recital contained in the lease dated 26th February, 1946 the date of the meeting wherein the majority of the Shebaita are alleged to have agreed to grant the lease had been mentioned as 24th day of February through mistake, in place of 27th day of February which is the correct date. A true copy of the said Deed of Rectification has been annexed to the application for reception of additional evidence. This application was not pressed before us and the certified copy of the said Deed of Rectification was not tendered in evidence and it was not marked as an exhibit in the appeal. In these circumstances we cannot take any notice of the aforesaid application. The application is

accordingly dismissed without however, any order as to costs.

11. According to the evidence of Chintaharan Bhattacharyya, the manager of the Naskar estate, meetings were held on 24th February, 1946 and 27th February, 1946. He however says that the date 24th in the third lease, Ext. W, is a mistake and it should be 27th. The minutes of the meeting of the 27th came into evidence for the first time on production of the records of Suit No. 48 of 1948 filed in the Sealdah Court. Exhibit 001 (b) is the written statement of Khagendra in that Suit. In that written statement the original minutes of the meetings dated 24-2-46 and 27-2-46 were annexed. Chinta Haran Bhattacharya, manager of the Naskar estate tried to prove the signature of Sachindra in the original minutes annexed to the written statement in the said suit. The original minutes of the meeting of the 24th are still part of the records of that case. Chintaharan Bhattacharya admitted that all these minutes annexed to the said written statements were the originals. On the other hand Khagendra has stated that the original minutes of the meetings dated 24th February, 1946, 25th February, 1946 and 7th December, 1947 were with him and his attorney. Chintaharan Bhattacharya is the only person who has given evidence with regard to the minutes of the meeting dated 27th February, 1946. On behalf of the Naskars it was not suggested to any of the plaintiff's witnesses or Khagendra or Abani that there was a meeting on 27th February, 1946. Admittedly neither the Naskar nor their manager Chintaharan Bhattacharya was present in any of these meetings. In these circumstances the minutes of the meeting dated 27th February, 1946 cannot be said to have been proved. Chintaharan's evidence is that he obtained certified copies of the minutes annexed to the written statement of Khagendra in Suit No. 48 of 1948 and that rough copies of the minutes of the meetings dated 24th February, 1946 and 27th February, 1946 were given to him by Khagendra. It is difficult to believe that if the appellant had copies of these minutes the same should not be suggested to any of the witnesses for the plaintiff. It appears from the evidence that Khetra was present in the meeting. According to the evidence of Khagendra the usual practice was that the seniormost member would preside over the meeting as Chairman. But the disputed meeting shows that although Khetra was present he was not the chairman in those meetings. There is no explanation as to why the usual practice was deviated from in these meetings. The serial number of the minutes of these meetings show that the meeting held on 9th July, 1944, Ext. 01, is the 4th extraordinary general meeting. Serial No. of the meeting held on 24th February, 1946, Ext. 0005, is the 6th extraordinary general meeting. When Khagendra was asked about the 5th extraordinary general meeting his answer to Q. 492 was that he

could not say which was the 5th extraordinary general meeting. When the minutes of the meeting dated 27th February, 1946 were produced by Chintaharan it appeared that it was the 5th extraordinary general meeting. In answer to Questions 491-499 Chintaharan frankly stated that he had no explanation and he stated that he did not check these things. It is also significant that only the impugned minutes contain the seal of the Shebait. This is very unusual. There are also serious discrepancies in the evidence of Khagendra, Abani and Chintaharan with regard to the persons on behalf of the Shebait who carried on negotiation with Chintaharan. Some say it was Khagendra who did everything. Others say that Sachindra did everything. It appears that the Naskara were insisting upon sanction of the leases from the court. Exhibit 012 (a) which is a letter dated 18th February, 1946 written by Hem Chandra Naskar and Jogendra Nath Naskar to Khagendra Lal Mitra and others mentions that a lease may be granted after obtaining the valid permission from the court. When sanction was refused by Alipore Court the lawyer Sanat Babu is said to have advised that no sanction is necessary and the first lease was executed. This conduct of the appellant is not consistent with the conduct of a person taking a lease bona fide after making due enquiry. Exhibit HH2 is an affidavit filed by Sachindra stating that the meetings were never held. Similarly Ext. RR1 is the petition of objection filed by Sushil. Chintaharan in his evidence has stated that he was satisfied only from the minutes that the majority of the Shebait have given consent for the execution of the leases and there is no case on behalf of the appellant that consent was given by the Shebait otherwise than in the disputed meeting. It is significant to note that although previously written notices used to be served for the disputed meetings it is said that only oral notices were served. Exhibits H, DD, G and P would show that written notices were previously served. Another curious feature about the meeting of the 25th February, 1946 is that the meeting of the 24th February, 1946 was finished at night. It would naturally take some time to decide that that meeting was not enough and another meeting should be held on the next day. There could hardly be any time to serve the notices for the meeting said to have been held on the 25th February, 1946. In the application for permission filed before the District Judge at Alipore no mention was made of the meeting said to have been held on the 27th February, 1946. On the other hand the plaintiff has given sufficient evidence to prove that no notices were served and no meetings were held. The persons shown to be present in the meetings of 24th and 25th are the same. The persons shown to be present in the meeting of the 27th are slightly different. Out of the persons shown to be present in the meetings of the 24th and 25th the plaintiff has called as witnesses a large number who may be considered to be disinter-

ested. The plaintiff has called Khetra. The next person is Khagendra himself. Dhiendra is siding with Khagendra. Sushil and Sachindra are dead. Provat and Panchanan were called as witnesses. Pasupati and Sanat were siding with Khagendra. They were the persons in the suit filed in Alipore and their father Khetra was the broker in the transaction. Manindra was siding with Khagendra. Bhajahai, Amarendra and Kiron Dasi are all dead. Over and above those persons the plaintiffs have examined Ajay Hriday Mitra who was shown to have been present in the meeting of 27th February, 1946. Four other Shebait, namely Ajit Uday Mitra, Anil Krishna Mitra, Rabindra Lala Mitra and Amulyadhan Joardar were also examined on behalf of the plaintiff. The last named person i.e. Amulyadhan Joardar has stated in his evidence that he usually does not concern himself with the affairs of the debutter estate. Nothing was suggested to him as to why he would depose falsely. In this state of evidence it must be held that the 3 meetings in question were not held as claimed by the defendants.

12. Another aspect to be considered in connection with the question whether the meetings were held or not, is the service of notice of the disputed meetings. On behalf of the appellant Mr. Banerjee contended before us that even assuming that there has been some irregularity in the matter of service of notice of the meetings the appellant cannot be held liable for that. It was contended that the charges of collusion and fraud not having been allowed to be raised by the trial court, it must be held that the enquiry made by Chintaharan Bhattacharyya was enough to uphold the transaction. In support of this contention he relied upon the decisions in (1856) 6 Moo Ind App 393 (PC), (1909) 36 Ind App 148 (PC), AIR 1966 SC 1011 and a passage at page 225 in Hindu Law of Religious and Charitable Trusts by Dr. B. K. Mukherjee. In our opinion, the authorities cited by Mr. Banerjee in support of his contention do not help him as would appear from the following passage at page 225 of Dr. Mukherjee's book of Hindu Law of Religious and Charitable Trusts (3rd Edition):

"Suppose that the income of the Debutter estate which was originally sufficient to meet the expenses of all the rites and festivals, either directed by the founder or observed in practice since the foundation of the temple, dwindles down, for some reason or other, can it be said in such cases that the Shebait can claim to continue the rites and ceremonies in the same scale as before and go on borrowing money to meet these additional expenses or else alienate the Debutter property to make up the deficiency. The answer must certainly be in the negative. Such conduct certainly cannot be that of a prudent manager which is essential to valid alienations of idol's property but would be repugnant to the very object of the grant.....

The Shebait in such circumstances, is duty bound to regulate the scale of service with reference to the reduced income and even some of the unessential ceremonies could be discontinued altogether."

The learned standing Counsel appearing on behalf of the Official Receiver, on the other hand, contended that clause 16 of the scheme requires a particular mode of service of notice and under clause 15 at least 3 days' notice must be given in order to enable the Shebait to give proxy. He argued that in the present case no notice was served as prescribed under the scheme and in fact no notice was served at all. He contended that unless the notice was served in the prescribed manner any business transacted in a meeting, even assuming that a meeting was held, would be illegal and invalid in law. Reliance was placed in support of this contention on the decision of the Supreme Court in *Gujarat Electricity Board v. Girdharlal Motilal*, AIR 1969 SC 267. In that case it was held that Section 6 (1) (a) of the Electricity Act (1910) (as amended in 1959) was mandatory. The notice must specifically call upon the licensee to sell the undertaking. It was further held that before the power conferred by S. 6 (i) could be exercised by the State Electricity Board the notice must be served in strict compliance with the provisions made in the Act. The learned standing counsel also relied upon a passage at pages 23, 24 in *Shackleton's Law and Practice of Meetings* (5th Edition). The said passage is as follows:

"Where meetings concern elected or other properly constituted bodies, due and adequate notice must be given to every member of the body, and the rules or regulations of that body must be strictly observed on all matters appertaining to the authority to issue, attestation of, and particular methods prescribed for, the service of notices"

General Principles

When notice is necessary, the following general rules must be observed.

1. Every person entitled to attend the meeting must be summoned, unless he be beyond reasonable summoning distance or is too ill to attend.
2. The notice must be frank, clear and free from trickiness, and if any special business is to be transacted this must be clearly stated.
3.
4. The notice must be served strictly in accordance with the regulations of the body on whose behalf it is given, and if any particular method is prescribed by Act of Parliament this also must be observed.
5.

In the present case the scheme has provided for a particular mode of service of notice.

The debuttar estate was being managed in terms of the scheme framed by the court. It was therefore incumbent upon the managing Shebait to serve notice of any proposed meeting strictly in the manner prescribed by the scheme. In our opinion, therefore, the failure to serve notice in accordance with the procedure prescribed by the scheme will render the meetings invalid in law even if such meetings were held, it having been admitted by Khagendra himself that no notices were served in the prescribed manner. It is to be noticed also that the majority of the Shebait within the meaning of clause 17 (b) of the scheme did not sanction the grant of the leases. As has already been seen clause 17 (b) of the scheme itself is a restriction upon the right of the members of the committee to grant a lease for a term exceeding 3 years at a time. It further provides that if the committee wants to grant a lease for a term exceeding 3 years the committee shall be empowered to do so with the sanction and consent of the majority of the Shebait to be ascertained in a general meeting of the Shebait held specially for that purpose. It was contended on behalf of the appellant that the term 'majority of the Shebait' in this clause implies majority of the Shebait present at the meeting. In our view the said expression in the said clause implies the majority of the total number of Shebait. This would be quite evident from the different expressions used in different clauses of the scheme. Clauses 4(7), 4(8), 4(11), 6(2), 6(3), 7(2), 9, 14, 15 and 19 would show that three different kinds of majority have been contemplated. The first kind is with regard to the decision by a majority of Shebait present at the meeting, the second is with regard to the decision of the majority of the Shebait to be ascertained at a general meeting and the third is the decision by the 3/4th majority of votes of Shebait present at a meeting. It would appear from the different clauses that where the income of the estate is likely to be affected the scheme requires the decision by a majority of all the Shebait. In the present case the number of Shebait was more than 50 as would appear from the evidence of Khagendra, Abani and Chintaharan. It is not the case of the defendant that except in the disputed meeting consent of the majority of the Shebait was independently taken in support of the alienation made. It must therefore be held that the 3 members of the managing committee were not competent to execute the leases in question as the same were executed contrary to the provisions of the scheme.

13. Even assuming that the 3 members of the managing committee were competent to execute the leases and the consent of the majority of the Shebait had been obtained it must be shown that the leases were executed for legal necessity before the same can be upheld. It is well settled that it is for the party who wants the court to uphold the

alienation of debuttar property to prove that the alienation was made for legal necessity. On behalf of the appellant Mr. Banerjee contended that there was legal necessity inasmuch as the income of the debuttar property was only Rs. 246/- per month from the lessee Sankarsen Ltd. and an income of Rs. 100/- from the remaining property. It was contended that the said income was totally insufficient to meet the expenses for sheba puja as provided in the scheme framed in Suit No. 1528 of 1926 and also for meeting the necessary repairs of the Thakurbari, purchase of utensils, expenses of preparing of bhog etc. Mr. Banerjee referred to the evidence of plaintiffs' witnesses Jogendra Lal Mitra, Ajit Uday Mitra and Khetra Lal Mitra and also to the evidence of the defendant's witnesses Khagendra Lal Mitra, Abani Ghosh and Chintaharan Bhattacharyya. Mr. Banerjee also referred to Exhibits D, OI, J and K in this connection and contended that from the above oral and documentary evidence it would appear that there was a pressing necessity upon the estate. Mr. Banerjee further contended that his client had made bona fide enquiry about the existence of legal necessity and therefore the alienation should be upheld. On behalf of the respondent it was contended that the evidence adduced in the case does not establish the existence of legal necessity and in any event the appellant did not make any bona fide enquiry as to the existence of legal necessity. It is to be noticed that in the written statement filed on behalf of the defendant No. 5 no case of bona fide enquiry has been pleaded. It was accordingly contended on behalf of the respondent that the appellant should not be permitted to raise that plea. But in the written statement filed on behalf of the Naskar defendant this plea had been taken specifically in paragraph 19. We would accordingly allow this point to be raised by the appellant. The facts constituting legal necessity as appearing from the recital in the lease, Exts. R, T. and W are the difficulty in performing the daily sheba and periodical festivals for want of fund in the hands of the Shebait and that consent of "majority of the Shebait" and "majority of the Shebait present at the meeting" was obtained sanctioning the lease. In paragraphs 7, 15, 16, 17 and 18 of the written statement filed on behalf of the Naskar defendants the particulars which necessitated the granting of leases have been mentioned. It has been stated that there were no sufficient funds in the hands of the Shebait for which the terms of the scheme could not be complied with and necessary expenses for sheba puja of the deity could not be performed, that rent could not be realised from the tenants, that large sums had to be spent by the estate for litigation, that as a result of reduction of rent by Sankarsen Ltd., the financial position of the estate had become far precarious and that the Naskar defendants had paid considerable sums of money as selami, and rent payable by them was sufficient, and this has im-

sely benefited the debuttar estate. Exhibit B2 the scheme framed by this court provides that the responsibility for proper performance of the sheba puja of the deity is on the committee and the committee is to take steps for improvement of the property and realisation of rent of the debuttar estate. It contains a provision in clause 7 (3) that if the income decreases or increases then with the consent and approval of the majority of the Shebait the committee shall be entitled to reduce or increase the puja expenses as the case may be. This provision in the scheme is important and has been incorporated in the scheme keeping in view the financial condition of the debuttar estate in future. By an order dated 18-8-1943, Ext. 001, the scheme was amended in two important respects, firstly, although the life of the first committee appointed by the scheme was for 5 years, by this order retirement of the first committee was accepted and direction was given for formation of the next committee by election, and secondly, directions were given for reduction of expenses and there was a mandatory direction upon the committee to be elected to take steps for reducing the expenses proportionately so that the same do not exceed the income of the debuttar estate. This modification of the scheme was necessitated by the fact that the rent of Sankarsen Ltd. was reduced to Rs. 266/- per month. It appears that no steps were taken by the committee to implement this order. In the first meeting of the elected managing committee this question was considered. In the subsequent meetings of the committee which are Ext. L, DD, EE, S and Ext. 05 it was unanimously decided that the expenditure should be reduced and efforts should be made to increase the income. As a matter of fact all were agreed to implement the order dated 18th August, 1943. From the letter dated 24th August, 1945, Ext. D, it appears that Jogendra made a grievance against Khagendra that he was deliberately opposing Jogendra's request to curtail the expenditure and he therefore submitted his resignation. In the committee meeting dated 1st June, 1944, Ext. FF, we find a complete change of attitude on the part of Khagendra and Abani and they stated that they were not in favour of any curtailment of the expenses. From Ext. 01 the proceedings of the general meeting of the Shebait on the 9th July, 1944 it would appear that it was decided that in view of the increase of prices it is not possible to reduce the expenses prescribed for daily sheba and the managing committee was directed to find out means for meeting the expenses by improvement of the present income of the estate. The expense which was found not possible to reduce in this meeting relates only to the daily sheba and not to the periodical festivals. In the adjourned general meeting held on 25th March, 1945, Ext. P, a request was made to the managing committee to frame a scheme or place any proposal for any improvement for the consideration of the Shebait. But the managing

committee did not follow this direction. From the above facts it would appear that prior to the execution of the disputed leases the income of the debuttar estate was Rs. 300/- per month and although repeated directions were given in the meeting to the managing committee to reduce the expenses nothing was done by the managing committee. The managing committee was directed to frame a scheme for reducing the expenses and for improvement of the estate for consideration by the general body of the Shebaitis but this direction was not complied with by the managing committee. The question of legal necessity has to be considered in the background of these facts and circumstances appearing in evidence. It is well established that in order to constitute legal necessity there must be such a pressure upon the estate that without the alienation in question the estates could not have been preserved. In *Palaniappa Chetty v. Srimath Deivasikamony Pandara Sannadhi*, 44 Ind App 147 = (AIR 1917 PC 33) it was held that the Shebaitis have power and authority to alienate the endowment only in case of necessity or for the benefit of the estate and also power to curb derivative interest out of them. It is impossible to give a precise definition of 'benefit to the estate' or 'necessity' applicable to all cases. The preservation, however, of the estate from the extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. In *Ramsumran Prosad v. Mt. Shyamkumari*, 49 Ind App 342 = (AIR 1922 PC 356) it was pointed out by the Privy Council that necessity does not mean actual compulsion but the kind of pressure which the law recognises as serious and sufficient. In the case of *Biram Prokash v. Narendra Das*, AIR 1966 SC 1011 it was held by the Supreme Court that the expenses incurred in litigation by the head of a religious endowment for the preservation of the endowed property against a trespasser and subsequent sale of a portion of the endowed property for such costs of litigation would amount to legal necessity, inasmuch as, the same was incurred for the preservation of the endowed property. From the principles enunciated in these decisions it follows that in order to constitute legal necessity an alienation must be for the preservation of or for the benefit to the estate. In the present case what we find is that the managing committee did not take any steps to reduce the expenses although such decision was repeatedly taken by the general body of the Shebaitis and although there was a clear direction by this Court to that effect. It cannot therefore be said that there was such a pressure upon the debuttar estate that without the leases in question the debuttar estate could not be preserved at all. We accordingly hold that there was no legal necessity justifying the alienation.

14. On the question of bona fide enquiry by the Naskar defendants it was con-

tended on behalf of the appellant that the Naskars having made bona fide enquiry as to the existence of legal necessity they entered into the transaction and as such their interest is protected under the law. On behalf of the respondents it was contended that there was no such pleading in the written statement and therefore the appellant should not be allowed to urge this point. Even if the appellant is allowed to urge this point we are unable to hold, upon the evidence adduced by the parties, that there was any bona fide enquiry made by the appellant about the existence of legal necessity. Bona fide enquiry implies that one must act with reasonable care and must act in good faith in entering into the transaction. From the evidence of Chintaharan in answer to questions 355 to 358 it is clear that the Naskars were fully aware of the suit in which the scheme was framed and they had full notice of the scheme. In fact there were proceedings on the basis that the leases would have to be taken under the scheme. It appears further from the evidence of Chintaharan that the Naskars were aware that consent of all the Shebaitis had to be taken. From the recital in the leases it would also appear that they were aware of the distinction between the 'majority of the Shebaitis' and 'majority of the Shebaitis present in the meeting'. The Naskars were also aware of the order dated 18th August, 1943 passed by this Court (Ext. 001) inasmuch as the leases recite that the term of the office of the first nominated committee ceased after the expiry of December 5, 1943. If the said order was not passed then according to the original scheme the term of office of the first nominated committee would have expired on 28th March, 1944. Knowledge of the Naskars about the aforesaid order would also be evident from the recital in the leases that the committee of which Khagendra was a member was elected at a general meeting on 5th December, 1943 upon notice to all the Shebaitis and this notice, Ext. 1, specially mentions the order dated 18th August, 1943. In any event they should have known not only about the aforesaid order but everything that has happened thereafter if they had acted with reasonable care. It was their duty to make proper enquiry and search the relevant documents and also to make enquiry from independent sources. The defendant's witness Chintaharan has stated in his evidence that he knew that there were 53 Shebaitis at the relevant time. But the resolution sanctioning the leases show the names of 16 or 17 Shebaitis only. The recitals in the leases are that the leases were with the consent of the majority of the Shebaitis. From the evidence of Chintaharan it would further appear that he was aware that only 3 shebaitis were functioning in the committee and they had doubt about their competency to grant the leases. It was argued that because of the order of the injunction passed by the Munsif at Sealdah, Ext. 2 (a), and also the order of injunction passed by the Subordinate Judge

the marriage is to be performed, and is not willing to perform the marriage in her absence.

On the other hand, defendant No. 4 states that she would rather not be married if defendant No. 5 performs the marriage or is to be present at the marriage. A similar stand has been taken by the plaintiffs. It has, therefore, become impossible to get the marriage performed through defendant No. 1. In view of the extraordinary strained relations between the plaintiffs and defendants 2 to 4 on the one hand and defendant No. 1 on the other, it would be, I think, impossible to get the marriage performed by letting Shri Nanak Chand perform the marriage. Such a step would certainly lead to serious trouble between the parties and possibly defendant No. 4 would not agree to the marriage being performed, and probably there would be violence or other incidents at the time which would render the order inoperative and impossible to perform. I have, therefore, to find some other solution for the purpose of seeing whether an order cannot be passed as prayed for by the applicants.

4. There are considerable difficulties in passing the order prayed for by the applicants, because there is no previously reported case in which an order as sought, has been passed. On the other hand, it is equally apparent that a situation like the present cannot have existed in many cases. The plaintiffs and defendants 2 to 4 have been fighting all sorts of litigations against defendant No. 1 and altogether wild allegations have been made by one against the other in those proceedings. This, therefore, is a case of a very unusual type.

5. I now turn to give some indication of the nature of the suit pending in this Court. According to the plaintiffs, there is a Joint Hindu Family property of which defendant No. 1 is Karta and manager. Details of that property are set out by the plaintiffs in paragraph 8 of the plaint. This shows that there is considerable property allegedly owned by the Joint Hindu Family. It also appears from paragraph 10 of the plaint that the Income-tax authorities have been assessing M/s. Banarsi Dass Nanak Chand, a Joint Hindu Family firm as an assessee. On the other hand, the case of defendant No. 1 in the written statement was to deny the existence of any Joint Hindu Family. Faced with the assessment orders which have been put on record, the case of defendant No. 1 is that he had got his income assessed as a Joint Hindu Family for the purpose of avoiding tax liability, but the property was in reality his self-acquired property. The first question for consideration at this stage is: Is there a

prima facie case to hold that there is a Joint Hindu Family which has property? In view of the fact that there is an assessment of the property as Joint Hindu Family property, there are three possibilities that can arise—one, there has always been a Joint Hindu Family and the property in suit is Joint Hindu Family; two the property in suit has been put into hotchpotch by defendant No. 1 and now that property is Joint Hindu Family property and three, the property is the self-acquired property of that defendant in spite of it being treated as Joint Hindu Family property over a number of years. It is possible that the defendant may succeed in showing that the property is in fact his separate property and is, therefore, not liable to partition.

At the present moment, unless the defendant succeeds in showing that the property is not joint property, the prima facie impression from the material on record must be that the property is in fact joint family property. I am, therefore, making this assumption on the basis of the income-tax assessment records. There is also other material which might support this view including the fact that some of this property has come to the first defendant from his adopted father. I, however, do not in any way predict the result of this matter at the eventual trial of the suit.

6. The next question for consideration is what is the nature of the order that can be passed in a suit of this type? The suit is one for partition. Defendant No. 4, for whom the expenses are sought, is the daughter of defendant No. 1, has no right in the Joint Hindu Family property as such, but she has the right to have her marriage expenses and other expenses for maintenance met from out of the Joint Hindu Family, being an unmarried daughter. This position is beyond dispute. However, can an order for meeting the marriage expenses of the daughter be passed during the duration of a suit for partition? This is the problem I have to deal with; and I must say that it bristles with difficulties.

7. Learned Counsel for both parties have cited judgment to show that an interim order of this type can and cannot be passed in certain circumstances. The learned Counsel for the first defendant has cited Mulimanj Sanna Basavarajappa v. Basavanappa, AIR 1959 Mys 152, Mahomed Abdul Rahman v. Tajunnissa Begum, AIR 1953 Mad 420, and Gopal Saran v. Sita Devi, AIR 1924 Pat 69. The learned Counsel for the applicants has cited Alagammal Achi v. Veerappa Chettiar, AIR 1956 Mad 428, M. A. Rajagopala Ayyar v. M. A. Venkataraman, 51 Cal WN 829 = (AIR 1947 PC 122), Smt. Gouri Gupta Chowdhury v. Tarani Gupta Chowdhury, AIR 1968 Cal 305, Nem Chand

Jain v. Smt. Lila Jain, AIR 1968 Cal 405 and Tarini Gupta Chowdhury v. Smt. Gouri Gupta Chowdhury, AIR 1968 Cal 567. The controversy in these cases has been, whether an interim order can be passed in a suit for maintenance. The cases cited by the learned Counsel for defendant No. 1, show that such an order cannot be passed being beyond the powers set out in Section 94 of the Code of Civil Procedure. On the other hand, the Calcutta High Court has taken the view that an interlocutory order can be passed permitting maintenance even when the matter is contested. In the judgment of A. N. Ray, J. (as he then was) it was stated in the last of these cases as follows:—

"I am unable to accept that contention. The relief asked for in the suit has yet to be determined and decided. If there is a prima facie case and if the Court is of opinion that the plaintiff is entitled to interim relief the plaintiff may be given such relief. That is not deciding the whole case. In these cases the Court is bound to arrive at a conclusion as to whether any interlocutory order will be made or not. There has to be a prima facie opinion. Interlocutory opinions do not bind the trial Court."

There, therefore, is a view to the effect that an interlocutory order for maintenance can be passed giving interim maintenance in a suit for maintenance. I have myself followed this latter view in an unreported case and have granted similar relief. Indeed, to refuse such a relief will in some cases result in a party being non-suited. The major difficulty in the present case is that the suit is not one for maintenance; it is a suit for partition and the application for marriage expenses is not, therefore, primarily a grant of interim relief. Unless the present applications can somehow come within the ambit of interim relief, it is difficult for the Court to allow the applications.

8. The judgment of the Privy Council, in 51 Cal WN 829 = (AIR 1947 PC 122), just referred to above, was also a case in which it was held that the right of an un-married daughter to maintenance and marriage expenses out of the Hindu Joint Family is in lieu of a share on partition and provision should accordingly be made for her in a decree for partition. The judgment relied on the quotation from Mulla (Hindu Law, 7th Ed. page 376), where it was stated:—

"The case of an unmarried daughter stands on a different footing. Her right to maintenance and marriage expenses out of the joint family property is in lieu of a share on partition; provision should accordingly be made for her marriage expenses in the decree."

As it happened in the case before the Privy Council, the marriage had already

taken place and the money had been spent by the mother. The Privy Council observed:

"Their Lordships agree with the High Court that the Subordinate Judge was not justified in refusing reimbursement, and they agree with head (8) of the decree." This I take, is an authority for the proposition that an unmarried daughter is entitled to get her marriage expenses from the joint family estate and in case the marriage expenses are met by somebody else, he is entitled to get reimbursement of those expenses from the Estate.

9. Thus, the legal position seems to be this. The 4th defendant is entitled to have her marriage expenses out of the Joint Hindu family property if there is any such property. She is entitled to get these expenses in lieu of her share in the partition. If there is a prima facie case that there is a Joint family property; there is also prima facie the case that the applicant, the 4th defendant is entitled to get her marriage expenses out of that estate. On the other hand, the position that there is no Joint Hindu Family estate is also to be considered. In that connection, I may now refer to the Hindu Adoptions and Maintenance Act, 1956. Section 20 of that Act deals with the situations as far as defendant No. 1 is concerned. Sub-section (3) of that section reads:—

"The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property."

Thus, the maintenance of a daughter extends to maintaining her to the extent she cannot do so out of her own earnings. Sub-section (1) of this very section reads:—

"Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents."

Sub-section (2) of the same section shows that the claim of a legitimate or illegitimate child extends only while the child is a minor. As I read the section as a whole, it means this. Clearly, a Hindu has the obligation to maintain his children as long as they are minor; but in the case of unmarried daughter, this obligation goes on as long as that daughter is unable to maintain herself. In this sense, sub-section (3) of Section 20, is an exception in the case of unmarried daughters. A Hindu is, therefore, obliged to maintain an unmarried daughter, even after she ceases to be a minor, but only as long as she has not sufficient earnings or her own property out of which she can maintain herself. The operation, of

this section in the case of an unmarried daughter is also explained by the definition section, wherein 'maintenance' is defined. Section 3 (b) reads as follows:—

(b) "maintenance" includes—

- (i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;
- (ii) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage."

Thus, the definition of maintenance in the case of an unmarried daughter not only includes food, education, medical attendance and treatment, but also the reasonable expenses incidental to her marriage. Thus, the obligation of the first defendant includes the obligation to maintain defendant No. 4 not only for the purpose of her day to day expenses but also in respect of the reasonable expenses of her marriage. In any event, therefore, defendant No. 1 is obliged to meet the marriage expenses of the 4th defendant. This applies, where there is a joint family property or not a joint family property. In fact, as I have stated earlier, the first defendant has very reasonably agreed to meet the expenses necessary for this marriage. The difficulty of carrying this promise into effect is his insistence on defendant No. 5 being also present to perform the marriage. It is on account of this insistence that I have been compelled to consider this matter from the prima facie angle. As I have come to the view, that there is a joint Hindu family property prima facie, I am also of the view that prima facie an interlocutory order can be passed granting reasonable marriage expenses for defendant No. 4.

If an interim order can be passed in a suit for maintenance an interim order can also be passed in favour of a daughter during the pendency of a partition suit. Such an order will be in the nature of an interlocutory judgment. It will, however, not be a conclusive judgment, because in case the partition suit fails, then the daughter cannot get this maintenance in the form of an interlocutory order in the partition suit, because it will not be a claim against the joint Hindu family property, there being no joint Hindu family property. However, in such a case, the 4th defendant could get a similar order against her father, defendant No. 1, on account of the Hindu Adoptions and Maintenance Act, 1956, as explained by me. This is one ground on which an interim order can be passed in favour of the 4th defendant on the application moved before this Court.

10. I propose now to deal with the application on the footing that an order cannot be passed in this manner because of Section 94 of the Code of

Civil Procedure, which permits interlocutory orders only to be passed in circumstances which are prescribed. There is no prescribed express section which permits interim orders to be passed in the manner proposed by me. If the aforementioned view of the Madras and Patna High Courts is accepted to be a correct view, then an interim order cannot be passed in the manner I have just proposed. It then remains to be seen whether an interim order can be passed under the inherent powers of the Court.

11. The Supreme Court has held in *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*, AIR 1962 SC 527 that the inherent power of the Court is not restricted by Section 94 of the Code of Civil Procedure. This means that the order sought for by the applicant can be passed under Section 151 of the Code of Civil Procedure if the Court deems it fit. That section reads:—

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court."

It has been observed by the Supreme Court in *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993, that the Court cannot override the express provision of law but if there is no express provision in the statute, then the Court can exercise its powers in a suitable case. In *Ram Chand and Sons Sugar Mills (P.) Ltd. v. Kanhayalal Bhargava*, AIR 1966 SC 1899, it was observed:—

"The inherent power of a Court is in addition to and complementary to the powers expressly conferred under the Civil Procedure Code. But that power will not be exercised if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code." I cannot find any provision in the Code which prohibits the passing of an order granting marriage expenses to a daughter in the circumstances of this case. In fact, as I have already pointed out, the substantive law of the country, as applicable to defendant No. 4, shows that she is entitled to marriage expenses from the defendant No. 1.

12. Where there is a Hindu joint family estate or where there is none, if there is a joint Hindu family property, she is entitled as of right to get her marriage expenses from that estate. If there is no joint Hindu family property she is entitled to get reasonable marriage expenses from defendant No. 1 under the express provisions of the Hindu Adop-

tions and Maintenance Act, 1956. What then would be the order in the present case? The marriage of the 4th defendant has apparently been fixed and is due to take place very shortly. If I refuse to make an order, the marriage cannot take place. If her marriage is to await the final decision of the suit probably, the marriage of the 4th defendant will never be performed, as I do not expect that the person she is due to marry, will wait till the suit is finally decided by this Court. This means that justice both substantive and procedural must be used in the interests of defendant No. 4, even if there is no parallel case previously. I, therefore, propose to pass an order directing defendant No. 1 to place a sum at the disposal of defendant No. 4 for enabling her marriage to be performed.

13. The claim made in the two applications before me is for a sum of Rs. 75,000 or such other sum as the Court may direct. I have been anxious, during the hearings before me, to pass some order which will provide the minimum assistance required to meet the expenses of the marriage. In discussions, it has turned out that the absolute minimum requirement is Rs. 25,000. I, therefore, proceed to pass an order directing defendant No. 1 to put a sum of Rupees 25,000 at the disposal of the 4th defendant. As per prayer in the applications, this amount is to be put at the disposal of the plaintiffs and the second to fourth defendants. I have now to see that the order is properly and promptly carried out and is not misused in any way by the plaintiffs or defendants 2 to 4 to get hold of this sum. I have considered how this can properly be managed. I think the proper order to pass is that the sum of Rs. 25,000 should be deposited by defendant No. 1 with the Registrar of this court and this sum should only be taken out by the plaintiffs and defendants 2 to 4 on furnishing security for restitution to the satisfaction of the Registrar. The money will not be expended by the plaintiff and defendants 2 to 4 except for the purpose of meeting the expenses of the marriage of defendant No. 4 and full and proper accounts will be maintained of the said expenses. If the expenses are less than Rs. 25,000 then the balance amount will be redeposited in the Court. If the expenses exceed Rs. 25,000 even then the accounts should be filed in Court as this amount has eventually to be taken into consideration for the purpose of passing a partition decree, if any such decree is passed. If the suit for partition fails, the Court may have to pass an order directing the refund of the money out of the security which the plaintiffs and defendants 2 to 4 might have furnished to this Court. Subject to this

direction, I direct that the sum of Rupees 25,000 should be deposited in Court by defendant No. 1 within ten days and he can utilise such part of the fixed deposits, shares or other assets of the alleged Hindu joint family property as may be necessary for the purpose of raising this amount including the amounts deposited in furtherance of the orders passed previously by this Court. Both the applications are allowed, but the parties will bear their own costs.

Applications allowed.

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B. C. MISRA, J.

Devi Dayal, Appellant v. Mst. Zamani Begum, Respondent.

Second Appeal No. 168 of 1973, D/- 14-2-1975.*

(A) Delhi Rent Control Act (1958), Ss. 26 and 14 (1) Proviso, Cl. (a) — Notice of demand for arrears — Failure of tenant to pay arrears of rent within time prescribed under S. 26 — Tenant is liable to eviction on grounds specified in Cl. (a) of Proviso to S. 14 (1) as no other ingredient required for Cl. (a).

Section 26 requires the tenant to pay rent within the time fixed by contract or in absence of such contract by the fifteenth day of the month next following the month for which it is payable and if landlord does not receive it, the tenant can deposit it with controller within 21 days. Proviso to S. 14 (1) lays down that controller may, on application made to him in prescribed manner, make an order for recovery of the premises on one or more grounds specified in cl. (a). It appears from S. 26 that on failure of tenant to pay or tender the whole of the arrears of rent legally recoverable from him within two months of the date of the service of a notice of demand, the tenant rendered himself liable to eviction on the grounds specified in Cl. (a) of the Proviso. So far as Cl. (a) is concerned, it does not require any other ingredient except that arrears of rent must be legally recoverable from tenant and tenant must have failed to pay same within two months from service of notice. In the instant case tenant failed to pay arrears of rent within the prescribed time under S. 26 and therefore he was held liable to eviction on ground specified in Cl. (a) of Proviso to S. 14 (1). (Para 5)

(B) Delhi Rent Control Act (1958), Ss. 14 (2) and 15 (1) — Tenant's failure to

*(From order of Gian Chand Jain, Rent Control Tribunal, Delhi, D/- 25-4-1973.)

DS/DS/B450/75/RSS

deposit future rent in compliance with order passed under S. 15 (1) — Tenant cannot get benefit of exceptions mentioned in S. 14 (2) and escape eviction.

In order to take advantage of the exception made in first part of S. 14 (2) the tenant must comply with the whole of the order of the Controller passed under S. 15 (1) including the order for payment of future rent. If the tenant fails to deposit future rent in compliance with order passed under S. 15 (1) he does not comply with the provisions of S. 14 (2) and is disentitled from seeking its benefit and escape eviction. (Para 7)

(C) Delhi Rent Control Act (1958), Ss. 39, 15 (1) — Order under S. 15 (1) became final — Controller passing order of striking off the defence — Appeal against order failing and order becoming final — Tenant cannot be allowed to challenge order under S. 15 (1) at this stage.

(Para 8)

(D) Delhi Rent Control Act (1958), S. 15 (1) — Controller passing order of deposit of future rent under S. 15 (1) — Suit for recovery of arrears of rent filed by landlord pending — Controller failed to decide validity of notice of demand — Held order passed by Controller under S. 15 (1) was not without jurisdiction.

(Para 9)

(E) Delhi Rent Control Act (1958), S. 15 (1) — Deposit of arrears of rent — Tenant contending that on deposit of arrears in compliance of order under Section 15 (1), proceedings come to an end and that he was not bound to deposit future rent — Held that proceedings ended when Controller passed order of eviction and not on deposit of arrears.

The judicial proceedings in a case naturally do not come to an end without a final order or by operation of law. In the instant case they ended when the Controller passed the order of eviction. The tenant could not take it on him to decide the question as to when the proceedings had legally terminated. If he were of the view that the proceedings had been terminated, he should have made an application to Controller to strike off the case. Instead of doing so, he committed default and has come with a plea that on deposit of arrears of rent in compliance with order under S. 15 (1), the petition has come to an end by operation of law and he was under no legal duty to deposit future rent. Such plea is not tenable. (Para 10)

K. L. Budhiraja, for Appellant.

JUDGMENT:— This second appeal has been filed by the tenant under Section 39 of the Delhi Rent Control Act 59 of 1958 (hereinafter referred to as 'the Act'); against the appellate order of Mr. G. C. Jain, Rent Control Tribunal, dated

25th April, 1973, by which he has dismissed in limine the appeal of the tenant and affirmed the order of Mr. Mohd. Shamim, Additional Controller, dated 21st April, 1973, finally maintaining the order of eviction passed against the appellant on the ground of non-payment of rent.

2. The material facts of the case are that the appellant is a tenant under the respondent in respect of a portion of house No. 8/356, Katra Sheikh Raza, Hauz Kazi, Delhi on a rent of Rs. 35 per month. The respondent landlady served a notice dated 27th October, 1969 on the appellant on 30th October, 1969 demanding arrears of rent for the period from 1st April, 1969 and not getting response she instituted the petition giving rise to the present appeal on 11th June, 1970 for eviction of the tenant on the ground of non-payment of rent being ground specified in clause (a) of the proviso to sub-section (1) of Section 14 of the Act. It was alleged in the petition (and it is significant to notice) that the appellant tenant had not paid rent since 1st May, 1964 and the respondent landlady was obliged to institute the suit for recovery of the amount from the said date up to March, 1967, which suit was decreed for payment of Rs. 1,260. The non-payment of rent subsequent to the period covered by the said suit was claimed as a ground of eviction. During the pendency of the petition, Mr. Jaspal Singh, Additional Controller, passed an order on 30th September, 1970 under Section 15 (1) of the Act directing the appellant tenant to deposit arrears of rent with effect from 1st May, 1967 at the rate of Rs. 35 per month and continue to pay future rent at the said rate by the 15th day of the succeeding month. It appears that the appellant deposited the arrears of rent, but admittedly committed default in payment of future rent for one of the months namely February, 1971. Eventually on 4th April, 1972 the Controller struck off the defence of the appellant under sub-section (7) of Section 15 of the Act. An appeal against the said order striking off the defence was dismissed by the Rent Control Tribunal on 27th October, 1972. The result is that the order striking off the defence of the appellant has become final.

3. Thereafter, the respondent landlady produced ex parte evidence in support of the claim and having established it to the satisfaction of the Additional Controller, has obtained an order for eviction by the impugned order, dated 21st April, 1973. Feeling aggrieved the appellant before me filed an appeal before the Rent Control Tribunal, which failed. The Rent Control Tribunal after hearing the counsel recapitulated the facts mentioned above and in particular

noticed that the appellant had deposited a sum of Rs. 1505 on 27th October, 1970 within one month of the order of the Controller dated 30th September, 1970 under Section 15 (1) of the Act as against Rs. 1,435 which was the arrears due from 1st May, 1967 to 30th September, 1970. He, however, found that the appellant had committed default in payment of rent for subsequent period. It was pressed before the Tribunal that the appellant was not liable to eviction since he had deposited the arrears of rent which was the subject-matter of the notice and the eviction petition and that his failure to deposit future rent in accordance with Section 15 (1) of the Act did not constitute a default for which the petition for eviction could be allowed. The Tribunal did not find any force in the submission and dismissed the appeal in limine.

4. Feeling aggrieved, the appellant has filed this second appeal. Mr. Budhiraja in support of the appeal has contended (1) that the order under sub-section (1) of Section 15 of the Act had been passed without jurisdiction, since the same ought to have been passed after the validity of the notice of demand (besides other factors like the rate of rent and the period for which the arrears were due, etc.) had finally been determined, and (2) that on the payment of the arrears of rent till then, the petition for eviction must have been dismissed or at all events, it failed by operation of law and there was no jurisdiction left with the Controller to strike off the defence of the appellant under Section 15 (7) of the Act nor to pass an order for eviction. Lastly, the counsel has contended that the ground mentioned in clause (a) had not been established and the order for eviction was legally not sustainable.

5. I shall take up the last contention of the counsel first. Section 26 of the Act requires the tenant to pay rent within the time fixed by the contract or in the absence of such contract by the fifteenth day of the month next following the month for which it is payable and if the landlord does not receive it, the tenant can deposit it with the Controller within 21 days. Proviso to sub-section (1) of Section 14 of the Act lays down that the Controller may, on an application made to him in the prescribed manner, make an order for recovery of the premises on one or more of the following grounds, namely, (a) the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for arrears of rent has been served on him by the landlord in the manner provided in Section 106 of the Transfer of Property Act,

1882 vide clause (a). An analysis of the aforesaid statutory provision shows that on the failure of the tenant to pay or tender the whole of the arrears of rent legally recoverable from him within two months of the date of the service of a notice of demand for the arrears, the tenant renders himself liable to eviction on the ground mentioned in clause (a) of the aforesaid proviso. So far as the proviso (a) is concerned, it does not require any other ingredient excepting that the arrears of rent must be legally recoverable from him and the tenant must have failed to pay the same within two months of the notice of demand. In the instant case, a notice of demand dated 27th October, 1969 had been served on the appellant on 30th October, 1969 and so within two months of the same, that is to say by 30th December, 1969, it was the duty of the tenant appellant to pay all the arrears of rent up to that date. There is no dispute between the parties with regard to arrears of rent being due for the period in the case, since in respect of arrears for previous period, a suit for recovery had been instituted in civil court. Admittedly, the tenant failed to comply with the notice and pay or tender the arrears of rent due within the time allowed. The section does not require any other ingredients. In the impugned order dated 21st April, 1973, the Additional Controller has recorded a finding that the copy of the notice, (Ex. A-1), had been served on the tenant vide postal acknowledgment, (Ex. A-2) and the statements of A.W. 1 and the landlady A.W. 2 had established the ingredients of clause (a) mentioned above. Consequently the tenant had rendered himself liable to eviction on the ground specified in clause (a) of the proviso to sub-section (1) of Section 14 of the Act.

6. At this stage, it may be noticed that sub-section (2) of Section 14 has prescribed an exception to the aforesaid proviso. It is to the effect that no order for recovery of possession of any premises shall be made on the ground specified in clause (a) of the proviso to sub-section (1), if the tenant makes payment or deposits as required by Section 15. A further proviso has been provided to the said exception. It is to the effect that no tenant shall be entitled to the benefit under sub-section (2) if, having obtained such benefit once in respect of any premises, he again makes a default in the payment of rent of those premises for three consecutive months. The result is that if a tenant complies with the order of the court passed under Section 15 (1) of the Act, a locus paenitentiae is provided to the tenant to escape eviction on the ground mentioned in clause (a) stated above. This

locus paenitentiae is, however, not available to the tenant on subsequent occasions if he persists in default in payment of rent for three consecutive months. This question, however, does not arise because the present is a case of first default only.

7. However, it is clear that in order to take advantage of the exception made in first part of sub-section (2) the tenant must comply with the whole of the order of the Controller passed under Section 15 (1) of the Act including the order for payment of future rent. In the facts of the case, it is established that the tenant has failed to comply with the aforesaid order in full and has not deposited the future rent in compliance of the said order. He has, therefore, not complied with the provisions of sub-section (2) and has disentitled him from seeking its benefit and escape the eviction. In this view of the matter, the appellate order of the Tribunal is not assailable.

8. Mr. Budhiraja has, however, strongly contended and pressed his first contention. He has urged that the order under Section 15 (1) was without jurisdiction. There is no basis for the said submission. Firstly, in my opinion the appellant cannot be allowed to raise the said contention at this stage of the case when the order passed under Section 15 (1) of the Act had not been appealed against and had become final, when for failure to comply with the said order, the defence of the appellant has finally been struck off. The contention of the appellant in the defence to the said application for striking off defence was that he had complied with the order in full and that he failed to comply with the order for payment of future rent in respect of one month on account of illness and some other circumstances beyond his control, (which excuse was found to be untenable). The Controller then found that there were no grounds for condoning the delay and he passed an order for striking off the defence. An appeal against the same failed and the order has become final. The appellant, therefore, cannot be allowed to challenge the basic order passed under Section 15 (1), when his defence has been struck off.

9. Moreover, I am unable to find any jurisdictional infirmity in the order of the Controller passed under Section 15 (1) of the Act. The order directed the tenant to pay all arrears of rent at the rate of Rs. 35 per month calculated from May, 1967 within one month from the date of the order, besides future rent at the said rate month by month by the fifteenth of each succeeding month. In that order the Controller found that the landlady was entitled to an order under

Section 15 (1) of the Act in respect of rent with effect from 1st May, 1968 and he repelled the contention advanced on behalf of the tenant that institution and pendency of the suit was a bar to the passing of this order. The plea of oral payment was also rejected. It was pointed out that no other point had been taken by either side during the course of arguments. However, in view of the pendency of the suit, the Additional Controller had also ordered that the landlord will not withdraw the rent deposited till orders to that effect had been passed by the Court. Mr. Budhiraja submits that at that stage it was the duty of the Controller to decide the question of validity of the notice as well. I am unable to accept the submission that because of the failure of the Controller to do so, the order passed by him, (which has become final between the parties) was without jurisdiction.

10. Mr. Budhiraja next contends that on payment or deposit of arrears of rent in compliance with the order under Section 15 (1) the petition has come to an end by operation of law and he was under no legal duty to deposit any future rent thereafter. I do not find any force in the submission. The judicial proceedings in a case naturally do not come to an end without a final order or by operation of law. In this case they ended when the Controller passed the impugned order dated 21st April, 1973. Surely, the tenant appellant could not take it upon himself to decide the question as to when the proceedings had legally terminated. If he were of the view that the proceedings had been terminated, he should have made an application before the Controller to strike off the case. Instead of doing so, he chose to commit default for a month and then has come out with a false plea. There is no force in the plea and the same has rightly been repelled by the Rent Control Tribunal. As a result, I do not find any merit in the appeal and dismiss the same. There will be no order as to costs, as there has been no appearance on behalf of the respondent.

11. As I was pronouncing this order, Mr. G. S. Mathur has appeared for the respondent landlady and has, accepting the request of counsel for the appellant, jointly prayed that the order of eviction be not executed till 15th April, 1975. It is ordered accordingly.

Appeal dismissed.

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T. V. R. TATACHARI, C. J. AND
M. R. A. ANSARI, J.

Brij Khandelwal, Petitioner v. Union of India, Respondent.

Civil Writ Petn. No. 822 of 1974, D/-25-11-1974.

(A) Constitution of India, Art. 226 — Prohibition, writ of— Does not lie against public authority — Boundary dispute between India and Sri Lanka — Agreement involving cession of Island of Kachchativu — Writ of prohibition to prevent Union of India from entering into such agreement and ratifying same — Not maintainable.

It is well settled that a writ of prohibition lies to prevent an inferior Tribunal from exceeding its jurisdiction or even from assuming a jurisdiction which does not vest in it under law. It does not lie against a public authority acting purely in an executive or administrative capacity. Thus, it will not lie preventing the Union of India from entering into an agreement with Sri Lanka involving cession by the Union, of the Island of Kachchativu, to settle a boundary dispute and the ratification thereof, as those are not judicial or quasi-judicial executive functions of the Government of India. AIR 1952 Mad 613 and AIR 1962 SC 1893 (1903) and AIR 1961 Bom 167 (168) and AIR 1957 Cal 514 (519), Rel. on.

(Para 10)

(B) Constitution of India, Art. 226 — Mandamus, writ of — Locus standi to apply for — Boundary dispute between India and Sri Lanka — Agreement involving cession by India of Island of Kachchativu— Writ of mandamus against Union of India preventing it from entering into and ratifying it — Right of— Citizen of India who has no specific right or interest in the Island to apply — No locus standi to pray for such a writ.

It is well settled that the petitioner who prays for a writ of mandamus should show that he has a legal right to the performance of a legal duty of a public nature by the party against whom the mandamus is sought. AIR 1969 SC 1306 (1309) and AIR 1954 SC 493, Rel. on.

(Para 11)

Further, the legal right to compel performance of the public duty must reside in the petitioner himself, either solely, or in common with others. It will not be sufficient to show merely that the petitioner has just an interest in the performance of the duty. AIR 1962 SC 1044 (1049), Rel. on. (Para 11)

Where the petitioners merely stated in their Writ Petitions (to prevent the

Union of India from entering into an agreement with Sri Lanka, involving the cession of the Island of Kachchativu, to settle a boundary dispute, and giving effect to it) that they are citizens of India, and did not make any averment regarding the nature of the specific right or interest they claim for themselves personally in the Island of Kachchativu; they have no locus standi to pray for a writ of mandamus. AIR 1969 SC 783, Rel. on. (Para 12)

Cases Referred: Chronological Paras
AIR 1969 SC 783 = (1969) 3 SCR 254

11, 14
AIR 1969 SC 1306 = (1969) 3 SCR 773 11
AIR 1962 SC 1044 = 1962 Supp (3) SCR 1
1
AIR 1962 SC 1893 = (1963) 3 SCR 338 10
AIR 1961 Bom 167 = 62 Bom LR 880 10
AIR 1957 Cal 514 10
AIR 1954 SC 493 = (1955) 1 SCR 599 11
AIR 1952 Mad 613 = (1952) 1 Mad LJ 557 10

R. N. Nath, for Petitioner; Niren De, Attorney General of India, with S. S. Chadha, for Respondent.

T. V. R. TATACHARI, C. J. :— These are two Civil Writ Petitions. Civil Writ Petition No. 822 of 1974 has been filed by Shri Brij Khandelwal praying that this Court may—

- (i) issue a writ of prohibition and/or any other appropriate writ, order or direction preventing the respondent from ceding the island of Kachchativu to Sri Lanka without making the necessary amendment to the Constitution; and
- (ii) issue a writ of mandamus and/or any other appropriate writ, order or direction compelling the respondent to perform the duty imposed on it under the Constitution of India.

2. The other Civil Writ Petition No. 935 of 1974 has been filed by Shri Shyama Charan Gupta praying as follows:—

"This Hon'ble Court may be pleased to issue the writ of prohibition prohibiting the respondent (Union of India represented by the Secretary, Ministry of External Affairs), from handing over the possession of Kachchativu to Sri Lanka. And/or

in case if it is found that the transfer has been completed a writ of mandamus be issued to the Union of India to take back the island of Kachchativu from Sri Lanka. And/or

to issue a writ against the respondent declaring that the respondent has transferred the island of Kachchativu to Sri Lanka without jurisdiction and further declare that Union of India or the Parliament have no powers to cede

any part of this country. And/or to declare that the adjustments permissible under Art. 294 have already been completed and Union of India and the Parliament have no power to make further adjustments even with Pakistan. And/or

to issue such other Writ, order or directions against respondent which are deemed fit and reasonable in the premises of the present petition."

3. The relevant averments in this Writ Petition are similar to the averments in Civil Writ Petition No. 822 of 1974 and therefore, it would be sufficient to mention the relevant averments in the latter Civil Writ Petition, and in the counter-affidavit filed therein by the respondent who is the same in the two writ petitions.

4. According to the averments in the writ petitions, the two petitioners are citizens of India. Shri Brij Khandelwal averred in his writ petition that he came to learn on June 28, 1974, that the sovereignty over 280 acres of Kachchativu Island in the Palk Straits had been agreed to be transferred to the State of Sri Lanka, and that he came to know on the next day, i.e., on June 29, 1974, that the Prime Ministers of India and Sri Lanka had signed a copy of an agreement which had already been signed by the Prime Minister of Sri Lanka and brought to them by the Foreign Secretary of the State concerned. He averred that on learning the same, he felt that the territorial integrity, political independence and sovereignty of India had received a set back on account of the said agreement between India on the one hand and Sri Lanka on the other, and also came to know that many of his fundamental rights, statutory rights and his rights under the common law were threatened, and the moment the cession takes place, all the said rights would come to an end. He also averred that on India becoming an independent country on August 15, 1947, it succeeded to the rights and duties of the predecessor State, and the territories which formed part of the Province of Madras in British India became the territories of India after its independence, that when India became a Republic on January 26, 1950, the said territories came to be governed by the Constitution of India, 1950, and that Kachchativu Island, which was within the administrative jurisdiction of the Province of Madras at the time of Independence and which continued to be in the Province of Madras on the day when the Constitution of India came into force, has continued to be within the jurisdiction of the State of Tamil Nadu. He alleged that though the Island is uninhabited except when the fishermen from India

make use of it for purposes of fishing and except when the festival of St. Anthony is celebrated every year, the island continues to come under the criminal and civil jurisdiction of the courts functioning in the State of Tamil Nadu as well as under the jurisdiction of the Supreme Court, that he understood that the Island belonged to India since the days of Ramayana, and that India had, therefore, a valid legal claim to the Island on account of various historical facts. He averred that he learnt that the agreement had subsequently been ratified by the Government of India on July 8, 1974, that despite all efforts he could not get a copy of the agreement, and that being aggrieved by the agreement which was entered into by the Union of India ceding the Island of Kachchativu, a part of the territory of India, and which threatened the very existence of his fundamental rights under Articles 19 (1), 21, 25 and 31, the constitutional rights under the Constitution, the statutory rights and the other common law rights, he has filed the present writ petition praying for the reliefs which have already been set out earlier in this order.

5. The petitioner, Shri Khandelwal, also filed an application, C. M. No. 2159 of 1974, praying for grant of stay of the contemplated transfer of Kachchativu Island to the State of Sri Lanka till the final disposal of the writ petition.

6. Notices were issued to the respondent, Union of India, to show cause why the writ petitions should not be admitted. In answer to the notices, the respondent filed similar counter-affidavits in the two writ petitions, and we shall mention only the averments in the counter-affidavit filed in the writ petition of Shri Khandelwal. It was stated in the counter-affidavit that the respondent was advised not to deal with the merits of the writ petition at that stage but to submit that the writ petition was not maintainable and should be dismissed in limine for the various reasons mentioned in the counter-affidavit. The reasons given in the counter-affidavit were—

- (i) that the petitioner had no legal right, either constitutional or statutory or otherwise, to make or maintain the writ petition;
- (ii) that no right of the petitioner was threatened;
- (iii) that none of the petitioner's fundamental rights under Articles 19, 21, 25 (1) and 31 (1) was threatened by the impugned agreement;
- (iv) that the petitioner had no locus standi to challenge the said agreement as he had no stake in the Island of Kachchativu;

(v) that neither Article 21 nor Article 25 (1) nor Article 31 (1) had any relevance so far as the grievance in the writ petition was concerned;

(vi) that in any event, in view of the continuing proclamation of emergency declared by the President on December 3, 1971, under Article 352 (1), and in view of Article 358, the impugned agreement could not be challenged, as the petitioner sought to do, by invoking Art. 19;

(vii) that the prayer for a writ of prohibition did not lie, as such a writ could be issued only to a Court or a judicial authority with regard to the proceedings pending therein, and that the prayer for a writ of mandamus also did not lie, as the petitioner had no right and there was no statutory duty which the petitioner could claim to have been breached; and

(viii) that the question raised in the petition concerned a dispute as to the boundary between two independent States, India and Sri Lanka, in the historic waters between the two States, and the same had been settled in a manner fair and equitable to both sides, and that the same ought not to be entertained by this Court in exercise of its jurisdiction under Article 226 of the Constitution. Copies of the agreement, dated June 26/28, 1974, the map, and the instrument of ratification were annexed to the counter-affidavit as exhibits R-I, R-II, R-III and R-IV.

7. It was further averred in the counter-affidavit that there had been a long standing dispute, dating from very long before the achievement of independence by India and Ceylon regarding, inter alia, the question whether the said Island of Kachchativu belonged to the territories of India or Ceylon (now known as Sri Lanka), that the dispute was necessarily connected with the question relating to the boundary line in the waters between the two countries, and that there was no question of cession of any part of the territory of India specified in Article 1 (13) and the First Schedule to the Constitution.

8. At the time of the hearing of the writ petitions for admission, the learned Attorney General submitted that in view of the preliminary objections raised in the counter-affidavit as regards the maintainability of the writ petitions for the main prayers therein, viz., for a Writ of Prohibition and a Writ of Mandamus, and the locus standi of the petitioners to make the said prayers, the said preliminary objections should be heard

and decided in the first instance, and that in case the said objections are overruled by this Court, the respondent may be given an opportunity to file a further counter-affidavit contesting the Writ Petitions on merits. We considered that the submission was a proper one, and, therefore, heard the arguments of the learned counsel for both the parties in the two writ petitions on the said preliminary objections, and reserved our orders.

9. A perusal of the prayers in the two writ petitions shows that the petitioners pray mainly for a Writ of Prohibition and a Writ of Mandamus, and that the other prayers for declarations and directions in Civil Writ No. 935 of 1974, are dependent upon the aforesaid two main prayers.

10. As regards the prayer for a Writ of Prohibition, it is well settled that it lies—

"to prevent an inferior tribunal from exceeding its jurisdiction or even from assuming a jurisdiction which does not vest in it under law (vide *Lakshmindra Theertha Swamiyar of Sri Shirur Mutt v. Commissioner*, AIR 1952 Mad 613, 631)."

In *East Indian Commercial Company v. Collector of Customs*, AIR 1962 SC 1893, the Supreme Court observed at p. 1903 that—

"a Writ of Prohibition is an order directed to an inferior tribunal, forbidding it from continuing with a proceeding therein on the ground that the proceeding is without or in excess of jurisdiction or contrary to the laws of the land, statutory or otherwise."

In *Laxman Moreswar v. Balakrishna*, AIR 1961 Bom 167, 168, it was held that a Writ of Prohibition does not lie against Government discharging executive functions. Again, in *S. K. Dutt v. Anglo India Jute Mills Co. Ltd.*, AIR 1957 Cal 514, 517, it was held that a Writ of Prohibition is not intended to control executive acts or administrative action. Thus, a Writ of Prohibition does not lie against a public authority acting purely in an executive or administrative capacity. In the present case, the Writ of Prohibition is sought against the Union of India, and the impugned actions of entering into the agreement and the ratification thereof are not judicial or quasi-judicial functions, but are only in the exercise of the executive functions of the Government of India. The prayer for a writ of Prohibition in the Writ Petitions is thus one which does not lie.

11. As regards the prayer for a Writ of Mandamus, it is again well settled that the petitioner who prays for such a writ should show that he has a legal

right to the performance of a legal duty of a public nature by the party against whom the Mandamus is sought, (vide *Praga Tools Corporation v. Imanual*, AIR 1969 SC 1306, 1309, and the State of Madhya Pradesh v. G. C. Mandawar, (1955) 1 SCR 599, 602, 603 = (AIR 1954 SC 493 at p. 495). Further, the legal right to compel performance of the public duty must reside in the petitioner himself, either solely, or in common with others. It will not, however, be sufficient to show merely that the petitioner has just an interest in the performance of the duty, (vide *Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal*, AIR 1962 SC 1044, 1047). In *Maganbhai Ishwarbhai Patel v. Union of India*, (1969) 3 SCR 254 = (AIR 1969 SC 783), the controversy was as to whether an award made by the Indo-Pakistan Western Boundary Case Tribunal may be implemented by a constitutional amendment and not otherwise. The petitioners before the Supreme Court contended that the award may be implemented only by an amendment of the relevant provision of the Constitution, because in giving effect to the award of the Tribunal, cession of Indian territory is involved, while the contention of the Union of India was that the award merely fixed or demarcated the boundary between the State of Gujarat—in India and West Pakistan regarding which there were disputes. In dealing with the said contentions of the parties, Hidayatullah, C. J. referred to the rights claimed by the petitioners who sought writs of mandamus and observed at pages 269 and 270 (of SCR) = (at p. 791 of AIR) as under:—

"Before we deal with the problem we wish to say something about the standing of the petitioners since it appears to us that most of them have no direct interest to question the action of Government or to raise any controversy regarding the implementation of the Award.

Before the hearing commenced we questioned each petitioner as to the foundation of his claim. We discovered that most of the petitioners had no real or apparent stake in the areas now declared to be Pakistan territory. These persons claim that they had and still have the fundamental rights guaranteed to them by Art. 19 (1) (d) (e) and (f), that is to say, the right to travel, to reside or settle down, or to acquire and hold property in these areas. None of them has so far made any move in this direction but their apprehension is that they will be deprived of these rights in the future. This, in our opinion, is too tenuous a right to be noticed by the court in administering the law and still less in enforcing fundamen-

tal rights. When we communicated our view at an earlier hearing, some more petitioners came forward. Mr. Madhu Limaye puts forward the supporting plea that he had attempted to penetrate this area to reconnoitre possibilities for settlement, but was turned back. In this way he claims that he had attempted to exercise his fundamental rights and they were infringed. Another party claims to have had a lease of grass lands some ten years ago in this area and he is now to be deprived of the right to obtain a similar lease. Lastly, one of the parties puts forward the plea that he lives in the adjoining territory and thus has interest in the territories proposed to be ceded to Pakistan. These petitioners too have very slender rights, if at all. The only person who can claim deprivation of fundamental rights is Mr. Madhu Limaye, although in his case also the connection was temporary and almost ephemeral. However, we decided to hear him and as we were to decide the question we heard supplementary arguments from the others also to have as much assistance as possible. But we are not to be taken as establishing a precedent for this Court which declines to issue a writ of mandamus except at the instance of a party whose fundamental rights are directly and substantially invaded or are in imminent danger of being so invaded. From this point of view we would have been justified in dismissing all petitions except perhaps that of Mr. Madhu Limaye."

12. In the present cases, the petitioners merely stated in their writ petitions that they are citizens of India, and did not make any averment regarding the nature of the specific right or interest they claim for themselves personally in the Island of Kachchativu. That being so, it has to be held that they have no locus standi to pray for a writ of mandamus.

13. Mr. R. Nath, learned counsel for petitioner in C. W. P. N. 822 of 1974, referred to ground No. 1 in the said Writ Petition in which it is averred that the impugned agreement has led to the diminution of the territory of the Union of India, and because of that diminution, his fundamental rights guaranteed under clauses (a) to (g) of Arts. 19 (1), 21, 25 (1) and 31 (1) are threatened. So far as the clauses of Art. 19 (1) are concerned, the petitioner cannot invoke the same in view of the continuance of the proclamation of emergency declared by the President of India on December 3, 1971, under Article 352 (1), and in view of Art. 19 (1), Art. 21 and Art. 31 (1) have no relevancy, at all so far as the petitioner is concerned. As regards Art. 25 (1), the learned Attorney General drew our attention to Art. 5 of the impugned agreement in

which it was provided that Indian fishermen and pilgrims will enjoy access to visit Kachchativu as hitherto, and will not be required by Sri Lanka to obtain travel documents or Visas for those purposes. It cannot, therefore, be said that any of the fundamental rights of the petitioner in Civil Writ Petition No. 822 of 1974 has been threatened.

14. Shri D. R. Gupta, learned counsel for the petitioner in Civil Writ Petition No. 935 of 1974, while admitting that the petitioner in the said writ petition did not make any averment in his writ petition as regards the nature of the specific right which he claims for himself personally in the Island of Kachchativu, referred to ground M in the said writ petition in which it is stated that by virtue of Art. 297 of the Constitution of India, all lands, minerals, and other things of value under the ocean within the continental shelf of India vest in the Union of India, and argued that the petitioner, as a citizen of India, has a right to collectively or individually enjoy the said properties so vested in the Union under Art. 297. We are unable to appreciate how the petitioner can claim to have a right to enjoy the aforesaid properties merely because they vest in the Union under Article 297. In any case, the petitioner cannot be said to have such right or interest in the said properties as would give him the locus standi to pray for the issue of a writ of mandamus against the Union of India, in view of the observations of Hidayatullah, C. J. in Maganbhai Ishwarbhai Patel's case, (AIR 1969 SC 783) (supra) set out above.

15. For the foregoing reasons, we hold that the petitioners have no locus standi to pray for a writ of prohibition or a writ of mandamus. We accordingly uphold the preliminary objection raised by the respondent and dismiss the writ petitions in limine, but in the circumstances without costs.

Petitions dismissed.

AIR 1975 DELHI 188

B. C. MISRA, J.

Umrao Singh, Petitioner v. Union of India, Respondent.

Civil Revn. No. 172 of 1974. D/- 30-10-1974.*

(A) Land Acquisition Act (1894), S. 28 — "Possession" — Symbolic possession —

*Petition under S. 115 of C. P. C., 1908 from order of H. C. Goel, Addl. Dist. J., Delhi, D/- 6-12-1973.)

*S/TS/B962/75/MBR

Interest is to be awarded on symbolic dispossession also.

Obtaining a symbolic possession is in law equivalent to obtaining actual physical possession and has the effect of terminating the legal possession of the person bound by the decree and order. In view of this principle, it is clear that the person whose property has been acquired could not legally derive any profits or exercise any rights of ownership or possession of the land as against the Government after its taking possession of it under S. 16 or 17 of the Act. (Para 11)

Section 28 does not make any distinction between physical possession and symbolic possession and as soon as the Collector proceeds under S. 16 or 17 (as the case may be) and takes possession of the land, the date from which the liability to pay interest arises under S. 28 becomes fixed. Interest under S. 28 is awarded on compulsory acquisition in view of possession and for being deprived of the amount of compensation since the taking of the possession. In view of this, there is no scope for holding that the interest is payable only on physical dispossession and not upon symbolic dispossession. (Case law discussed).

(Paras 13, 14)

Cases Referred: Chronological Paras

AIR 1968 SC 129 = (1967) 3 SCR 653 13

AIR 1966 SC 470 = (1966) 1 SCR 628 7

AIR 1961 SC 137 = (1961) 1 SCR 680 10

AIR 1961 SC 908 = (1961) 3 SCR 676 13

AIR 1957 SC 202 13

AIR 1949 Lah 252 = Pak Cas 1950 Lah 59 10

AIR 1942 Mad 698 = (1942) 2 Mad LJ 305 9

AIR 1935 Lah 475 = 37 Pun LR 743 (FB) 10

AIR 1926 Lah 35 = 26 Pun LR 546 9

AIR 1917 PC 197 (2) = 16 All LJ 33 7

(1882) ILR 7 Cal 418 9

(1880) ILR 5 Cal 584 = 5 Cal LR 548 7

(FB)

D. R. Dhamija, for Petitioner.

ORDER:— This revision petition raises a short but important question of law. It is this: Whether a person, whose property has been acquired under the Land Acquisition Act, is entitled to interest under Section 28 of the Act on the amount of compensation awarded to him from the date of the dispossession, in case the authorities have taken only symbolic possession and not actual physical possession of the property from him.

2. The material facts of the case lie in a small compass. Some land including two fields in dispute were acquired by the Collector under the Land Acquisition Act, 1 of 1894 (hereinafter referred to as 'the Act'). The Collector determined the compensation payable for

the land including the two fields in dispute. On a reference made under Section 18 of the Act, compensation of the land was enhanced from Rs. 800 per bigha to Rs. 4,250 per bigha and interest was awarded according to law. This was also payable in respect of the aforesaid two fields. Consequent upon the enhancement, the Collector remitted the requisite amount to the court which paid it to the claimant-petitioner. The petitioner, however, complained that the interest in respect of the aforesaid two fields on the amount of compensation awarded by the court had not been deposited and he applied to the District Court for calculation of the interest and requested the payment of the balance amount. Notice of the application was issued to the Union of India, which contended in reply that interest on the enhanced compensation in respect of the two fields in dispute could not be allowed, since the Government had not taken physical possession of the said fields. On the trial of the application, the facts established on the record are that the Naib Tehsildar took symbolic possession of the two fields in dispute on 15th June, 1963 and then on 13th August, 1964 by a notification issued under subsection (1) of Section 22 of the Delhi Development Act, 1957, the Chief Commissioner of Delhi, by virtue of the powers of the Central Government vesting in him for the purpose, placed the land including the two fields in dispute, which had vested in the Central Government, at the disposal of the Delhi Development Authority for the purpose of development in accordance with the terms of the said Act. The Naib Tehsildar, who was examined as R. W. 1, deposed from the record that symbolic possession of the two fields in dispute, namely Khasra No. 5/15 measuring 3 bighas 11 biswas and Khasra No. 5/16/1 measuring 5 biswas, had been taken and that physical possession of the same had not been taken by the Naib Tehsildar and he had passed on the symbolic possession to the Tehsildar, Land and Building, on the same day. The Court below accepted the above statement of the Naib Tehsildar and held that actual possession of the aforesaid two fields had not been taken over by the Union of India and as such the petitioner was not entitled to the interest claimed and the application was dismissed by the impugned order. The petitioner, feeling aggrieved has come up to this court in revision.

3. The scheme of the Land Acquisition Act is that under Section 4 a notification is issued indicating that the specific land is needed or is likely to be needed for a public purpose. Thereupon, it is lawful for the officer of the Government to enter upon the survey and to

take other steps for the purpose. Under Section 5-A, the interested parties are, after the notification under Section 4, entitled to file objections against the acquisitions; after considering the said objections, a decision is taken by the appropriate Government and under Section 6 a declaration is issued to the effect that the specified land is needed for a public purpose and this declaration is conclusive of the fact that the land is needed for the public purpose or for a company, as the case may be and after making such declaration, the appropriate Government may acquire the land in the manner provided by the Act. Thereafter, the Government directs the Collector to make order for acquisition of the land. The Collector then takes steps to measure and mark and prepare plan of the land and then issues a public notice under Section 9 inviting persons interested to claim compensation. The Collector enquires into the claims under Section 11 of the Act and then determines the questions relating to the area of the land, apportionment of the compensation and the award made under Section 11 is published in accordance with Section 12. Section 16 of the Act, which is material, reads as follows:

"16. When the Collector has made an award under Section 11, he may take possession of the land, which shall thereupon vest absolutely in the Government free from all encumbrances."

Under Section 17, the Collector has been authorised to take possession in specified cases before the making of the award. Such land also vests in the Government free from all encumbrances. The aforesaid provisions from Sections 4 to 17 are contained in Part II of the Act. Part III deals with the provisions for reference of the dispute to the District Court and procedure prescribed thereon. It also deals with the principles and procedure for award of compensation. Section 28 on which the party relies is reproduced below:

"If the sum which in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of six per centum per annum from the date on which he took possession of the land to the date of payment of such excess into court."

4. The other provisions of the Act are not material for determination of the dispute raised before me, except that reference has been made to Sections 35 and 36 where temporary possession can

be obtained by the Government, and under Section 47 of the Act the Collector as a Magistrate may enforce surrender of the land to the Collector, in case he is opposed or impeded in taking possession of the land. Section 46 provides for punishment for obstructing the Collector in carrying out the duties under Section 4 or 8 of the Act.

5. The provisions of law requiring interpretation in the instant case is Section 28, which has been reproduced above. On its construction, there is no doubt that if possession of the acquired land had not been taken, then no interest is payable. If actual physical possession has been taken, then interest is payable as provided in the section. The question for consideration is what is the result of only symbolic possession having been taken.

6. To appreciate the concept of the two kinds of taking possession, reference may be made to the Code of Civil Procedure. The provisions for taking physical possession is contained in Rule 35 of Order 21 of the Code of Civil Procedure, while the provision for taking symbolic possession is contained in Rule 36. Rule 35 provides that if possession is to be delivered, it would be delivered, if necessary, by removing any person bound by the decree. Rule 36 provides that if the decree is for delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the possession is to be delivered by affixing the copy of the warrant in some conspicuous place on the property and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property. These provisions lay down that if a judgment-debtor is bound by the decree to deliver possession, the possession should be taken from him by physically removing him from the property. On the other hand, if the actual physical possession be with some person (who is not bound by the decree) possession would be delivered by the order of the court in the manner provided by Rule 36 and this would, therefore, be sufficient compliance with the decree. This kind of possession, where the occupant is not physically removed, but only possession in law is taken from him, has come to be known as symbolic possession.

7. What is the effect of symbolic possession? In *Juggobundhu Mukerjee v. Ram Chunder Bysack*, (1880) ILR 5 Cal 584, a Full Bench of five Judges of the High Court held that delivery of symbolic possession must be deemed equivalent

to actual possession in respect of the parties bound by the decree, but as against the third parties, the symbolic possession would be of no avail. This rule of law has been approved by the Judicial Committee in *Radha Krishna v. Ram Bahadur*, AIR 1917 PC 197 (2), where the Committee after mentioning and approving *Juggobundhu Mukerjee's* case, observed that "symbolical possession is available to dispossess a party sufficiently where he was a party to the proceedings in which it was ordered and given." *Radha Krishna's* case has been quoted with approval by the Supreme Court in *M. V. S. Manikayala Rao v. M. Narasimhaswami*, AIR 1966 SC 470, in paragraph 20. In this case, the Supreme Court also observed that even assuming that the grant of symbolic delivery of possession ought not to have been made and that the executing court acted illegally in making such order, it could not be argued that the executing court had no jurisdiction to make the order or that the act of symbolic possession was a nullity in the eye of law. Therefore, the grant of symbolic possession by the Court tantamounts in law to delivery of actual possession.

8. The question is well settled that where the law allows symbolic possession to be delivered, it is, as laid down by the aforesaid authorities, equivalent to delivery of actual physical possession as against the judgment-debtor or a person bound by the decree, but it is of no avail against third parties. What will be the legal position, if symbolic possession is not required by law to be delivered and a decree-holder or a person entitled to obtain possession has a right to obtain actual physical possession, but fails to obtain the same and in its stead feels satisfied by obtaining symbolic possession?

9. Such a case came up for consideration before a Division Bench of the High Court of Calcutta in *Lokessur Koer v. Purgun Roy*, (1882) ILR 7 Cal 418. The court observed that the plaintiff had been put in possession under the decree by the officer of the court and, therefore, the form in which the execution had been carried out was not material and "as between the parties, the formal possession operates in point of law and fact, as a complete transfer of possession from the one party to the other". The court, however, proceeded to state that "as against third parties, this would not be the result, but as between the parties to the suit, the formal delivery passes the actual possession." To the same effect is the judgment of a Single Judge of the High Court of Lahore in *Harbhagwan v. Taja*, AIR 1926 Lah 35. The learned Judge ob-

served that delivery of symbolical possession in the circumstances in which actual possession ought to have been delivered was not a nullity and that "delivery of such possession even erroneously amounts to delivery of actual possession so far as the judgment-debtor and his representatives are concerned..... In the eye of law, therefore, the delivery of symbolical possession to a decree-holder, even in cases in which actual possession should have been given, puts an end to the adverse possession of the judgment-debtor and effectually vests the property in suit in the decree-holder....." The High Court of Madras in *A. L. N. Sathappa Chetti v. Thayyanayaki Ammal*, AIR 1942 Mad 698, also took the view that where the plaintiff was entitled to take possession of the property, but instead he gets only symbolic possession, the fact that he had obtained only symbolic possession interfered with the possession of the judgment-debtor.

10. The matter was considered at length by a Division Bench of the High Court of Lahore in *Miru v. Nur Muhammad*, AIR 1949 Lah 252. The Court observed "the delivery of symbolical possession, whether through mistaken application by the plaintiffs or otherwise, in circumstances in which actual possession should have been asked for or could have been delivered, and minor irregularities not materially affecting the degree of publicity attending the delivery proceedings, do not prejudice the effect of the proceedings in relation to the parties to the suit and if one of these parties is the party in possession, such proceedings will have the effect of determining such possession". The Supreme Court in *Shew Bux Mohata v. Bengal Breweries Ltd.*, AIR 1961 SC 137, was faced with the facts that the decree-holder who was entitled to obtain physical possession from the judgment-debtor under Order 21, Rule 35 of the Code, satisfied himself by giving a receipt acknowledging full delivery of possession and allowed the execution to be dismissed on the ground that full possession had been delivered by the defendant, but in fact he allowed the defendant-judgment-debtor to physically remain on the premises. In these circumstances, the court observed in paragraph 22 of the report that although the defendant was bound by the decree and could be physically removed, he was not required by the decree-holder to be physically removed, but the possession had otherwise been taken. Still it was "open to the decree-holder to accept delivery of possession under that rule without actual removal of the person in possession. If he does that, then he cannot later on say that he has not

been given that possession to which he was entitled under the law". The High Court of Lahore in Full Bench decision in *Behari Lal v. Narain Das*, AIR 1935 Lah 475 (FB), observed "dispossession may be either actual in the sense of an existing actual possession being forcibly terminated by actual dispossession, or it may be a legal constructive possession being terminated by a legal dispossession."

11. As a result of the discussion of the aforesaid authorities, my conclusion is that obtaining a symbolic possession is in law equivalent to obtaining actual physical possession and has the effect of terminating the legal possession of the person bound by the decree and order. However, this does not affect third parties, who be in actual possession of the property and who are not bound by the decree or order, and who have been removed by the taking of possession. Their rights may or may not be changed by the delivery of symbolic possession. But so far as the judgment-debtor or the person bound by the decree or order is concerned, his dispossession is in the eye of law complete by delivery of symbolic possession and neither of the parties to the proceedings can thereafter be allowed to agitate that symbolic possession does not have the effect of delivery of physical possession and the judgment-debtor continues to have the same legal rights as before the delivery of symbolic possession owing to any irregularity in the delivery of possession.

12. Applying this principle to the facts of the present case, I find that the Government acting through the Collector could take actual possession, but it chose to take only symbolic possession of the two fields in dispute on 15th June, 1963. Thereupon, the said fields had admittedly in view of Section 16 of the Act vested absolutely in the Government free from all encumbrances. Thereafter the Government went a step further and placed the said fields at the disposal of the Delhi Development Authority. This could not be done by the Government, unless and until the land had vested in the Government and the land could not have vested in the Government unless it had taken its legal possession. The fact that the Collector or the Government allowed the petitioner to remain physically on the land in dispute and in the circumstances of the case did for any reason not think it fit to physically throw him out, does not lead to the conclusion that the Government had not taken possession of the land or that the petitioners had not been dispossessed in the eye of law. Surely, after the Collector had taken possession under Section 16, the petitioner could not

exercise any rights of ownership or possession in respect of the land in dispute; he could neither construct any structure nor let out the land to anybody and in law it would be deemed that he was holding physical possession of the land under and on behalf of the Government which had legally taken symbolic possession of the land and in whom it had absolutely vested. Had the Government not desired to take possession of the land for any reason there was no point in its proceeding to take a symbolic possession and then vesting it in the Government and again placing it at the disposal of the Delhi Development Authority. Under these circumstances, it is rather strange on the part of the Government to contend that although for purposes of Section 16 it had taken possession of the land which had vested in it and had been placed at the disposal of the Delhi Development Authority, still it be deemed not to have taken possession for purposes of paying interest to the claimant.

13. Section 28 of the Act, which has been reproduced above, does not make any distinction between physical possession and symbolic possession and as soon as the Collector has proceeded under Section 16 or 17 of the Act (as the case may be) and has taken possession of the land, the date from which the liability to pay interest arises under Section 28 of the Act becomes fixed. Interest under Section 28 of the Act is awarded on compulsory acquisition in lieu of possession and for being deprived of the amount of compensation since the taking of the possession. The Supreme Court in *Satinder Singh v. Umrao Singh*, AIR 1961 SC 908, observed in paragraph 19 that when a claim for payment of interest is made by a person whose immovable property has been acquired compulsorily, he is not making claim for damages properly or technically so-called; but he is basing his claim on the general rule that if he is deprived of his land he should be put in possession of compensation immediately; if not in lieu of possession taken by compulsory acquisition interest should be paid to him on the amount of compensation. In *Uttar Pradesh Government v. H. S. Gupta*, AIR 1957 SC 202, the Supreme Court awarded interest on the amount of compensation which was restored by the Supreme Court and which though deposited had not been paid to the claimant on account of various interim orders. In *M/s. T. N. K. Govindaraju Chetty v. Commr. of Income-tax, Madras*, AIR 1968 SC 129, the court observed in paragraph 9 that interest was in truth compensation for loss suffered on account of deprivation of property and the source of the obligation imposed by the statute to pay

interest arises because the claimant is kept out of his money.

14. In view of the said rule of law and the construction of the statutory provision, there is no scope for holding that the interest is payable only on physical dispossession and not upon symbolic dispossession under the Act. Surely, the claimant has been deprived of his title and rights in the land and the market value has been paid to him as on the date of Section 4 notification only and no more. He could not legally derive any profits or exercise any rights of ownership or possession of the land as against the Government after its taking possession of it under Section 16. He is, therefore, certainly entitled to obtain the interest, which the law allows to him, and which the court had awarded to him, at six per cent. per annum from the date of the taking of the possession of the land to the date of payment of the amount of compensation awarded. The impugned order must accordingly be reversed.

15. As a result, I hold that the petitioner is entitled to interest in respect of two fields in dispute from the date of symbolic possession which had been taken by the Naib Tehsildar on 15th June, 1963. The revision is, therefore, allowed and the impugned order is reversed. The lower court will now calculate the amount that is payable in view of my findings and cause the same to be paid in accordance with law. The petitioner will have costs of the revision from the Union of India.

Revision allowed.

AIR 1975 DELHI 192

T. P. S. CHAWLA, J.

Joginder Singh, Appellant v. The Bar Council of India, New Delhi and another, Respondents.

Second Appeal No. 140 of 1973. D/- 17-10-1974.*

(A) Advocates Act (1961), S. 26 (1) Proviso — Application form for enrolment as an advocate not requiring applicant to state whether he had been previously convicted — Still applicant is bound to state this fact — Non-disclosure of fact regarding previous conviction — Removal of name held not illegal.

The appellant was convicted of offences involving moral turpitude before he applied to be enrolled as an advocate.

*(From judgment and decree of S. R. Goel, Addl. Dist. J., Delhi; D/- 19-1-1973.)

ES/ES/B613/75/CWM

He had not, however, disclosed these facts in his application to the Bar Council of Uttar Pradesh for enrolment as an advocate. Admittedly the form of application that he was required to fill in contained no query as to such matters.

Held, that even in the absence of specific query the appellant was bound to mention that he had been convicted of the offences. His reticence amounted either to fraud or misrepresentation. The name of the appellant was correctly removed from the roll of advocate under S. 26 (1) Proviso by the Bar Council of India. (1878) 3 Ex D 352, Distinguished.

(Paras 15, 18 and 19)

Although Section 26 (1) does not envisage the making of any contract, it was generally agreed that the words 'fraud' and 'misrepresentation' occurring in the proviso ought to be understood in the like sense in which they are defined in Sections 17 and 18 of the Contract Act. In any case, no other definition or better guide could be suggested. (Para 15)

Having regard to the known high traditions of the legal profession and the functions which its members are expected to perform, those who seek to enter its portals are obliged to declare whether they were convicted of an offence. Especially is this true in respect of offences involving moral turpitude. These are matters which the admitting authority certainly ought to know. They are relevant for ascertaining the character of the man. Character is, and always has been, a most material consideration for deciding whether to admit a person as an advocate or not. (1963) 65 Pun LR 619, Rel. on.

(Para 17)

Broadly, it may be true to say, 'that no one is bound to advertise his past misfortunes.' There are occasions, however, when he has no option as for example, when he, of his own applies for that which compels a disclosure. Besides, a conviction for an offence cannot be treated at par with other incidents in a man's life. It is the judicial determination of a man's guilt. (1878) 3 Ex D 352, Rel. on.

The maxim *expressio unius est exclusio alterius*, or, as it is otherwise worded, *expressum facit cessare tectum* is applicable to the construction of written instruments. There is no written instrument here requiring to be construed.

(Para 19)

The order of the Bar Council of India held that the appellant had gained admission as an advocate by fraud or misrepresentation in that he had refrained from disclosing that he had previously been convicted of offences. The facts on which that conclusion rested were admitted by the appellant. Merely because the character certificate submitted by the

appellant to the U. P. Bar Council was referred to in the interrogation of the appellant, or in the argument of his counsel, did not mean that the Bar Council relied on it, or the surrounding circumstances, for the purpose of reaching its decision. (Para 28)

(B) Constitution of India, Art. 20 (2) — Refusal of a State Bar Council to admit a person as an advocate — Does not come within the concept of the words 'prosecuted' or 'punished'. (1867) 18 Law Ed 366, Distinguished. (Para 23)

(C) Advocates Act (1961), 26 (1) Proviso — Order passed by Bar Council of India under — Quasi judicial nature — Reasons have to be recorded. AIR 1972 SC 2083 and AIR 1970 SC 1302. Rel. on.

(Para 26)

Cases Referred: Chronological Paras

AIR 1972 SC 2083 = 1972 Serv LR 85 26

AIR 1970 SC 1302 = (1971) 1 SCR 201 26

AIR 1969 SC 78 = (1968) 3 SCR 662 9

(1969) 73 Cal WN 751 16

(1969) 1 All ER 208 = (1969) 2 WLR 163 27

(1966) 1 All ER 545 = (1967) 1 AC 13 27

(1963) 65 Pun LR 619 13, 17

AIR 1961 SC 838 = 1961 (2) Cri LJ 1 12

AIR 1961 SC 1543 = 1961 (2) Cri LJ 713 12

AIR 1959 Pat 413 = ILR 37 Pat 1336 16

AIR 1958 Madh Pra 162 = 1958 Cri LJ 767 12

AIR 1937 Lah 508 = 39 Pun LR 508 16

(1878) 3 Ex D 352 = 47 LJQB 470 18

(1867) 18 Law Ed 366 = 4 Wall 333 23

Daniel Latifi with Swatantar Kumar,

for Appellant; H. N. Hingorani Counsel,

for Respondent No. 1.

JUDGMENT:— The appellant, Joginder Singh, was once an advocate. His grievance is that his name has been struck off the rolls.

2. On 28th March, 1962 he was enrolled as an advocate by the Bar Council of the State of Uttar Pradesh. For a short while, he says, he practised at Saharanpur. He then applied to the Bar Council of India under Section 18 of the Advocates Act, 1961 for the transfer of his name from the roll of the U. P. Bar Council to that of the Bar Council of Delhi. This application was allowed in October 1963, and thereafter he began to practise in Delhi.

3. Pursuant to a communication received from the Deputy Registrar of the Punjab High Court, the Bar Council of India sent a notice dated 12th January, 1965 to the appellant saying:

'Whereas it has been brought to the notice of this Council that you made an application for enrolment under the Advocates' Act of 1961 to the Bar Council of Uttar Pradesh, that in the said appli-

cation for enrolment you concealed the fact of your having been previously convicted of offences involving moral turpitude, that by such concealment of an essential fact you obtained your enrolment, and whereas it appears to this Council that this concealment constitutes misrepresentation and fraud within the meaning of the proviso to Section 26 (1) of the said Act, and whereas your name is liable to be removed from the roll of advocates under the said section.

This is to give you notice to show cause why action be not taken against you.

The appellant was required to file his written statement within three weeks of the date on which he received this notice, and was informed that his defence would be considered by the Council on a date to be notified to him when he could appear in person or by an advocate duly instructed. By another letter dated 10th February, 1965, the appellant was informed that the matter would be taken up by the Bar Council on 3rd April, 1965. Both these letters were despatched to the appellant at an address in Saharanpur. According to the Bar Council they were received by him, but the appellant denies it. It does not matter because the appellant admits that in early March, 1965 he learnt that an inquiry was being held against him by the Bar Council of India.

4. On 4th March, 1965, he went to the office of the Secretary of the Bar Council of India and personally received copies of the letters dated 12th January, 1965 and 10th February, 1965. Forthwith, he wrote an application for permission to inspect the file giving rise to the allegations against him, and said he would like to make a representation after seeing it. In a letter dated 11th March, 1965, the Secretary told the appellant that he could come and inspect the file on 16th March, 1965 at 12 noon. When, on the appointed day, the appellant went to the office of the Secretary, he found that his original application for enrolment lodged with the U. P. Bar Council and the connected file had not been requisitioned from that Council. So, there and then he handed over two letters to the Secretary: one asking for those papers to be summoned, and the other requesting that he be given copies of his application for enrolment and of a statement alleged to have been made by him before Mr. Hans Raj, Additional District Judge, Delhi. In answer to the request for copies, the Secretary gave a reply to the appellant on the same day telling him to apply to the appropriate authorities. Later, by a letter of 1st April, 1965, the Secretary informed the appellant that his original application for enrolment had been called

from the U. P. Bar Council and would be shown to him when received, if permitted by the Bar Council of India. In this letter the appellant was also informed that time for filing his written statement could not be extended, which apparently the appellant had prayed for, and that now the matter would be taken up by the Bar Council of India on 11th April, 1965 at 11 A. M.

5. At or about the same time the original application for enrolment was received from the U. P. Bar Council, and the appellant was given inspection on 2nd April, 1965. Three days' later, by a letter of 5th April, 1965, the appellant complained to the Secretary that he had been allowed to see only pages 1, 2 and 3 of his application for enrolment, and that page 4 had been withheld, and he had not been permitted to make a copy of it or take notes. He protested that he could not obtain proper legal advice unless he had access to all the material oral and documentary evidence which the Bar Council intended to use against him. Furthermore, he now contended, that the notice to show cause had been served on him only on 16th March, 1965 and the period of 3 weeks granted for filing a written statement ought to be computed from that date. He added that he would, of course, appear before the Bar Council of India on 11th April, 1965; but, in view of the inadequate opportunity given to him of looking into the evidence and taking copies, he had been denied an opportunity of making proper preparation for his defence, and that his appearance before the Council would 'not be effective for a final disposal of the matter by it.' In the end he requested that his letter be considered, and that an order be obtained before 11th April, 1965. The Secretary, in a short reply dated 6th April, 1965, advised the appellant that he could make the representation contained in his letter to the Bar Council of India when he appeared before it on 11th April, 1965.

6. The appellant and his counsel Mr. Rameshwar Dayal appeared before the Bar Council of India on the date fixed. According to the appellant, he prayed to the Bar Council to postpone the hearing of the matter as he had not been given inspection of the record and the copies he had asked for, and hence had not been able to file his written statement. He says, the Council observed that before considering his request they would like to interrogate him, and then proceeded to do so. In paragraphs 3, 4 and 5 of the order which the Bar Council made on 11th April, 1965, this is what they said:

'3. Shri Joginder Singh did not file any statement. He, however, appeared

with his counsel, Shri Rameshwar Dayal, Advocate, before the Council at its meeting on 11th April, 1965.

As a result of questions asked the following were ascertained from Shri Joginder Singh Nanda.

- (1) That he was convicted under Sections 473 and 411, I.P.C. in three cases resulting in a sentence of imprisonment of one year in each case, to run concurrently.
- (2) There are still certain criminal cases pending against him and that he is at present on bail.
- (3) That Shri Joginder Singh Nanda did not disclose to the Bar Council of U. P. at the time of applying for enrolment the fact of his conviction.
- (4) That the certificate of character annexed to the enrolment application was obtained from a Haveli Munsif with whom his acquaintance was slight and who could really have had no such contact as could enable him, the munsif, to give a certificate of character.
- (5) That the Haveli Munsif did not know of the fact of the conviction nor did Shri Joginder Singh Nanda enlighten him as to it.

4. Shri Joginder Singh Nanda's counsel was heard. He submitted that since there was no column in the enrolment form asking about any convictions or adverse circumstances, Shri Joginder Singh Nanda was not bound to disclose the fact of his convictions, that the non-disclosure of the convictions did not amount to fraud or misrepresentation within the meaning of the proviso to Section 26 (1) of the Advocates' Act of 1961, and further that though the certificate of character may have been wrongly obtained that was not a matter relevant to the issue here. He had fulfilled the only obligation upon him which was to produce a certificate of character.

5. Having heard Shri Joginder Singh Nanda and his counsel and having considered the matter, we are satisfied that the case falls within the proviso to Section 26 (1) of the Advocates' Act, 1961, and that we are entitled to revise the enrolment. We accordingly order that his name be removed from the roll of advocates.

7. Understandably, the appellant tried every means to get rid of that order. He moved the High Court of Punjab to quash it, but his petition was dismissed. He applied to the Supreme Court for leave to appeal, but leave was refused. On 20th July, 1966 he made a fresh application for enrolment to the Bar Council of Delhi in which he mentioned

that he had been previously convicted of offences. Before this application could be considered he sought to withdraw it on 30th September, 1966. Permission to withdraw the application was refused. The application itself was rejected by the Bar Council of Delhi by an order made on 27th January, 1967. Then, on 13th February, 1967, the appellant applied for review of the order of 30th September, 1966 refusing permission to withdraw the application. The application for review was also rejected.

8. Ultimately, on 15th April, 1968, the appellant instituted a suit in the court of the Subordinate Judge seeking declarations that the orders made by the Bar Council of India on 11th April, 1965 and the Bar Council of Delhi on 27th January, 1967 were null and void, unconstitutional, ultra vires, without jurisdiction and not binding on the plaintiff, and that the plaintiff continued to remain on the roll of the Bar Council of Delhi. Apart from the Bar Councils whose orders were impugned, the Bar Council of the State of Uttar Pradesh was also joined as a party. Objections being raised as to misjoinder of parties and causes of action, counsel for the appellant made a statement on 13th November, 1968 that the suit may be treated as if it sought a declaration only in respect of the order dated 11th April, 1965 made by the Bar Council of India, and by an order of the same date the court directed accordingly. It was on that footing that the case was fought.

9. An objection was also raised that the court had no jurisdiction to try the suit as the Bar Council of India was a domestic tribunal. For the appellant, it was contended, on the authority of *Dhulabhai v. State of Madhya Pradesh*, AIR 1969 SC 78, that the jurisdiction of a civil court was not excluded—

'Where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.' Here, it was said, the Bar Council of India had not afforded to the appellant an adequate or proper opportunity of being heard, and could not on the facts have found that he had secured his enrolment as an advocate by misrepresentation as to an essential fact or by fraud—which were the conditions precedent to the exercise of the power conferred by the proviso to Section 26 (1) of the Advocates' Act. That proviso says:

'Provided that the Bar Council of India may, if satisfied, either on a reference made to it in this behalf or otherwise, that any person has got his name entered on the roll of advocates by mis-

representation as to an essential fact or by fraud or undue influence, remove the name of such person from the roll of advocates after giving him an opportunity of being heard;

The Subordinate Judge held against the appellant on all his contentions, and dismissed the suit. An appeal heard by the Additional District Judge was also dismissed. This is a second appeal before me. The contentions, though, perhaps, more elaborately argued, are the same.

10. That the appellant had the right to be heard is indisputable, for the proviso expressly grants it. He said that this right had been infringed in two ways: (i) in that he had not been shown the fourth page of his application for enrolment and had thus been prejudiced in his defence; and, (ii) at the hearing on 11th April, 1965 the Bar Council had allowed very little time to him and his counsel to argue the case. These are questions of fact on which both courts below have found against the appellant. They have disbelieved him, and accepted the statement of the Secretary of the Bar Council that he was shown all the pages of his application for enrolment, and was given a patient hearing by the Bar Council. I am bound to accept these concurrent findings of fact; and it was not argued that any grounds existed for interfering with them in second appeal.

11. But, the main argument before me was on the question whether the appellant had secured his enrolment by misrepresentation or fraud. It was not disputed that the appellant was convicted of offences involving moral turpitude before he applied to be enrolled; nor that he had not disclosed these facts in his application. Admittedly, the form of application that he was required to fill in, contained no query as to such matters. In these circumstances, it was urged, the appellant was under no duty to volunteer the information; and it could not, therefore, be held that he had procured his enrolment by misrepresentation or fraud. Whether, in the absence of a specific query, the appellant was yet bound to mention that he had been convicted of offences, is the crucial question in the case.

12. What I regard as a subsidiary point based on the certificate of good character given by the Munsif, had best be disposed of first. The rules made by the Bar Council of Uttar Pradesh under the Advocates' Act came into force in May, 1963. They did not exist when the appellant made his application for enrolment. Under the Bar Councils Act of 1926 some rules had also been framed. On behalf of the Bar Council of India it was maintained, that these rules conti-

nued to be in force by virtue of Section 24 read with Section 8 of the General Clauses Act, 1897 till such time as they were superseded by the rules framed by the Bar Council of Uttar Pradesh under the Advocates' Act. In support of this contention I was referred to State of Madhya Pradesh v. A. K. Jain, AIR 1958 Madh Pra 162, Chief Inspector of Mines v. Karam Chand Thapar, AIR 1961 SC 838 and Mohan Lal Goenka v. State of West Bengal, AIR 1961 SC 1543. It is not necessary to dwell on the nice points involved in this argument because counsel for the appellant conceded that the Advocates' Act, 1961 was in pari materia with the Bar Councils Act of 1926, which meant, in effect, that Section 24 of the General Clauses Act did apply so as to keep in force the rules framed under the earlier Act till they were supplanted. Neither the rules under the Bar Councils Act nor those under the Advocates' Act require a person applying for admission as an advocate to state whether he had previously been convicted of an offence. Even the Advocates' Act itself contains no such provision. The purpose of invoking the rules was merely to show that it was always a requirement, no matter which of the rules applied, that a certificate of good character be furnished with the application. This was not disputed by the appellant. Indeed that is precisely the reason why he had obtained and submitted a certificate.

13. In the certificate the Munsif said the appellant

'is personally known to me and he bears a good moral character and is a fit and proper person to be enrolled as an advocate.'

By presenting this certificate, it was suggested, the appellant had tacitly represented that he had not previously been convicted of an offence. I do not think that necessarily follows. Granting as was said in the matter of a complaint of Professional Misconduct against Shri Indar Singh, (1963) 65 Pun LR 619, that a certificate is a solemn assurance of the truth of what it states, it is not to be presumed that a person who has once been convicted of an offence, even if involving moral turpitude, can never reform and become a person of good character. I know of no such doctrine. It would violate the first principles of the criminal law if there were. Thus if the Munsif was satisfied, when he gave the certificate, that the appellant was a person of good character despite his past bad record, the Munsif did no wrong.

14. The Munsif was examined as a witness and, in substance, that is what he sought to say. He admitted that when he gave the certificate he was aware that

the appellant had been convicted of some offences, but said he was advised by a senior counsel that this was no bar to the giving of a certificate. No doubt his cross-examination lays bare the fact that he did not know the appellant personally and did not make sufficient inquiries. That only proves that the Munsif acted with less circumspection than might have been expected of him; not that he intended to make a representation that the appellant was never convicted of an offence. A representation of that kind could only be inferred if the Munsif himself was under an obligation to state that the appellant was a convicted person, having become aware of it. At least, so far as the Munsif was concerned, the appellant had not suppressed information. Now, I cannot see how the Munsif could owe such a duty to the U. P. Bar Council if the appellant did not. Conversely, if the appellant himself owed the duty, he was directly in breach of it; and there is no need then to search for indirect modes of breach through the certificate or by the Munsif. That is why I said that, in my understanding of the case, this aspect of the matter was subsidiary. With these observations, I revert to the main point.

15. Although Section 26 (1) of the Advocates' Act does not envisage the making of any contract, it was generally agreed that the words 'fraud' and 'misrepresentation' occurring in the proviso ought to be understood in the like sense in which they are defined in Sections 17 and 18 of the Contract Act, 1872. In any case, no other definition or better guide could be suggested. It is unnecessary to expatiate on those definitions because, again, it was accepted that if the appellant was held to be under a duty to state that he had previously been convicted of an offence, his reticence would amount either to fraud or misrepresentation. However, it is important to notice the explanation to Section 17 of that Act, which says:

'Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.'

That shows that whether a duty to speak arises or not depends entirely upon the facts.

16. Many diverse arguments were propounded to persuade me that in the present case no such duty arose. A case was cited which holds that non-disclosure of his minority by a minor entering into a contract does not amount to mis-

representation or fraud; see *Sher Khan v. Akhtar Din*, AIR 1937 Lah 598. And another which holds that concealment of pre-marital unchastity by a party to a marriage is not fraud within the meaning of Section 12 (1) (c) of the Hindu Marriage Act, 1955: see *Rani Bala Debnath v. Ram Krishna Debnath*, (1969) 73 Cal WN 751. To my mind these cases only serve to emphasise how very much the answer turns on the nature of a particular transaction and what it implies. The materiality of the representation in the context of the facts is bound to influence the decision. A representation is material when it induces the representee to act on the faith of it in the way that he does: see *Halsbury's Laws of England* 3rd Edn., Volume 26, page 853, para. 1586. I am conscious that the line between what is material and what is not is often hard to draw: see *Ratan Lal v. Metropolitan Insurance Co. Ltd.*, AIR 1959 Pat 413. Still, in every case which comes before a court it has, nonetheless, to be drawn.

17. Having regard to the known high traditions of the legal profession and the functions which its members are expected to perform, I cannot help thinking that those who seek to enter its portals are obliged to declare whether they were convicted of an offence. Especially this is true in respect of offences involving moral turpitude. These are matters which the admitting authority certainly ought to know. They are relevant for ascertaining the character of the man. Character is, and always has been, a most material consideration for deciding whether to admit a person as an advocate or not. That is the reason for the invariable and indispensable requirement of a certificate of good character. It is the means by which an assurance of good character is obtained. In England no person can be admitted as a student of an Inn with a view to being called to the Bar unless he produces such a certificate or other evidence of good character. Nor, if he has been convicted of a criminal offence of such a nature that in the opinion of the Masters of the Bench his admission is undesirable: see *Halsbury's Laws of England*, 4th Edn., Volume 3, page 596, para. 1113. Duties with respect to call to the Bar are duties to the public. Hence, securing admission to the Bar by fraud is punishable as 'an act tending to public mischief': see *Ibid.*, page 590, para. 1106. which shows that underlying it all is the public interest, and this was the aspect stressed in the Matter of a Complaint of Professional Misconduct against *Shri Under Singh*, (1963) 65 Pun LR 619.

18. Everywhere the governing ideas have been the same. According to the rules framed by the Punjab High

Court under the Bar Councils Act, 1926, two testimonials of good character and conduct had to be submitted with the application for enrolment. In the application the applicant had to say whether he had been convicted by a criminal court: see Punjab High Court Rules and Orders, Chapter 6-A, Rule 2. Due to some mistake or oversight the form of application in vogue in Uttar Pradesh contained no such query. Probably, that was the reason why the appellant chose to apply for admission there. He knew that in Delhi he could not evade the question. In Uttar Pradesh no awkward question was asked. But, question or no question, I think, the nature of the thing he was applying for and the public interest, imposed on him a duty to state that he had been convicted of offences. Broadly, it may be true to say, in counsel for appellant's phrase, 'that no one is bound to advertise his past misfortunes.' There are occasions, however, when he has no option: as for example, when he, of his own volition, applies for that which compels a disclosure. Besides, a conviction for an offence cannot be treated at par with other incidents in a man's life. It is the judicial determination of a man's guilt. In reply to the forceful plea made by counsel for the appellant, I would adopt as apt the words of Bramwell, L. J., in *Leyman v. Latimer*, (1878) 3 Ex D 352 where he said:

'It is no doubt despicable that a time should come when a person who has been convicted of felony should cease to be called a felon, and it is cruel to rake up what is past; but on the other hand it is part of the punishment for a crime, that the person committing it should suffer opprobrium; it would be strange to say that a person formerly convicted upon the clearest evidence of felony is no longer felon.'

19. Then, it was said, that even if otherwise a duty to disclose existed, it was negated by the fact that the form of application for enrolment asked for some particulars and not others. The maxim *expressio unius est exclusio alterius*, or, as it is otherwise worded, *expressum facit cessare tacitum* was called in aid to argue that what was not asked need not be disclosed. As is apparent from the discussion on page 443 of Broom's *Legal Maxims*, 1969 Edn., this maxim is applicable to the construction of written instruments. There is no written instrument here requiring to be construed. The real question is whether, regardless of the form of the application, a duty existed. For reasons I have already stated, I think, it did. Undoubtedly the new Section 24-A added to the Advocates Act 1961 by the Amendment Act

60 of 1973 has brought about some changes. On the one hand the disqualification resulting from a conviction for an offence involving moral turpitude has been made absolute and is subject to no discretion; and on the other its duration has been restricted till a period of two years has expired after sentence has been served. Far from leading to the conclusion that previously no such disqualification existed, the section is patently designed to prevent it from operating for an indefinite time. In the process it gives evidence of what was before.

20. A further argument was advanced on the basis of an English statute known as the Civil Rights of Convicts Act, 1828 (9 Geo., 4 c. 32): see Halsbury's *Statutes of England*, 2nd Edn., Volume 5, page 639. Summarising the effect of Section 3 of that Act, it is said in Halsbury's *Laws of England*, 3rd Edn., Volume 7 at page 245, para. 530, that:

'The endurance of the punishment on conviction for any felony not capital has the like effect and consequences as a pardon under the Great Seal with respect to the felony,.....'

And, in paragraph 529 on page 244 of the same volume, the following passage occurs:

'The effect of a pardon under the Great Seal is to clear the person from all infamy, and from all consequences of the offence for which it is granted, and from all statutory or other disqualifications following upon conviction. It makes him, as it were, a new man, so as to enable him to maintain an action against any person afterwards defaming him in respect of the offence for which he was convicted, and, in the days when crime disqualified a man from being a witness, removed the disqualification.'

Initially, counsel for the appellant maintained that the English statute applied in India *proprio vigore* and was still a law in force; but he was unable to establish it. Subsequently, he modified his submission and urged that the statute embodied rational and progressive notions which I ought to adopt as principles of justice, equity and good conscience. The appellant, it was said, had served the sentences awarded to him for the offences of which he was convicted. He was thus cleansed of the offences, and was, 'as it were, a new man'. This transmutation brought about by the law freed him from the necessity of disclosure when he applied to be enrolled as an advocate.

21. Much reliance was placed for this line of reasoning on a case reported as *Layman v. Latimer* (1878) 3 Ex. D. 352. That was an action by the editor of a newspaper for libel by printing and publishing of him in another newspaper that he was 'a convicted felon'

and also 'a felon editor'. The defendants pleaded justification. Upon a demurrer to the justification the Court of Appeal held that the defendants could not succeed merely by proof of the fact that the plaintiff had been convicted of felony; for to justify the words 'felon editor' it had to be shown that the plaintiff had 'actually committed felony', and that a conviction of itself is no evidence in any civil proceeding, that the person convicted has committed a felony.

22. In my opinion, even supposing it were right for me to act on the English statute as expressing a rule of justice, equity and good conscience, as to which I entertain grave doubt, it would not assist the appellant. In the case last mentioned, Cotton, J. recognised that the principal object of the statute was to allow persons to be called as witnesses, who had been previously disqualified. Branwell, L. J., was of the view that the statute was not pertinent to the case at all. Although, Brett, L. J., thought otherwise and was prepared to hold that a person who had endured his punishment was no longer in law a 'felon', as endurance of the punishment did away with the felony, he said at the end of his judgment:

'I only wish to add that nothing in our judgment has a tendency to limit the power of inquiry into the previous character of a person tendering himself as a witness: questions may then be put from a justifiable motive, and the occasion is proper; but needlessly to rake up the past misfortunes of another person shews a malignant and wicked frame of mind.' Likewise, Cotton, L. J., who also thought the statute applied, said:

'I need hardly say that the statute does not prevent a full inquiry into the past history of any man, whenever it is a matter of duty to form a right estimate of his credibility or character.'

These observations make it perfectly plain that, in the course of an inquiry into his character, the statute would not have relieved the appellant of the duty to disclose that he had previously been convicted of offences. Perhaps, the statute and the case might have been more relevant if the appellant had made a full disclosure to the U. P. Bar Council, and still been refused admission. He might then, more plausibly, have said, on the analogy of the English statute, that having served his sentence he ought to be treated as 'a new man'.

23. That is also the answer or a part of it, to yet another argument advanced for the appellant. It was said that even if the appellant had proclaimed that he had previously been convicted of offences, he could not have been refused admission as an advocate by the State Bar Council for that would have amounted to imposing a second penalty for the same offences in violation of Article 20 (2) of the Constitution of India. The words of that sub-article are:

'No person shall be prosecuted and punished for the same offence more than once.'

I find it impossible to accept that the refusal of a State Bar Council to admit a person as an advocate comes within the concept of the words 'prosecuted' or 'punished' as there used. Certainly the majority judgment of the Supreme Court of the United States in the Matter of A. H. Garland (1867) 18 Law Ed 366 = 4 Wall 333 holds that:

'Exclusions from any of the professions or any of the ordinary avocations of life for past conduct, can be regarded in no other light than as punishment for such conduct.' But, I think, they were using the word 'punishment' in a loose sense. For my part, I would agree with the very powerful dissent delivered by Mr. Justice Miller, with which the Chief Justice and Justices Swayne and Davis concurred. The minority judgment demonstrates conclusively the serious flaws in and the grave consequences of the decision of the majority.

24. Moreover, the facts of that case were rather special. The petitioner had been pardoned by the President of the U. S. A. for certain acts committed by him during the American Civil War. Nevertheless, he was required by an Act passed by Congress to take an oath that he had never committed those acts as a qualification for admission as an attorney of the Supreme Court. This rendered the pardon granted by the President largely ineffectual. In resolving this conflict the majority held:

'It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency.'

I doubt if the majority judgment can be taken as a guide for interpreting the word 'punished' in Article 20 (2) of the Constitution of India. Even if it were, it would avail the appellant only if he had made a candid disclosure of his past, and the U. P. Bar Council had then sought to 'punish' him by refusing to enter his name on the rolls.

25. It is significant and worth noticing, for the present purpose, that both the judgments in that case acknowledge unreservedly the great importance of attorneys being men of good character. From that point of view the case is against the appellant.

26. Towards the end, in the reply on behalf of the appellant, some new points were raised. It was contended that the order made by the Bar Council of India could not be sustained because it was not a speaking order. I concede that the order made by the Bar Council of India was of a quasi-judicial nature and reasons had to be recorded: see *State of Punjab v. Bakhtawar Singh* 1972 Serv LR 85 = (AIR 1972 SC 2083) and *M/s. Mahabir Prasad Santosh Kumar v. State of U. P.* AIR 1970 SC 1302. But, I think, it speaks enough. Although the last paragraph of the order is somewhat laconic, the reasons for the decision of the Bar Council

are quite apparent when it is read in the background of what precedes it. True, the order does not specifically say whether the appellant had secured his enrolment by fraud or by misrepresentation as to an essential fact; but it is obvious that the Bar Council was satisfied that it was either the one or the other, and that the case was covered by the proviso to Sec. 26 (1) of The Advocates Act. Be it noted, also, that this point was never raised in the courts below or even in the grounds of appeal, which shows that until the case was argued here, the appellant experienced no difficulty in comprehending the order.

27. Finally, it was urged that by the rules of natural justice the appellant was entitled to notice of what was charged against him so that he could make his answer: see *Maradana Mosque v. Badi-ud-din-Mahmud*, (1966) 1 All ER 545. And, if that was not done, the Bar Council of India would have no right to take into consideration a matter of which notice had not been given: see *Anisminic, Ltd. v. The Foreign Compensation Commission* (1969) 1 All ER 208. Applying these propositions to the present case, it was said that in the notice requiring the appellant to show cause against their proposed action, the Bar Council had not alleged that he had obtained the certificate of character by deceit or falsehood; yet they took this matter into account whilst making their order, despite the objection of the appellant that it was not relevant.

28. I do not think that the order of the Bar Council lends itself to this construction. The falsity of the certificate of character is referred to in that part of the order which records the answers given by the appellant and the submissions made by his counsel. There is nothing to suggest that the ultimate decision of the Bar Council was based on the finding that the certificate of character produced by the appellant was untrue. As I understand the order, it holds, that the appellant had gained admission as an advocate by fraud or misrepresentation in that he had refrained from disclosing that he had previously been convicted of offences. The facts on which that conclusion rested were admitted by the appellant. Merely because the certificate was referred to in the interrogation of the appellant, or in the argument of his counsel, does not mean that the Bar Council relied on it, or the surrounding circumstances, for the purpose of reaching its decision.

29. These were all the contentions raised on behalf of the appellant. I am not persuaded that any of them is sound. Accordingly, the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1975 DELHI 200

V. S. DESHPANDE AND B. C.

MISRA, JJ.

Bar Council of Delhi, Petitioner v. The Bar Council of India, New Delhi-1 and another, Respondents.

Civil Writ No. 71 of 1973. D/- 16-10-1974.

(A) Advocates Act (1961), Ss. 15 and 3 (3) — Rule-making power of Bar Council — Rule to remove Chairman by no-confidence motion in meeting specifically convened therefor — If and how far intra vires.

The Chairman of Bar Council is holder of office which is distinct from employment and he is not employee of anyone. The power to elect Chairman conferred on the Bar Council also carries with it power of removal of holder of an office. The silence of the Act on the point of his removal indicates that the common law on the removal remains unchanged. The power to elect Chairman given to the Bar Council is only codification of a part of the common law and that codification does not change the other part of the common law implying the removal of the elected Chairman. Just as rules can be made under the section to carry out the powers of the Bar Council, rules also may be made on such implied power. The two powers are inseparable except by statutory intervention without which they remain connected even if only one of those powers have been made statutory. (Paras 8, 9, 11 and 12)

Thus reading the section with S. 3 (3) a State Bar Council is entitled under the section to frame a rule for removal of the Chairman from the office by passing a motion of no-confidence against him in a meeting convened expressly for that purpose. Case law discussed. (Para 14)

Cases Referred: Chronological Paras

AIR 1972 Delhi 91 = ILR (1972) 1 Delhi 217	10
AIR 1968 SC 292 = (1968) 1 SCR 434 = 1968 Lab IC 232	13
AIR 1967 SC 997 = (1967) 2 SCR 170 = 1967 Cri LJ 950	7
AIR 1964 SC 1781 = (1964) 7 SCR 456	7
1964 AC 40 = (1963) 2 All ER 66	9
1962 All LJ 113 = 1962 All WR (HC) 100	13
AIR 1960 SC 1355 = (1961) 1 SCR 138 = 1960 Cri LJ 1684	7
AIR 1958 Bom 314 = 60 Bom LR 217	9
AIR 1954 Cal 41 = 58 Cal WN 152	10
1954 AC 11 = (1953) 2 All ER 671	9
(1946) 328 US 108 = 90 Law Ed 1114	7
(1920) 3 KB 266 = 90 LJKB 41	9
(1874) 18 Eq 28 = 43 LJ Ch 834	10

R. L. Aggarwal, Sr. Advocate with G. N. Aggarwal and V. H. Hingorani.

V. S. DESHPANDE, J.— Can a State Bar Council acting under Section 15 of the Advocates Act, 1961 (briefly "the Act") make a rule to provide for the removal of its Chairman by passing a resolution of no-confidence against him in a meeting of the Bar Council summoned for that purpose? The question has arisen for decision as follows:—

2. After the Delhi Bar Council was elected in January 1969, the members of the Council elected Shri Radhe Mohan Lal as the Chairman of the Delhi Bar Council. Later differences arose between him and some of the members of the Bar Council. A meeting of the Bar Council was called on September 22, 1972 in which a resolution of no-confidence was passed against the Chairman by a majority. But the Chairman disputed the legality of the resolution and sought the directions of the Bar Council of India who heard the Chairman and the Delhi Bar Council on October 21, 1972. The majority of the Bar Council of India expressed the view that (a) there was no provision either in the Act or under the Rules framed thereunder for removal of the Chairman by a no-confidence motion passed against him in a meeting of the Bar Council, and (b) no rule for such removal of the Chairman can be made under the Act by the State Bar Council under Section 15.

3. The present writ petition was originally filed both against the Bar Council of India and Shri Radhe Mohan Lal but in the meanwhile the Delhi Bar Council elected in 1969 expired. By a fresh election a new Bar Council has come into being and a different person was elected as the Chairman, Shri Radhe Mohan Lal having gone out of office when the previous Delhi Bar Council ceased to exist on the expiry of its term. The petitioner, therefore, does not now press for the decision of the question whether the resolution of no-confidence could be passed by it against Shri Radhe Mohan Lal validly inasmuch as such a question has become academic on the retirement of Shri Radhe Mohan Lal. The petitioner has, however, made a draft amendment of Rule 33 to ensure that a Chairman of the Delhi Bar Council may be removed by the passing of such a vote of no-confidence against him in a meeting of the Bar Council summoned for that purpose. The petitioner is aggrieved by the decision of the Bar Council of India that no such rule can be made under the Act at all. The only relief now sought by the petitioner is for a declaration against the Bar Council of India that such a rule can be made under the Act so that once such

a rule is made by the Delhi Bar Council, the Bar Council of India may give their assent to it.

4. The petition is opposed by the Bar Council of India in accordance with their majority decision which had expressed a view that the Delhi Bar Council has no power to make such a rule under Section 15 of the Act.

5. The following provisions of the Act are relevant for consideration in the decision of the question whether such a rule can be made under Section 15. According to the Preamble, one of the objects of the Act is the constitution of Bar Councils. Chapter II of the Act deals with the constitution of the Bar Councils and with provisions relating to them. Section 3 (3) states that "there shall be a Chairman and a Vice-Chairman of each State Bar Council elected by the Council in such manner as may be prescribed." Section 5 makes every Bar Council a body corporate having perpetual succession and a common seal with power to acquire and hold property and to sue and be liable to be sued. Section 6 describes the functions of State Bar Councils. According to Section 8, the term of office of the members of the State Bar Council is four years. Section 10-A lays down the disqualifications by the incurring of which an elected member of a Bar Council shall be deemed to have vacated his office or would be otherwise disqualified under any rule made by the Bar Council of India.

5-A. The relevant part of Section 15 is as follows:—

"15. Power to make rules.— (1) A Bar Council may make rules to carry out the purposes of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for—

*(c) the manner of election of the Chairman and the Vice-Chairman of the Bar Council."

6. All that we know from the statute is that there is to be a Chairman of each State Bar Council elected by the Council in such manner as may be prescribed and that rules can be made to carry out this statutory purpose. No doubt, two learned bodies of lawyers, namely, the Delhi Bar Council and the Bar Council of India, have differed on the question whether rule can be made to provide for the removal of the Chairman of the Bar Council by a resolution of no confidence passed against him in a meeting of the Bar Council summoned for that purpose. One reason why the two learned bodies have not been able to solve this problem is that they relied

only on the language of the statute. On the one hand, the Delhi Bar Council contends that the power given to the State Bar Council to elect its Chairman carries with it the capacity of the said Bar Council to remove the Chairman. On the other hand, the Bar Council of India has expressed the view that in the absence of a definitive provision in the Advocates Act, 1961 enabling the making of such a rule, the power of the State Bar Council to make such a rule cannot be implied. In short, the Bar Council of India sticks to the literal construction of the Act and would not permit the rule to be made simply because a specific provision for the making of such a rule is not to be found in the Act.

7. In our view, to quote Justice Frankfurter, "the 'policy' of a statute should be drawn out of its terms, as nourished by their proper environment, and not, like nitrogen, out of the air." (*D. A. Schulte v. Gangi*, (1946) 328 US 108, 121-22). The ecology of this statute like all others is that part of common law which has been received in India as rules of "justice, equity and good conscience" as suited to the genus of this country. This much of common law is in force in India in view of Article 372 (1) of the Constitution as held by the nine Judges' Bench of the Supreme Court in *Supdt. and Legal Remembrancer, State of West Bengal v. Corporation of Calcutta*, (1967) 2 SCR 170 at pp. 180 and 186 = (AIR 1967 SC 997 at p. 1003). As pointed out at page 187 of the report in this respect the decision did not differ from the previous decisions of the Court in *Director of Rationing and Distribution v. Corporation of Calcutta*, (1961) 1 SCR 258 = (AIR 1960 SC 1355) and *V. S. Rice and Oil Mills v. State of Andhra Pradesh*, (1964) 7 SCR 456 = (AIR 1964 SC 1781).

8. The relationship between statute law and common law has been expressed by Professor W. M. Galdart as follows:—

"The most fundamental part of our law is still Common Law..... The statutes assume the existence of the common law; they are the addenda and errata of the book of the Common Law; they would have no meaning except by reference to the Common Law." (*Elements of English Law*, page 9).

It is well known rule of construction of statutes that "the legislature does not intend to make any substantial alteration in the existing law beyond the immediate scope and the object of the statute" (*Maxwell on Interpretation of Statutes*, 12th Edition, page 116). We have, therefore, to look to the existing common law which surrounds the statutory provision giving the State Bar Council the power to elect a Chairman.

9. The State Bar Council is a statutory corporation and its Chairmanship is a statutory office. The Chairman for the time being is thus the holder of an office. He is not an employee of anyone. This position recalls the observation of Lord Reid in *Ridge v. Baldwin*, (1964) AC 40 at p. 65, that the cases of dismissal relate to three kinds of persons, namely, (1) a servant appointed by the master, (2) holder of an office at pleasure, and (3) holder of an office otherwise than at pleasure. An office is often distinct from employment. As observed by Lord Normand in *Dale v. Inland Revenue Commissioners*, (1954) AC 11 at p. 26, "office" is an apt word to describe a trustee's position, or any position in which services are due by the holder and in which the holder has no employer." Another earmark of office is indicated in the following description by Rowlatt J. in *Great Western Rly. Co. v. Bator*, (1920) 3 KB 266, as follows:—

"An office or employment which was a subsisting, permanent, substantive position which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders. There can be no doubt that the director of a company holds such an office as is described." Further, an office may be one of profit or it may be honorary. The payment of remuneration is not a necessary condition of an office (*Dr. Deorao v. Keshav Laxman*, AIR 1958 Bom 314, per Chinnai and Shelat JJ.).

10. What is the common law relating to the removal from office of the holder thereof who is not a servant of anyone? In answering this question, a distinction between two different meanings of the word "officer" may be borne in mind. A person may come to occupy an office either by appointment or by election. In either case, he may be an employee of a corporation or he may be only the holder of an office of the corporation and not its employee. The essence of the employment is the disciplinary power of the employer over the employee. This is expressed in the principle embodied in Section 15 of the General Clauses Act that the power to appoint includes the power to suspend or dismiss.

The power of suspension is mainly connected with the power to inquire into the conduct of the employee signifying the disciplinary power of the employer over the employee. This disciplinary aspect is not attached to the holder of an office which is not an employment. When the employer is not a single person but is a body of persons, the decision to employ is taken by such a body in a meeting by majority. Such a resolution may

be analogous to an election. In this sense, an employee may be appointed by an election. In such circumstances, the process of appointment and election may be analogous (*Heyman v. Governors of Rugby School*, (1874) 18 Eq 28). But the occupation of an office by the holder thereof even by appointment and much more so by election is an entirely different process. The distinction between the two is not found to have been made by a Division Bench of this Court in *Mohan Chandra v. Institute of Chartered Accountants*, AIR 1972 Delhi 91, when it was observed obiter that the principle of Section 16 was relevant to the consideration of the removal of the elected President of the Institute of Chartered Accountants. Nor can it be said that every appointment results in an employment. An appointed arbitrator is not, for instance, an employee of anyone. In *East India Film Studios v. P. K. Mukherjee*, AIR 1954 Cal 41, Section 16 of the General Clauses Act was held inapplicable to the removal of an arbitrator firstly because he was not an employee and secondly because specific provisions for his removal inconsistent with Section 16 of the General Clauses Act have been made in the Arbitration Act.

11. Quite irrespective of the question whether the office of the Chairman of a State Bar Council is held at pleasure or for the same period for which the Bar Council is elected, the common law relating to the removal of the holder of an office is that the body which has the authority to elect its Chairman has the inherent and implied power to remove the Chairman. If the Chairman holds his office at pleasure, then he can be removed at will. But if he holds his office otherwise than at pleasure, he can be removed only for cause after notice and hearing. It would suffice to quote the following from 19 *Corpus Juris Secundum*, pages 71-72:—

"The power of amotion is inherent in every private corporation as an incident of its being and may be expressly conferred by statute or charter in recognition, it has been said of at least one statute, of the inherent nature of the power. While ministerial officers and agents who are elected or appointed by the Board of Directors are removable at will, without a cause being assigned and without notice or a hearing, directors, trustees, and officers elected by the corporation at large may, by virtue of this inherent power, and irrespective of the existence of a provision for removal in the articles or bye-laws, be removed for cause, but not otherwise, and only after notice and a hearing or an opportunity of being heard."

To the same effect is the statement of law in 19 *American Jurisprudence* 2d, pages 545 and 547 and in *Bouvier's Law Dictionary*, 3rd Edition, Volume 1, page 190. The English common law relating to the removal or "amotion" of the holder of an office is stated as follows in *Jowitt's Dictionary of English Law* at page 115:—

"In municipal boroughs, a removal from his office of a councillor by his fellow-councillors, frequently exercised before the Municipal Corporations Act, 1835, and not expressly abolished either by that Act or by the Municipal Corporations Act, 1882. The power of amotion is implied or may be conferred by charter."

Similar statements of law occur in *Wharton's Law Lexicon*, 14th Edition, pages 59-60 and in 9 *Halsbury's Laws of England*, 3rd Edition, paragraph 67, with regard to an office held at pleasure.

12. The view expressed by the majority of the Bar Council of India that a rule cannot be made under Section 15 of the Advocates Act for the removal of the Chairman of the State Bar Council leads to the result that once elected such Chairman is irremovable. He would go out of office only when the State Bar Council does at the expiry of its statutory tenure. Such a result can be justified only if the common law stated above has been changed by the statute. The view of the Bar Council of India is, on the other hand, based on the very silence of the statute on this point. We are of the opinion that such silence indicates that the common law regarding the removal of the holder of an office remains unchanged. The statute does not, therefore, have to say that the Chairman of the State Bar Council would be removable by a resolution of no-confidence. The reason is that such power of removal is inherent in the Bar Council which elects its Chairman. The power given to the State Bar Council to elect its Chairman is the codification of only a part of the common law. Such codification does not change the other part of the common law which implies in the State Bar Council the power to remove the Chairman so elected. Just as rules can be made under Section 15 to carry out the expressed power of the Bar Council to elect the Chairman, it would appear that rules may also be made to carry out the implied power of the State Bar Council to remove the Chairman. The two powers are inseparable in common law. They can be separated only by a statutory intervention. So long as this is not done, they would remain connected with each other even though only one of the

powers, namely, the power of election has been made statutory while the other power, namely, the power of removal has been left to be implied. If such a power is not implied, the mere codification of the power to elect would result in a change in the common law. There is no warrant for implying such a change. On the contrary, the construction of the statute in the light of the common law implies such a power in the State Bar Council.

13. Shri Hingorani for the Bar Council of India relied on the decision in *Lakshmi Narain Misra v. Municipal Board*, 1962 All LJ 113, to support his contention that the Chairman of the State Bar Council who is once elected cannot be removed from office by the resolution of the State Bar Council. The term of office of the Vice-President of the Municipal Board in that case was one year. It was held that the said term could not be cut down and the Municipal Board could not cancel the resolution electing the appellant as the Vice-President. No such tenure has been fixed for the Chairman of the State Bar Council under the Advocates Act. On the contrary, the common law rule that the holder of an office can be removed for a cause even if he has a fixed tenure of office was followed by the Supreme Court in *Dr. Bhal Chandra v. Chancellor, Kurukshetra University*, (1968) 1 SCR 434 = (AIR 1968 SC 292). The Vice-Chancellor had been appointed for a period of three years. Nevertheless, his appointment was held to be terminable before the expiry of three years for cause and after he was given a hearing following *Ridge v. Baldwin*.

14. It is, therefore, declared that the petitioner Delhi Bar Council is entitled under Section 15 of the Advocates Act, 1961 to make a rule to provide for the summoning of a meeting of the said council for the express purpose of moving a motion of no-confidence against the Chairman and for the passage of such a resolution resulting in the removal of the Chairman from office. This is our construction of Sections 15 (1) and 15 (2) (c) read with Section 3 (3) of the Act. This procedure would also give notice and hearing to the Chairman before the proposed resolution is voted upon. While we hold that the proposed rule will be within the scope of the rule-making power of the State Bar Council, the consent of the Bar Council of India to the rule would of course be necessary in accordance with law. As the Delhi Bar Council and the Bar Council of India differed in their views on this question in good faith, we make no order as to

costs in this writ petition. The writ petition is allowed in the above terms.

Petition allowed.

AIR 1975 DELHI 204

V. S. DESHPANDE AND YOGESHWAR DAYAL, JJ.

Premier Tyres Ltd., Bombay and others, Petitioners v. The Monopolies and Restrictive Trade Practices Commission, New Delhi and others, Respondents.

Civil Writ Petn. No. 1523 of 1974, D/-28-2-1975.

(A) Monopolies and Restrictive Trade Practices Act (1969), Section 10 (a) (iii) — Restrictive Trade Practices (Enquiry) Regulations (1970), Regn. 1 — Restrictive Trade Practices (Enquiry) Regulations (1974), Regn. 87 (1) — Application for enquiry into restrictive trade practices in 1971 — Regulations applicable — Effect of repeal of earlier Regulations — (General Clauses Act (1897), Section 6).

Held: The Regulations as to enquiry into restrictive trade practices made under the Act are mainly procedural. The normal rule is that a party has no vested right in procedure and, therefore, the procedure which is applicable at the relevant time will govern unless the application of the previous procedure is expressly saved. (Para 4)

Clause 87 (1) of Regulations of 1974 repeals the Regulations of 1970 and thereby brings into force the Regulations of 1974 from June 29, 1974 when they were promulgated. Clause 87 (2) saves the previous operation of the Regulations of 1970 upto the date of repeal. It also saves anything duly done or suffered under the Regulations of 1970 and states that the repeal will not affect any right, privilege, obligation or liability acquired, accrued or incurred under the 1970 Regulations. The latter part of clause 87 (2) goes on to state that the repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation or liability. Since there is no right, privilege, obligation or liability under consideration, the question of any investigation, legal proceeding or remedy in respect of them also does not arise. (Para 4)

Had regulation 87 (2) not been made by the Commission, the principle of Section 6 (e) of the General Clauses Act, 1897, would have governed the effect of the repeal of the 1970 Regulations. The last part of regulation 87 (2) uses the words "all investigations and legal proceedings". These words are not restricted to the immediately preceding words which refer to investigation, legal proceeding or remedy in respect of a right, privilege, obligation or liability which

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was acquired, accrued or incurred under the repealed Regulations. It would appear, therefore, that the substitution of the word "all" in place of the words "any such" by regulation 87 (2) has varied the meaning which could have been attributed to the said regulation had it been phrased similarly to Section 6 (e) of the General Clauses Act.

(Para 5)

Since, in their natural sense, the last words of regulation 87 (2) would appear to include all the pending proceedings to be governed by the repealed regulations, there is no need to give any other meaning to these words. The view that pending proceedings are not affected by the repeal is not an unusual one and would, therefore, appear to accord with the intention of the framers of regulation 87 (2) of the Regulations of 1974.

(Para 6)

(B) Monopolies and Restrictive Trade Practices Act (1969), Sections 10 (a) (iii), 18 (1) (a), 37 — R. T. P. (Enquiry) Regulations (1970), Regns. 6, 7, 22 — R. T. P. (Enquiry) Regulations (1974), Regn. 72 — Power of Commission to allow amendment of application under Section 10 (a) (iii) — Not anywise affected by repeal of R. T. P. (Enquiry) Regulations 1970 by R. T. P. (Enquiry), Regulations 1974 — (Interpretation of Statutes — Special legislation — Power to perform functions under — Can be implied). AIR 1972 SC 2563 Considered.

Under regulation 6, an application made under Section 10 (a) (iii) by the Registrar shall contain the facts which constitute the restrictive trade practices and shall set out the relevant portions of the agreement, if any. The proceeding before the Commission is a quasi-judicial one. The complaint made under Section 10 (a) is analogous, in its nature, to a plaint filed before a Civil Court or a criminal complaint filed before a criminal Court. Just as a plaint may be rejected by a Civil Court for want of cause of action, a complaint under Section 10 (a) may not be acted upon by the Commission if, with or without the investigation by the Director, the Commission comes to the conclusion that it does not disclose a sufficient cause for the Commission to proceed further. But just as a plaint which is not rejected for want of a cause of action and a complaint which is registered as disclosing a prima facie case become the starting point of a civil or a criminal proceeding, the complaint under Section 10 (a) becomes the starting point of the proceeding for the investigation into restrictive trade practices under Section 37. Regulation 7 requires a notice to be given to the person against whom allegations of restrictive trade practices are made stating that the Commission proposed to hold an inquiry into the practices. It follows, therefore, that a notice must specify the allegations constituting the restrictive trade practices, which otherwise would be meaningless. The party on whom it is served will not know the very

reason for the issue of the notice and will not be able to draft a statement of case to meet the allegations which were to be conveyed by the notice. The power to amend the notice thus includes the power to amend the allegations conveyed by the notice. Regulation 27 also gives the Commission the power to give a direction that the notice of hearing be amended. The provisions for the amendment of notice contained in the Regulations of 1974 are even more explicit. Regulation 72 (3) empowers the Commission to allow an amendment even before a notice of inquiry is served on the respondent. The Commission, however, must give a notice of the application for amendment to the respondents before allowing the amendment.

Before the issue of the notice, the only document which would be before the Commission in a proceeding pending before it under Section 37 of the Act would be the complaint or the reference or the information received by it under Section 10 (a). Each of these documents could be amended after notice to respondents and after the respondents are heard even before the notice of the filing of the complaint or the report or the information is issued to the respondents. The complaint under Section 10 (a) (iii) is thus capable of being amended by the Commission on the application of the complainant.

(Paras 8, 10, 12, 13)

(C) Monopolies and R. T. P. Act (1969), Section 10 (a) (iii) — R. T. P. (Enquiry) Regulations (1970), Regn. 22 — Amendment of application — Whether legally permissible.

Held: The argument that having once filed a complaint on specific allegations and having asserted that the additional material will be only to strengthen these allegations, the Commission cannot allow the amendment of the original complaint by the introduction of totally new allegations, as doing so would amount to making out a new case, is unacceptable. The complaint is that the respondents are resorting to restrictive trade practices. Whether the restrictive trade practice is only one or they are numerous, the object of the complaint is to invite an inquiry by the Commission under Section 37. Each restrictive trade practice may either be connected with one another or be quite different from the others. The disparate nature of restrictive trade practices is like separate causes of action. Just as separate causes of action can be joined in one civil suit similarly different allegations of restrictive trade practices can also be made in one complaint. They can be introduced by an amendment of the original complaint just as they can be introduced by an amendment of the plaint or an application. There is no estoppel against the Registrar in making additional allegations even if he had thought at one stage that the additional allegations would support only the original allegations and would not make out new restrictive trade practices, AIR 1975 Delhi 46 (FB), Foll. (Paras 17, 18)

(D) Constitution of India, Article 133 (2) — Prayer for a certificate — Two different views equally persuasive on point of law involved, not possible — Leave refused.

(Para 20)

Cases Referred: Chronological Paras
AIR 1975 Delhi 46 = ILR (1974) 2 Delhi 133 (FB) 17
AIR 1972 SC 2563 = 1973 Tax LR 1607 8

Sh. Ravinder Narain and Sh. J. N. Aggarwal, for Petitioner; Smt. Shyamla Pappu, Sr. Advocate with Sh. Harish Chandra, for Respondent.

ORDER:— Two questions are raised by the writ petition for decision at the threshold, namely:— (1) Whether the Restrictive Trade Practices (Enquiry) Regulations, 1970 (hereinafter called "Regulations of 1970") which applied to the proceeding titled Application No. 1 of 1971 pending before the Monopolies and Restrictive Trade Practices Commission would also apply to a subsequent application filed on October 26, 1974 for the amendment of Application No. 1 of 1971 though in the meanwhile the Monopolies and Restrictive Trade Practices Commission Regulations, 1974 (hereinafter called "Regulations of 1974") came into force on June 29, 1974, clause 87 of which repealed the Regulations of 1970 without affecting the operation of the repealed Regulations or any investigation, privilege, obligation or liability acquired, accrued or incurred under the repealed Regulations so that all legal proceeding or remedy in respect of any right investigations and legal proceedings shall be continued as if the Regulations of 1974 had not been made. And (2) Whether the Commission had the power to entertain and allow the application for amendment dated October 26, 1974.

2. The legal and the factual background in which the above questions arise is as follows:— The Monopolies and Restrictive Trade Practices Commission has been established by the Monopolies and Restrictive Trade Practices Act, 1969. Under Sec. 10 (a) the Commission may inquire into any restrictive trade practices while under Section 10 (b) it may inquire into any monopolistic trade practices. In this case we are concerned with an inquiry by the Commission into restrictive trade practices. Such an inquiry may be made by the Commission (i) upon receiving a complaint from any trade or consumers' association; (ii) upon a reference made to it by the Government; (iii) upon an application made to it by the Registrar of the Commission; or (iv) upon its own knowledge. The first method of inquiry is initiated by non-officials while the other methods are initiated officially. Therefore, an investigation by the Director of the Commission has to be made in the complaint by the non-officials under Section 10 (a) (i). But such an investigation may or may not be made if the initiation is by the officials under the other methods. Under Section 12, the Commission is deemed to be a

Civil Court for certain purposes and has been conferred with certain powers of the Civil Court. Section 18 empowers the Commission to regulate the procedure and conduct of its business. Section 68 gives the Commission powers to make regulations for the efficient performance of its functions under the Act. In particular and without prejudice to the generality of the provisions, such regulations may provide for various specified matters. In exercise of the above powers, the Regulations of 1970 and the Regulations of 1974 were made by the Commission.

3. Application No. 1 of 1971 was made by the Registrar of the Commission on December 23, 1971 under Section 10 (a) (iii) of the MRTP Act praying that the Commission may inquire into certain restrictive trade practices practised by the various tyre manufacturers in India who had entered into an Agreement called a code of conduct. The restrictive trade practices referred to in that application were terms and conditions 1 (h), 11, 12 of the Agreement and provisions for credit policy and trade prices. On October 26, 1974 an application for amendment of Application No. 1 of 1971 was filed by the Registrar by which some other restrictive trade practices resorted to by the said tyre manufacturers were sought to be added to the original complaint made in Application No. 1 of 1971. The tyre manufacturers opposed the application. But the Commission allowed the amendment prayed for by the impugned order dated November 22, 1974. In the present writ petition the said order of the Commission is challenged as being without jurisdiction whether it is taken to have been passed under the Regulations of 1970 or the Regulations of 1974.

4. Let us, therefore, first consider which of the two sets of Regulations, namely, those of 1970 and those of 1974 were applicable to the consideration of the application for amendment filed on October 26, 1974. The Regulations are mainly procedural. The normal rule is that a party has no vested right in procedure and, therefore, the procedure which is applicable at the relevant time will govern unless the application of the previous procedure is expressly saved. Clause 87 (1) of Regulations of 1974 repeals the Regulations of 1970 and thereby brings into force the Regulations of 1974 from June 29, 1974 when they were promulgated. Clause 87 (2) saves the previous operation of the Regulations of 1970 upto the date of repeal. It also saves anything duly done or suffered under the Regulations of 1970 and states that the repeal will not affect any right, privilege, obligation or liability acquired, accrued or incurred under the Regulations of 1970. We are not concerned here with any previous operation of the Regulations of 1970 nor are we concerned with any right, privilege, obligation or liability which was acquired, accrued or incurred under the Regulations of 1970. The latter part of clause 87 (2) goes on to state that

the repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation or liability. Since there is no right, privilege, obligation or liability under consideration, the question of any investigation, legal proceeding or remedy in respect of them also does not arise. The last words of clause 87 (2) are "and all investigations and legal proceedings shall be continued or enforced as if the present Regulations had not been made." The contention of Shri Ashok Desai learned counsel for the petitioner is that these last words mean that the investigations and legal proceedings which were pending on June 29, 1974 were to be governed by the Regulations of 1970 as if the Regulations of 1974 were not made.

5. Had regulation 87 (2) not been made by the Commission, the principle of Section 6 (e) of the General Clauses Act, 1897 would have governed the effect of the repeal of the Regulations of 1970. In drafting regulation 87 (2) the Commission seems to have in mind the following scheme. The first part of regulation 87 (2) repeats the language of clauses (b) to (d) of Section 6 of the General Clauses Act. But the second part of regulation 87 (2) makes a departure from the second part of clause (e) of Section 6 of the said Act. For, while the second part of clause (e) of Section 6 of the General Clauses Act saves only "any such investigation, legal proceeding or remedy" meaning thereby the investigation, legal proceeding or remedy referred to in the first part of clause (e), namely, which are in respect of any such right, privilege, obligation, liability, etc., which are acquired, accrued or incurred under the repealed enactment, the last part of regulation 87 (2) uses the words "all investigations and legal proceedings". These words are not restricted to the immediately preceding words which refer to investigation, legal proceeding or remedy in respect of a right, privilege, obligation or liability which was acquired, accrued or incurred under the repealed Regulations. It would appear, therefore, that the substitution of the word "all" in place of the words "any such" by regulation 87 (2) has varied the meaning which could have been attributed to the said regulation had it been phrased similarly to Section 6 (e) of the General Clauses Act. Since the last words of regulation 87 (2) are wider than the last words of Section 6 (e) of the General Clauses Act it would appear that all pending investigations and legal proceedings would be governed by Regulations of 1970 and that Regulations of 1974 would apply only to those proceedings or investigations which are instituted on or after 29th June 1974.

6. Though ordinarily an amendment or repeal of procedural regulations would have a retrospective effect, such amendment or repeal may not affect the pending proceedings which may continue to be govern-

ed by the repealed regulations. It would, therefore, depend upon the language of the repealing statute or regulation as to whether the pending proceedings are to be affected by it. It is in this context that we have to construe the last words of regulation 87 (2) differing from the language of Section 6 (e) of the General Clauses Act. Since in their natural sense the last words of regulation 87 (2) would appear to include all the pending proceedings to be governed by the repealed regulations, there is no need to give any other meaning to these words. The view that pending proceedings are not affected by the repeal is not an unusual one and would, therefore, appear to accord with the intention of the framers of regulation 87 (2) of the Regulations of 1974.

7. We may, however, observe that the expression of this opinion by us would not make any difference to our finding on the next question inasmuch as, as we shall show later, the power of the Commission to allow the impugned amendment would be the same under the Regulations of 1970 as also the Regulations of 1974.

8. The Monopolies and Restrictive Trade Practices Commission is a statutory body established by the MRTP Act, 1969 for the purpose of certain functions. Section 18 (1) (a) of the Act expressly states that "subject to the provisions of this Act, the Commission shall have the power to regulate the procedure and conduct of its business". The statute thus gives effect to the general principle that a statutory body or authority created to discharge certain functions would have the implied power to follow such procedure as is necessary or essential for the discharge of its statutory functions. This rule of statutory construction is stated in Craies on Statute Law, 7th Edition, page 111, as follows:—

"If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance (if not actually essential) to the proper and effectual performance of the work which the statute has in contemplation, the courts are at liberty to infer that the statute by implication empowers that detail to be carried out."

In *Asst. Collector of Central Excise, Calcutta v. National Tobacco Co. of India, Ltd.* AIR 1972 SC 2563, paragraph 30; the Supreme Court referred to Craies on Statute Law (Fifth Edition) page 105 and observed as follows:—

"It is a well-established rule of construction that a power to do something essential for the proper and effectual performance of the work which the statute has in contemplation may be implied."

It would appear, therefore, that even in the absence of Section 18, the Commission would have the power to devise and apply the necessary rules of procedure for holding an inquiry under Section 37 of the Act into any

restrictive trade practices on a complaint received under Section 10 (a) of the Act.

9. The Regulations of 1970 (or of 1974) may now be considered in the above background in relation to the power which is conferred on the Commission to allow an amendment of the application of complaint made under Section 10 (a) (iii). The title of regulation 22 of the Regulations of 1970 is "Amendment of notice of reference, etc." The opening part of regulation 22 says:—"A notice of hearing, statement of case, answer or reply may be amended at any time by leave of the Commission".

10. Under regulation 8 an application made under Section 10 (a) (iii) by the Registrar shall contain the facts which constitute the restrictive trade practices and shall set out the relevant portions of the agreement, if any. Further, it shall be signed and verified by the Registrar. In our view, the complaint under Section 10 (a) brings to the notice of the Commission the restrictive trade practices complained of. The proceeding before the Commission is a quasi-judicial one. The complaint made under Section 10 (a) is analogous, in its nature, to a plaint filed before a civil Court or a criminal complaint filed before a criminal Court. Just as a plaint may be rejected by a Civil Court for want of cause of action, a complaint under Section 10 (a) may not be acted upon by the Commission if, with or without the investigation by the Director, the Commission comes to the conclusion that it does not disclose a sufficient cause for the Commission to proceed further. Similarly, a criminal Court on the examination of a complaint may not find a prima facie case to proceed against the accused. But just as a plaint which is not rejected for want of a cause of action and a complaint which is registered as disclosing a prima facie case become the starting point of a civil or a criminal proceeding, the complaint under Section 10 (a) becomes the starting point of the proceeding for the investigation into restrictive trade practices under Section 37. Regulation 7 states that proceedings under Section 37 (1) shall be instituted by a notice by the Commission to the person against whom allegations of restrictive trade practices are made stating that the Commission proposed to hold an inquiry into the said practices. The reason seems to be that until and unless the Commission has made up its mind to bring the opposite party before it in an inquiry under Section 37, the proceedings to which the complainant and the respondent would be parties cannot be said to be initiated by the Commission. Till the issue of the notice only the complaint is before the Commission and the only party before the Commission is the complainant. Once the notice is issued, however, the substance of the complaint on which the notice is issued has to be communicated to the respondents. This is made clear by the last words of regulation 7 which

required that the notice shall state "that the Commission proposed to hold an inquiry into the practice". "The practice" is the one which is complained of as being restrictive in the complaint. In the notice, therefore, the complained of practice will necessarily have to be set out. A notice which does not set out the practice will be unintelligible. In our view, therefore, the notice necessarily conveys to the respondents the allegations of restrictive trade practice or practices made against them. It is only then that the respondents can file a statement of case under regulation 16 to which an answer may be filed by the Registrar under regulation 18. We have, therefore, the complaint which after consideration or investigation is embodied in the notice followed by a statement of case by the respondents and answer by the Registrar. Regulation 22 allows the amendment of a notice of hearing, statement of case and answer.

11. The question is as to what is meant by "a notice of hearing" in relation to its amendment? In the present case, the notices served on the respondents referred to the complaint made by the Registrar copies of which are annexed to the notices. It is only because of the annexures that the respondents could know from the notices as to what the allegations against them were. It is to meet these allegations that the statement of case is filed by the respondents. In construing regulation 22, learned counsel for the petitioner submitted that the amendment authorized by it is only the amendment of the notice but not of the amendment of the annexures to the notice. Learned counsel visualized some technical or minor errors in a notice which could be amended under regulation 22. He contended that there is no provision in regulation 22 for the amendment of the complaint made by the Registrar and, therefore, the impugned order of the Commission allowing the amendment is without jurisdiction. We put to the learned counsel whether the additional restrictive trade practices alleged in the application for amendment could have been joined to the original restrictive trade practices complained of in Application No. 1 of 1971 when it was filed. Learned counsel could not deny that the allegations now sought to be introduced by way of amendment in Application No. 1 of 1971 could have been made in the original application when the same was filed. We also put to the learned counsel if an additional application as an additional complaint under Section 10 (a) (iii) containing these very additional allegations can be filed by the Registrar. The learned counsel could not deny that such an additional application could be filed subject to limitation and estoppel. We are of the view that the original application and the additional application could be considered together by the Commission inasmuch as these are restrictive trade practices arising out of the same Code of conduct alleged against the same set of

filed in 1957 and the appeal had come up for hearing in 1972 — they could hardly have been expected to move in that direction. Next, the appeal was listed on board in the first week of May prior to the commencement of summer vacation and was called out for hearing in July. No use of these two months was made for this purpose. I granted adjournments because I did not want to displease a senior lawyer. He probably thought that by doing so I had displayed weakness. This was a wrong approach. Nothing would have been easier for him to persuade me to restore this appeal than to annex to this application the settlement arrived at between the parties. Nothing was produced before me until November 1973 when this application was heard. These facts bear out my belief that there were no talks or probability of settlement at all between the parties. Yet I granted the adjournments out of sheer deference to Mr. Mehta. Yet, strangely enough, he thought he could achieve his purpose by making all sorts of statements against the court. They do not pay. They never pay. Such a stance should never be adopted.

10. Reliance upon the alleged practice prevailing in the Bombay High Court and this High Court was also totally misplaced. I have practised at the appellate bar at Bombay longer than Mr. Mehta has done. There is no such inflexible practice or rule. Whether to accept an oral application or not depends upon the facts and circumstances of each case. If the court has made a speaking order detailing the unusual circumstances under which it has made an *ex parte* order, it may not accept an oral application and direct a party to make a written application. Mr. Mehta, therefore, ought not to have displayed his temper in the application in order to impress upon me that I had violated an inflexible practice and committed an act of sacrilege. It would neither pay him nor would it cow me down.

11. The learned Advocate-General, therefore, saw the wisdom and propriety of striking off some of the grounds. He applied for leave to strike off those averments from the application which constitute grounds Nos. 2; 4 (later part) 8; 9; 10; 11; 12; 13; 14; 15; 16; 17; 19; 20 and 21. I granted the leave and he deleted them. In my opinion, he removed the bang and placed the application on an even keel.

12. Now I am required to examine the surviving grounds and determine whether they constitute sufficient reasons to restore this appeal to file.

13. The first ground relates to Mr. Mehta's illness. I have already dealt with

it. It entitles an advocate to one adjournment. He cannot claim as of right more adjournments. One adjournment was granted subject to the condition that the appellant would make his own arrangements for the hearing of the appeal if Mr. Mehta could not attend the court on the adjourned date of hearing. It was not done. Dismissal for default of appearance resulting from omission to comply with such a condition was quite justified. Omission or failure to comply with such a condition scuttles the sufficient cause which may otherwise arise from a lawyer's illness.

14. It is wrong to say that the mere fact that the appeal is an old one is not a relevant consideration. It is one of the most relevant considerations. In a situation of this type, a court has got to take it into account. A case cannot be decided at a time only when the lawyer desires it to be decided. Delayed justice is no justice. The court owes a duty to the society and a lawyer owes a duty both to his client and to the court. Therefore, such an assertion can never be accepted.

15. Appearance on the same day for restoration may be a good ground for restoration but it is never a good ground for restoration and further adjournment. A matter is not restored for further adjournment. It is restored for final decision. Therefore, appearance on the same day cannot be pleaded in support of restoration, if, after restoration, a case is to be adjourned again.

16. It is wrong to say that a lawyer has an option to retire from a case. His retirement is subject to the permission of the court. Court may not permit him to retire from a case which is as old as nine years and in which court has shown indulgence by granting adjournments for settlement. It is, therefore, no ground at all. In no case — more particularly in an old case, a lawyer as of right can say that he retires from it and that the court should issue notice to his client to enter fresh appearance on his behalf. None has any right to put the machinery of the court out of gear.

17. Engagement of a lawyer elsewhere in some other case may entitle him to an adjournment. He cannot claim more than one. A court will be perfectly justified in refusing further adjournments on this ground otherwise senior lawyers will hold up the work of the court, the courts will have to work according to their convenience and the junior lawyers will starve.

18. These are the grounds which survive the amendment of this application. I do not see much force in them.

19. The learned Advocate-General has invited my attention to two decisions in this behalf. In *P. D. Shamdasani v. The Central Bank of India Ltd.*, 40 Bom LR 238 = (AIR 1938 Bom 199) (FB) it has been laid down by a Full Bench of the Bombay High Court that if a person whose suit has been dismissed for his non-appearance appears on the same day, prima facie the court ought to exercise its discretion in his favour. It has however been laid down that such a person has no absolute right to ask the court to waive its rules in his favour and that the restoration is a matter within the discretion of the Court. It is, therefore, clear that whether restoration of a case on the application made on the same day should be granted or not depends upon the facts of each case.

20. In *Mrigendra Nath Bir v. Dibakar Bir*, AIR 1926 Cal 1231, it has been laid down by a Division Bench of the Calcutta High Court that absence of the appellant's lawyer on account of his being busy in another court is sufficient cause for restoration of the appeal. This decision does not lay down the proposition that such a cause is a sufficient cause even though adjournments might have been granted earlier.

21. I have no doubt in my mind that if this application is strictly examined, it cannot be granted. But I do not want to take a very strict view of the matter. I do not want to punish the appellant for the presumptuousness and carelessness of his lawyer. Secondly Mr. I. M. Nanavaty and Mr. Vidyarthi who appear for the respondents have no objection to the restoration of the appeal to file.

22. In the facts and circumstances of this case, these two reasons are sufficient for restoring the appeal to file.

23. I, therefore, grant this application, set aside the order of dismissal for default of appearance and direct that Second Appeal No. 497 of 1963 shall be restored to file. Rule is made absolute with no order as to costs. I may add that I do not desire to hear this appeal. It shall not, therefore, be placed before me for final hearing and disposal.

Application allowed.

AIR 1975 GUJARAT 178

A. D. DESAI, J.

Rasiklal Shankerlal Soni, Petitioner
v. Natverlal Shankerlal Upadhyaya and
others, Opponents.

Civil Revn. Appln. No. 651 of 1973,
D/- 21-9-1974.*

(A) Civil P. C. (1908), O. 1, R. 10 (2)
— Suit for specific performance of agreement for sale — Defendant's sisters not parties to agreement but claiming right to suit property — Question of their joining as parties.

The parties to the agreement for sale in respect of which the suit for specific performance was filed were only the plaintiff and the defendant. The only relief claimed was that the defendant should be ordered to execute a document of sale in pursuance of the agreement of sale or the same should be got executed through Court. The plaintiff was willing to take the title which his vendor had. No relief for possession of the suit property was claimed, nor was any relief claimed against the defendant's sisters. They claimed that they were entitled to inherit the suit property under the provisions of the Hindu Law and that the agreement of sale was not binding on them and therefore entitled to be impleaded as parties to the suit.

Held, defendant's sisters could not be allowed to be joined as parties to the suit. They could not be said to be necessary parties, nor was their presence necessary to adjudicate upon all the questions involved in the case. (AIR 1950 Mad 90 and AIR 1950 Mad 91, Rel. on; AIR 1943 Bom 27 and AIR 1971 Guj 256, Distinguished). (Paras 4; 6)

Cases Referred: Chronological Paras
(1974) Civil Revn. Appln. No. 514 of 1972,
D/- 9-4-1974 (Guj.) 2

AIR 1973 Pat 347 = 1973 BLJR 528 5

AIR 1972 Bom 148 = 73 Bom LR 814 2

AIR 1971 Guj 256 = ILR (1971) Guj 37 4

AIR 1969 Punj 57 = 70 Pun LR 451 2

AIR 1958 SC 886 = (1959) SCR 1111 5

AIR 1950 Mad 90 = (1949) 2 Mad LJ 343 3

AIR 1950 Mad 91 = (1949) 2 Mad LJ 568 3

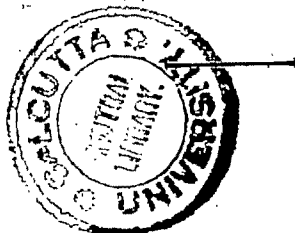
AIR 1943 Bom 27 = 44 Bom LR 874 4

AIR 1940 Mad 69 = (1939) 2 Mad LJ 551 5

AIR 1932 Cal 448 = ILR 59 Cal 329 5

B. K. Amin, for Petitioner; G. H. Amin (for No. 1); G. H. Amin with J. N. Panchal (for No. 2), for Opponents.

*(Against order passed by S. M. Pirzada, Civil Judge (Junior Division), Kapadwanj in Civil Suit No. 85 of 1971, D/- 17-3-1973.)



ORDER:— This civil revision application raises an interesting question about the joinder of parties in a suit for specific performance, in which only relief which is claimed is that the original defendant to the suit should execute a document in plaintiff's favour or the same should be executed through the Court. The dispute between the parties is in respect of the house bearing Panchayat No. 99 situated in village Kathlal. The petitioner, who is the original plaintiff, filed Regular Civil Suit No. 85 of 1971 in the Court of the Civil Judge, Junior Division, Kapadvanj, alleging that opponent No. 1—original defendant No. 1 had mortgaged the suit house to him by a registered document dated October 9, 1967 for the amount of Rs. 1,500. On or about April 8, 1969 a second mortgage for Rs. 2,000 was created by the said defendant by a registered document. Defendant No. 1 was in need of money and he had taken in all Rs. 4051-25 P. as loan from him. Defendant No. 1 then entered into an agreement with the petitioner to sell the suit property on September 29, 1970, and this agreement is produced in the suit at Ex. 49. By a notice dated January 23, 1971 the petitioner called upon defendant No. 1 to remain present at 11-00 a.m. on February 6, 1971 in the office of the Sub-Registrar of Documents at Kapadvanj in order to get executed and registered the deed of sale in pursuance of the agreement of sale entered into on September 29, 1970. Defendant No. 1 did not remain present. On these allegations the plaintiff filed the aforesaid suit for specific performance of the agreement. Defendant No. 1 filed written statement and the main pleas raised by him are that he had not executed any agreement of sale and that he had not received any amount as loan from the plaintiff. On these pleadings the learned trial Judge raised the following issues:

- "1. Whether the plaintiff proves that the defendant contracted to sell suit house to him?
2. Whether the defendant proves that he agreed to mortgage suit house by way of conditional sale?
3. Whether the defendant proves that this court has no jurisdiction to hear this suit?
4. Whether the court has jurisdiction?
5. Whether this court has pecuniary jurisdiction?
6. Whether the suit in its present form is maintainable?
7. Whether the defendant proves that the document, dated 8-4-1969 is without consideration?
8. Whether the defendant proves that the Vasul of Rs. 800 (is) as contain-

ed in para. 6 of the written statement Ex. 10?"

The hearing of the suit commenced on or about September 7, 1972 and the plaintiff was examined as a witness. The examination of the plaintiff was over on November 24, 1972. The last witness on behalf of the plaintiff was examined on January 6, 1973. Defendant No. 1 was examined on February 1, 1973. His witness was examined on February 3, 1973. At this stage opponent No. 2 and opponent No. 3 filed applications Exs. 57 and 70 to join them as parties to the suit on the ground that they are sisters of defendant No. 1, that their father Shankerlal Anopram executed a registered will dated April 17, 1947 giving the properties including the suit property absolutely to their brother Batubhai, that their father died on February 10, 1956, that their brother Batubhai died on July 6, 1957, that their mother died on May 11, 1967 and according to the provisions of the Hindu Law they are entitled to inherit the suit property. The claim of opponents Nos. 2 and 3 was that they had direct interest in the property and defendant No. 1 had no power to execute the agreement of sale in respect of the entire property, that the agreement of sale was not binding on them and if they are not joined as parties to the suit they would be seriously prejudiced. The learned trial Judge came to the conclusion that the sisters had direct interest in the property and, therefore, he allowed them to be joined as parties to the suit. It is this order which the petitioner challenges in this revision application.

2. Now the provisions relating to adding of parties are to be found in sub-rule (2) of Rule 10 of Order 1 of the Civil Procedure Code, which provide that the Court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. Under these provisions a person may be added as a party to the suit in two cases only, namely, (1) when he ought to have been joined and is not joined that is whenever he is a necessary party and (2) when without his presence the suit cannot be completely adjudicated. There is no jurisdiction to add a party in any other case merely because that would save a third

person the expense and botheration of a separate suit for seeking adjudication of a collateral matter, which was not directly and substantively in issue in the suit into which he seeks inclusion. The general rule is that the plaintiff is the master of his suit. He is dominus litis. He cannot be compelled to fight against a person against whom he does not wish to fight and against whom he does not claim any relief. It is discretionary to grant a relief under Order 1, Rule 10 (2) of the Civil Procedure Code. In exercising the discretion the Court will invariably take into account the wishes of the plaintiff before adding a third person as a defendant to his suit. Only in exceptional cases, where the Court finds that the addition of the new defendant is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties, will it add a person as a defendant without the consent of the plaintiff. Vide Banarsi Dass Durga Prasad v. Panna Lal Ram Richhpal Oswal, AIR 1969 Punj 57; Jivanlal Damodardas Wani v. Narayan Ukha Sali, AIR 1972 Bom 148 and the decision of my brother J. M. Sheth J. in Civil Revn. Appln. No. 514 of 1972 decided on 9-4-1974 (Guj.).

3. Now the question whether a person should be added as a party to the suit or not depends on the nature of the suit and the allegations made in the pleadings. In the present case, we are concerned with the suit for specific performance. The material allegations in the plaint are that defendant No. 1 had executed an agreement of sale in favour of the plaintiff and that defendant No. 1 had received full consideration for the said transaction. On the basis of these allegations the only relief which is claimed is that defendant No. 1 should execute a document of sale in plaintiff's favour or the same should be got executed through the Court. The main issue is to be decided in the suit is whether an agreement had been executed by defendant No. 1. The agreement for sale constitutes the basis of the plaintiff's right to the relief which he claims and is also the basis of the suit. The contract between the plaintiff and defendant No. 1 regulates the rights or liability of the parties. The necessary party in a suit for specific performance of contract for sale are parties to the contract or if they are dead their legal representatives as also a person who purchased the property from a vendor after the contract. Where a person sues for specific performance of an agreement of sale impleading the executant of the agreement as a party, there is no necessity to determine the question of vendor's title. The fact that the title, which the purchaser may acquire might be defeasible

by a third party as for example, by the persons claiming right to the property under Hindu law, is no ground for refusing specific performance, if the purchaser is willing to take such title as the vendor has. Vide C. V. Muni Samappa v. Kolala Gurunanjappa, AIR 1950 Mad 90; and N. T. Palanisamy Chettiar v. Komara Chettiar, AIR 1950 Mad 91. The main question involved in the present suit, is with respect to the execution of the agreement of sale. The question of title of defendant No. 1 is not at all in issue. There is no necessity to determine the vendor's title. The present opponents Nos. 2 and 3 cannot be said to be necessary parties for adjudicating the questions involved in the suit. An order for addition as parties cannot be made merely to avoid multiplicity of suit. The present suit is a simple suit for specific performance of an agreement. No relief is claimed against opponents Nos. 2 and 3. There is no claim for possession of the suit property. The suit is merely for the enforcement of the agreement of sale between the plaintiff and defendant No. 1. It is thus clear that opponents Nos. 2 and 3 cannot claim to be joined as parties to the plaintiff's suit. On this point I am supported by the decisions of the Madras High Court in C. V. Muni Samappa v. Kolala Gurunanjappa and N. T. Palanisamy Chettiar v. Komara Chettiar (supra). A simple suit for specific performance on agreement of sale cannot be allowed to be converted into a suit for title.

4. It was contended on behalf of the opponents that in the present case opponents Nos. 2 and 3 had direct interest in the property, that they claim adversely to the vendor, and that any decree granted to the plaintiff would cut their legal rights. They have direct interest in the subject-matter of the suit and hence their presence is necessary to enable the Court to effectually adjudicate upon all the questions involved in the suit. The plaintiff has filed the suit in order to complete his title and, therefore, the question which is involved in the suit is one of title. Opponents Nos. 2 and 3 claim title in the suit property and in their absence the question involved in the case cannot be completely adjudicated upon by the Court. Reliance was sought to be placed on the decision in Shivshankarappa Mahadevappa v. Shivappa Parappa, AIR 1943 Bom 27. In that case the suit was for specific performance of an agreement of sale and a relief for possession was also sought against the original defendant. Defendants Nos. 3 to 20 who were in actual possession of the suit property filed an application to join them as parties and the question that arose was whether they should be added as parties to

the suit. While considering the provisions of Order 1, Rule 10 (2) of the Civil Procedure Code, the Court observed that the general rule is that in a suit for specific performance of a contract, only parties to the contract are necessary parties. This general rule is subject to certain exceptions. For instance, strangers are made parties as an exception to the rule in cases of novatio; and in cases of an interest arising under a prior contract; and in cases where it is desirable to avoid multiplicity of suits. In a suit for specific performance in respect of a contract of sale a person who claims the property in the suit adversely to vendor and who are in possession of the property could be joined as parties as their possession is likely to be affected. Now it is very clear that in the case before the Bombay High Court the suit was not only for specific performance of an agreement of sale but was also for possession of the suit property. As a result of this relief for possession, defendants Nos. 3 to 20 who were in possession of the property were likely to be directly affected. In light of these facts it was held that the Court made the aforesaid observations. Reliance was also sought to be placed on the decision in *Bai Devkabai v. Shah Shamji Mulji*, AIR 1971 Guj 256, wherein the suit was filed for specific performance of the agreement to sell as well as the partition of the properties. The case of the plaintiff was that because of the partition effected between the members of the joint family, the suit property had gone to the share of his vendor and, therefore, he intended to obtain a sale deed from him. He had also joined other members of the joint family as defendants Nos. 2 to 6 as it was claimed by them that the previous partition was not acted upon and, therefore, they had proprietary interest in the suit property. Defendants Nos. 2 to 6 also claimed adverse possession. At the stage of final hearing of the suit, the plaintiff did not press for the relief of possession. Both the lower Courts had held that defendants Nos. 2 to 6 were necessary parties to the suit. In the second appeal before the High Court a contention was raised on behalf of defendants Nos. 2 to 6 that they were not necessary parties. The learned Judge having regard to the special facts of the case came to the conclusion, following the decision of the Bombay High Court in *Mahadevappa Parakanhatti v. Shivappa Parappa Kupati* (supra), that the persons who according to the plaintiff claimed proprietary interest were necessary parties to the suit. Now it is to be noted that the plaintiff himself had joined certain persons who claimed proprietary interest as defendants to the suit. It is the choice of the

plaintiff as to who should be the defendants in his suit. If he joins the defendants who are not necessary or proper parties to the suit, he does so at his own risk. In that case the plaintiff's suit was not only for specific performance but was for partition and possession and it is for this reason that the Court came to the conclusion that the members who claimed proprietary interest in the property were necessary parties in a suit for specific performance. The aforesaid two decisions are quite distinguishable. In the present case the only relief which the plaintiff claims is against defendant No. 1 and the relief claimed by him is that defendant No. 1 should be ordered to execute a document of sale in pursuance of the agreement of sale or the same should be got executed through Court. No relief for possession of the suit property is claimed. No relief of any sort is claimed against opponents Nos. 2 and 3. No issue of title of defendant No. 1 arises in the suit. In such a suit for specific performance opponents Nos. 2 and 3 cannot be said to be necessary parties nor their presence is necessary to adjudicate upon any of the issues between the parties.

5. It was contended on behalf of the opponents that the words "all questions involved in the suit" must be widely interpreted and must not only mean the questions involved in the suit as originally framed between the parties to the suit but the object of the provision is that where several disputes arise out of one subject-matter all the parties interested in such disputes should be brought before the Court and all questions in controversy between them should be completely settled in the action. For this proposition reliance was placed on the decisions in *Vanjiappa Goundan v. Annamalai Chettiar*, AIR 1940 Mad 69, and *Bindeshwari Chaudhary v. Dr. Sheo Nandan Upadhyaya*, AIR 1973 Pat 347. Now on this point the decisions of the Court are not unanimous. The decision in *Banbihari v. Bhojnath Singh*, ILR 59 Cal 329 = (AIR 1932 Cal 448), takes a contrary view and the view taken is that the aforesaid words must only mean that the questions which are involved in the suit as originally framed between the parties to the suit should be only considered for adding parties to the suit. The Supreme Court case in *Razia Begum v. Sahebzadi Anwar Begum*, AIR 1958 SC 886 throws much light on the point. But it is not necessary for me to decide this question because assuming that the words have wider connotation, the question is whether on the facts of this case, the presence of opponents Nos. 2 and 3 is essential to completely adjudicate the dispute in the suit. Opponents Nos. 2 and 3 cannot be said to be

necessary parties nor their presence is essential to completely adjudicate upon the controversy in the suit because the suit is a simple suit for specific performance of an agreement of sale—an agreement of sale passed by defendant No. 1 in favour of the plaintiff. In the instant case no question of possession is involved and no relief against opponents Nos. 2 and 3 has been asked for.

6. It was then urged that the relief for specific performance is in the discretion of the Court and the Court will not grant a decree to a party if such a decree is not likely to be effective. If defendant No. 1 is not the exclusive owner of the suit property and it is ultimately found that opponents Nos. 2 and 3 have proprietary interest therein, the decree for conveying the entire suit property would be rendered infructuous. It cannot be gainsaid that granting a relief for specific performance is in the discretion of the Court. Discretion has to be judicially exercised. Judicial discretion to add a party to the plaintiff's suit for specific performance has to be exercised keeping in mind the provisions of Order 1, Rule 10 (2) of the Civil Procedure Code. In the present suit no relief is claimed against opponents Nos. 2 and 3. No relief for possession is asked for. It is a simple suit for the enforcement of an agreement which is legal and valid. The parties to the agreement are the plaintiff and defendant No. 1. The plaintiff is willing to take the risk and he can get whatever title his vendor has. The plaintiff is willing to take such title which his vendor has. A simple suit for specific enforcement of an agreement between the plaintiff and defendant No. 1 cannot be permitted to be converted into a suit for establishing title and that too against the wish of the plaintiff. In view of the peculiar facts of this case, it cannot be said that opponents Nos. 2 and 3 are necessary parties to the suit or their presence is necessary to adjudicate upon all the questions involved in the case.

7. There is one more point to be noticed and it is this. Opponents Nos. 2 and 3 are the sisters of defendant No. 1. Prior to the agreement of sale defendant No. 1 had executed two mortgages in respect of the suit house. These mortgage transactions are evidenced by registered deeds. One of the mortgage is of the year 1969. Exhibit 39 is the letter on the record and on the basis of the letter the learned trial Judge has come to the conclusion that opponents Nos. 2 and 3 were aware of the transactions between defendant No. 1 and the plaintiff at least from September 1967, that is, prior to one mortgage transaction. Opponents Nos. 2 and 3 are not strangers to the defendant

No. 1 as they are his sisters. The record of the case also shows that the plaintiff is in possession of a part of the property. All these circumstances clearly indicate that opponents Nos. 2 and 3 had full knowledge of the transactions between the plaintiff and defendant No. 1 at least since February 4, 1967. No attempt has been made by opponents Nos. 2 and 3 to challenge the mortgage transactions entered into between the plaintiff and defendant No. 1. It is only at the far-end of the litigation that they have made this application to be added as parties to the suit claiming proprietary interest in the suit property. This application is made after a long delay and from the said delay want of bona fide on the part of opponents Nos. 2 and 3 can easily be inferred. It is in the discretion of the Court to order addition of the parties and I am of the opinion that such discretion cannot be exercised in favour of opponents Nos. 2 and 3 who have come to the Court with an ulterior motive.

8. The result is that the order of the learned trial Judge passed on Exs. 57 and 70 that opponents Nos. 2 and 3 are necessary parties to the suit cannot be sustained as the same is without jurisdiction. The said order is set aside and the applications Exs. 57 and 70 made by opponents Nos. 2 and 3 to join them as parties to the suit are rejected. There shall be no order as to costs.

Petition allowed.

AIR 1975 GUJARAT 182

J. B. MEHTA AND P. D. DESAI, JJ.

Murtujakhan Joravarkhan Babi, Petitioner v. The Municipal Corporation of the City of Ahmedabad and others, Respondents.

Spl. Civil Appln. No. 1829 of 1971, D/- 16-9-1974.

(A) Constitution of India, Arts. 14, 19 (1) (f), 141. — Bombay Town Planning Act (27 of 1955), Ss. 53, 54 — Constitutional validity of — Binding effect of Supreme Court decisions—(Bombay Town Planning Act (27 of 1955), Ss. 53, 54).

In view of decisions in AIR 1967 SC 1373, AIR 1968 SC 303, AIR 1969 SC 634 and (1972) 13 Guj LR 649, it is not open to a petitioner to challenge the validity of any of the sections of the Bombay Town Planning Act on the ground that it infringes upon his fundamental rights.

(Para 17)

Once the validity of the Act as a whole has been upheld after considering the various provisions of the Act and

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taking into account both the procedural as well as substantive aspects, it cannot possibly be urged that the validity of a particular section is still open to challenge because it has not been specifically considered. Merely because certain aspect based on guarantee contained in Art. 19 (1) (f) was not expressly considered will not take away the binding effect of the decisions upholding the validity of the Act, more so when such decisions are those of Supreme Court. AIR 1963 SC 151, AIR 1973 SC 974 and S. C. A. No. 747 of 1971, D/- 6-9-1974 (Guj.), Followed.

(Para 18)

The challenge to the constitutional validity of Sections 53 and 54 must, therefore, fail on the ground that it is concluded by the decisions of the Supreme Court as well as of Gujarat High Court.

(Para 20)

(B) Constitution of India, Arts. 226, 19 (1) (f) — Who can apply — Petitioner's plot determined by its reconstitution under S. 53 (b) of Bombay Town Planning Act — He has no subsisting proprietary right therein which he can protect under Art. 19 (1) (f) — (Bombay Town Planning Act (27 of 1955), Ss. 53, 54).

Where title of petitioner to certain plot of land stands determined under S. 53 (b) by its reconstitution upon allotment thereof to the postal authorities for the purpose of post office, the petitioner has no subsisting proprietary right therein which he can protect under Art. 19 (1) (f). It is not open to him to challenge the power of summary eviction conferred under S. 54 on ground that it violates fundamental rights under Art. 19 (1) (f).

(Para 21)

(C) Constitution of India, Art. 226 — Mandamus — Jurisdiction of High Court — Nature of — Withdrawal of petition — Effect — Principle of res judicata — Applicability.

A writ of mandamus is not a writ of course or a writ of right but is, as a rule, a matter for the discretion of the Court. Upon a prerogative writ of that nature there may arise many matters of discretion which may induce the court to withhold the grant of it, i.e. matters connected with delay or possibly with the conduct of the parties. AIR 1972 SC 793, Relied on.

(Para 22)

The petitioner had earlier filed Special Civil Application No. 425 of 1956 (Guj.) in High Court. It was not in dispute that the constitutional validity of the Act as a whole was inter alia challenged in the said writ application. On the issue of the rule, the respondents appeared and filed affidavits and contested the petition on merits. The petition was ultimately withdrawn on the ground that the point about the validity of the

Act was already covered by certain decisions of the Supreme Court. On writ petition by the petitioner after lapse of five years from the said withdrawal, actions under the same Statute were challenged on identical grounds.

Held that the consequence of the withdrawal of the writ petition in the eye of law was that it stood dismissed on merits albeit on a concession made by or on behalf of the petitioner to the effect that the question of the constitutional validity of the Act was no longer open in view of the decisions of the Supreme Court. In other words, the effect of the dismissal by withdrawal was that the challenge of the petitioner to the actions of the respondents under the Act on the ground that the said Act itself was ultra vires stood concluded by an adverse decision of the High Court based on his own concession. The subsequent writ petition was barred by the general principles of res judicata. The petitioner could not be allowed to reagitate the very point after lapse of number of years. AIR 1970 SC 898, Followed.

(Para 22)

Held further that although the petitioner in his earlier petition might not have expressly pleaded the invalidity of S. 54, he must be deemed to have brought it into question in view of the wide ambit of his challenge and abandoned it.

(Para 23)

(D) Bombay Town Planning Act (27 of 1955), Ss. 53, 54 — Final scheme sanctioned by Government — Effect of — Plot allotted to postal department for post office under the final scheme — Effect.

When the State Government sanctions the final scheme, it comes into force on such date as may be fixed by the State Government and the final scheme becomes effective from such date. The scheme so sanctioned has the effect as if it were enacted in the Act; it acquires legislative force as if it were written out in the Act itself. Object of the Act explained.

(Para 26)

Once the final scheme is sanctioned, by statutory operation, the title of the various owners is readjusted and these consequences are provided for in Section 53. Under Section 53 (a) all lands in the area which are subjected to the scheme, to whomsoever they might have originally belonged, would absolutely vest in the local authority if under the scheme the same are allotted to the local authority. As a necessary corollary to this, all rights of the private owners in such lands would determine. Similarly, under S. 53 (b) in respect of those lands which do not vest absolutely in the local authority but which are otherwise reconstituted, all rights in the original plots stand determined and the

reconstituted plots become subject to the rights settled by the Town Planning Officer. (Paras 26, 27)

Sections 53, 54 read together provide for divesting of title and acquisition of title as well as for eviction of persons who have ceased to be entitled to occupy the land in respect of which titles have been readjusted. There is a complete scheme or Code of acquisition laid down in the Act. When power is given under a statute to do a certain thing in a certain way the thing must be done in that way or not at all and land required for any of the purposes of the Town Planning Scheme cannot be acquired otherwise than under the Act. (Para 27)

Where certain plot of land of a person was allotted under the varied final scheme to the postal department for setting up a post office and an award to that effect was made by the Town Planning Officer and that person was ordered to be paid compensation for the same, the appeal of that person against the award having failed, he ceased to be entitled to occupy the land in question upon its reconstitution under S. 53 (b) and as such he was liable to be evicted under S. 54. (Paras 28, 29)

(E) Constitution of India, Art. 226 — Procedure — Pleadings — Party pleading wrong provision of law — Remedy.

Law is not required to be pleaded and even if a wrong provision of law is pleaded, it would always be open to a party litigant to correct the mistake and to advert to the right provision of law at the hearing of the cause. (Para 30)

Cases Referred: Chronological Paras

(1974) Spl. C. A. No. 747 of 1971, D/- 6-9-1974 (Guj.) 19

AIR 1973 SC 974 = (1973) 3 SCR 222 18

AIR 1972 SC 793 = (1972) 1 SCR 408 22, 28

(1972) 13 Guj LR 649 16, 17, 21

AIR 1970 SC 898 = (1969) 2 SCR 824 22

AIR 1969 SC 634 = (1969) 2 SCWR 366 15, 17, 27, 28

AIR 1968 SC 303 = (1968) 1 SCR 274 14, 17

AIR 1967 SC 1373 = (1967) 3 SCR 65 13, 14, 17

(1967) 2 SCR 949 15

AIR 1963 SC 151 = (1963) 2 SCR 774 18

(1956) Spl. C. A. No. 425 of 1956 (Guj.) 22

K. S. Nanavati for I. M. Nanavati, for Petitioner; V. B. Patel, for No. 1 and C. V. Jani, Asstt. Govt. Pleader of M/s. Purnanand & Co., Solicitors, for No. 5, for Respondents.

P. D. DESAI, J.:— The petitioner is the owner of final plot No. 51 of Town Planning Scheme No. IV (Varied) of Maninagar (Manipur) at Ahmedabad. The

said plot admeasures about 2662 sq. yds. In the year 1924 the Notified Area Committee of Kankaria was the local authority for the Maninagar area within the meaning of Section 9 of the Bombay Town Planning Act, 1915 (hereinafter referred to as the old Act). The Notified Area Committee declared its intention to frame a Town Planning Scheme in the year 1924 and a draft planning scheme was accordingly prepared in due course. In the said draft scheme the land of the petitioner was reserved for post office and it was directed that the land shall remain vacant in possession of the owner for fifteen years and that no super structure shall be erected thereon during the said period. The Final Town Planning Scheme No. IV (Manipur) was thereafter duly prepared and by a notification dated April 27, 1931 sanction was accorded to the same with effect from July 1, 1931. This scheme subsequently came to be known as the "Principal Scheme" and will be referred as such in the course of this judgment. Under the Principal Scheme also the plot in question was reserved for fifteen years for post office and a direction was given that the land shall remain vacant in possession of the owner and no superstructure shall be erected thereon during the period of reservation.

2. On July 13, 1939, a Government Notification was issued in exercise of the power conferred by Section 45-A of the old Act under which the properties and rights of the Notified Area Committee in the Principal Scheme were vested in the then Municipal Borough of Ahmedabad with effect from February 1, 1939. On November 15, 1944 the Committee of Management of the Municipal Borough of Ahmedabad passed a resolution declaring its intention to vary the Principal Scheme and a notification to that effect was duly published in the Government Gazette on November 30, 1944— (Annexure 'A').

Clauses 4 and 5 of the said notification indicate that it was inter alia proposed to acquire final plot No. 51 which was originally reserved for a public purpose and to allot additional plots for public purposes where no such provision was made in the Principal Scheme. By a notification dated December 21, 1945 published in the Government Gazette dated December 27, 1945, the Government accorded sanction to the variation of the Principal Scheme under sub-section (6) of Section 9 of the old Act— (Annexure 'B'). On December 16, 1946 the draft varied scheme was prepared and it was published in the Government Gazette dated December 20, 1946. In the draft varied scheme, provision was made for the allotment of final plot No. 51 to the postal

authorities. The objections were invited and duly considered and the draft varied scheme was thereafter submitted to the Government for sanction under Section 14 of the old Act. The Government by its notification dated July 9, 1948 (Annexure 'C') accorded its sanction to the said varied scheme under sub-section (2) of Section 14 of the old Act.

3. On May 21, 1953 the petitioner made an application for putting up a structure on the land in question. The said application was, however, rejected by the Town Development Officer, Ahmedabad Municipal Corporation by his letter dated May 24, 1953 on the ground inter alia that the plot in question having been reserved for post office sanction for construction thereon could not be granted (Annexure 'D').

4. On April 1, 1967 the Bombay Town Planning Act, 1954 (hereinafter referred to as the Act) came into force. Section 90 of the Act repealed the old Act but saved the steps taken under the old Act with regard to the bringing into force of a Town Planning Scheme.

5. On March 3, 1966 the petitioner filed Special Civil Application No. 425 of 1966 in this Court challenging the Town Planning Schemes in question and the reservation of his plot under the said scheme for the purpose of post office. The constitutional validity of the old Act as well as of the new Act as a whole was also challenged. On April 18, 1966 rule was issued on the petition. On July 11, 1969 the said petition was withdrawn on the ground that the only point raised in the petition related to the validity of the provisions of Bombay Town Planning Act, 1954 and that since the said point was covered by two decisions of the Supreme Court, the petition did not survive.

6. In the meantime, on April 28, 1966 the Town Planning Officer drew up the final Town Planning Scheme (varied) under Section 32 (1) of the new Act. In the said scheme the petitioner's land was allotted to the postal authorities for the purpose of setting up a post office. The petitioner was awarded compensation in the sum of Rs. 5,990 in respect of the plot in question. The Town Planning Officer forwarded the scheme to the Board of Appeal in due course. The Board of Appeal met on several days and decided all the matters arising under the various relevant clauses of sub-section (1) of Section 32 of the Act and communicated its decision to the Town Planning Officer on April 16, 1969. The petitioner's appeal against the compensation awarded to him was dismissed by the Board of Appeal. On August 7, 1969 the final varied scheme was submitted to the Government for

according its sanction. On November 4, 1969 sanction was accorded to the final varied scheme and the said scheme came into force with effect from January 1, 1970.

7. On December 17, 1970, the Estate and City Improvement Officer, Ahmedabad Municipal Corporation, addressed a letter to the petitioner stating that plot No. 51 had been reconstituted and the said plot had been allotted to Posts and Telegraphs Department under the final varied scheme. The letter gave intimation to the petitioner that possession of the said plot would be given to the Posts and Telegraphs Department. A copy of this letter is at Annexure 'F'.

8. On June 18, 1971 the petitioner filed Civil Suit No. 1329 of 1971 in the City Civil Court at Ahmedabad against the Municipal Corporation of Ahmedabad, Union of India and the Town Planning Officer inter alia praying for a declaration that the defendants had no right, title or interest in final plot No. 51 and that they were not entitled to recover possession of the said plot in pursuance of the varied Town Planning Scheme since the said scheme was null, void, ultra vires, ineffective and inoperative and for a permanent injunction restraining the defendants from disturbing or interfering with the plaintiff's possession of the said plot. An interim injunction was granted in the said suit.

9. While the suit was pending in the City Civil Court, on October 13, 1971 the petitioner filed the present petition challenging the legality of (i) the reservation of the land in question as made in the principal town planning scheme No. 4; (ii) the allotment of the land made under the final town planning scheme (varied) in favour of the postal authorities; (iii) the order of the Estate and City Improvement Officer intimating that possession of final plot No. 51 was to be handed over to the postal authorities and (iv) the constitutional validity of Section 54 of the Act on the ground that it violated the fundamental rights guaranteed to the petitioner under Articles 14 and 19 of the Constitution. Rule was issued on the petition on October 14, 1971 and interim relief restraining the respondents from interfering with the petitioner's possession of final plot No. 51 was granted.

10. After the petition was admitted, the petitioner withdrew Civil Suit No. 1329 of 1971 which was filed by him in the City Civil Court at Ahmedabad.

11. At the hearing of the petition, Mr. K. S. Nanavati, learned advocate appearing on behalf of the petitioner, expressly gave up the challenge to the re-

servation made in the principal town planning scheme and to the allotment of the land in question made under the final town planning scheme (varied) for the purpose of post office. He confined the challenge to the order of the Estate and City Improvement Officer at Annexure F and to the vires of the provisions of Sections 53 and 54. The following points were urged by him in support of the said challenge:

I. On a true construction of Section 53 of the Act only such lands as are required by the local authority vest absolutely in it and since the petitioner's land is not required for the purpose of the local authority but it is allotted for post office which is a public purpose of the Union Government, the said land cannot vest in the local authority under Section 53 (a) and the petitioner cannot be deprived of its ownership and possession except by having recourse to the provisions of the Land Acquisition Act, 1894 or by private negotiations. The notice, Annexure 'F', is, therefore, without authority of law.

II. If the provisions of Section 53 are so construed as to result in the vesting in the local authority of lands which are required not only for its own purpose but also for the purpose of other authorities such as the Union or the State Government, its provisions read with those of Section 67 are violative of Article 14 since a citizen can be deprived of his property at the sweet will of the Government in either of the two ways, namely, under the provisions of the Town Planning Act or under the provisions of the Land Acquisition Act. The former mode of deprivation of property is more prejudicial than the latter since the compensation payable thereunder is determined at the rate prevailing on the date of the declaration of intention which is usually many years prior to the date of actual vesting. The conferment of such discriminatory power without any guidelines offended the equality clause and the guarantee of equal protection of law.

III. Section 54 of the Act, in so far as it confers powers of summary eviction on the local authority, discriminates amongst those in occupation of land required by the local authority under the final scheme in that it leaves it open to the local authority at its own sweet will to adopt either the ordinary remedy

of civil suit or drastic summary remedy under the said section and there being no guiding principle or policy, it permits the local authority to pick and choose occupants of such land for the application of the more drastic procedure under the said section. The section is, therefore, violative of the equal protection clause contained in Article 14.

IV. Section 54 also impinges upon the fundamental right guaranteed by Article 19 (1) (f) since it suffers from the vice of procedural unreasonableness inasmuch as (a) it provides for summary eviction of occupant of land without affording to him an opportunity to show cause and (b) even if such an opportunity is implied having regard to the nature of the power and the impact of its exercise on the rights of the citizens, the local authority which is very much interested in the possession of the land which is vested in it, is itself constituted the authority to determine whether the occupant is liable to be summarily evicted.

12. We would have ordinarily taken up these points for consideration serialim. However, in the present case, it would be convenient to deal with points Nos. II, III and IV together at the outset in view of the fact that they are liable to be rejected in limine on the grounds that: (i) the question of the constitutional validity of the relevant provisions of the Act is no longer *res integra*; (ii) the petitioner having been deprived of his title to the land in question upon the reconstitution of the plot on its allotment to the postal authorities, he has no *locus standi* to invoke Article 19 (1) (f) in relation to the said land and (iii) the petitioner is, in any case, precluded from challenging those provisions as *ultra vires*. In the following paragraphs we give our reasons in support of the aforesaid view.

13. The constitutional validity of the provisions of the Act has been the subject-matter of at least three reported decisions of the Supreme Court and one reported decision of this Court. In *Maneklal Chhotalal v. N. G. Makvana*, AIR 1967 SC 1373 the challenge to the Act as a whole in the context of legislative competence as well as of Articles 14, 19 (1) (f) and 31 was considered. The main contention urged on behalf of the petitioners in that case was that the State Legislature was not competent to pass the Act as it was not covered by any of the entries in List II or List III of the Seventh Schedule to the Constitution and

that even assuming that the State Legislature could pass the Act, nevertheless, its provisions regarding the levy of contribution towards the cost of the scheme and all other matters relating to the working of the scheme were unauthorised and unreasonable and that the powers vested in the Town Planning and other authorities under the Act were unguided, arbitrary and unconstitutional and as such in conflict with the fundamental rights of the petitioners under Articles 14, 19 (1) (f) and (g) and 31 of the Constitution. After reviewing the provisions of the Act and examining the substantive and procedural aspects it was held (see paras 45 to 53 of the report) that the Act imposed only reasonable restrictions and that it was saved under Article 19 (5). The challenge based on Article 14 was rejected *inter alia* on the ground that the Act did not confer arbitrary or unguided powers. It was further found that there was no deprivation of property without compensation on account of the framing of a scheme under the Act and that Article 31 was, therefore, not attracted. In paragraph 53 of the report, it was reiterated that the Act as a whole must be sustained.

14. Then next in point of time is the decision in *K. L. Gupte v. The Corporation of Greater Bombay*, AIR 1968 SC 303. The petitioners in that case challenged Sections 9, 10, 11, 12 and 13 of the Act as violative of Articles 14 and 19 (1) (f). The scheme of the Act was again considered in detail and the validity of the provisions in question was upheld in the context of both those articles. While doing so, however, it was pointed out that the validity of the Act was not called in question for the first time before the Supreme Court in that case and that in *Maneklal's case* (AIR 1967 SC 1374) (*supra*) the Act as a whole came up for scrutiny before the Supreme Court. It was further pointed out that there was great deal of similarity between *Maneklal's case* and *Gupte's case*, (AIR 1968 SC 303) (*supra*) although the objections raised were not quite the same. It was observed that in *Maneklal's case* the Act had been found, after consideration of its different sections, to be a valid enactment. In spite of this position, however, the challenge to the various sections mentioned earlier was considered and rejected on merits.

15. In *State of Gujarat v. Shantilal*, AIR 1969 SC 634, the question of the vires of Sections 53 and 67 specifically came up for consideration again before the Supreme Court in the context of Article 31 (2) read with Articles 31 (2-A), 19 (1) (f) and 14 of the Constitution. It was held that the said sections were not

violative of Article 31 (2) read with Article 31 (1-A) since the relevant provisions of the Act laid down principles of valuation which were not irrelevant and compensation payable accordingly could not be regarded as illusory. As regards the contention that the statute violated Article 19 (1) (f) since it did not meet the test of reasonableness, it was held, in the first place, that the Act being a law made under clause (2) of Article 31 was not liable to be challenged on the ground that it imposes unreasonable restriction upon the right to hold or dispose of property in view of the decision in *Smt. Sitabati Devi v. State of U. P.*, (1967) 2 SCR 949 and, secondly, that the validity of the statute in the context of Article 19 (1) (f) could not depend upon whether in a given case it operates harshly and that, therefore, merely because in a given case considerable time might have elapsed since the declaration of intention to make the scheme and hence the market value of the property compulsorily acquired would be determined with reference to a date many years prior to the date of extinguishment of title, the relevant sections could not be held *ultra vires* as being unreasonable (see para. 52 of the report). The challenge under Article 14 was based on the ground that whereas if the land required for the purpose of a local authority were to be acquired under the provisions of the Land Acquisition Act, 1894 compensation would be payable as on the date of the issuance of Section 4 notification, in case of acquisition of land for the purpose of a local authority under the provisions of the Act, compensation will be determined at the rate prevailing on the date of the declaration of intention which would ordinarily be a rate prevailing many years prior to the date of the notification under Section 4. The argument was negatived on the ground that there was no option to acquire land either under the Land Acquisition Act or under the Town Planning Act and that once the draft town planning scheme is sanctioned, the land becomes subject to the provisions of the Town Planning Act and on the final Town Planning Scheme being sanctioned, by statutory operation the title of the various owners is readjusted and the land needed for a public purpose vests in the local authority (see para. 54 of the report).

16. In *Mangaljiibhai Roopajiibhai v. State*, (1972) 13 Guj LR 649 Section 54 was challenged on the ground that it conferred discretionary power on the local authority without any guideline to adopt either the ordinary remedy of civil suit or the drastic summary remedy under the said section for evicting an occupant

of land which was the subject-matter of the Town Planning Scheme. It was also urged that Rule 27 of the Bombay Town Planning Rules, 1955 did not comply with the requirements of natural justice inasmuch as it did not contemplate an opportunity being afforded to the occupant of land to show cause why he should not be summarily evicted. A Division Bench of this Court considered the entire scheme of the Act and came to the conclusion that so far as the land required by the local authority under the final scheme was concerned, the right to own it and to obtain possession of it with the corresponding liability of the occupant of such land to eviction did not exist under the general law prior to the making of the final scheme and that it was a right or liability created for the first time by the final scheme which was to be read as a part of the Act. So also the right to own the reconstituted plot and to obtain possession of it with the corresponding liability of the previous owner of such reconstituted plot to eviction did not exist under the general law prior to the making of the town planning scheme but it was a right or liability created for the first time by the final scheme which was, as it were, incorporated in the Act. The Act, according to the Division Bench, while creating the new rights and liabilities gave a special and particular remedy for enforcing them under Section 54 and the remedy of summary eviction was, therefore, an exclusive remedy and the liability to eviction under Section 53 (a) or (b) could not be enforced by the ordinary remedy of a suit. As regards the other ground of challenge, it was found that the power of summary eviction conferred on the local authority under Section 54 was quasi-judicial having regard to the nature of the power conferred, its impact on the rights of the occupants of land and the consequences ensuing from the exercise of the power. The power was, therefore, required to be exercised in conformity with the principles of natural justice and if there was any violation of the principles of natural justice, the exercise of the power would have to be struck down as invalid. The provisions of Section 54 and Rule 27 were then considered in detail and it was pointed out that those provisions did not exclude the observance of the principles of natural justice. The basic minimum requirement of natural justice, namely, that the occupant of land who is sought to be summarily evicted must be told what are the grounds on which he is sought to be so evicted and that he must be afforded an opportunity of showing cause against the action proposed to be taken against him were read into the statutory provisions by implication.

17. The foregoing summary of the decisions of the Supreme Court in three cases and the decision of this Court in one case establishes beyond doubt that the challenge to the constitutional validity of the relevant provisions of the Act is not open. The decision in *Maneklal's case*, (AIR 1967 SC 1373) (supra) upheld the validity of the Act as a whole and that decision was so read in *Gupte's case*, (AIR 1968 SC 303) (supra). Still, however, in *Gupte's case* (supra) and *Shantilal's case* (AIR 1969 SC 634) (supra) the validity of Ss. 9, 10, 11, 12, 13, 53 and 67 was again considered in the context of Articles 14, 19 (1) (f) and 31 and upheld. In *Mangaljiibhai's case* ((1972) 13 Guj LR 649) (supra) the validity of Section 54 in the context of Article 14 came up for consideration and was upheld. The decision in *Shantilal's case* (supra) specifically covers the second ground raised on behalf of the petitioner in the present petition. The decision in *Mangaljiibhai's case* specifically covers the challenge based on ground III and ground IV (a) in the present petition. Ground IV (b), though not specifically raised in these cases, would be covered by the decision in *Maneklal's case* (supra) which, as stated earlier, upheld the validity of the Act as a whole after considering its entire scheme. We are, therefore, of the opinion that it is not open to the petitioner to challenge the validity of any of the sections of the Act on the ground that it infringes upon his fundamental rights.

18. Mr. K. S. Nanavati, however, contended that in none of the abovementioned cases the Court was called upon to determine the validity of Section 54 on the ground at IV (b) as formulated hereinabove and that, therefore, challenge to the said section on the said ground was *res integra*. The submission, in our opinion, is misconceived. Once the validity of the Act as a whole has been upheld after considering the various provisions of the Act and taking into account both the procedural as well as substantive aspects, it cannot possibly be urged that the validity of a particular section is still open to challenge because it has not been specifically considered. As observed in the majority decision in *Somawanti v. State of Punjab*, AIR 1963 SC 151 the binding effect of a decision does not depend upon whether a particular argument was considered therein or not provided that the point with reference to which an argument was subsequently advanced was actually decided. Once it is found that the validity of the Act as a whole has been upheld, merely because the aspect now presented based on the guarantee contained in Article 19 (1) (f) was not expressly considered or a deci-

sion given thereon, it will not take away the binding effect of the said decision (see *T. G. Mudaliar v. State of T. N.*, AIR 1973 SC 974 at p. 978). These observations were made with reference to a binding precedent of a Court of co-ordinate or concurrent jurisdiction and they will apply with greater force to the declaration of law made by the Supreme Court which binds us under Article 141.

19. We might mention that an argument similar to the one advanced by Mr. Nanavati was recently considered by us in the context of the constitutional validity of some of the sections of this very Act in Special Civil Application No. 747 of 1971 decided on 6-9-1974 (Guj.). We have there held that the challenge to the provisions of the Act on the ground of violation of fundamental rights is not *res integra* and that merely because a new point is raised touching the aspect of the vires of the Act which is painted in a different hue or fitted with new feathers it would not open the doors for a fresh challenge.

20. The challenge to the constitutional validity of Sections 53 and 54 must, therefore, fail on the short ground that it is concluded by the decisions of the Supreme Court as well as of this Court.

21. The second ground on which the challenge to Section 54 in the context of Article 19 (1) (f) must fail is that the petitioner's title to the plot in question has been finally determined by its reconstitution and that therefore, he has no subsisting proprietary right in the said plot which he could protect under Article 19 (1) (f). In *Mangaljiabhai's case*, ((1972) 13 Guj LR 649) (*supra*), this Court while considering the scheme of the Act, observed that broadly speaking the making of town planning schemes is dealt with in Sections 21 to 53 while the execution of the town planning schemes is provided for in Sections 54, 55 and 71 to 78. As we shall point out a little later in the course of this judgment, by allotment of the petitioner's land to the postal authorities for the purpose of post office, his title thereto stands determined under Section 53 (b). It is not open to the petitioner to challenge the constitutional validity of the said section and there is no other ground on which the determination of the title can be challenged. Section 54 relates merely to the eviction of the person not entitled to occupy any land under the town planning scheme by summary eviction. When action is taken under the said section, there is no subsisting title of the occupant in the land in question with the result that in the context of the said section the provisions of Article 19 (1) (f) cannot possibly be invoked. We are of the view, therefore,

that the title of the petitioner in the land in question having been determined by its reconstitution upon allotment thereof to the postal authorities, under the final varied scheme, it is not open to the petitioner to challenge the power of summary eviction conferred under Section 54 on the ground that it violates fundamental rights under Article 19 (1) (f).

22. There is still one more ground, on which the challenge to the constitutional validity of the relevant provisions of the Act at the instance of the petitioner is barred in this writ petition. The petitioner seeks the writ of mandamus which is not a writ of course or a writ of right but is, as a rule, a matter for the discretion of the Court. Upon a prerogative writ of that nature there may arise many matters of discretion which may induce the court to withhold the grant of it matters connected with delay or possibly with the conduct of the parties (see *Bombay Municipality v. Advance Builders*, AIR 1972 SC 793 at p. 800). Now, as stated earlier, the petitioner had earlier filed Special Civil Appln. No. 425 of 1956 (Guj.) in this Court. It is not in dispute that the validity of the Act as a whole was *inter alia* challenged in the said writ application. On the issue of the rule, the respondents appeared and filed affidavits and contested the petition on merits. The petition was ultimately withdrawn and the Court which allowed the withdrawal made a speaking order. The order was in the following terms:—

"Mr. K. G. Vakharia, learned advocate appearing on behalf of the petitioner, states that the only point raised in this petition relates to the validity of the provisions of the Bombay Town Planning Act, 1954 and since that point is already covered by two decisions of the Supreme Court, nothing survives in the petition. He, therefore, withdraws the petition and the petition accordingly stands withdrawn. There will be no order as to costs of the petition."

The consequence of the withdrawal of the said writ petition in the eye of law was that it stood dismissed on merits albeit on a concession made by or on behalf of the petitioner to the effect that the question of the constitutional validity of the Act was no longer open in view of the decisions of the Supreme Court. In other words, the effect of the dismissal by withdrawal was that the challenge of the petitioner to the actions of the respondents under the Act on the ground that the said Act itself was *ultra vires* stood concluded by an adverse decision of this Court based on his own concession. It is not the case of the petitioner as set out in the petition that the concession was wrongly made by his counsel. Indeed

such a contention could not have been raised in the view that we have taken as regards the wide ambit of the pronouncement of the Supreme Court and it was, therefore, rightly not raised. In these circumstances, the petitioner's complaint in the present petition directed against the actions of the respondents under the same statute and based on identical grounds is barred by the general principles of *res judicata* or at least by principles underlying the doctrine of *res judicata*, namely, that there should be finality in litigation and that a person should not be vexed twice over in respect of the same cause or matter. In any case, the petitioner having himself abandoned without reservation the previous writ proceeding initiated in this very Court with eyes open and after due deliberation, he cannot now be allowed to pick up the thread after a lapse of five years and to start a fresh proceeding to re-agitate the very point which he expressly gave up in the previous proceeding. He had set the machinery of law in motion but solemnly brought it to an abrupt halt, indeed forsaken it in midstream, in proclaimed obeisance to the decisions of the Supreme Court. He cannot be permitted to resume it now after a number of years and be heard to say that despite his earlier proclamation, he still wishes to persist in raising the same point in this litigation. Courts moved upon a prerogative writ are not the forum to flog a dead horse or to resuscitate a ghost already laid to rest. The doctrine of abandonment has been expressly invoked and recognised in *Trilokchand Motichand v. H. B. Munshi*, AIR 1970 SC 898 even in a proceeding under Article 32 and relief was refused to the petitioner in that case (although the point that he was agitating was covered in his favour by a Supreme Court decision given in a different case) on the ground that after an adverse decision of the High Court in his writ petition under Article 226 he had not moved the Supreme Court by way of appeal but had chosen to move the Supreme Court directly after a number of years only when "another person more adventurous than him in his turn got a favourable decision" meanwhile on a point not urged by the petitioner in his writ petition before High Court (see the decision of *Hidayatullah C. J.* at pages 902 and 903). The principle on which the Supreme Court acted in that case will apply appositely and with greater force to a situation such as that which obtains in the present case. We are, therefore, of the opinion that even on that ground the petitioner's challenge to the constitutional validity of the Act must fail.

23. Mr. K. S. Nanavati, however, urged that in the previous proceeding the

vires of Section 54 could not at all have been challenged inasmuch as at that stage the final scheme (varied) was not sanctioned and that, therefore, such a challenge, even if made, was premature and withdrawal of the previous petition could not preclude the challenge to the said section in this writ petition since the real threat of dispossession has now arisen. We are unable to accede to this argument. It runs counter to the wide amplitude of the challenge in the previous petition. We called for the original petition from the records of the Court and on perusal found that the challenge there was levelled in the broadest possible terms in that the whole of the Act was challenged. That apart, we do not think that the challenge could be said to be premature. As stated earlier, broadly speaking the scheme of the Act is that it deals with the making of the Town Planning Scheme in one part and the implementation or execution of the scheme in the other part. Once the final scheme is sanctioned, Section 53 will come into operation and there might be divesting or readjustment of titles of the occupants of the land subjected to the scheme. Section 54 will then be attracted and the person unauthorisedly occupying any land will be liable to be evicted thereunder. Such a person could not possibly challenge the vires of Section 54, after the scheme is sanctioned, under Article 19 as held earlier. The petitioner could, therefore, have rightfully challenged the whole of the Act at the earlier stage and though he might not have expressly pleaded the invalidity of Section 54, he must be deemed to have brought it into question in view of the wide ambit of his challenge and abandoned it.

24. As a result of the foregoing discussion, it would appear that the challenge to the constitutional validity of Sections 53 and 54 cannot be entertained in this petition. Grounds Nos. II, III and IV raised on behalf of the petitioner, are, therefore, rejected.

25. That takes us to the only point which survives for our consideration (Ground I) and it turns upon the interpretation of Section 53 of the Act and the provisions of the scheme in question. The argument on behalf of the petitioner was that on a true construction of Section 53, only such lands vest absolutely in the local authority as are required by it and since the petitioner's land is not required for the purpose of the local authority but is allotted to the postal authorities for a public purpose of general nature, it cannot vest in the local authority under Section 53, clause (a) and the petitioner cannot be deprived of its ownership and possession except in

accordance with the provisions of the Land Acquisition Act, 1894 or by private negotiations. Reference was made in support of this submission to certain Sections of the Act and it was urged that they made a distinction between reservation and allotment of land for a public purpose and for the purpose of the local authority and that the scheme of the Act was to vest in the local authority only such land as was required by it and to acquire under the ordinary law the land which was reserved for public purposes other than those of the local authority. In the present case, proceeded the argument, the petitioner's land was allotted for post office which was a purpose of the Union or a public purpose of general nature and the land allotted for such a purpose could not vest in the local authority and result in divesting of the title of the petitioner under the Act making it possible for the local authority to exercise its power of summary eviction in respect of such land.

26. The submission made on behalf of the petitioner proceeds, in our opinion, upon a fundamental misconception arising out of the misreading of the provisions of the Act. It is not necessary for our present purposes to go through the several provisions of the Act. However, in order to arrive at a proper interpretation of Section 53, which cannot be construed in isolation, we would examine briefly the scheme of the Act of which it forms a part. The Act, as its preamble shows, was intended to be a consolidating and amending Act relating to town planning and it was enacted with a view to ensure that town planning schemes are made in a proper manner and their execution is made effective by local authorities. The legislature had to tackle a situation arising out of a continuing influx of people from the villages to the towns and cities for the purpose of residence and employment and also out of the natural development which was taking place in and round about many cities which also in its turn attracted people from outside. Most of the towns and cities had grown up without any planning with the result that public amenities therein which were to be provided by the local authorities were wholly inadequate for the already enlarged and still expanding population. The amenities such as drainage, water supply etc. were overburdened and inadequate. It is to remedy this situation that the Act conferred powers upon the local authorities to take measures for scientific town planning. The process commences with the declaration of intention to make a town planning scheme by the local authority. The local authority then makes in consultation with the Consulting Surveyor a draft scheme for the

area in respect of which the declaration has been made and publishes it in the prescribed manner. The draft scheme must contain various particulars and amongst other things it must provide for the following matters: (i) how it is proposed to alter the boundaries of original plots so as to constitute new plots; (ii) the size and shape of every reconstituted plot, so far as may be, to render it suitable for building purposes and where the plot has already been built upon, to ensure that the building, as far as possible, complies with the provisions of the scheme as regards open space and (iii) allotment of or transfer of ownership of the reconstituted plots and for compensation. The draft scheme might also make provision inter alia for allotment or reservation of lands for roads, open spaces, gardens, recreation grounds, schools, markets, green belts, dairies, transport and communication facilities and public amenities of all kinds. The persons affected by the draft scheme have a right to file their objections to the proposed scheme and after considering the objections and modifying the scheme in the light of the objections, the local authority is required to submit the same to the State Government for its sanction. The State Government may sanction the draft scheme or refuse to give its sanction. Where the draft scheme is sanctioned, the State Government would appoint a Town Planning Officer who would usually be a qualified and experienced town planner and he would scrutinise the proposals of the local authority in all its details and give his decision. He has the power to make variations and in respect of technical matters such as roads, reservation or allotment of land for public purposes etc. his decision is final. There is an appeal provided against the decision of the Town Planning Officer in respect of other specified matters including compensation to the Board of Appeal. The Town Planning Officer has then to finalise the scheme in accordance with his decision except to the extent to which his decision may have been superseded by the decision of the Board of Appeal. The final scheme as drawn by the Town Planning Officer is then sent to the State Government for sanction and the State Government may sanction the final scheme or refuse to sanction it. When the State Government sanctions the final scheme, it comes into force on such date as may be fixed by the State Government and the final scheme becomes effective from such date. The scheme so sanctioned has the effect as if it were enacted in the Act; it acquires legislative force as if it were written out in the Act itself.

27. Now, once the final scheme is sanctioned, by statutory operation, the

title of the various owners is readjusted and these consequences are provided for in Section 53 which reads as under:—

"53. On the day on which the final scheme comes into force:—

- (a) all lands required by the local authority shall, unless it is otherwise determined in such scheme, vest absolutely in the local authority free from all encumbrances;
- (b) all rights in the original plots which have been reconstituted shall determine and the reconstituted plots shall become subject to the rights settled by the Town Planning Officer."

It will be seen that under clause (a) all lands in the area, which are subjected to the scheme, to whomsoever they might have originally belonged, would absolutely vest in the local authority if under the scheme the same are allotted to the local authority. As a necessary corollary to this, all rights of the private owners in such lands would determine. Similarly, under clause (b) in respect of those lands which do not vest absolutely in the local authority but which are otherwise reconstituted, all rights in the original plots stand determined and the reconstituted plots become subject to the rights settled by the Town Planning Officer. The original plots might completely disappear or be substantially cut down and their owners might be paid compensation or allotted reconstituted plots at some other place. New ownership rights might come into existence on allotment of lands where none existed prior to the sanction of the scheme. Upon the operation of clause (a) or (b), as the case may be, some of the persons who were original occupants of lands might cease to become entitled to occupy the lands in question. Such persons will have to be evicted from such lands and possession of the lands will have to be handed over to those who become entitled to the same under the final scheme. The legislature has provided a special machinery for this purpose in Section 54 which reads as under:—

"54. On and after the day on which the final scheme comes into force any person continuing to occupy any land which he is not entitled to occupy under the final scheme may, in accordance with the prescribed procedure, be summarily evicted by the local authority."

This section confers power of summary eviction on the local authority and authorises it to evict occupants who cease to be entitled to occupy the lands in their occupation under the final scheme. These two sections, namely, Section 53 and Section 54, read together provide for divesting of title and acquisition of title as well as for eviction of persons who have ceased

to be entitled to occupy the land in respect of which titles have been readjusted. It would thus appear that there is a complete scheme or Code of acquisition laid down in the Act. As observed by the Supreme Court in *Shantilal's case*, (AIR 1969 SC 634) (supra), when power is given under a statute to do a certain thing in a certain way the thing must be done in that way or not at all and land required for any of the purposes of the Town Planning Scheme cannot be acquired otherwise than under the Act. Against this background we have to determine the validity of the contention under consideration.

28. Now, in the present case, it is the case of the respondents as set out in the affidavit-in-reply filed by K. S. Mehta, Under Secretary to the Government of Gujarat, Panchayats and Health Department, that final plot No. 51 of the petitioner was allotted under the varied final scheme to the postal department for setting up a post office and that an award to that effect was made by the Town Planning Officer and the petitioner was ordered to be paid compensation for the land on the basis of the value prevailing on the date of the declaration to vary the final scheme. The petitioner's appeal against the award, as stated earlier, also failed. At the hearing of the petition, the respondents produced before us the Redistribution and Valuation Statement prepared in the prescribed Form B. under Rule 17 read with Rule 29 of the Bombay Town Planning Rules, 1955. The statement shows that the land in question has been allotted to the Post-Master General, Ahmedabad, who is shown as the owner of the land, for the purposes of post-office. The word "allotment" in its grammatical variation appears in some of the provisions of the Act as well as in the scheme which is to have effect as if it were enacted in the Act and it will have to be judicially interpreted. The expression, according to the Shorter Oxford English Dictionary, means:

"To distribute by lot, or in such way that the recipients have no choice; to assign shares authoritatively; to apportion; to assign as a lot or portion to; to appropriate to a special person or purpose."

In the context, therefore, the expression "allot" would mean to assign or apportion any land as owner, by virtue of the authority conferred by the Act, to any person or authority for any purpose. Now, the land in question having been allotted to the postal authorities under the final varied scheme, there has been an alteration of the ownership of the land. Such an alteration having been

Nos. 55, 56, 57 and 58 of Basohli Range. In response to this notice the plaintiff, Messrs Kohli Brothers, which is a partnership firm, submitted two tenders offering Rs. 16,51,000/- in respect of Compartments Nos. 1 and 2 of Billawar Range and Rs. 22,31,000.00 in respect of Compartments Nos. 55, 56, 57 and 58 of Basohli Range. Both these tenders were accepted by the Government. Whereas the plaintiff executed the agreement in respect of lease of Compartments Nos. 55, 56, 57 and 58 of Basohli Range it did not despite the intimation given to it by the Conservator of Forests that the Government had accepted its offer in respect of Compartments Nos. 1 and 2 of Billawar Range and it should pay the balance of security of Rs. 8,020/- and 1/5th of the total sinking fund amounting to Rs. 3,302/- and sign the formal agreement in terms of the tender notice, comply with the directions.

On failure of the plaintiff to pay the balance of the security money etc. and to execute the agreement as provided in the tender notice, the earnest money of Rs. 25,000.00 deposited by it was confiscated and intimation thereof was given to it by the Conservator of Forests on February 1, 1966. This action against the plaintiff was taken in terms of Cls. 15 and 16 of the tender notice which read as under:—

"15. The earnest money that must accompany each tender is given in the statement attached to clause 2 and must be in the form of revenue deposit receipt from any treasury of Jammu and Kashmir State or a deposit receipt from any bank recognized by the Jammu and Kashmir Government pledged to the Conservator of forests Jammu Circle, Jammu. The earnest money will be returned to unsuccessful tenderer but retained in the case of successful tenderers and will count as part of the security money which will be 6% of the annual lease value but in no case less than 1% of the total lease value rounded off to the nearest thousand. The C. C. F. may however increase the security to any amount not exceeding 6% of the total royalty.

The annual lease value works to $\frac{1}{4}$ of the total royalty of one year, $\frac{1}{2}$ for two years, $\frac{3}{4}$ th for three years and $\frac{1}{n+1}$ for the n year lease.

16. The successful tenderer will have to pay the balance of the security which shall have to be deposited in the treasury or bank mentioned in clause 15 above and

sign the agreement within fifteen days of the acceptance of his tender otherwise his earnest money will be forfeited and the purchasers will be debarred from taking further leases and the lease will be sold afresh or allotted for working at the discretion of the department."

2. On April 1, 1972, the plaintiff brought the present suit for recovery of Rs. 25,000/- against the State alleging inter alia that the tender notice issued by the Conservator of Forests was illegal as he was not the competent authority for inviting tenders from the intending forest lessees; that on realizing this illegality it intimated to the Government that it would not be in a position to work the lease; that it also informed the Government that since it was not in a position to work out both the leases simultaneously, the working of lease of Compartments Nos. 1 and 2 of Billawar Range be allowed to be deferred; that the Government did not consider the prayer of the plaintiffs sympathetically and being fully conscious of the fact that the tender notice was illegal and the acceptance of the bid in response thereto was not enforceable, it illegally ordered on February 1, 1966 the confiscation of the earnest money of Rs. 25,000/- deposited by the plaintiff and deregistered the firm; that both the aforesaid orders of forfeiture of the earnest money and deregistration of the firm were unauthorised and illegal; that both orders being illegal, it i. e. the plaintiff served a notice on the Chief Secretary to Government of Jammu and Kashmir on January 28, 1972, calling upon the Government to refund Rs. 25,000/-, that as the Government neither sent a reply to the notice nor returned the earnest money, hence the suit.

3. The suit was resisted by the Government inter alia on the ground that it was time-barred.

4. On November 2, 1972 a number of issues including the one as to whether the suit was time barred were framed.

5. On the case coming up before Justice Thakur it was contended before him on behalf of the plaintiff that the suit was governed by Article 119 of the Limitation Act No. IX of 1995 (1938 A. D.) hereinafter referred to as 'the Limitation Act'. On the other hand it was contended by Mr. R. P. Bakshi appearing on behalf of the defendant that the suit was governed by Article 68 of the Limitation Act. Feeling that important question of law relating to the application of various articles of the Limitation Act arose in the case, Thakur J. ordered that the papers be placed before the Hon'ble Chief Justice for constituting a Division Bench for decision of the question. On the matter coming up before the Division Bench which was

accordingly constituted by the Hon'ble Chief Justice, it was argued before it on behalf of the plaintiff that the suit was governed either by Article 145 or 119 of the Limitation Act. On the other hand it was reiterated on behalf of defendant that the suit was governed by Article 68 of the Limitation Act. A number of decisions expressing divergent views were cited before the Division Bench by the learned Counsel for the parties. In view of the fact that there was no decision either of the Supreme Court or of our own Court bearing on the point, the Division Bench considered it necessary to refer the following question to a Full Bench.

“Whether in the facts and circumstances of the present case, the plaintiff's suit is governed by Articles 145, 119 or 68 of the State Limitation Act.”

6. This is how the matter is before us.

7. Learned counsel for the parties have reiterated the contentions urged by them before the Division Bench. For a proper determination of the question involved in this reference, it is necessary to refer to the following Articles of the Limitation Act:

Art. No:	Description of the suit	Period of Limitation.	Time from which period begins.
68	For money paid upon an existing consideration which afterwards fails	3 years	The date of the failure.
92	For money payable by the defdt. to the plfff. for money received by the defdt. for the plaintiffs use.	6 years	When the money is received.
119	Suit for which no period of Limitation is provided elsewhere in this schedule	6 years	When the right to sue accrues.
145	Against a depository or a pawnee to recover moveable property deposited or pawned.	30 years	Date of the deposit or pawn.

8. It is now well settled that Article 119 which corresponds to Article 120 of the Indian Limitation Act (1908) is a residuary Article and applies only when no other Article applies. Let us therefore, see as to which of the other three above mentioned Articles of the Limitation Act is applicable to the present case.

9. So far as Article 145 is concerned, it has, in my opinion no application to the present case. The context in which the word 'depository' is used indicates that the deposit should resemble a pawn or should be in the nature of a trust. It would be clear from the terms of the Tender Notice (Exhibit DA) which is admitted by the plaintiff that the money of which recovery is sought, was intended to serve as a security for the lease sanctioned in its favour. There is nothing in the Tender Notice to show that the deposit in question possessed an element of entrustment. It is nowhere provided in the Tender Notice that the deposit would be kept as a separate fund or in other words that there would be a segregation of the amount which would have gone a long way to impress it with the character of a trust. In *M/s. Seth Jessa Ram Fateh Chand v. Om Narain Tankha* AIR 1967 SC 1162 where Rs. 50,000/- were deposited by the appellant as security for due performance of the contract Wanchoo J. (as His Lordship then was) speaking for the Court said:-

“The mere fact that money was deposited as a security is not sufficient to come to the conclusion that it must be treated as trust money. The court will have to look to all the terms of the agreement if in writ-

ing and to the facts and circumstances of the case and to the conduct of the parties before coming to the conclusion whether a security deposit was impressed with a trust. If a trust can clearly be spelled out from the terms of the agreement that ends the matter. But if the trust cannot be spelled out clearly, the fact that there was no segregation provided for and the fact that interest was to be paid would go a long way to show that the deposit was not impressed with the character of a trust particularly where the person with whom the deposit was made could mix it with his own money and could use it for himself.”

10. Another factor which inclines me to hold that Article 145 cannot be invoked in case of refund of earnest money is that whereas under Article 145 time for suit begins to run from the date of the deposit or pawn, in case of a deposit made for the performance of a contract the deposit does not become returnable until the happening of a certain contingency. I am fortified in this view by a catena of authorities.

11. In *Dhanraj Mills Ltd. v. Laxmi Cotton Traders, Bombay*, AIR 1960 Bom 404 Chagla C. J. speaking for the Bench said:-

“The deposit contemplated by Article 145 is a deposit which must as far as possible be approximated to a pawn as the expression “depository” in Article 145 must take colour from the expression that follows, viz; ‘pawnee’. Thus the deposit to which Article 145 applies is only that deposit where there is an element of entrustment, which may be as security for a debt as in a pawn

or safe custody as in a deposit. In the case of a deposit made for the performance of a contract, the deposit does not become returnable until the happening of a certain contingency. Hence it is neither an entrustment as security for a debt nor an entrustment purely for safe custody.

A deposit for the performance of a contract is not merely a part payment, but is also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract. Hence, a suit for the return of a deposit made by the plaintiffs for the due performance of a contract, which deposit by its very nature was to serve both the purpose of a part payment and an earnest, does not fall under Article 145."

12. Similar views have been expressed by the Patna and Rajasthan High Courts in *Union of India v. Gangadhar Mirraj*, AIR 1962 Pat 372, and in *Badri Prasad v. State of Rajasthan* AIR 1968 Raj 59 respectively. The following passage occurring in AIR 1968 Raj 59 will amply repay a perusal:—

"A perusal of Article 145 shows that there are three points to be borne in mind while considering its applications: (i) the article does not appear in that part of the schedule which deals with claims for the recovery money; (ii) the claim for refund of deposit mentioned in the article ranks with a claim in respect of a pawn and (iii) the starting point of limitation is the date of the deposit. All these features of article 145 are important and have to be considered while deciding the question of its applicability to the present case.

13. The view expressed by Chagla C. J. in *Dhan Raj Mills Ltd. v. Laxmi Cotton Traders Bombay* (Supra) was reiterated in *Shanker Moreshwar v. State of Maharashtra*, AIR 1970 Bom 8.

14. The matter was also considered in two decisions of a Travancore High Court. In *Narayana Pillai v. Chithambaram Phillai*, 15 Trav, LR 51 a Full Bench of the Court while considering the scope of Article 122 of the Travancore Limitation Regulation which corresponds to Article 145 of our Limitation Act, held that the Article will apply only to deposit of moveable property which has to be returned in specie. In another case *Chacho v. Mathew* (1918) 8 Trav L. J. 346 it was held that even assuming that the word moveable property employed in the Article included money no person could be held to be a 'depository' unless the identical property left with the person was intended to be returned to the owner.

15. Again in *Bala Krishnudu v. Narayanaswami* AIR 1914 Mad 4 Sir Charles Arnold White C. J. held that "the word 'pawnee' which occurs in conjunction with the word 'depositor' seems to be wholly inappropriate to the case of money."

16. In *Joseph Annamma v. Thressiamma*, AIR 1972 Ker 170, Poti J. observed that the view expressed by Sir Charles Arnold White C. J. in AIR 1914 Mad 4 (supra) is entitled to a considerable weight.

17. The view expressed by Narasimham J. in *Union of India v. Mohd Sultan* AIR 1966 Andh Pra 218 that a suit for recovery of money kept as security deposit for proper discharge of the plaintiffs' functions as Govt. auctioneer is a suit against the depository and is governed by Art. 145 does not, if I may be permitted to say so with utmost deference, commend itself to me in view of the preponderance of judicial authority referred to above.

18. In view of the above discussion, I have no hesitation in ruling out the applicability of Article 145 of the Limitation Act to the present case.

19. Article 68 of the Limitation Act, which corresponds to Article 97 of the Indian Limitation Act (1908) and to Article 47 of the Indian Limitation Act (1963), it may be observed applies only where the suit is for recovery of money paid upon an existing consideration which afterwards fails and the time begins to run from the date of subsequent failure. As held in *Susila Devi v. Sridhar* AIR 1970 Ori 89, the applicability of this Article would depend on answer to the question as to when the consideration failed. It was further held in that case that where the transaction of the plaintiff is void ab initio and the plaintiffs never obtained possession of the suit property consideration fell immediately and Article 97 of the Indian Limitation Act, 1908 (which corresponds to our Article 68) is wholly inapplicable. Similar views were expressed in *Gajadhar Baksh v. Gaurishankar* AIR 1921 Oudh 47 and in *Firm Makhanlal Girwarlal, Lashkar v. Harnadrian*, AIR 1960 Madh Pra 56.

20. As in the instant case the plaintiff did not pay the balance of the security money nor was a formal agreement in accordance with the requirement of Section 122 of the Constitution drawn up nor was possession of Compartments Nos. 1 and 2 of Billawar Range delivered to the plaintiff it is clear that there could be no question of failure of an existing consideration to attract the applicability of Article 68 of the Limitation Act.

21. Let us now turn to Article 92 of the Limitation Act (which corresponds to Article 62 of the Indian Limitation Act 1908) and Article 24 of the Indian Limitation Act, (1963) and see whether it can be appropriately applied to the present case. Although there has been a sharp divergence of opinion regarding the circumstances in which this Article can apply, the controversy seems now to have been set at rest by their Lordships of the Supreme Court. In *A. Venkata Subbarao v. State of Andhra Pradesh*, AIR 1965 SC 1773 Ayyangar J. while adverting to the expression 'for money re-

ceived by the defendant for the plaintiff's use' occurring in the Article posed the following questions:—

"Does Article 62 embody the essential elements of the action known in English Law and pleading as the 'action for money had and received to the plaintiff's use'? (2) Does the fact that at the moment of receipt the defendant intended to receive the money for his own benefit and not for the use of the plaintiff render the Article inapplicable? Stated in other terms, is a literal compliance with the words that the money must have been received by the defendant for the plaintiff's use necessary before the Article applies, or is it sufficient that the circumstances of the case are such that the plaintiff being entitled in equity to the money, the law would impute to the defendant the intention to hold it for the plaintiff's use and compel a refund of it to the plaintiff."

and then proceeded to quote with approval the following passage occurring in the judgment of Mookerjee J. in *Mohomed Wahib v. Mohomed Ameer*, (1905) ILR 32 Cal 527:—

"The Article, when it speaks of a suit for money received by the defendant for the plaintiff's use points to the well-known English action in that form. Consequently the Article ought to apply wherever the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which in law render the receipt of it, a receipt by the defendant to the use of the plaintiff."

22. It would also in this connection be advantageous to refer to the following passage occurring in headnote (b) of the said judgment of Ayyangar J:—

"In order to attract Article 62, it is not necessary that at the moment of the receipt of money the defendant should have actually intended to receive it for the use of the plaintiff and that it is sufficient if the receipt is in such circumstances that the law would impute to him an obligation to retain it for the use of the plaintiff and refund to him when demanded. Art. 62 most nearly approaches the formula of money had and received by the defendant for the plaintiff's use, if read as a description and apart from the technical qualifications imported in English Law and Procedure....."

23. Relying on the decision of the Supreme Court in *A. Venkata Subbarao v. State of Andhra Pradesh* (supra) a Bench of the Patna High Court in *Gouri Shankar v. Ram Kishun* AIR 1974 Pat 319 at pp. 323 and 324 said:—

"Generally it used to be urged that when the contract is void then the money lying with the defendant cannot be said to be money received by the defendant for the plaintiff's use. But in the aforesaid judgment of the Supreme Court it has been held that once the contract is held to be void, in eye of law the defendant does hold the

money paid to him by the plaintiff and the plaintiff is entitled to file a suit within 3 years of the payment of the money in question for refund of the same under the said Article. The said Article 62 came up for consideration before a Bench of this Court in *Smt. Ambika Bhawani Devi v. Chandrika Singh* AIR 1974 Pat 264. The learned Chief Justice of this Court, on consideration of the different authorities including the aforesaid Supreme Court judgment came to the conclusion that when the contract is void and money paid to the defendant is money received by the defendant for the plaintiff's use and a suit, within 3 years from the date when the money was received, has to be filed. In a contract for sale of land if the vendor has neither title nor possession of the land in question, the contract is void and the vendor will be deemed to hold the consideration money since the date of the receipt, for the plaintiff's use...."

24. Keeping in view the facts and circumstances and the frame of the plaint of the present case especially Para 7 thereof which avers that 'under the circumstances there could not be and there was no existing contract or any agreement between the parties as envisaged under Section 122 of the Constitution of Jammu and Kashmir' the money paid to the defendant by the plaintiff cannot but be deemed to have been received by the defendant for the plaintiff's use and the suit in my opinion, is governed by Article 92 of the Limitation Act. This view also receives support from the decision of the Lahore High Court in *Buta Ram v. Gurdas* reported in 46 Ind Cas 26 = (AIR 1918 Lah 249 (1)) where it was held that if a contract of sale between two parties is void ab initio and is not merely voidable then a suit brought by the vendee against the vendor for refund of the purchase money is governed by Article 62 of the Indian Limitation Act, 1908, (which corresponds to our Article 92) and not by Article 97 of the Indian Limitation Act, 1908, (which corresponds to our Article 68).

25. I am not inclined to agree with the view expressed in *Ram Lal Puri v. Gokalnagar Sugar Mills Co. Ltd.* AIR 1967 Delhi 91 where it was held that Article 120 of the Indian Limitation Act, 1908 (which corresponds to our Article 119) applies to the case of return of earnest money paid under the transaction which did not materialise as the attention of their Lordships does not in that case seem to have drawn to the decision of the Supreme Court reported in AIR 1967 SC 1162 (supra).

26. In view of the conclusions arrived at by me, there can be no question of the applicability of Article 119 of the Limitation Act.

27. I am therefore, of the opinion that the question referred to this Bench should be answered as follows:—

"In the facts and the circumstances of the case the plaintiff's suit is governed by

Article 92 of the Limitation Act and not by Article 145 or by Article 119 or Article 68 of the Limitation Act."

D. D. THAKUR J. (Majority view).—I have gone through the Judgment prepared by my learned brother, Jaswant Singh J. I fully endorse his view that Articles 68 and 145 of the Limitation Act have no application. For the reasons given by him and those to be stated in this judgment the aforesaid two articles cannot at all apply. I, however, respectfully record my dissent to the view that Article 92 of the State Limitation Act applies. I would, for the reasons given hereinafter, hold that no specific Article of the Limitation Act, as such, is applicable and that the case must fall under the residuary Article, being Article 119 of the State Limitation Act.

28-29. The facts have been stated by my learned brother in his judgment are quite a good detail and there is hardly any necessity of reiterating the same here. I would rest content only by making reference to those facts in a precise manner, wherever necessary deviating from the customary verbosity.

30. One of the conditions precedent for the application of Article 92 of the State Limitation Act is that the money sued for must have been received by the defendant for the plaintiff's use. The precise question, therefore, which invites an answer is, whether in the circumstances of this case the amount sued for had been received by the defendant for the plaintiff's use. It is not disputed that the amount was deposited by the plaintiff pursuant to the tender notice issued by the Conservator of Forests. This is also not disputed that the Conservator of Forests was not a person authorised by the Governor under Section 122 of the Constitution of Jammu and Kashmir to enter into a contract on behalf of the State. A perusal of clause 15 of the tender notice clearly suggests that the amount in question was received by the defendant as earnest money and that the same had to be appropriated by the defendant towards the security money in the event of the plaintiff's tender being successful. The plaintiff was entitled to the refund of the amount in case his tender was not accepted. According to clause 16 of the said notice the successful tenderer had to pay the balance of the security and sign the agreement within 15 days of the acceptance of his tender otherwise his earnest money would stand forfeited. It is admitted that no agreement envisaged by clause 16 of the tender notice was entered into between the parties. It is in this factual background that we have to decide whether the receipt by the defendant of the amount in question was for the plaintiff's use.

31. In order to approach the question it is necessary to examine the importance and the effect of the tender notice as a step towards the conclusion of a valid

contract. The Conservator of Forests not being the person authorised under Section 122 of the Constitution of Jammu and Kashmir and there being no formal contract concluded between the parties admittedly no contract valid in law enforceable by either party against the other can be said to have come into being for the simple reason that the requirements of Section 122 of the Constitution of Jammu and Kashmir did not stand satisfied. But that by itself does not resolve the difficulty. What even then remains to be examined is whether the tender notice and its terms can be deemed to be non-existent so as to disentitle the court to look into them. To me, it appears that the mere fact that the Conservator of Forests was not duly authorised under Section 122 of the Constitution of Jammu and Kashmir to issue a tender notice or to receive earnest money from the tenderers and the mere fact that such a tender notice could not, in any event, culminate in the conclusion of a valid contract enforceable in law do not make the tender notice as non-existent.

The principle behind the rule contained in Section 122 of the Constitution of Jammu and Kashmir, as is well settled, is that there should be a definite procedure according to which contract must be made by its agents in order to bind the Government so as to obviate the possibility of public funds being depleted by clandestine contracts made by any and every public servant. What was sought to be avoided by the incorporation of this rule in the Constitution was to save the Govt. from being saddled with liabilities for contracts not entered into by a person duly authorised to do so. The salutary principle which flowed from the said Section was to render a contract not consistent with the said Section as unenforceable and inoperative and nothing more. With this principle in view all that can be said regarding a contract inconsistent with the said constitutional prohibition is that the contract is unenforceable. The prohibition in my opinion does not have the effect of causing the disappearance of the contract. The record relating to a contract which is unenforceable in law very much remains visible to the court to be considered for any purpose other than the one prohibited by the Constitution itself.

So is the case in regard to other contracts forbidden by law specifically or rendered void by force of Sections 21 to 30 of the Contract Act. In all such contracts what the court is prohibited from doing is to enforce the same and nothing more. Both for purposes of common parlance and legal connotation the contracts remain contracts though unenforceable in law. What I propose to emphasise in consequence is the fact that the tender notice in the instant case remained available to the court for consideration of matters other than the enforceability of the contract sought to be founded on such a tender notice. That being so we cannot

close our eyes to the contents of clauses 15 and 16 of the said notice nor can we leave the same out of consideration while determining the purpose for which the amount of earnest money was deposited by the plaintiff, as such a purpose is of a collateral character not at all falling within the purview of the prohibition contained in Section 122 of the Constitution of Jammu and Kashmir. The question as to what was the purpose of payment by the plaintiff and the receipt of the money by the defendant though related to the contract can be taken into account for purposes of applying the relevant articles of the Limitation Act to a suit seeking refund of the amount received by the defendant.

Support for this view is amply available from a judgment of the Supreme Court in *Chattur Bhuj Vithaldas v. Moreswar Parashram*, reported as 1954 SCR 817 = (AIR 1954 SC 236). In that case one of the candidates for election to the Parliament of India had entered into a contract as a partner of a firm with the Central Government for the supply of goods. The contract subsisted on the date of nomination and the date of election. Defence to a challenge to the validity of the nomination paper of the candidate was that the contract in question did not satisfy the requirements of Art. 299 of the Constitution of India and therefore the subsistence of such a contract did not entail any disqualification of the candidate. Repelling the argument their Lordships of the Supreme Court observed that the contention was without force as this was the type of cases to which Section 230 (3) of the Indian Contract Act would apply. Bose J. who spoke for the Court observed as follows:

"Now Section 7 (d) of the Representation of the People Act does not require that the contracts at which it strikes should be enforceable against the Government, all it requires is that the contracts should be for the supply of goods to the Government. The contracts in question are just that and so are hit by the section."

32. If in that case the contract not being in accordance with the provision of Article 299 of the Constitution of India had been treated as non-existent there could be no question of recognising the existence of such a contract even though not enforceable in law. Apart from that the Supreme Court borrowed support from the provisions of Section 230 (3) of the Contract Act which provides that a contract entered into by an agent on behalf of his principal can be enforced against the agent personally where the principal, though disclosed cannot be sued. The aforesaid provision of the Contract Act also goes to suggest that the unenforceability of a contract because of its invalidity due to the absence of the requisite requirement of the Constitution does not make a contract non-existent so as to deprive the Court of

its power to examine the documents relating to the contract for a collateral purpose.

33. Support can be borrowed from the principle contained in Sections 17 and 49 of the Registration Act also. No authority is needed for the proposition that even when Section 49 prohibits receipt in evidence of any unregistered document required by Sec. 17 or by any provision of the Transfer of Property Act to be registered affecting any immovable property or any transaction affecting such property can be looked into for a collateral purpose of determining the nature of possession referable to such a document. I have said all this to support the view that even when the contract sought to be founded on the tender notice did not take a concluded shape or even if it would have taken such a shape, would not be enforceable in law, by itself does not remove from the record the tender notice and that the same can be examined for purpose of determining the nature of prospective relationship between the parties their intention and the purpose of receipt by the defendant of the amount in question.

34. Once the principle that the tender notice remains available for consideration of a collateral purpose is acknowledged it has to be seen as to whether the money in the instant case was received by the defendant for the plaintiff's use. As stated earlier the amount had to serve the purpose of earnest money till the date of the decision by the Government whether the plaintiff's tender had to be accepted or rejected. Needless to say that the earnest money in the hands of the defendant cannot be said to have been received by the defendant for plaintiff's use. The use, if any, was that of the defendant itself as if the plaintiff's tender would have been accepted as was done in this case, and if the plaintiff would have failed to execute the agreement as envisaged by clause 16 of the tender notice the amount of earnest money would stand forfeited to the State. This precisely is the defence of the defendant in the suit. It is a different question to decide whether the defendant could claim forfeiture of the amount because of the failure of the plaintiff to execute the agreement but it is not possible to deny that the money in the hands of the defendant was not to enure for the use of the plaintiff but it was a case where the money was received by the defendant for its own use.

Going a step further we find that in the event of a valid contract having concluded the amount was to be appropriated by the defendant towards the part payment of the security the value in percentage of which was specified in clause 16 itself. Here again it could not be said that the money was to be retained by the defendant for the plaintiff's use. The amount of security in a contract is intended to ensure the performance of a contract by the party depositing the security. The right of the party with whom

the security is deposited to forfeit the same in case of violation of any terms of the contract by the party depositing the security amount is provided in the contract itself. In nutshell therefore it is very difficult for me to hold that the receipt by the defendant of the amount in question in the instant case was for the plaintiff's use so as to attract the application of Article 92 of the Limitation Act.

35. There is one more angle of vision which necessitates exposition. One of the basic principles of the law of limitation is that the accrual of the right to sue must either synchronise with the starting point of limitation or precede it. We cannot conceive of a case where the period of limitation has started running against a plaintiff but he has no right to sue. Under Article 92 of the Limitation Act the starting point of limitation is the date of the receipt of money by the defendant. Admittedly from the date of the receipt of the money till the date of the decision of the Government regarding the acceptance or rejection of the tender of the plaintiff the plaintiff could not have any right to sue for the refund of the money. How could therefore we say that in this case even when the right to sue had not accrued to the plaintiff the period of limitation would have started running against him. This is also settled that where the words in the third column of an Article relating to starting point of limitation referred to a time before the date of accrual of cause of action for a suit it must be held that such words cannot apply to the suit or in other words that the article does not apply to such a suit. If this were not true there could be cases where the period of limitation might expire before the date of accrual of the cause of action. This also in my opinion is a circumstance to exclude the application of Article 92 of the Limitation Act.

36. My learned brother in his judgment has relied on a judgment of the Calcutta High Court in *Mohomed Wahib v. Mohomed Ameer*, reported as (1905) ILR 32 Cal 527. It was a case in which the defendant received money due to him on two deeds of mortgage. The plaintiff who was entitled to a share out of this money instituted a suit for recovery of his share from the defendant more than three years after the receipt of the money by him. The Calcutta High Court held that the money was received by the defendant for the plaintiff's use and that therefore the suit was governed by Article 62 of the Indian Limitation Act corresponding to Article 92 of the State Limitation Act. In the circumstances of that case, it appears to me, that no other article except Article 92 of the State Limitation Act could possibly apply, as the share out of the money received by the defendant was payable to the plaintiff and the only intention of the defendant in that case to receive the plaintiff's share was, to receive it for plaintiff's

use. The intention to receive the money for the plaintiff's use, in such circumstances could very reasonably and justifiably be imputed to the defendant as both in justice and equity the plaintiff was entitled to a share out of the money. The facts of this case being wholly different from those of the Calcutta case the view that Article 92 should have applied to the facts of the case remains wholly un-supportable.

37. My learned brother has relied upon a judgment of the Supreme Court in *V. Venkata Subbarao v. State of Andhra Pradesh*, AIR 1965 SC 1773. As a matter of fact the observations of the Calcutta High Court in *Mohomed Wahib's case* (supra) were reported with approval. In the case before the Supreme Court the money had been received by the State from the plaintiff as tax which the plaintiff was not bound in law to pay but which he was compelled and forced to pay because of threats and apprehension of legal process. Their Lordships of the Supreme Court held that the money received by the State at the very moment of the receipt in justice and equity belonged to the plaintiff rendering its receipt a receipt by the defendant for the use of the plaintiff and that the suit claiming refund of the money would be governed by Article 62 of the Indian Limitation Act. This judgment of the Supreme Court is also in my opinion clearly distinguishable from the facts of the present case.

If the receipt of the money by the State in the Supreme Court case as tax was illegal, the intention to receive the money for the plaintiff's use could be reasonably imputed to the State. But in the instant case, as stated earlier, on the own showing of the defendant the receipt of the money was not for the plaintiff's use. Moreover, there will be no occasion to impute such an intention to the defendant when the intention at the time of the receipt of the money is clearly discernible from various clauses of the tender notice which I have held earlier remains available to the Court to be looked into to judge the intention of the parties accompanying the receipt of the money by the defendant. At least till the time when the plaintiff refused to execute an agreement in favour of the State on the ground that the Conservator of Forests was not competent to enter into a contract on behalf of the State the intention of the plaintiff to pay and of the defendant to receive the money was unmistakably clear viz. that the amount shall be treated as earnest money with a concomitant right of the defendant to forfeit it in case of the failure of the plaintiff to execute an agreement. The following observations of Sarkar J. in the aforesaid judgment clarify the position beyond doubt.

"In order to attract Article 62 it is not necessary that at the moment of the receipt of the money the defendant should have actually intended to receive it for the use of

the plaintiff and that it is sufficient if the receipt is in such circumstances that the law would impute to him an obligation to retain it for the use of the plaintiff and refund to him when demanded. Article 62 most necessarily approaches the formula of money had and received by the defendant for the plaintiff's use, if read as a description and apart from the technical qualifications imported in English Law and procedure. However, if the right to refund does not arise immediately on receipt by the defendant but arises by reason of facts transpiring subsequently, Article 62 cannot apply, for it proceeds on the basis of that the plaintiff has a cause of action for instituting the suit at the very moment of the receipt."

38. It is manifest from the aforesaid observations that such an intention could be imputed to the defendant only if a contrary intention is not discernible from the facts attendant upon a case. Moreover, the right to file a suit immediately is a necessary condition for the application of the Article. As stated earlier the right to sue in this case, on the assumption that the tender notice was valid, could not accrue to the plaintiff till he had been declared to be an unsuccessful tenderer. For these reasons therefore the aforesaid judgment of the Supreme Court does not in my opinion constitute an authority for the proposition that Article 92 must be attracted in application to the case in hand.

39. Another judgment relied upon by my learned brother is one in Gouri Shankar Prasad v. Ramkishun reported as AIR 1974 Pat 319. In this judgment of the Patna High Court also support was borrowed from the judgment of the Supreme Court (supra). With utmost regard to their Lordships of the Patna High Court I am unable to agree that the ratio in the Supreme Court case could support the view expressed in the Patna judgment. Their Lordships of the Supreme Court did not consider in Venkata Subbarao's case the question as to whether in a case in which the amount is paid on the assumption that the prospective contract would be valid and enforceable in law an intention could be imputed to the recipient of the amount that the amount received would be held for the plaintiff's use. Shorn of the support of the Supreme Court judgment the reasoning adopted by their Lordships of the Patna High Court does not touch the question as to whether a contract or an important document in relation to a contract can be considered for an ancillary or a collateral purpose to judge the intention of the parties in regard to the payment of the receipt of the amount.

40. On the other hand the view expressed by the Delhi High Court in Ram Lal Puri v. Gokalnagar Sugar Mills Company Ltd. reported as AIR 1967 Delhi 91 is more appealable and I respectfully follow it.

41. There is another principle a reference to which is necessary to support the

conclusion I have arrived at. While it is settled that an article of the law of Limitation has to be given plain grammatical meaning howsoever great hardship may be to a plaintiff in a case, it is equally settled that if an article is capable of two interpretations, a construction favourable to the party whose valuable right has been taken away has to be preferred. Assuming therefore that Article 92 of the Limitation Act by some stretch of reasoning is capable of another interpretation bringing the suit within its purview it is comparatively more reasonable and just to avoid its application as Article 119 of the Limitation Act is comparatively more benevolent to the plaintiff for the reason that the limitation starts under that Article from the date of the accrual of the right to sue. In *P. N. Films Ltd. v. Overseas Films Corporation Ltd.* reported as AIR 1958 Bom 10 Chagla C. J. dealing with the aforesaid judgment observed as follows:—

"The Limitation Act must always be construed strictly against the party who sets up the plea of limitation. The Limitation Act deprives a party of a valuable right, and unless the provision in the Limitation Act is clear and beyond doubt, a benevolent construction, a construction favourable to the party whose valuable right is being taken away, must always be given.

42. To the same effect are the observations of the Rajasthan High Court in *Jethmal v. Amb Singh* reported as AIR 1955 Raj 97 (FB), of the Madras High Court in *Kandaswami Pillai v. Kennappa Chetty*, reported as AIR 1952 Mad 186 (FB) and of the Punjab High Court in *Sardarni Ram Khatri v. Hind Iran Bank Ltd.* reported as AIR 1962 Punj 528. So far the exclusion of Articles 68 and 145 of the Limitation Act is concerned I fully support the reasoning given by my learned brother Jaswant Singh J and state that it is neither a case of entrustment under Article 145 nor a case of failure of consideration so as to bring the case within the purview of Article 68 of the Limitation Act.

43. For the aforesaid reasons therefore I am of the opinion that Article 119 of the State Limitation Act is the only Article within the purview of which the present suit should fall. I answer the reference accordingly.

S. M. F. ALI C. J. (Majority view):— 44. I have gone through the lucid judgments prepared by my brothers, Jaswant Singh and Thakur JJ. After going through the same, I am afraid I cannot subscribe to the view expressed by Jaswant Singh J. On the other hand I find myself in complete agreement with the reasoning given and the view taken by Thakur J.

45. The question of applicability of any Article of the Limitation Act would have to depend upon the facts of each case and cannot be divorced from the terms and recitals of a transaction, the intention of the

parties and the surrounding circumstances. In the instant case the main centre of controversy between Jaswant Singh J. and Thakur J. is whether Article 92 or Article 119 of the Limitation Act applies to the facts of the present case. Thakur J. has rightly pointed out that having regard to the terms and recitals of the contract, in the instant case the contract being in the shape of an agreement, there is no evidence to show that money was ever intended to be used for the benefit of the plaintiff. Once this matter is determined, then the case is at once taken out of the purview of Article 92 of the State Limitation Act. My learned Brother Thakur J. has given cogent reasons for holding that the facts and circumstances of the present case are not covered by any particular Article of the Limitation Act, and therefore, the inference is irresistible that the only Article that would apply is the residuary Article namely, Article 119 of the Limitation Act.

46. The sheet anchor of the judgment of my learned brother, Jaswant Singh J. is a decision of the Supreme Court in AIR 1965 SC 1773 which, as rightly pointed out by Thakur J. is clearly distinguishable from the facts of the present case inasmuch as the money in that case had been received by the State from the plaintiff as tax which the plaintiff was bound in law to refund, as the tax was illegal. In these circumstances the facts of that case admit of no doubt at all that the money in question had not been received for plaintiff's use, and therefore Article 92 was not at all applicable to that case. The same, however, cannot be said in the present case as pointed out by my learned brother, Thakur J.

47. For these reasons I agree with my brother Thakur J. that the present suit is clearly covered by Article 119 of the Limitation Act. The case shall now go back to the learned Single Judge for disposing of the question of limitation in the light of the view expressed by the majority judgment.

Order accordingly.

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FULL BENCH

S. MURTAZA FAZL ALI C. J., JASWANT SINGH, MUFTI AND D. D. THAKUR JJ.

Lala Tota Ram, Plaintiff v, State, Defendant,

Civil Suit No. 65 of 1971, D/- 23-2-1975.

(A) Jammu and Kashmir Constitution Act (14 of 1996 Samvat), Section 56 (2) — Suits of the value of Rs. 20,000/- and above — Jurisdiction of High Court and District

*(The judgments in this case are printed in the order in which they appear in the certified copy —Ed.)

ES/ES/B619/75/DHZ

Judge. (J. and K. State Civil Courts Act (46 of 1977 Smt.), Section 20) — (Letters Patent of Jammu and Kashmir (1943) Cl. 10).

Section 56 (2) runs into two separate and distinct parts. The first part confers power on the High Court to hear and determine any original suit, a power which hitherto had not been exercised by the High Court. The first part therefore does empower the High Court to hear and determine original suit or proceeding, provided the value of these suits is Rs. 20,000/- or more. The second part, however, modifies a portion of Section 20 of the Civil Courts Act by providing that any suit whose value is Rs. 20,000/- or more shall not be instituted in the District Court but in the High Court. To this extent and to this extent alone the provisions of Section 20 of the Civil Courts Act have been modified both by the Constitution Act and the Letters Patent of Jammu and Kashmir High Court. Thus, suits of the value of Rs. 20,000/- or over would have to be instituted in the High Court and not in the District Court, but once the suits are instituted in the High Court, the bar of the District Court to entertain them is completely removed and those suits can be heard by the District Court if transferred by the High Court.

(Para 10)

Cases Referred: Chronological Paras

AIR 1965 Mad 149 = 1965-1 Mad LJ 203	6
AIR 1953 Cal 20 = 56 Cal WN 566	6
AIR 1943 Cal 450 = 47 Cal WN 662	5
(1867) 8 Suth WR 428 = 2 Ind Jur NS 327	6

I. K. Kotwa, for Plaintiff; Amar Chand, Addl. Advocate General, for Defendant.

JASWANT SINGH J.:— The plaintiff who is a contractor originally brought a suit on January 14, 1966, in the Court of the District Judge, Udhampur, for rendition of accounts relating to the execution of the work of construction of Motor Road from Forebay to the site of Power House of the Chenani Hydel Project (RD O, to RD 20,000) allotted to him vide agreement dated December 29, 1964, valuing it for the purpose of Court-fees and jurisdiction at Rs. 5,100/- A preliminary decree directing accounts to be taken was passed in the said suit by the District Judge on July 25, 1966. On appeal a Division Bench of this Court vide its judgment dated July 10, 1970, set aside the preliminary decree passed by the District Judge holding that the suit for rendition of accounts was not maintainable. The Bench however, granted an opportunity to the plaintiff to amend his plaint by claiming a specific sum and "putting a proper valuation on his claim in the trial Court." Pursuant to the aforesaid judgment of the Division Bench of this Court the amended plaint claiming Rupees 23,785.42 from the defendant was filed in the court of the District Judge on October 3, 1970. On an objection however, being

taken on behalf of the defendant to the effect that the valuation of the suit being in excess of the pecuniary jurisdiction of the Court, the plaint ought to be returned for presentation to the proper court under Order 7 Rule 10 (1) of the Code of Civil Procedure the District Judge passed an order on November 24, 1970, returning the plaint to the plaintiff for presentation to the proper Court.

Thereafter the plaintiff presented the plaint on the original side of this court on November 25, 1970. After the filing of the written statement by the defendant and the framing of the issues a prayer was made on behalf of the plaintiff before the learned Single Judge for transfer of the suit to the Court of the District Judge, Udhampur, on the ground that the cause of action having arisen within the territorial jurisdiction of that court, it would tend to the convenience of the parties if the suit is tried in that Court. This prayer was resisted on behalf of the defendant on the ground that the valuation of the suit being above rupees twenty thousand, it had not only to be instituted in but had also to be tried and disposed of by this Court. Reliance in support of this objection was placed upon Section 56 (2) of the Constitution Act, 1996 (Act XIV of 1996 Samvat: 1939 A. D.) and clause 10 of the Letters Patent issued to the High Court in 1943 A. D. It was on the other hand contended by the learned counsel for the plaintiff that the only restriction contained in the aforesaid provisions of law, relied upon by the plaintiff, was regarding the institution of a suit of which the value is Rs. 20,000/- or above and not regarding its trial and determination by the District Court which has unlimited pecuniary jurisdiction under Section 20 of the Civil Courts Act, 1977 (1920 AD). Feeling that the point raised before him involved an important question relating to the interpretation of Section 56 (2) of the Constitution Act, 1996, Clause 10 of the Letters Patent and Section 20 of the Civil Courts Act, 1977, (1920 A. D.), D. D. Thakur J has referred it for decision to this Bench. It is how the matter is before us.

2. The learned counsel for the parties have reiterated the submissions made by them before the learned Single Judge.

3. We have given our anxious consideration to the submissions of the learned counsel for the parties.

4. It will be seen that the jurisdiction exercised by the High Court in relation to the administration of justice immediately before the commencement of the Constitution of Jammu and Kashmir which came into force on January 26, 1957, was not only left intact but was specifically saved by Section 102 of the Constitution. Now the jurisdiction in relation to Civil Suits and original proceedings was before the coming into force of the Constitution of Jammu and Kashmir derived by the High Court from Section 56

(2) of the Jammu and Kashmir Constitution Act, 1996, and clause 10 of the Letters Patent which are reproduced below for facility of reference:

"Section 56 of the Constitution of J. and K.

(2) The High Court shall have jurisdiction to hear and determine any original Civil suit or other proceeding of which the value is not less than rupees twenty thousand and every such suit or proceeding shall be instituted in the High Court."

5. Clause 10 of the Letters Patent (Civil Original Jurisdiction of the High Court)

"And we do hereby ordain that the said High Court of Judicature shall have jurisdiction to hear and determine any suit or original proceeding of which the value is not less than rupees twenty thousand where the said suit or original proceeding relates to any right, title, or obligation arising in the towns of Srinagar and Jammu or anywhere else within our State and notwithstanding anything contained in any Section of the Code of Civil Procedure every such suit or proceeding shall be instituted in the said High Court."

The above quoted provisions which are identical consist of two parts. The first part is in the nature of an enabling provision. It appears to have been enacted to confer original jurisdiction on the High Court. But for this provisions the High Court which, no doubt, enjoyed extraordinary original jurisdiction under Section 11 of the Civil Courts Act, 1977 (1920 A. D.) would not have been in a position to entertain any civil suit or original civil proceeding as a court of ordinary original jurisdiction. The second part contains a rule of procedure. It regulates the forum for institution of civil suits and original proceedings by imposing an obligation on the suitors to file the aforesaid suits and original proceeding of the value of rupees twenty thousand and above on the original side of the High Court so that it may see as to which case of such a high valuation can be safely entrusted to the District Court for trial and determination, but does not oust or nullify the jurisdiction possessed by the District Court to try and determine suits of any value. This position would be clear from a perusal of Sections 19 and 20 of the Civil Courts Act, 1977. According to Section 19 which is a deeming provision, the Court of the District Judge has to be treated as the principal Civil Court of original jurisdiction in the District. Section 20 lays down that except as otherwise provided by any enactment for the time being in force, the Court of the District Judge shall have jurisdiction in original suits without limit as regards the value. Now the requirement of the institution of the civil suits and original proceedings of the value of rupees twenty

thousand and above in the High Court enjoined by Section 56 (2) of the Constitution Act, 1996, and Clause 10 of the Letters Patent cannot by any stretch of imagination be taken to rob the District Court of its jurisdiction to try and determine them. Reference in this connection may be made to a decision of the Calcutta High Court in *Mohini Mohan Das v. Kunjabehari*, AIR 1943 Cal 450, where while dealing with the effect of Section 15 of the Code of Civil Procedure, which provides that every suit must be filed in the Court of the lowest grade competent to try it, a Division Bench of that Court said:

"Section 15 lays down a rule of procedure and not of jurisdiction and it does not divest any Court of jurisdiction which it otherwise possesses under the Statute constituting such Courts."

6. It would also be useful at this stage to recall that it is a well settled canon of construction of statutes that exclusion of jurisdiction of an existing competent Civil Court will not be taken for granted in the absence of express words in or necessary intendment of the statutory provisions to that effect. Reference in this connection be made to AIR 1965 Mad 149. Again in *Prosunno Coomar Paul v. Koylash Chunder Paul*, (1867) 8 Suth WR 428, at p. 436, Peacock C. J. said:

"The jurisdiction of the ordinary courts of judicature is not to be taken away by putting a construction upon an Act of the Legislature which does not clearly say that it was the intention of the legislature to deprive such courts of their jurisdiction."

It is also well recognised that if there be any doubt about the ousting of jurisdiction of an existing court, the court would lean to such an interpretation which would maintain the existing jurisdiction. Reference in this connection may with advantage be made to a case reported as 56 Cal WN 566 = (AIR 1953 Cal 20).

7. It would be also profitable to bear in mind that the expressions "institute", "hear" or "try", and "determine" have different connotations and are used to indicate different stages of litigation.

8. In view of the above discussion, I am clearly of the opinion that after a suit of the value of rupees twenty thousand or above, is instituted in the High Court it can be transferred to the District Judge for trial and disposal. This view receives further support from the phraseology of Section 24 (1) (a) of the Code of Civil Procedure, 1977 (1920 A. D.) which runs thus:

"24 (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or dis-

posal to any Court subordinate to it and competent to try or dispose of the same."

The reference is answered accordingly. Let the case go back to the learned Judge, for disposal in accordance with law.

ALI, C. J.:— 9. I entirely agree with the judgment proposed by my learned brother Jaswant Singh J. and would like to add a few lines of my own on certain aspects of the case.

10. The sole point for determination in this case is as to the scope and ambit of Section 56 of the Jammu and Kashmir Constitution Act of 1996 and the provisions of our Letters Patent in so far as they are inconsistent with Section 20 of the Civil Courts Act. My learned brother has pointed out the history and the background against which both these provisions have been made. It seems to me that Section 20 of the Civil Courts Act is the general law which gives unlimited jurisdiction to the court of the District Judge to try suits of any value. Before the Letters Patent and Section 56 of the Constitution Act of 1996, the High Court had no original jurisdiction to try suits and this power was conferred on the High Court by virtue of the Constitution Act of 1996 and incorporated in the Letters Patent of this Court. A careful perusal of Section 56 (2) which runs thus:

"The High Court shall have jurisdiction to hear and determine any original Civil suit or other proceeding of which the value is not less than Rs. 20,000/- and every such suit or proceeding shall be instituted in the High Court"

shows that the provision runs into two separate and distinct parts. The first part is merely an enabling provision which confers the power on the High Court to hear and determine any original suit—a power which hitherto had not been exercised by the High Court. The first part therefore does empower the High Court to hear and determine original suits or proceeding, provided the value of these suits is Rs. 20,000/- or more. The second part, however, modifies a portion of Section 20 of the Civil Courts Act by providing that any suit whose value is Rs. 20,000/- or more shall not be instituted in the district Court but in the High Court. To this extent and to this extent alone the provisions of Section 20 of the Civil Courts Act have been modified both by the Constitution Act and Letters Patent of this Court. In other words the position is that whereas the District Judge continues to be competent to hear and try original suits of any value, he cannot entertain suits of the value of Rs. 20,000/- or over unless such suits after being instituted in the High Court or transferred to him. Thus the intention of His Highness in engrafting Section 56 of the Constitution Act appears to have been to insist that suits of a particular valuation, namely, suits of the value of Rs. 20,000/- or over shall be insti-

tuted only in the High Court and not in the district Court without disturbing the right of the district Court to hear and determine such suits. Thus the position is that suits of the value of Rs. 20,000/- or over would have to be instituted in the High Court and not in the district Court, but once the suits are instituted in the High Court, the bar of the District Court to entertain them is completely removed and those suits can be heard by the district Court if transferred by the High Court. The policy behind conferring powers of transfer of such suits to the district Court by the High Court is that the High Court will determine such types of suits whose value is Rs. 20,000/- or more having regard to the nature of the parties in the cases, the complexities of the questions involved in the suits and the stakes involved in the causes. Thus the High Court can retain those suits on its own file which involve complicated questions of law or important rights or where the valuation is extremely high. For these reasons I am unable to agree with the Addl. Advocate General that the effect of Section 56 is that suits of the valuation of Rs. 20,000/- or above should not only be instituted in the High Court but should also be heard and determined by it. In fact the provisions of Section 56 are not contradictory but complementary to Sec. 20 of the Civil Courts Act, and as I have already pointed out the first part of Section 56 regarding hearing and determining the suits and the second part of the Section regarding institution of the suits refer to different contingencies and have distinct underlying objects.

11. I, therefore, answer the question accordingly.

THAKUR J.:— 12. I agree with the judgment proposed by my Lord the Chief Justice. I have gone through the judgment prepared by my brother, Jaswant Singh J. I agree with the conclusion arrived at by him but am of the opinion that the principle contained in Section 15 Civil P. C. has no room for its application to justify the conclusion. Similarly the principle regarding the ouster of the jurisdiction of the Civil Courts too is beside the point. The case hinges upon the question as to how the seemingly conflicting provisions of the Constitution Act of 1996, the Letters Patent of this Court and those of the Civil Courts Act can be allowed to co-exist in harmony with each other, without negating the effect of any of these provisions. I am in complete agreement with that part of the judgment of my brother Jaswant Singh J. which relates to the harmonious interpretation of these provisions. The other principles from which support has been borrowed appear to me to be wholly inapplicable.

MUFTI BAHADUR-DIN FAROOQ J.:— I associate myself with the observations made by brother D. D. Thakur J. Answer accordingly.

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FULL BENCH

S. MURTAZA FAZL ALI, C. J. JASWANT SINGH AND MIAN JALAL-UD-DIN, JJ.

Triloki Nath Dhar, Appellant v. Dharmarth Counsel, Srinagar and others, Respondents.

Second Appeal No. 58 of 1973, D/- 20-9-1974**.

(A) Civil P. C. (1908), Section 9, O. 7, R. 2 and Order 20, Rule 16 — Suit for rendition of accounts — No suit for rendition of accounts can be maintained between promisor and promisee or between two contracting parties.

The scope of suit for accounts is limited to a certain number of cases for instance between one partner against another, between the beneficiary against the executor or administrator, between mortgagor against the mortgagee, between cestui que trust against a trustee and between principal against an agent. But no suit for accounts can be maintained by a promisee against a promisor or as between two contracting parties. Where 'A' undertakes to execute two works and executes an agreement in favour of 'B' for the construction of the said works, 'A' is a mere contractor who had contracted to execute the works as envisaged in the agreement. 'B' did not stand in any fiduciary capacity so as to impose upon him a legal obligation to render accounts to 'A', the relation being that of a contractor and contractee. No suit for rendition of account lies. AIR 1925 Lah. 100, Followed; AIR 1967 SC 333, Distinguished; AIR 1971 J. and K. 71 Referred to. (Para 7)

Cases Referred: Chronological Paras
AIR 1971 J. and K. 71 2, 5, 6, 10
AIR 1967 SC 333 = (1966) Supp 38 6, 10
AIR 1925 Lah 100 = 78 Ind Cas 959 7

J. L. Chowdhary, for Appellant; S. Lal, for Respondents.

MIAN JALAL-UD-DIN J.:— This is a plaintiff's second appeal and arises out of a suit for rendition of accounts brought by him in the court of City Munsiff Srinagar. The suit was dismissed by the trial Court on the ground that the claim for rendition of accounts did not lie. On appeal the Additional District Judge, Srinagar affirmed the judgment and decree of the trial Court and dismissed the appeal.

2. The appeal was originally heard by His Lordship the Hon'ble Chief Justice who was of the view that the appeal involved a substantial question of law as to the maintainability of a suit for accounts by an agent against the principal. The soundness of the

*(The judgments in this case are printed in the order in which they appear in the certified copy —Ed.)

** (Against order of Addl. Dist. J. Srinagar, D/- 30-12-1972).

view taken by a Division Bench of this court in AIR 1971 J. and K. 71 was challenged before His Lordship. The case was therefore, referred to the Full Bench. This is how the case has come before us.

3. Briefly speaking the facts of the case are that the plaintiff appellant brought a suit for rendition of accounts. The plaintiff averred that in the year 1956-57 tenders were invited by Mohtim Dharmarth defendant respondent for the construction of two works namely; (1) "Construction of office building at Basant Bagh" and (2) "construction of surrounding wall Samadhi Rambagh." Consequent upon the submission of tender by the appellant which was accepted the appellant deposited Rs. 400/- as earnest money with the defendant respondent and executed agreements for the construction of the aforesaid works. The appellant completed both the works in accordance with the terms of the agreements and the defendant respondent paid some amount of money to him on account, but no accounts were settled. The plaintiff further averred that there were huge outstandings against the defendant on account of the said works. The plaintiff was not certain about the actual outstanding due to him. Although he called upon the defendant to settle accounts with him, there was no response from the defendant's side. Hence the suit.

4. The defendants contested the suit on various grounds inter alia that the appellant had received final payment regarding the work of Basant Bagh as evidenced by the measurement book and as such there was no amount outstanding against the defendant on account of this work. Regarding the work of wall surrounding, Samadhi Rambagh it was pleaded that the plaintiff had already over drawn an amount of Rs. 493-5-3 and that the plaintiff had furnished a written undertaking agreeing that the amount be set off against him from the cost of material and earnest money. The suit for rendition of accounts was not maintainable.

5. After raising the necessary issues in the case the trial judge found that there was no relationship of principal and agent between the parties. It was, however, established from the evidence on record, that the plaintiff had maintained regular accounts about both the aforesaid works and had received full and final payment for office building at Basant Bagh in token thereof the plaintiff executed receipt in his own hand on page No. 35 of the Measurement Book. The plaintiff had failed to appear in the witness box to explain the position and he had also withheld the accounts. Therefore, in view of these facts suit for rendition of accounts did not lie. On appeal the learned Addl. District Judge concurred with this view of the trial judge and relying upon the observations made in AIR 1971 J. and K. 71 dismissed the appeal.

6. Shri J. L. Chowdhary appearing for the appellant has submitted that in the present case the relationship between the parties was that of Principal and agent. The defendant was under statutory obligation to render accounts to the plaintiff. The plaintiff had stated in the plaint that the accounts were with the defendant and therefore he was not in a position to know the exact amount due to him from the defendant on account of the works executed by him for the defendant. He has challenged the correctness of the view taken in AIR 1971 J. and K. 71 and has relied upon AIR 1967 SC 333 in support of his case.

7. On a careful consideration of the matter I am of the view that the proposition enunciated by the learned counsel that the suit for rendition of accounts in the present circumstances is maintainable does not hold good as no relationship of principal and agent is found to subsist between the parties. The plaint does not disclose the existence of any such relationship. According to the plaintiff he undertook to execute two works in respect of which he had submitted the tender. The tender was accepted by the defendant and he was called upon to execute an agreement in favour of the defendant for the construction of the said works. The relationship of the parties is governed by the terms of the agreement. The terms of the agreement do not indicate that the plaintiff was the agent or the principal of the defendant. He was a mere contractor who had contracted to execute the two construction works as envisaged in the agreement. The idea behind the relationship of principal and agent is that the agent must act on behalf of the principal and he must represent the principal in any such dealing. That exactly is not the case before us. The defendant did not stand in any fiduciary capacity so as to impose upon him a legal obligation to render accounts to the plaintiff; the relation being only that of a contractor and contractee/promisor and promisee. In such a situation it is doubtful if a suit for rendition of accounts can lie. The scope of suit for accounts is limited to a certain number of cases for instance between one partner against another, between the beneficiary against the executor or administrator, between mortgagor against the mortgagee, between cestui que trust against a trustee and between principal against an agent. But no suit for accounts can be maintained by a promisee against a promisor or as between two contracting parties. In AIR 1925 Lah 100 it was held that a suit for rendition of accounts brought by the sons of certain contractor who had done some building work for the defendant was not maintainable. It was observed that a right to claim a statement of accounts is unusual form of relief only granted in certain specific cases and is only to be claimed when the relationship between the parties is such that this is the only relief which would enable the claimant to satisfactorily assert

his legal rights. In that case it was found that there was no duty cast upon the defendant under the law to keep an account and that the proper relief to claim for the plaintiffs was to have brought a suit for specific amount and not to have asked the defendant to produce his accounts book as evidence in support of their case. In the instant case the plaintiff has not been able to show that there was a statutory obligation on the defendant to have maintained the accounts and that the plaintiff could not maintain any such accounts.

8. I, therefore, do not subscribe to the view propounded by the learned counsel for the plaintiff-appellant that the only relief available to the plaintiff in the present case was to bring a suit for rendition of accounts. There is, therefore, no merit in the contention raised before us.

9. Again, on facts as well the suit is not found maintainable because as affirmed by the plaintiff's own witness namely Jia Lal Mattu the plaintiff did maintain the accounts for both the aforesaid works. The trial Judge found that the plaintiff received full and final payment for the office building at Basant Bagh in token whereof he executed personally the receipt in his own hand on the measurement book. The plaintiff did not produce the accounts maintained by him in the court. He even did not appear as his own witness to explain his stand in the matter. The presumption is that the plaintiff knew as to what was the amount outstanding. He only pretended to know nothing about the matter and therefore clothed his suit with a prayer for rendition of accounts although the sum was ascertainable and could be ascertained from looking into the accounts maintained by him.

10. For the foregoing reasons it is found difficult to accede to the contention raised by the learned counsel for the plaintiff. Nothing has been shown as to how the view taken in AIR 1971 J. and K. 71 (supra) is not sound. The principle enunciated in the said authority does not militate against what has been observed in AIR 1967 SC 933. There can be no dispute with regard to the proposition that a principal can sue an agent for rendition of accounts. This is recognised by law relating to the contract. The Supreme Court has also held that the right of an agent to sue the principal for accounts is an equitable right arising under special circumstances and is not a statutory right. Where, therefore, all the accounts are in possession of principal and the agent does not possess accounts to enable him to determine his claim for commission against principal a suit for rendition of accounts is maintainable. But that is not the case before us. As already observed above the relationship of the parties is not as that of principal and agent but is purely on contractual basis, therefore the authority of the Supreme Court relied upon by the appellant is of little help to him in so

far as its application to the facts of the case before us are concerned.

11. For the foregoing reasons I see no force in this appeal which is hereby dismissed with costs.

S. M. F. ALI C. J.:— I agree.

JASWANT SINGH J.:— I agree.

Appeal dismissed.

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FULL BENCH

S. MURTAZA FAZL ALI C. J., JASWANT SINGH AND D. D. THAKUR JJ.

Smt. Daya Wanti Petitioner v. Deputy Custodian General and another, Respondents.

Writ Petn. No. 100 of 1972, D/- 20-1-1975.

(A) (J. and K.) Allotment Rules (Cabinet Order No. 578-C of 1954), Frs. 12, 2 (c) Proviso Explns. Rr. 15A, 15B (2) — Allotment of land in favour of displaced family consisting of D and her parents — Name of D entered in ration-card as head of family — Death of parents — D marrying A out of parental house — D's allotment held could not be cancelled — (Hindu Law — Succession — Survivorship).

D and her parents constituting a joint family, migrated from Pakistan to Jammu and settled in the refugee camp at Nagrota. A ration-card was also issued to the family in which, the father of D was shown as the head of the family. Because of father's illness, D's name was substituted as head of the family in 1967. On death of the parents, one R made an application before the Tehsildar that the land be allotted to him to make up his deficiency. The Patwari reported that the parents had died and that D had married one A of Delhi (i. e. out of her parental house). On this report, the Tehsildar recommended to the P. R. O. that the land may be allotted in favour of R. On being summoned, D objected before the P. R. O. to the proposed cancellation on the ground that during the lifetime of her father, she had been made the head of the family and an entry to that effect had been made in the ration-card as she was a "Khana Nisheen" Dukhtar. She further pleaded that as her husband refused to live with her at her parental house, the marriage had been dissolved. The PRO in the enquiry found that the dissolution of marriage between D and her husband was not proved but the allotment of D could not be cancelled. On revision, the Dy. Custodian General held that D on her marriage with A stood transplant-

*(The judgments in this case are printed in the order in which they appear in the certified copy.— Ed.)

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ed in the family of her husband and was thus not entitled to retain her own allotment. He accordingly cancelled the allotment. On writ petition by D against this order,

Held (1) that on the death of the father and the mother, D became the sole surviving member of the family and that the interests of her parents in the allotted land devolved upon D under the rule of survivorship.

(Para 8)

(2) That Pr. 12 of the Cabinet Order No. 578-C of 1954 did not permit retention of more than one allotment by the same family at the same time.

(Para 10)

(3) That D's family stood merged in that of her husband as there did not remain behind any member in the family after the marriage of D to maintain the existence and the entity of the family. As a direct concomitant of marriage, D and A would have shared their allotments but for the prohibitional provisions contained in Pr. 12 of the Cabinet Order 578-C. If the husband had no such allotment in his name, the allotment standing in the name of the wife could not be cancelled as in such an event even when the two families had united and merged into one, the allotment remained only one and Para 12 of the Cabinet Order could not apply. Division Bench judgment D/- 17-4-73 (J. and K.), Considered.

(Paras 12, 16, 20, 26)

(4) That in the absence of a specific provision in the Cabinet Order No. 578-C of 1954 debarring the recipient of rehabilitation ex gratia grant, A could not be equated with an allottee and the receipt of pecuniary assistance did not debar him from sharing an allotment with his wife the original allottee.

(Para 21)

(5) That the order of the Deputy Custodian General cancelling the allotment of the petitioner was not legally correct and suffered from a patent error of law.

(Paras 23, 25)

Cases Referred: Chronological Paras
(1973) Shant Kaur v. Divisional Commr.,
case decided on 17-4-1973 (J. and K.)

18, 19, 26

S. P. Gupta, for Petitioner; Amarchand
and C. M. Gupta, for Respondents.

D. D. THAKUR J.— This is a petition under Article 226 of the Constitution of India and is directed against the order of the Deputy Custodian General, Jammu, dated 13-10-1972 whereby he cancelled the allotment made in favour of the petitioner under Cabinet Order No. 578-C of 1954. The facts which led to the filing of this petition briefly put, are these:

Before 1947 the petitioner, her father Inder Singh and her mother Kartar Kaur constituted a joint family. The family lived in Rawalkot Tehsil Plandari at present under Pakistan occupation. In 1947 as a result of Pakistan aggression the family migrated to Jammu and settled in the refugee camp at

Nagrota. A ration-card was also issued to the family in which Inder Singh, the father of the petitioner was shown as the head of the family. It is stated in the petition that Inder Singh was ailing for a long time before his death and because of his illness the petitioner's name was substituted as head of the family for that of Inder Singh by the Tehsildar Ranbirsingh Pura vide his order dated 29-3-1967. Inder Singh died in January 1971 whereas his wife had died long before him. Respondent No. 2, therefore, made an application before the Tehsildar Ranbirsingh Pura that Inder Singh and his wife, Kartar Kaur, having died issueless the land held by Inder Singh and his family be allotted to him to make up his deficiency. On this application, it appears, that the Tehsildar obtained the report of the Patwari who reported that Inder Singh and Kartar Kaur had died and that the petitioner had married one Avtar Singh of Delhi. On this report of the Patwari the Tehsildar recommended to the Provincial Rehabilitation Officer that the land may be allotted in favour of respondent No. 2.

The Provincial Rehabilitation Officer summoned the petitioner. The petitioner objected to the proposed cancellation on the ground that during the lifetime of her father, Inder Singh, she had been made the head of the family and an entry to that effect had been made in the ration-card as she was a 'Khana Nisheen' Dukhtar. Being a Khana Nisheen Dukhtar she was permanently residing in the house of her father. She further pleaded that as her husband refused to live with her at her parental house the marriage had been dissolved. Regarding payment of Rs. 3500/- as ex gratia grant to the petitioner's husband, it was stated that the same could not debar her from retaining the land in her allotment. The PRO in the course of enquiry found vide his judgment dated 2-3-1973 (sic) that the dissolution of marriage between the petitioner and her husband was not proved but he held that the allotment of the petitioner could not be cancelled in view of S. R. O. No. 328 of 1969. Against this order of the P. R. O. respondent No. 2 filed a revision petition before respondent No. 1 who allowed the same vide his order dated 13-10-1972 and held that the petitioner on her marriage with Avtar Singh stood transplanted in the family of her husband and was thus not entitled to retain her own allotment. He accordingly allowed the revision, set aside the order of the P. R. O. and cancelled the allotment. As stated earlier this petition is directed against the aforesaid order of the Deputy Custodian General.

2. The petition came up for hearing before Jaswant Singh J. sitting singly who was of the opinion that important question of law being involved the petition should be heard by Full Bench. This is how the petition is before the Full Bench.

8. The petitioner herein contended that she having become the head of the family in place of her father Inder Singh, was entitled to retain the allotment and the order of the Deputy Custodian General cancelling the allotment was patently erroneous in law and that having become the sole surviving member of the family the interests of her parents in the land had devolved on her under Rule 15-B (2) of Cabinet Order 578-C added by SRO No. 378 of 1969.

4. On behalf of the respondent it has been contended that in consequence of the petitioner's marriage with Avtar Singh the petitioner had become a member of the family of Avtar Singh and therefore she was not entitled to retain the land.

5. The short question therefore which falls for consideration is:

Whether, the allotment of land made in favour of a displaced family is liable to be cancelled if the girl who is the sole surviving member of the family and who is entered in the ration-card as head of the family is married out of her parental house.

6. SRO 328 of 1969 whereby R. 15B (2) was added to Cabinet Order No. 578-C of 1954 reads as under:—

"After an allottee has died or otherwise ceased to be in possession of the allotted land his interest in the allotted land shall devolve on the other members of his family (in whose favour allotment of land had been originally made or regularised under the said Rules) under the rule of survivorship and not on those who were not included in such family at the time of first valid allotment."

7. On the strength of this Rule it is contended that the petitioner is solely entitled to retain the whole of the allotted land even after the death of her parents who were the members of the family at the time of the allotment. It is further submitted that the intention of the Government in inserting the aforesaid Rule in Cabinet Order No. 578-C was to give absolute rights to the members of the family in whose favour the allotment was made. Otherwise, it is argued, the rule of survivorship would not have been made applicable to the devolution of interest in the allotted land.

8. There can be no two opinions that on the death of the father and the mother of the petitioner the petitioner became the sole surviving member of the family and that the interests of her parents in the allotted land devolved upon the petitioner under the rule of survivorship. But the question as to what should be the position in the event of the petitioner marrying out of her parental house cannot be decided on the anvil of this rule but has to be considered on the basis of the rest of the paras contained in Cabinet Order No. 578-C of 1954 and the general principles of law. The rule is silent as to a contingency where the sole surviving member of the family in whose favour the allot-

ment has been made happens to be a girl and is married out of the parental house.

9. A reference to the provisions of the Cabinet Order No. 578-C would show that the intention in promulgating the aforesaid Cabinet Order was to lay down the precise terms the manner in which the allotments had to be made and cancelled, the conditions necessary to be satisfied to entitle a person to allotment and the units of allotment. Relevant clauses of Para 12 of the aforesaid Cabinet Order read as under:

"12. Cancellation of spurious allotments of land.— (i) No family shall retain with itself more than one allotment of land exceeding the unit prescribed in Para 2 or made under a valid order before the coming into force of this order.

(ii) If any family has secured more than one allotment of land as indicated in clause (i) in its favour, it may within one month of the date of the commencement of this order communicate the fact to the Tehsildar of the Tehsil in which it has been allotted land or to the Provincial Rehabilitation Officer, indicating at the same time the particular allotment which it wants to retain with itself. Upon such information being communicated, the Tehsildar or the Provincial Rehabilitation Officer shall cancel the spurious allotment or allotments made in favour of such family."

10. A perusal of this para would show that the Cabinet Order No. 578-C of 1954 discountenanced the idea of a family having more than one allotment in its favour. That was obvious because the paucity of the land at the disposal of the Government in comparison to the number of displaced persons to be settled on agricultural lands did not permit an inequitable distribution of land amongst the displaced families. It is therefore certain that Cabinet Order No. 578-C of 1954 did not permit retention of more than one allotment by the same family at the same time.

11. The next question which therefore arises is: Do the two families namely the one of which the petitioner was the head and later its sole surviving member and the family of Avtar Singh to whom the petitioner was married unite together to constitute one family, or they remain as separate families so as to be entitled to separate allotments and benefits?

12. In my opinion in a case of this nature the girl's family stands merged in that of the husband as there does not remain behind any member in the family after the marriage of the girl to maintain the existence and the entity of the family. There may be cases where the husband and wife live separately even after marriage because of judicial separation or for any other similar cause. That may be a different case altogether. We are not, however, concerned with those contingencies in this petition particularly when

was made contrary to the basic rule of natural justice.

13. In the result, this petition is allowed with a direction to respondent 1 to forbear from enforcing the letter dated 31-7-1972 against the petitioner and respondents 3 to 7, with liberty reserved to respondent 1 to take appropriate decision after affording them a reasonable opportunity of being heard.

14. In the circumstances, I make no order as to costs.

Petition allowed.

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D. M. CHANDRASHEKHAR AND
D. NORONHA, JJ.

B. Srinivasa Reddy and another, Appellants v. Khatumbi and others, Respondents.

Misc First Appeal No. 136 of 1973, D/- 21-3-1974.*

(A) Motor Vehicles Act (1939), Ss. 110-A, 96 (1) — Mysore Motor Vehicles Rules (1963), R. 346—Necessary parties—After the insurer is served with a notice, Tribunal could not delete the insurer as a party to the proceedings even if the claimant does not press his claim against the insurer.

Neither the Act nor the Rules requires that the claimant making an application under S. 110-A should implead as respondent or opponent the insurer of the vehicle involved in the accident. A duty is cast on the Tribunal to send a notice of such application to the insurer under Rule 346 of the Mysore Motor Vehicle Rules, 1963. When such notice is issued to the insurer, he can be regarded as a party to the proceedings before the Tribunal. Then the claimant has no right to give up the insurer as a party to the proceedings before the Tribunal, nor can he ask the Tribunal to delete the insurer as a party to those proceedings.

(Paras 17, 20)

So long as the claimant does not give up his claim against the owner of the vehicle involved in the accident, the insurer to whom a notice has already been issued, is necessary party because under Section 96 (1) of the Act the insurer is liable to pay the person entitled to the benefit of the decree passed against the insured. AIR 1970 Bom 337, AIR 1969 Madh Pra 89 and M. F. A. No. 353 of 1969 (Karnataka), Rel. on. (Paras 21, 22)

(B) Motor Vehicles Act (1939), S. 110-D—Civil P. C. (1908), S. 100—Ques-

*(Against judgment and award of Dist. J., Tumkur, D/- 7-11-1972.)

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tion of law — Question whether claimant could give up insurer as a party to the proceedings and whether Tribunal can decline to make an award against insurer — Questions are pure questions of law and can be raised for first time in appeal.

(Para 23)

Cases Referred: Chronological Paras

AIR 1970 Bom 337 = 72 Bom LR 482 19

AIR 1969 Madh Pra 89 = 1969 Acc CJ 3

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(1969) M. F. A. No. 353 of 1969 (Karnataka)

18

AIR 1959 SC 1331 = (1960) 1 SCR 168 20

H. Kumaraswamy for M. S. Gopal, for Appellants; P. K. Basheer Ahmed (for Nos. 1 to 6) and R. Narayana (for No. 7), for Respondents.

CHANDRASHEKHAR, J.:— This appeal under Section 110-D of the Motor Vehicles Act, 1939, (hereinafter referred to as the Act), is from a judgment of the Motor Accidents Claims Tribunal, Tumkur, (hereinafter referred to as the Tribunal), awarding compensation for the death of a person in an automobile accident. Appellants 1 and 2 are the owner and the driver respectively of the motor bus involved in the accident. Respondents 1 to 6 herein (hereinafter referred to as the claimants) are the wife and children of Kaza Hussain, the victim of the fatal accident. Respondent 7 herein is the Insurance Company with which the motor bus had been insured against third party risk.

2. The claimants presented an application under Section 110-A of the Act before the Tribunal, claiming a compensation of Rs. 25,000 for the death of Kaza Hussain. In the proceedings before the Tribunal, the appellants and the Insurance Company were respondents 1 to 3, respectively. To that application the appellants filed one set of objections and the Insurance Company filed an independent statement of objections in which it pleaded, *inter alia*, that the bus was driven by a person who did not possess a valid driving licence and that the bus did not also have a valid permit.

3. The Tribunal framed issues and proceeded to try the case. On 3-8-1972 the claimants filed a memo stating that they did not intend to press their claim against the Insurance Company and that their claim against it (the Insurance Company) might be dismissed as not pressed. On the basis of that memo, the Tribunal made an order on that day itself dismissing the application as against the Insurance Company. Subsequently, the Tribunal recorded the evidence of witnesses examined by the claimants. On 27-10-1972, the Tribunal adjourned the case to 3-11-1972 stating that both sides should close the evidence on 3-11-1972. On 3-11-

1972 the Tribunal recorded the evidence of the claimants' witnesses. The claimants closed their evidence. The appellants were not ready with their witnesses on that day. They prayed for an adjournment to enable them to produce their witnesses. The Tribunal declined to grant an adjournment, heard arguments on that day itself and pronounced judgment on 7-11-1972 awarding a compensation of Rs. 5,000 against the appellants only.

4. In this appeal Mr. Kumaraswamy, learned counsel for the appellants, urged the following two contentions:

- (i) The Tribunal should have held that the Insurance Company was a necessary party and should not have dismissed the Claimants' application as against the Insurance Company.
- (ii) The Tribunal was not justified in refusing an adjournment and thereby depriving an opportunity to the appellants to examine their witnesses.

5. Elaborating his first contention, Mr. Kumaraswamy argued that after the Insurance Company was served with a notice, the Tribunal should not have dismissed the application as against it (the Insurance Company) merely because the Claimants did not press their case against it. On the other hand, Mr. R. Narayan, learned counsel for the Insurance Company, contended that the Claimants had the choice to implead or not to implead the Insurance Company as a party and to ask or not to ask for any judgment against it and that if the Claimants did not themselves press their claim as against the Insurance Company, the Tribunal could not compel the Insurance Company to continue as a party and could not pass a judgment against it.

6. To appreciate the rival contentions of the parties it is necessary to set out the relevant provisions of the Act and the rules made thereunder relating to the procedure before the Tribunal.

7. Sub-sec. (1) of Section 96 of the Act provides, inter alia, that if a judgment in respect of any such liability as is required to be covered by a policy under cl. (b) of sub-section (1) of Section 95, is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor in respect of the liability, together with costs and interest,

8. Sub-section (2) of Section 96 of the Act provides that no sum shall be payable by an insurer under sub-section (1) of Section 95 in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings. That sub-section also provides that the insurer to whom notice of any such proceeding is given, shall be entitled to be made a party thereto and to defend the action on any of the grounds specified in cls. (a) to (c) of that sub-section.

9. Section 110-B of the Act provides, inter alia, that in making the award the Tribunal shall specify the amount payable by the insurer, the owner or the driver of the vehicle involved in the accident or by all or any of them.

10. Section 111-A of the Act empowers the State Government to make rules for the purpose of carrying into effect the provisions of Sections 110 to 110-E and such rules may, in particular, provide, inter alia, for the form of application for claims of compensation and the particulars it may contain and the procedure to be followed by the Claims Tribunal in holding enquiry under Chapter VIII of the Act. Such rules may also provide which of the powers vested in a Civil Court may be exercised by the Tribunal.

11. Rule 343 of the Mysore Motor Vehicles Rules, 1963 (hereinafter referred to as the Rules) made by the State Government, in exercise of the powers conferred by Section 111-A of the Act, provides, inter alia, that every application for payment of compensation made under Section 110-A of the Act shall be made in Form No. 82 appended to the Rules.

12. Rule 346 of the Rules provides, inter alia, that the Tribunal shall send notice together with copies of the application under Section 110-A of the Act to the owner of the motor vehicle involved in the accident and to its insurer.

13. Rule 360 of the Rules provides, inter alia, that certain provisions of the First Schedule to the Code of Civil Procedure shall apply to the proceedings before the Tribunal. The provisions of Order I of the Code of Civil Procedure which deal with parties to a suit, are not made applicable to the proceedings before the Tribunal.

14. Form No. 82 in the Schedule to the Rules specifies the particulars to be stated in such application. Such particulars include the name and the address of the insurer of the vehicle involved in an accident.

15. Neither the Form (Form No. 82) nor any provisions of the Act or the Rules, requires the claimant to implead the insurer as a party to his application under Section 110-A of the Act. In fact, the cause title containing the names of parties to the proceedings before the Tribunal, is not shown as a part of the form. The form merely provides for mentioning the names and the addresses of the owner and the insurer of the vehicle involved in the accident.

16. Rule 346 of the Rules requires the Tribunal to send notices along with copies of the application under Section 110-A of the Act, to the owner and the insurer of the vehicle involved in the accident.

17. Neither the Act nor the Rules requires that the claimant making an application under Section 110-A of the Act, should implead as respondent or opponent the insurer of the vehicle involved in the accident. A duty is cast on the Tribunal to send a notice of such application to the insurer. When such notice is issued to the insurer, he can be regarded as a party to the proceedings before the Tribunal.

18. A similar view was expressed by a Bench of this Court consisting one of us, in M. F. A. No. 353 of 1969 (Karnataka) (The Concord of India Insurance Co. Ltd. v. Rudregowda). There, the question that arose for determination was whether an insurer can be impleaded as a party to an application under Section 110-A of the Act after the expiry of the period of limitation prescribed by sub-Section (3) of that section, for presentation of such application. Dealing with that question, this is what that Bench observed:

"There is no express provision in the Act or the rules made thereunder, which requires that the insurer of a motor vehicle involved in an accident, should be impleaded as party in a petition under Section 110-A in which compensation is claimed as against the owner of that vehicle.....

.....
All that is necessary to make the insurer so liable, is to give him through the court or the Tribunal, notice of the proceeding, in which compensation is claimed as against the insured."

19. A like view was taken by a Bench of the Bombay High Court in Bessarlal v. Motor Accidents Claims Tribunal, Greater Bombay. (AIR 1970 Bom 337). Their Lordships observed at p. 340:

"It is quite clear on a reading of the prescribed form that it does not direct the claimant for compensation to include in the application any party as defendant and/or opposite party. We apprehend

that all the relevant facts are in this connection left to be ascertained by the Claims Tribunal which has been entrusted with the very serious duties of finding out all the parties who may be liable to pay compensation by recording evidence to be produced by the parties concerned....."

20. As the insurer becomes a party to the proceedings before the Tribunal by virtue of the notice issued to him by the Tribunal, the claimant who makes an application under Section 110-A of the Act, has no right to give up the insurer as a party to the proceedings before the Tribunal, nor can he ask the Tribunal to delete the insurer as a party to those proceedings. The view we have taken receives support from the following observations of a Bench of the Madhya Pradesh High Court in M. P. State Road Transport Corporation v. Jahiram, 1969 Acc CJ 3, at p. 7 = (AIR 1969 Madh Pra 89 at p. 91): ".....Their Lordships of the Supreme Court have in British India General Insurance Co. Ltd. v. Captain Itbar Singh, (AIR 1959 SC 1331) indicated the nature of defences that are available to an insurer upon being impleaded as a party. We fail to appreciate how can the statutory defences be raised unless the insurer" is made a party. That is the only manner in which the insurer can avoid its liability. In view of the clear provisions contained in Section 96 (2) and (6) of the Motor Vehicles Act, it can hardly be asserted that an insurer is not a party to an action for recovery of damages. Thus, the insurer must, of necessity, be a party to such proceedings."

21. After notice was issued to the Insurance Company and it filed its statement of objections and the Tribunal framed issues as to whether the Insurance Company was not liable to pay any compensation to the claimants, the Tribunal could not, in our opinion, delete the Insurance Company as a party to the proceedings even if the Claimants stated that they did not press their case against the Insurance Company. So long as the Claimants did not give up their claim against the owner of the vehicle involved in the accident, the insurer to whom a notice had already been issued, was necessary party because under S. 96 (1) of the Act the insurer is liable to pay the person entitled to the benefit of the decree passed against the insured.

22. Thus, the Tribunal was not justified in dismissing the Claimants' application as against the Insurance Company merely because the Claimants did not press their claim against the Insurance Company. The judgment of the Tribunal is vitiated by this material illegality.

23. However, Mr. Narayan contended that the appellants who were res-

pondents 1 and 2 before the Tribunal, did not urge before the Tribunal that the Claimants could not give up the Insurance Company as a party to the proceedings and that hence they should not be permitted to urge this point in this appeal. The question whether the Insurance Company can be given up by the Claimant and whether the Tribunal can decline to make an award against the Insurance Company solely on the ground that the Claimant did not press his claim against the Insurance Company, are pure questions of law and do not involve investigation of any disputed questions of fact. Hence, there is no impediment for our permitting those questions being raised for the first time in this appeal.

24. There is considerable force in the contention of Mr. Kumaraswamy that the Tribunal should not have refused the appellants' request for an adjournment to enable them to examine their witnesses. But, it is not necessary to express any final opinion on this point as the judgment of the Tribunal has to be set aside on the other ground stated earlier.

25. We may also point out another error committed by the Tribunal. The Tribunal awarded compensation to the Claimants under the head 'pecuniary loss to the dependents'. The Tribunal has overlooked that in the case of a fatal accident, compensation also be given under another head 'loss of expectation of life.'

26. In the result, we allow this appeal, set aside the judgment of the Tribunal and remand the case to the Tribunal. The Tribunal is directed to treat the Insurance Company as continuing to be a party in the proceedings. It is likely that the Insurance Company did not cross-examine P. Ws. 1 to 3 thinking that it (the Insurance Company) had ceased to be a party to the proceedings in view of the Claimants themselves stating that they did not press their case against the Insurance Company. We direct the Tribunal to recall P. Ws. 1 to 3 if the Insurance Company desires to cross-examine them. We also direct the Tribunal to afford opportunity to the appellants and the Insurance Company to examine witnesses, if they so desire. It will be open to the Claimants also to adduce further evidence if they so desire.

27. In the circumstances of the case, we direct the parties to bear their own costs in this appeal.

28. The Tribunal is directed to dispose of the case very expeditiously.

Appeal allowed.

AIR 1975 KARNATAKA 196

V. S. MALIMATH, J.

Smt. Nanjamma, Appellant v. Chandrappa, Respondent.

Second Appeal No. 781 of 1971. D/- 7-3-1974.*

(A) Hindu Women's Right to Property Act (1933), S. 8 (1) (d) — Propositus leaving behind one son — Another son born posthumously — Daughter not entitled to benefit of Section 8 (1) (d).

The reason is that it is not a case of property passing to a 'sole surviving coparcener' because under the fiction of Hindu Law a posthumously born son must be deemed to have been born immediately before the death of the father and thus the property passed by survivorship to both the sons. Held, further, that since the daughter got married before the death of one of the sons i. e. before the death of one of her brothers and thus before the property passed on to the remaining brother by survivorship, she could not also get benefit of S. 8 (1) (d).

(Paras 5, 6, 10)

(B) Hindu Women's Right to Property Act (1933), S. 8 (1) (b) — Unmarried sister — Can claim share only if partition takes place between brothers. AIR 1968 SC 209, Followed.

(Para 7)
Cases Referred: Chronological Paras
AIR 1968 SC 209 = (1968) 1 SCR 124

N. C. Biligiri Rangiah, for Appellant;
S. V. Narasimhan, for Respondent.

JUDGMENT:— This is a plaintiff's second appeal against the decree passed by the Civil Judge, Chickmagalur, in R. A. No. 67 of 1970, reversing the decree passed by the Munsiff, Tarikere, in O. S. No. 328 of 1967.

2. The plaintiff instituted the suit for partition and possession of half-a-share in the suit properties. The admitted facts of the case are that one Kollurappa was the propositus who died in or about 1936 leaving behind his widow Kariyavva his son Mallappa and his daughter Nanjamma (the plaintiff). The defendant Chandrappa was, on the date of the death of Kollurappa, in the womb of Kariyawva and was born only a couple of months after his father's death. Mallappa died unmarried. By the time Mallappa died, Nanjamma, the plaintiff, had got married. She had claimed a share in the joint family properties under Cl. (d) of sub-section (1) of Section 8 of the Hindu Women's Right to Property Act, 1933 (hereinafter referred to as the 'Act'), which came into force on 1-1-1934. The

* (Against judgment and decree passed by Civil J., Chickmagalur, in Appeal No. 67 of 1970. D/- 10-6-1971).

suit was resisted by the defendant who, *inter alia*, took the stand that as the plaintiff is the married sister of his, she having got married long before the death of her brother, Mallappa, is not entitled to claim any share in the suit properties. The Court of first instance accepted the plaintiff's case and made a decree for partition and separate possession, as prayed for by her. On appeal, the learned Civil Judge reversed the said decree and dismissed the plaintiff's suit. Hence this second appeal by the plaintiff.

3. Sri N. C. Biligiri Rangaiah, learned counsel appearing for the appellant, contended that the plaintiff became entitled to half-a-share in the suit properties immediately on the death of her father, Kollurappa, as Mallappa got the suit properties by survivorship, he being the sole coparcener in the family. His submission is that the defendant being a posthumous child, he must be regarded as having been born only after the right to a share in the suit properties accrued to the plaintiff under clause (d) of sub-section (1) of Section 8 of the Act.

4. Sub-section (1) of Section 8 of the Act confers right on certain females to a share in the coparcenary property, when there is a partition in the family or when the family property passes on to a single coparcener by survivorship. Cl. (a) of sub-section (1) of Section 8 provides that the mother, the unmarried daughters and the widows and unmarried daughters of his predeceased undivided sons and brothers who have left no male issues shall be entitled to a share when the partition of the joint family property takes place between the said person and his son or sons. Clause (b) of sub-section (1) of Section 8 provides that the mother, unmarried sisters, the widow and unmarried daughters of the predeceased undivided brothers who have left no male issues shall be entitled to a share at a partition of the joint family property among the brothers. Clause (c) of sub-section (1) of Section 8 provides that clauses (a) and (b) shall also apply *mutatis mutandis* to a partition among other coparceners in a joint family. The provisions of clauses (a), (b) and (c) of sub-section (1) of Section 8 of the Act, it is not disputed, are not attracted to the facts of the present case. Clause (d), on which the appellant — plaintiff — has based her claim, reads as follows:—

"(d) Where joint family property passes to a single coparcener by survivorship, it shall so pass subject to the right to share all the classes of females enumerated in the above sub-sections."

5. The actual share, to which a female is entitled under sub-section (1), is regulated by the provisions of sub-section

(2) of Section 8 of the Act. The occasion that gives right to a female enumerated in clauses (a) to (c) of sub-section (1) of Section 8 to a share in the joint family property under clause (d) of that sub-section is, when the family property passes on to a single coparcener by survivorship. The argument constructed by Sri Biligiri Rangaiah is that such an event took place when the plaintiff's father Kollurappa died leaving behind him, Mallappa as a sole surviving coparcener. If the right to a share accrued to the plaintiff under clause (d) of sub-section (1) of Section 8 on the date of death of Kollurappa, it is contended that the birth of the defendant on a subsequent date should be ignored for the purpose of ascertaining of the right to which the plaintiff is entitled in the joint family properties. This argument fails to take notice of the position of a posthumous son under the Mithakshara Law. The defendant who was in the womb of his mother Kariyavva at the time of the death of Kollurappa, must, for the purpose of Law, be regarded as having been born before the death of Kollurappa and the rights of the surviving coparceners have to be worked out on that basis. In Section 270 of Mulla's Hindu Law, 13th Edition, this is what is stated at page 309:

"..... Under the Hindu Law a son begotten (or conceived, or in his mother's womb) is equal, in many respects, to a son actually in existence. Thus a son in his mother's womb and this also applies to a daughter is entitled to inheritance, if born alive. He is also entitled to a share on partition. Further, he is entitled to take coparcenary property by survivorship as against a legatee of such property under his father's will. That is to say, just as a son living at the time of his father's death is entitled on his father's death to take coparcenary property by survivorship, so is a son who is in his mother's womb at the time of the father's death. The father cannot bequeath coparcenary property to a third person so as to defeat the son's right of survivorship whether the son was in existence at the time of his death or was in his mother's womb at the time. Lastly, an alienation that can be impeached by a son actually existing at the time of alienation can also be impeached by a son who was in his mother's womb at the time."

6. The fiction under Hindu Law is that a posthumously born son must be deemed to have been born immediately before the death of the father of the posthumous son. If this fiction is given effect to then it follows that the joint family property did not pass to Mallappa by survivorship on the death of Kollurappa, but that the property passed on by

survivorship to Mallappa as well, as his brother, Chandrappa, the defendant. It therefore follows that on the death of Kollurappa the property did not pass on to a single coparcener by survivorship in order to attract the provisions of clause (d) of sub-section (1) of Section 8 of the Act. Hence, it is not possible to accede to the contention of Sri Biligiri Rangaiah that for the purpose of ascertaining the right of the plaintiff, the birth of the defendant Chandrappa, who was in the womb of his mother Kariyavva, on the death of Kollurappa should be ignored.

7. It was next submitted by Sri Biligiri Rangaiah that the plaintiff was an unmarried daughter of Kollurappa and unmarried sister of Mallappa and Chandrappa, who got married only a couple of years later. The argument constructed by the counsel is that if the plaintiff as an unmarried sister of Mallappa and Chandrappa was entitled to a share under clause (b) of sub-section (1) of Section 8 of the Act, she cannot be deprived of that right merely because she has subsequently got married. The right of an unmarried sister to claim a share under clause (b) of sub-section (1) of Section 8 arises only when a partition takes place of the joint family property among the brothers. If no partition takes place among the brothers, the unmarried sister cannot claim any share under clause (b). I am fortified in this view of mine by the decision of the Supreme Court in *Nagendra Prasad v. Kempananiamma*, (AIR 1968 SC 209).

8. It was however contended by Sri Biligiri Rangaiah that the aforesaid decision of the Supreme Court lays down the proposition that for the purpose of the application of clause (d) of sub-section (1) of Section 8 of the Act, all that is required is to ascertain who are the females that are enumerated in clauses (a) and (b) of sub-section (1) of Section 8. He submitted that a sister is one of the persons enumerated in clauses (a) and (b), and as such, she would be entitled to a share in the joint family property, when it passed on to the defendant by survivorship on the death of Mallappa.

9. The aforesaid decision of the Supreme Court makes it clear that the object of sub-section (1) of Section 8 of the Act is, to confer a right to secure a share on certain females who are otherwise entitled to be maintained out of the joint family property. An unmarried sister of a coparcener is entitled to be maintained out of the joint family property until she gets married. It is precisely for this reason that clauses (a), (b) and (c) of sub-section (1) of Section 8 provide that it is only the unmarried daughters and unmarried sisters that have been

enumerated as persons entitled to claim a share and not the married daughters and married sisters.

10. It is not disputed that on the date of the death of Mallappa when the property passed on by survivorship to the sole surviving coparcener, viz., Chandrappa the defendant, the plaintiff Naniamma was married. As on the date on which the properties passed on by survivorship to the defendant the plaintiff was married, she cannot be regarded as a female enumerated in clauses (a), (b) and (c) of sub-section (1) of Section 8 of the Act to become entitled to a share. Hence, it is not possible to accede to the contention of Sri Biligiri Rangaiah that the plaintiff is entitled to a share under clause (d) of sub-section (1) of Section 8. If the joint family property had passed on to a single coparcener before the plaintiff got married, she would have been entitled to claim the benefit of clause (d). But, as in this case the plaintiff was married by the time the property passed on by survivorship to the defendant, she is not entitled to claim any share in the joint family properties. The view taken by the Court below in this behalf is perfectly justified and does not call for interference.

11. For the reasons stated above, this appeal fails and is dismissed.

12. No costs.

Appeal dismissed.

AIR 1975 KARNATAKA 198

V. S. MALIMATH, J.

Adivappa, Appellant v. Smt. Tangewwa and another, Respondents.

Second Appeal No. 643 of 1971. D/-15-2-1974.*

(A) T. P. Act (1882), Section 39 — Word "maintenance" — Connotation — It includes residence also.

The suit was for possession of the property. It was by way of settlement of the dispute between the husband and the wife that the suit property was given by the husband to the wife for her separate residence during her lifetime. In effect it was a part of the arrangement for the grant of maintenance to the wife. As a right was created in respect of a specific immovable property i.e., the suit house in this case, before the property was transferred by the husband in favour of the plaintiff, defendant-wife who had a right of residence during her lifetime.

*(Against Judgment and decree passed by Civil J., Bagalkot in Appeal No. 4 of 1968, D/- 13-1-1971).

JR/LR/E378/74/MBR

can successfully resist the suit for possession under Section 39. (AIR 1921 Bom 380, Rel. on; (1904) ILR 27 Mad 45, Distinguished). (Paras 4, 7)

Cases Referred: Chronological Paras
AIR 1921 Bom 380 = 22 Bom LR 1309 5
(1904) ILR 27 Mad 45 6

K. S. Savanur, for Appellant; C. M. Desai, for Respondent No. 1.

JUDGMENT:— This is the plaintiff's Second Appeal against the decree passed by the Civil Judge at Bagalkot in Regular Appeal No. 4 of 1968 affirming the decree passed by the Munsiff at Bagalkot in Civil Suit No. 9 of 1967.

2. The suit property is a house of which the owner is Shivanappa, the second defendant. The first defendant Tangewwa is the wife of the second defendant. The plaintiff claims to have purchased the suit property on 2nd December 1957 from the second defendant. He has, on the basis of his title, filed the suit for possession. The second defendant filed a pursis consenting for a decree in favour of the plaintiff. It is only the wife, the first defendant that resisted the suit. Her main case is that the suit house has been given for her residence during her lifetime by the husband and that therefore, the plaintiff is not entitled to secure immediate possession of the suit property from her in view of the bar contained in Section 39 of the Transfer of Property Act. She has further pleaded that disputes arose between herself and her husband and as they were not pulling on well, the disputes were referred to the elders of the village. The elders brought about some sort of settlement between the parties in pursuance of which the second defendant gave the suit property to the first defendant for her residence during her lifetime. It is, therefore, her case that during her lifetime the plaintiff will not be entitled to the possession of the suit property.

3. The Court of first instance held that the agreement pleaded by the first defendant is proved. It further held that the provisions of Section 39 of the T. P. Act are attracted and consequently dismissed the suit. The decree of the Court of first instance has been affirmed on appeal by the learned Civil Judge. Hence this second appeal by the plaintiff.

4. Sri K. S. Savanur, learned counsel appearing on behalf of the plaintiff contended that the first defendant is not entitled to claim benefit of Section 39 of the T. P. Act, inasmuch as she does not claim that the suit house was given to her for her maintenance, but only claims that the same was given for her residence. Section 39 of the Transfer of Property Act, reads as follows:—

"Where a third person has a right to receive maintenance or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands." It is not the case of the first defendant that the suit house was given to her to make provision for advancement or for meeting the marriage expenses of the dependants. It was, therefore, submitted that if only the first defendant establishes that the suit house was given to her in lieu of maintenance to which she is entitled, that the provisions of Section 39 of the T. P. Act are attracted. The contention of Sri Savanur is that the word 'maintenance' used in Section 39 of the T. P. Act does not include the right of residence. I find it difficult to understand the word 'maintenance' in the restricted sense in which Sri Savanur wants me to understand. As the expression 'maintenance' has not been defined in the T. P. Act, one has to necessarily give the ordinary meaning of the said expression. The word 'maintenance' in its ordinary parlance means and includes provision for food, provision for shelter, provision for clothing etc. The word 'maintenance' occurring in Section 39 of the T. P. Act must be deemed to have been used to convey this ordinary meaning of that word. The context in which the word 'maintenance' is used in Section 39 of the T. P. Act does not warrant the giving of any restricted meaning and holding that it only includes within its ambit expenses of food and clothing. I have, therefore, to repeal the contention of Sri Savanur that the word 'maintenance' used in Section 39 of the T. P. Act does not include residence within its ambit.

5. Sri Savanur, learned counsel for the plaintiff invited my attention to the decision of the Bombay High Court in *Mst. Gangabai v. Mst. Jankibai*, (AIR 1921 Bom 380). The relevant paragraph to which my attention was invited, reads as follows:—

"As regards the question of the wife's right of residence I am of opinion that the lower appellate Court has taken an erroneous view. All the right which the wife has during her husband's lifetime is a matter of personal obligation arising from the very existence of the relation and quite independent of the possession by the husband of any property, ancestral or self-acquired. It is not suggested in the present case that her right of maintenance including the right of residence was declared a charge on this property during her husband's lifetime.

There was a suit by Janakibai against her husband for maintenance after the sale of 1904 and it is common ground that no charge was created in favour of Janakibai in respect of this house; and indeed it is difficult to see how it could be done in view of the sale by the husband in 1904." The clear effect of the judgment of the Bombay High Court is that the mere fact that the wife is entitled to be maintained by the husband during his lifetime, is not sufficient to clothe her with a right in respect of any immovable property of her husband, which is transferred by him in order to attract the protection of Section 39 of the T. P. Act. The right that is contemplated under Section 39 of the T. P. Act is a right in respect of a specific property, having been created by way of making provision for maintenance or for making provision for advancement or making provision for marriage, by the husband during his lifetime. It is necessary to note that in the case decided by the Bombay High Court, no right as such was created in the property in question by the husband in favour of the wife in that the said property was not given to her for her maintenance including the right of residence. The said decision far from indicating that the right of residence is not included in the right of maintenance, clearly indicates the contrary. Their Lordships have understood the right of maintenance as including the right of residence, as is clear from the portion of the judgment, which I have extracted above. Hence, the said decision is not of any assistance to support the contention which Sri Savanur has pressed in this appeal.

6. The next decision relied upon is the one reported in (1904) ILR 27 Mad 45, (Jayanti Subbiah v. Alamelu Mangamma). That was a case in which the deceased husband of the defendant had executed a promissory note as a surety and after his death a decree was obtained against the defendant his widow on the promissory note. The decree-holder attached a house which belonged to the deceased and in which the widow was residing, brought it for sale and purchased it. On the auction-purchaser endeavouring to obtain possession the widow resisted on the ground that she had a right of residence in the house during her lifetime and could not, therefore, be ejected. The High Court of Madras held that the decree-holder was entitled to be given possession of the house and that the widow had no right of residence therein. It is clear from the said decision that no charge was created in respect of the specific immovable property in respect of the right of maintenance of the widow. The widow could not resist the suit claim of the auction-purchaser for possession as

she was not given a right of residence during her lifetime. The said decision is clearly distinguishable from the facts of the present case.

7. In the present case the first defendant has pleaded that an agreement was entered into on the advice of the elders to resolve the disputes between defendant 1 and her husband, who were not pulling on well. It is by way of settlement of the disputes between the husband and the wife that the suit property was given by the husband to the wife for her separate residence during her lifetime. Though it was given for residence, it is obvious that the same is a part of the arrangement for the grant of maintenance to the wife. As a right was created in respect of a specific immovable property i.e., the suit house in this case, before the property was transferred by the husband in favour of the plaintiff, the first defendant, who has a right of residence during her lifetime, can successfully resist the suit for possession by the plaintiff under Section 39 of the Transfer of Property Act. The Courts below, therefore were right in dismissing the suit of the plaintiff.

8. For the reasons stated above, this appeal fails and it is dismissed. No costs.

Appeal dismissed.

AIR 1975 KARNATAKA 200

K. JAGANNATHA SHETTY, J.

B. Narayana Reddy, Petitioner v. N. R. Vasudeva Bhatta, Respondent.

C. R. P. No. 2252 of 1973, D/- 25-1-1974.

(A) Civil P. C. (1908), Section 9 — Suit for possession — Pending suit tenant surrendering part of premises and rent refixed at Rs. 450/- attracting application of Section 21 of the Karnataka Rent Control Act — Court of general jurisdiction would lose its jurisdiction to proceed with the suit. (Houses and Rents — Karnataka Rent Control Act (1961), Section 21) — AIR 1918 Mad 998 (2) (FB), Distinguished). (Para 8)

Cases Referred: Chronological Paras AIR 1918 Mad 998 (2) = 39 Ind Cas 439 (FB)

JUDGMENT:— This is a petition under Section 115, Civil P. C. to revise an order made by the Prl. Civil Judge, Bangalore City, in which he held that the Court has no jurisdiction to pass a decree for possession of certain premises.

2. B. Narayana Reddy, the petitioner instituted O. S. 161/71 for possession and for arrears of rent. Vasudeva Bhatta — the respondent — is his tenant

in occupation of the premises. The tenancy commenced in 1967 on a monthly rent of 730. The landlord has stated in his plaint that the tenant has entered into a subsequent agreement dated 21-1-1971, by which he agreed to surrender a portion of the premises and as per that agreement, the rent for the remaining portion would be Rs. 450 per month, but the tenant refused to surrender that portion and hence the said agreement did not come into force.

3. The tenant resisted the suit *inter alia* contending that he had surrendered the portion of the premises as per the agreement dated 21-1-1971 and consequently the rent stood abated to Rs. 450 per month and the Civil Court has no jurisdiction to entertain the suit for possession since the monthly rent of the building is less than Rs. 500 per month.

4. During the pendency of the suit, the parties however, agreed for the Court passing a consent order. On 28-10-1972 the Court made a consent order in the following terms:

"The plaintiff and the defendant present. By agreement of both of them the following order is passed without prejudice to their contentions as to the factum of surrender. The plaintiff will put up a wall for separating the two portions as per the agreement filed in the Court dated 21-1-1971 at his cost within four weeks from now and report the matter to the Court. The defendant will afford all facilities for execution of the above said work. I. A. 4 is accordingly closed."

I. A. IV referred to above was an application filed by the tenant for an order to direct the landlord to put up a wall separating the portion of premises which he surrendered to the landlord pursuant to the agreement dated 21-1-1971. The consent order was to give effect to the terms of the agreement dated 21-1-1971, one of the terms of the said agreement was that the tenant would be liable to pay rent of Rs. 450 per month. On these subsequent events, the trial Court held that it has no jurisdiction to pass a decree for possession in view of the prohibition contained in Section 21 of the Karnataka Rent Control Act (called shortly "the Act"). The landlord challenges the correctness of the decision of the trial Court.

6. In order to appreciate the contention urged, it is better to recall the facts. The premises in question is a non-residential building. The rent originally payable by the tenant was more than Rs. 500. The building was exempted from the provisions of Part V of the Act, as provided by Section 31 of the Act. The landlord therefore instituted the suit for recovery of possession before the Court of general jurisdiction. During the pen-

dency of the suit, the parties entered into a compromise by which a portion of the building was surrendered by the tenant to the landlord. Consequently, the rent stood abated to Rs. 450/- per month.

7. Before me, learned Counsel for the landlord contended that the subsequent event by which the rent was reduced could not divest the jurisdiction of the trial Court to make a decree for possession as the suit originally instituted was maintainable before the Court. In support of his contention, he relied upon the Full Bench decision of the Madras High Court in Putta Kannayya Chetti v. Venkatanarasayya, 39 Ind Cas 439 = (AIR 1918 Mad 998 (2)) (FB) and in particular on the following observations of the Court at page 443:

".....We are, therefore, of opinion, that in every case when the Court is seized of jurisdiction, it cannot and does not lose it by any change in the value of the subject-matter of the suit after the institution of the suit or by the precise ascertainment of its value in cases which do not admit of such ascertainment at the time of institution, except when the plaint is allowed to be amended and that is not really an exception."

In my view, there cannot be dispute about the above proposition of law. Any change in the valuation of the suit happening subsequent to the institution of the suit, cannot and does not divest the jurisdiction of the Court which is seized of jurisdiction to try the suit. But the dispute in the present case is not relating to any change in the valuation of the subject-matter of the suit. It is a dispute which concerns with the competency of the Court to make a decree for possession when in a pending suit, the provisions of Part V of the Act are attracted to the subject-matter of the suit.

8. Section 21 which is in Part V of the Act imposes a bar on any Court to make an order or decree for recovery of possession of any premises falling under the provisions of the Act. If a landlord wants to recover possession of any premises including a non-residential building fetching a rent of less than Rs. 500 per month, he has to file an application on one or the other grounds set out in clauses (a) to (p) of Section 21 (1). It is that Court exercising jurisdiction under the Rent Control Act that can pass an order for possession of the premises. This principle has to be borne in mind, by the Courts while trying original suits for recovery of possession of any premises. The Court of general jurisdiction may be competent to make an order or decree for possession so long as Part V of the Act is not applicable to the subject-matter of the suit. If during the pendency of the suit, due to act of parties or by operation

of law, if Part V of the Act is attracted to the subject-matter of the suit, the Court of general jurisdiction would lose its jurisdiction to proceed with the suit and the provisions of Section 21 with all its limitations would govern the relationship of landlord and tenant.

In the present case when the rent of the non-residential building was reduced to Rs. 450 per month, the provisions of Part V of the Act were immediately attracted to the premises and the learned Judge was therefore right in holding that he has no jurisdiction to pass a decree for possession.

9. In the result, this revision petition fails and is dismissed, but no costs.

Petition dismissed.

AIR 1975 KARNATAKA 202

B. VENKATASWAMI, J.

Eagle Star Insurance Co. Ltd. and another, Petitioners v. The Gwalior Transport (P.) Ltd. and another, Respondents.

Civil Revn. Petn. No. 288 of 1973. D/- 19-3-1975.*

(A) Civil P. C. (1908), Section 115 — Order directing return of plaint for presentation to proper Court is appealable under Order 43, Rule 1, Clause (1) — Revision petition is untenable. AIR 1957 Cal 135; AIR 1968 Andh Pra 33; AIR 1964 SC 497, Distinguished. (Para 2)

Cases Referred: Chronological Paras
AIR 1968 Andh Pra 33 3
AIR 1964 SC 497 = (1964) 4 SCR 409 3
AIR 1957 Cal 135 = 60 Cal WN 591 3

K. C. Mehta, for Petitioners; M. S. Bhujanga Rao, for Respondent No. 1.

ORDER:— This petition under Section 115, Civil P. C. is by the plaintiffs in O. S. 123/1970 on the file of the Additional Civil Judge, Mysore. They are aggrieved by an order made therein directing the return of the plaint for presentation to the proper Court.

2. It is unnecessary to set out the facts leading up to the filing of the suit as, in my view, a preliminary objection raised on behalf of the respondents as to the maintainability of a petition of this nature clearly deserves to be upheld. The contention urged on behalf of the respondents is that any order directing the return of the plaint for presentation to the proper Court had been clearly made appealable under clause (1) of Rule 1 of Order 43, Civil P. C. and therefore, one of the essential ingredients for the exercise of jurisdiction under Sec-

tion 115, Civil P. C. relative to the absence of a right of appeal remains unfulfilled.

3. On behalf of the petitioners, Sri K. C. Mehta, the learned counsel, while conceding that the provisions relied on on behalf of the respondent would apparently impose a bar on the entertainment of the present petition, submits that since the matter related to one of proper exercise of jurisdiction, is one clearly in the interests of justice, this Court should exercise the jurisdiction vested in it under Section 115, Civil P. C. In support of this submission, he relied on three decisions. They are: Manash Ranjan Chakravarty v. Tropical Accumulators Ltd., (AIR 1957 Cal 135); Puranam Venkata Lakshamma v. T. J. Ratnam, (AIR 1968 Andh Pra 33) and Major S. S. Khanna v. Brig. F. J. Dillon, (AIR 1964 SC 497).

4. In my view, none of these decisions are directly on the point canvassed by Sri Mehta. In Manash Ranjan's case, the Division Bench which proceeded to examine the matter before it under Section 115, Civil P. C. has clearly observed that it had not been shown that any appeal lay under Rule 1 of Order 43, Civil P. C. or under any other provision of the Code. In the instant case, it is clear that there is a specific provision conferring the right of appeal against orders of the kind impugned herein.

5. In Puranam Venkata Lakshamma's case, it is no doubt true that the learned single Judge who decided the matter has observed thus:

"Assuming an appeal is competent, the right of the High Court to exercise its revisional jurisdiction is not taken away to correct error that comes to its notice under Section 115, Civil P. C. though it would hesitate to do so normally."

It is seen from the facts of that case that the learned Judge was concerned with a provision in the Arbitration Act which conferred a right of appeal in regard to certain specific matters or decisions. It was in the context of such provision for appeals provided under a special Act that the learned Judge concluded that the operation of Section 115, Civil P. C. was not excluded. Under Section 115, Civil P. C., the expression "in which no appeal lies thereto", in my view, is clearly relatable to the several rights of appeal conferred under the C. P. Code itself. In other words, if a right of appeal in respect of any order or decision or decree is conferred under any of the provisions of the C. P. Code, the jurisdiction under Section 115, Civil P. C. would be clearly barred. Hence this decision also cannot be of much assistance to the petitioners.

6. The last decision relied on is that of the Supreme Court in Khanna's

*(Against order of Addl. Civil J., Mysore, in O. S. No. 123 of 1970, D/- 15-9-1972).

case. Sri Mehta placed considerable reliance on an observation to this effect made in paragraph 15 of the aforesaid report:

"But once it is granted that the expression "case" includes a part of a case, there is no escape from the conclusion that revisional jurisdiction of the High Court may be exercised irrespective of the question whether an appeal lies from the ultimate decree or order passed in the suit. Any other view would impute to the legislature an intention to restrict the exercise of this salutary jurisdiction to those comparatively unimportant suits and proceedings in which the appellate jurisdiction of the High Court is excluded for reasons of public policy. Nor is the expression "in which no appeal lies thereto" susceptible of the interpretation that it excludes the exercise of revisional jurisdiction when an appeal may be competent from the final order."

(Emphasis supplied)

Shri Mehta relied on the second of the underlined enunciations and submitted that even if an appeal was competent from the final order, which in the instant case he identifies the impugned order as one such, a revision would be competent. I am afraid that the said enunciation cannot be read in isolation and must be read along with what has preceded it. If so read, it would be clear that what his Lordship meant was that even though any order that may be ultimately passed, which in fact had not been passed while the preliminary issue was decided, was itself appealable under the Code, it would not bar the jurisdiction of the Court under Section 115, Civil P. C. to deal with the order made on such preliminary issue affecting jurisdiction. Hence I am not in agreement with Sri Mehta on this contention also.

7. But Sri Mehta submits that some observation might be made which would help his client to secure an order of condonation of delay in preferring an appeal as provided under Rule 1 of O. 43, Civil P. C., if and when it is done. I do not wish to say anything which may affect the discretion of the first appellate Court in the matter of condonation of delay. It is unnecessary to observe that if and when an appeal were to be filed along with an appropriate application for condonation of delay, the Court which has seisin of the matter would examine the same on its merits keeping all the circumstances in view. It is seen from the record that there is a stay order operating in favour of the petitioners in regard to the taking of the return of the plaint as ordered by the Court below. The time prescribed by the Court below has now expired. In these circumstances, I consi-

der it just and necessary to grant the petitioners a further time of 15 days from today to take the return of the plaint as ordered by the Court below.

8. In the result, this petition has to fail and is accordingly dismissed. No costs.

Petition dismissed.

AIR 1975 KARNATAKA 203

C. HONNIAH, J.

T. Gangadharaswamy, Petitioner v. Dowlatram Mohandas and others, Respondents.

Civil Revn. Petn. No. 2462 of 1973. D/- 12-12-1974.*

(A) Karnataka Court-fees and Suits Valuation Act (1958), S. 40 (a) — Specific performance of agreement — Specific performance sought only in respect of one of the items of properties covered by the agreement — Court-fee to be paid is on the whole agreement and not on basis of value of one item. AIR 1958 All 851 and AIR 1937 Mad 831, Rel. on; AIR 1967 Pat 281 and (1966) 2 Mad LJ 38, Dissented from. (Court-fees Act (1870), Section 7, Para. 10)). (Para 4)

Cases Referred: Chronological Paras
AIR 1967 Pat 281 = 1966 BLJR 544 3
(1966) 2 Mad LJ 38 = 79 Mad LW 312 3
AIR 1958 All 851 = 1957 All LJ 889 4
AIR 1937 Mad 831 = 1937 Mad WN 236 3

V. K. Govindarajulu, for Petitioner; H. J. Sundarkumar (for No. 2) and Pranesha Rao (for No. 1), for Respondents; Venkatachala High Court Govt. Pleader, for State.

ORDER:— This revision petition raises a question of court-fee.

2. A few facts may be necessary for the disposal of the same. The plaintiff filed the suit, out of which this petition arises, for specific performance of an agreement dated 23-3-1948, by which defendant 1 agreed to convey four items of properties to the plaintiff for a consideration of Rs. 35,000/-. By an arrangement between them defendant 1 conveyed Items 1 and 3 in favour of the plaintiff and Item 4 in favour of his mother, and failed to convey the other item, namely, item No. 2. The plaintiff brought the suit for specific performance of the agreement between him and first defendant and sought the relief of conveyance of the second item. He paid court-fee on Rs. 4,060/- on the basis that represented the amount due by him to defendant 1 for conveyance

*(Against order of 2nd Addl. Civil J., Bangalore in O. S. No. 21 of 1969. D/- 17-8-1973).

BS/CS/A614/75/RSK

of item No. 2. Defendant 2 in his written statement raised an objection that the suit had to be valued on the basis of the agreement and court-fee had to be paid as provided under Section 40 (a) of the Karnataka Court-fees and Suits Valuation Act, 1958, hereinafter referred to as the "Act". This objection was upheld by the trial Court.

3. Mr. V. K. Govindarajulu, the learned counsel for the plaintiff says that a conveyance is sought only in respect of the second item of the properties mentioned in the agreement and he is therefore not bound to pay court-fee leviable on a claim for specific performance of the agreement. His argument is one for specific performance of the whole contract but only for performance of conveyance of the second item. He relied upon a decision in *R. S. Jhavar v. Thanicakchala Gramani*, (1966) 2 Mad LJ 38. In that decision S. 42 (a) of the Madras Court-fees and Suits Valuation Act, which is similar to Section 40 (a) of the Act was being considered. The learned Judge distinguished an earlier decision of the Madras High Court rendered by Venkataramana Rao, J. in *Dullabho Sahu v. Adinarayana*, (AIR 1937 Mad 831) and said:

"The intention of Section 42 (a) of the Madras Court-fees and Suits Valuation Act (XIV of 1955) seems to be that, where a party who has entered into a contract to purchase certain properties is able to get conveyance of a portion of the properties only, he can file a suit for specific performance of the unperformed portion of the contract and can pay court-fee on it. He is liable to pay court-fee only on the value of the unperformed portion of the contract of which he seeks specific performance and is not liable to pay court-fee on the entire value of the properties covered by the original contract."

The learned Judge appears to have taken this view on the assumption that the word "computed" occurring in Section 42 (a) of the Madras Act had been introduced for the first time and such a word was not found in Section 7 (x) of the Court-fees Act (VII of 1870). Venkataramana Rao, J. in *Dullabho Sahu's* case, while considering Section 7 (x) of the Court-fees Act (VII of 1870) held:

"There can be no question that so far as a conveyance is sought in favour of the plaintiff in respect of defendant 2's interest, the suit is essentially one for specific performance of a contract and court-fee will have to be levied under Section 7, clause (x) Court-fees Act The fact that certain properties have been sold by mutual arrangement will not alter the nature of the claim which is essentially one for specific performance of

contract of sale which is implied in the said arrangement. How, I understand the relief claimed is this: 'The plaintiff requests the Court to give effect to the arrangement which he entered into, but desires that in effecting the conveyance only the properties described in the schedule should be conveyed and possession in respect thereof should be given. As the Court will in any event have to declare the original arrangement entered into and only on that basis should give the relief to the plaintiff, the suit will have to be valued on the consideration mentioned therein. In a suit for specific performance, the view has always been taken by this Court that there is no question of primary and secondary relief and both the execution of the conveyance and delivery of possession are essential reliefs. Further, without getting a conveyance it is not possible to get possession."

In my opinion, the learned Judge in *Jhavar's* case obviously misread the decision in *Dullabho Sahu's* case on the assumption that the word 'computed' was not in Section 7 of the Court-fees Act (VII of 1870). Mr. Govindarajulu also relied upon another decision in *Thakur Prasad Singh v. Smt. Janki Devi*, (AIR 1967 Pat 281). In that case, the contract had been partly performed and the suit had been instituted for specific performance of the rest. Therein, it was held that on no principle can the plaintiffs be asked to pay *ad valorem* court-fee on the full consideration mentioned in the contract as no relief was asked for in respect of the entire property covered by the contract. This view ignored again the provisions of Section 7 of the Court-fees Act (VII of 1870). Therefore, I am not in agreement with the view expressed in the above two cases.

4. Mr. N. Venkatachala, the learned Government Advocate on behalf of the Government and Mr. Pranesh Rao, learned Advocate on behalf of the defendant, relied upon *Gudia Dullabho Sahu's* case and the decision in *S. P. Gupta v. Abdul Rahman*, (AIR 1958 All 851) and contended that the suit essentially being one for specific performance of a contract, court-fee payable was on the sum agreed to be paid under the original contract and under Section 40 (a) of the Act the Court-fee payable is on the amount of consideration mentioned in the contract. Section 40 (a) of the Act provides that in a suit for specific performance, whether with or without possession, fee shall be payable (a) in the case of a contract of sale, computed on the amount of consideration. There is no ambiguity at all in this provision. In a suit for specific performance, based on a contract of sale, court-fee has to be computed on the amount of the consideration. That being

so, I am entirely in agreement with the view expressed in Gudla Dullabho Sahu's case, which has been followed by a Bench decision in Gupta's case. Therefore, the trial Court was justified in asking the plaintiff to pay court-fee on the amount of consideration mentioned in the contract.

5. In the result, this revision petition is dismissed. No costs.

Revision dismissed.

AIR 1975 KARNATAKA 205

C. HONNIAH, J.

V. Giriappa Setty, Petitioner v. Muni Boyee, Respondent.

Civil Revn. Petn. No. 558 of 1973, D/- 21-11-1974.*

(A) Karnataka Agricultural Debtors Relief Act (29 of 1966), S. 64 (2) — Act repealing Karnataka Agriculturists' Relief Act (18 of 1928) — Repealing Act struck down — Earlier Act (18 of 1928) still in existence. AIR 1974 SC 1480. Foll; AIR 1972 Mys 199, No longer good in law.

(Para 2)

Cases Referred: Chronological Paras

AIR 1974 SC 1480 2

AIR 1972 Mys 119 = (1971) 2 Mys LJ 348 2

AIR 1972 Mys 199 = (1972) 1 Mys LJ 310 2

(1971) 1 Mys LJ 350 2

AIR 1970 SC 685 2

(1970) 1 Mys LJ 43 1, 2

(1970) 1 Mys LJ 278 2

K. R. Muniraj, for Petitioner; R. Srinivasa Vakil, for Respondent.

ORDER:— The petitioner in this revision petition is the plaintiff. He filed the suit (O. S. No. 157 of 1965) in the Court of the Munsiff, K. G. F., out of which this revision petition arises, for recovery of certain amount due to him.

The suit was decreed ex parte on 15-12-1965. That decree was set aside in Mis. No. 13 of 1970 and the suit was restored.

The defendant filed his written statement contending inter alia that the suit was not maintainable on the ground that it was barred by time in view of the Karnataka Agricultural Debtors Relief Act, 1966, hereinafter referred to as the 'Act of 1966', which came into force in the year 1969. A preliminary issue was raised, namely, 'whether the suit was maintainable'. On this issue, the Court below held that as the Karnataka Agriculturists' Relief Act, 1928, hereinafter referred to as the 'Act of 1928' being repealed by the Act of 1966 and as the latter Act was

struck down by this Court in D. M. Thippeswamy v. State of Mysore, ((1970) 1 Mys LJ 43) as unconstitutional, the Act of 1928 was not revived and the plaintiff therefore could not have the benefit of Section 24 of the Act of 1928. In that view it held that the suit was barred by limitation and hence dismissed the same. At the time the plaintiff filed the suit the Act of 1928 was in force and under Section 24 of that Act a suit could have been brought under the extended period of limitation, namely, six years.

2. It is contended that the Act of 1966 repealed the Act of 1928 and that was struck down with the result there is no repeal of the Act of 1928 and the provisions of that Act are in operation and therefore the Court below was not justified in dismissing the suit. In support of this contention, reliance is placed on the decision in Venkatappa v. S. N. Venkateshaiah, (1971) 2 Mys LJ 348 = (AIR 1972 Mys 119). In that case, following the principle laid down by the Supreme Court in Mulchand Odhavji v. Raikot Borough Municipality, AIR 1970 SC 685 and a Division Bench decision of this Court in C. M. Gopala Setty v. Channarayapatna Town Municipality, (1970) 1 Mys LJ 278, it was held that the effect of the Karnataka Agricultural Debtors Relief Act, 1966 (Act of 1966) being declared unconstitutional and struck down in Thippeswamy's case (1970) 1 Mys LJ 43 was that there was no Act by which the provisions of the pre-existing laws, i.e. Act of 1928, have been repealed and that there was no question of the earlier Act being revived when there was no repeal of that Act at all. In that decision it was also pointed out that the view taken in P. W. Rangaswamy v. Shah Krishnaji Valaji & Co., (1971) 1 Mys LJ 350 was not in accordance with the principle laid down in the said two cases. As there was conflict of opinion on this point, the matter came up before a Division Bench of this Court in Rudre Gowda v. Angadi Chikkanna, (1972) 1 Mys LJ 310 = (AIR 1972 Mys 199). The Division Bench ruled that the decision of this Court in Thippeswamy's case that the Act of 1966 was unconstitutional had not the effect of reviving the Act of 1928, which was one of the Acts repealed by Section 64 (2) of that Act. This decision, in my opinion, is not in accordance with the principles laid down by the Supreme Court in Mohd. Shaukat Hussain Khan v. State of Andhra Pradesh, (AIR 1974 SC 1480). In that case the facts were these: Under the Hyderabad Abolition of Inams Act (8 of 1955) the Government of Hyderabad abolished the inams and the inams vested in the Government. In accordance with that, the Government discontinued payment of 'Baithak' of Sendhi shops and

*(Against order of Munsiff, K. G. F. in O. S. No. 157 of 1965, D/- 28-10-1972)

tree tax under the wrong impression that the Hyderabad Abolition of Inams Act (8 of 1955) prohibited any such payment. On April 20, 1956 the Abolition Act was amended by Act 10 of 1956, by which the provisions relating to payment of compensation were superseded while those relating to vesting continued in force. The Government, therefore, issued a circular to the effect that all the amounts collected as land revenue from the erstwhile inam lands were to be kept in a suspense account. The Hyderabad Act 8 of 1955 as amended by Act 10 of 1956 was repealed by the Andhra Pradesh (Telengana Area) Abolition of Inams Act (9 of 1967), repealing the earlier Act 8 of 1955. The Andhra Pradesh High Court struck down Act 9 of 1967. The question for consideration was whether the Act 8 of 1955 as amended by Act 10 of 1956 continued to exist although the repealing Act 9 of 1967 was struck down by the Andhra Pradesh High Court. Dealing with that question, the Supreme Court held that what the High Court of Andhra Pradesh implied by declaring Act 9 of 1967 void was that it was non est, and further held that the provisions of Act 8 of 1955 as amended by Act 10 of 1956 could not be said to have been repealed at all and therefore they were in existence. In view of this decision, the decision in Rudre Gowda's case (AIR 1972 Mys 199) is not in accordance with law and the Act of 1928 is in existence. Therefore, the learned Munsiff was not justified in dismissing the suit.

3. In the result, I allow this revision petition, set aside the impugned order and remit the case to the Munsiff, with a direction to take the case on his file and dispose of the same in accordance with law.

No costs.

Revision allowed.

AIR 1975 KARNATAKA 206

M. SADANANDASWAMY, J.

Gurawwa and another, Appellants v. Dilawar Hussain Shiledar and others, Respondents.

Second Appeal No. 1035 of 1972, D/- 8-11-1974.*

(A) Civil P. C. (1908), Section 11 — Mixed question of law and fact — Suit for partition against co-sharers — Question whether some of defendants were tenants on suit land — Not pure question of law but mixed one — Tenancy not pleaded —

*(Against judgment and decree of 2nd Addl. Civil J., Belgaum, in Appeal No. 381 of 1969, D/- 15-7-1972).

LR/AS/F120/74/HGP

Issue not raised — Decision not without jurisdiction — It is *res judicata* in subsequent suit for declaration and injunction — (Civil P. C. (1908), O. 39, R. 1); (Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 29 (2)).

The question whether some of the defendants in earlier suit for partition were tenants on suit lands, at the time of suit, is not a pure question of law but a mixed question of law and fact. Where there were no pleadings as to their tenancy except the plaintiff's statement in evidence but that statement did not refer to the tenancy on the date of the suit or to its continuity on the date of preliminary decree, nor was it by all parties and therefore, no issue was raised by the Court.

Held (i) that the jurisdiction of Civil Court was not barred by Section 29 (2) of the Bombay Tenancy and Agricultural Lands Act and the preliminary decree passed by the Civil Court was not a nullity. Consequently, the subsequent suit by defendants 8 and 9 for declaration that the decree was not binding on them and for injunction was barred by *res judicata*. Case law reviewed. (Para 9)

(ii) that even if it is to be found that some defendants were in possession of suit lands on the date of suit, no injunction could be granted to them, as such an injunction would defeat the rights of decreeholders. (Para 11)

Cases Referred: Chronological Paras
 AIR 1972 SC 1427 = (1973) 1 SCR 254 7
 AIR 1971 SC 2355 = (1970) 3 SCR 830 7
 ILR (1969) Guj 291 = 10 Guj LR 431 8-A
 (1969) 1 Mys LJ 121 6
 AIR 1966 SC 166 = (1966) 1 SCR 145 8
 (1966) 1 Mys LJ 738 = ILR (1966) Mys 1096 6
 AIR 1962 SC 199 = (1962) 2 SCR 747 8-A
 AIR 1958 Andh Pra 1 = (1957) 2 Andh WR 137 (FB) 8-A
 (1884) 7 Mys LR 151 8-A

K. I. Bhatta, for Appellants; N. A. Mandagi, for Respondents Nos. 1 to 6.

JUDGMENT:— This second appeal arises out of O. S. No. 131/63 filed by the appellants in the Court of the Additional Munsiff, Gokak. The suit is for a declaration that the decree passed in O. S. 111/51 in favour of respondents 4 to 7 on 23-9-1955 is not binding on them, that the same is null and void and for a perpetual injunction restraining respondents 1 to 3 from interfering with the possession of the plaintiffs in respect of the suit lands. Both the lower Courts dismissed the suit.

2. According to the case of the plaintiffs, the first plaintiff is the protected tenant of survey No. 17 and the second plaintiff is the protected tenant of survey No. 68 both situated within the limits of Gokak and they are in possession cultivating the lands as tenants since 30 to 40

years. Defendants-respondents 4 to 7 had filed a suit for partition, Regular Original Suit No. 111/51 against the other co-sharers, defendants-respondents 8 to 14. The deceased husband of the first plaintiff as well as the second plaintiff were added as parties to the said suit as defendants 8 and 9 respectively. The present plaintiffs believed that they would not be evicted from the suit lands, but the plaintiffs in that suit practised fraud on the Court and obtained a preliminary decree for actual possession of their 1/3 share. In execution of that decree the Tahsildar, Gokak, is purported to have handed over possession of half the suit survey numbers on 29-10-1963 to defendants 1 and 2 jointly since defendants 1 and 2 claimed to be the assignees of the decree. Defendants 2, 3 and 5 filed a written statement admitting that the husband of the first plaintiff and the second plaintiff are parties to O. S. 111/51 and contended that since there was a final adjudication regarding their possession in respect of the suit lands by a competent Court the suit is barred by *res judicata*. The plaintiffs are parties even in the execution proceedings and the defendants have been awarded actual possession of the suit lands on 29-10-1963, that the suit lands have been given Survey No. 68/1, measuring 4 acres 39 guntas, and Survey No. 17/2, measuring 1 acre 30 guntas, and mutation entries have been made in respect of these lands in their names.

They also denied that the plaintiffs were the tenants of the suit lands. Even if they had got false entries made in the revenue records, the same would not be binding on the defendants. They also pleaded that defendants 1, 7 and 14 and deceased Dadibi had not leased their 2/3 share to the plaintiffs. They also denied that any assurance had been given to the plaintiffs that they will not be evicted from the suit lands in O. S. 111/51. Defendants 1, 3, 6 and 14 adopted the written statement of defendants 2, 4 and 5. The seventh defendant supported the plaintiffs' case. She was one of the five plaintiffs in O. S. 111/51. All the five plaintiffs together were awarded 1/3 share in that suit. Defendant 8 also supported the plaintiffs' case. Defendants 9, 12 and 13 adopted the written statement of defendant 8. Defendants 10 and 11 remained *ex parte*. Defendants 1 to 3 are respectively husbands of defendants 4 to 6 who are the daughters of deceased Dadibi.

3. The contention of the plaintiffs is that on the date of the suit O. S. 111/51 the Bombay Tenancy and Agricultural Lands Act was in force and the Civil Court had no jurisdiction to pass the decree and that an order of eviction has to be made only under Section 29 (2) of the

B. T. & A. L. Act by the prescribed authority under that Act. It is therefore null and void and without jurisdiction, and that any proceedings in furtherance of that decree are also null and void. Defendants 1 to 4 pleaded in answer to this contention that the plaintiffs and their predecessors-in-title did not contend in O. S. 111/51 that they had any tenancy rights in respect of the suit lands under the B. T. & A. L. Act, 1948. No issues regarding their tenancy were sought by the plaintiffs in that suit, no decision was given in their favour and the decree and judgment in O. S. 111/51 is binding on the plaintiffs.

4. The trial Court held that the decree in R. O. S. 111/51 is binding on the plaintiffs, that they were not in lawful possession of the suit properties on the date of suit and accordingly dismissed the suit. It held that the plaintiffs were barred by *res judicata* from questioning the validity of the decree in O. S. 111/51. The lower appellate Court also held that the suit is barred by *res judicata*. It further held that the decree passed in O. S. 111/51 is not without jurisdiction and therefore is not null and void.

5. Exhibit P-6 is the copy of the preliminary decree dated 23-9-1955 passed in O. S. 111/51. That suit was filed by Dadibi, the deceased mother of defendants 4 and 5, and by defendants 4 to 7 against the present defendants 8 to 14 claiming a half share in the properties in that suit. Dadibi died on 23-8-1962. Defendants 1, 2 and 3 claimed to be the assignees of the decree. The present suit is filed on 27-11-1963. Ext. P-6 has set out the contents of the plaint. There was no allegation in the plaint in O. S. 111/51 that the defendants 8 and 9 in that suit were tenants. The plaint, judgment and the written statement of the present plaintiffs in O. S. 111/51 have not been produced. It is not the case of the plaintiffs that defendants 8 and 9 in O. S. 111/51 pleaded their tenancy rights though it is contended that they did engage a counsel to appear for them and had filed their written statement in that suit. The plaintiffs relied on Ext. P-8 which is a certified copy of the evidence of Dadibi in O. S. 111/51. Dadibi stated in her evidence in that suit that the husband of first plaintiff and the second plaintiff had been inducted as tenants on the suit lands. Exhibits P-6 and P-8 are the only documents relating to O. S. 111/51 which have been produced in the present case.

6. In 1966 (1) Mys LJ 738, (Bandu Tukaram v. Vijayasingrao), in the earlier suit for redemption of a mortgage and possession, the defendants pleaded that they are protected tenants under the Bombay Tenancy and Agricultural Lands Act.

The Civil Court granted a decree for possession subject to the tenancy rights of the defendants, if any. Thereafter, the plaintiffs filed an application before the Mamlatdar for a declaration that the defendants were not tenants. That declaration was granted and was upheld on appeal. Thereafter, the suit which gave rise to the second appeal was filed for declaration that the decree in the mortgage suit was not binding on the plaintiff. Following the decision of the Supreme Court in *Bhimaji Shankar v. Dundappa Vithappa*, (AIR 1966 SC 166) it was held that since the question arose in the earlier suit as to whether a party was or was not a tenant, the Civil Court should have directed the parties to obtain a decision from the Mamlatdar on that question before passing a decree for possession and that the proper course for the Civil Judge would have been to stop the proceedings before him when the question of tenancy was raised, to direct the party who raised the plea of tenancy to obtain a decision from the Mamlatdar and thereafter to decide whether to direct delivery of possession or not. But since the plaintiff did not file any appeal against the decision in the mortgage suit, it was held that the decree became final and binding as between the parties since it operated as res judicata between the parties to the suit. It was held that it was not a case of initial lack of jurisdiction of the Civil Court.

In 1969 (1) Mys LJ 121, (L. V. Kulkarni v. Siddappa Basappa) the writ petitioners filed a suit against the respondents for possession and obtained a decree for possession and in execution recovered possession. Thereafter, respondents filed a petition under Section 29 of the B. T. & A. L. Act for possession claiming to be tenants. It was held that after the decree for possession and petitioners obtaining possession, respondents' application under Section 29 was not sustainable. In the original suit, the respondent contended that he was a tenant but that contention was negatived by the Civil Court. It was urged that the Civil Court had no jurisdiction to decide the question of tenancy by virtue of the Bombay Tenancy and Agricultural Lands Act. The fact that such a contention was raised before Civil Court was disputed. It was held by a Division Bench of this Court that the Civil Court had jurisdiction to decide the suit and the fact that the Civil Court had no jurisdiction to decide one of the issues arising in that suit did not divest the Civil Court of its jurisdiction to make a decree in that suit. Following the decision in 1966 (1) Mys LJ 738, (*Bandu Tukaram v. Vijayasingrao*).

7. The learned counsel appearing for the appellants contended that the above decisions of this Court must be

deemed to be no longer good law in view of the decision in AIR 1971 SC 2355 (*Mathura Prasad v. Dossibai*) wherein the law relating to the res judicata has been stated as follows:—

"It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be re-opened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law, i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11, Code of Civil Procedure, means the right litigated between the parties, i.e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of the order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land." But the question whether defendants 8 and 9 were tenants of the suit lands is not a pure question of law, but is a mixed question of fact and law. Hence, it cannot be said that the decisions of this Court referred to above are no longer good law. In AIR 1972 SC 1427 (*Kani Ram v. Kazani*) it was held that the decision given in the first execution proceeding on a mixed question of law and fact, and not one of law only, would operate as res judicata in a subsequent execution proceeding between the same parties. In the earlier execution proceeding, the Court came to the conclusion that the learned Judge who passed the decree for eviction under S. 13 of the Delhi Rent Control Act, was satisfied that one or more of the grounds mentioned in that section had been made out before passing the order and therefore held that the decree for eviction was valid. It was therefore held to be a decision on a mixed question of law and fact and operated as res judicata.

8. In AIR 1966 SC 166 it was held that a Civil Court has no jurisdiction to try a suit for recovery of possession of

charge, to be represented by an advocate or other competent agent at the enquiry. In support of the above proposition, he relied strongly on the following passage appearing in the judgment of Lord Denning, M. R. in the decision of the Court of Appeal in *Pett v. Greyhound Racing Association Ltd.*, (1968) 2 All ER 545.—

"Now the point arises: has the trainer a right to be legally represented? The club object to any legal representation. Their secretary states in his affidavit:

"If legal representation were allowed as of right, the delay and complications that this would cause would largely frustrate the stewards' intention to conduct their meetings expeditiously and with complete fairness."

Counsel for the defendants, says that the procedure is in the hands of the stewards. If they choose to say: "We will not hear lawyers", that is for them, he says, and it is not for the Courts to interfere.

I cannot accept this contention. The plaintiff is here facing a serious charge. He is charged either with giving the dog drugs or with not exercising proper control over the dog so that someone else drugged it. If he is found guilty, he may be suspended or his licence may not be renewed. The charge concerns his reputation and his livelihood. On such an enquiry, I think that he is entitled not only to appear by himself but also to appoint an agent to act for him. Even a prisoner can have his friend. The general principle was stated by Stirling, J. in *Jackson & Co. v. Napper, Re Schmidt's Trade Marks*, (1886) 35 Ch D 162 at p. 172):

".....that, subject to certain well-known exceptions, every person who is sui juris has a right to appoint an agent for any purpose whatever, and that he can do so when he is exercising a statutory right no less than when he is exercising any other right."

This was applied to a hearing before an assessment committee in the case of *R. v. St. Mary Abbots, Kensington Assessment Committee*, (1891) 1 QB 378. It was held that a ratepayer had a right to have a surveyor to appear for him. Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man: "You can ask any questions you like"; whereupon the man immediately starts

to make speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth, he has also a right to speak by counsel or solicitor.

I am aware that Maugham, J. once expressed a different view. In *Maclean v. Workers Union*, (1929) All ER Rep 468 at p. 471 = (1929) 1 Ch 602 at p. 621) speaking of domestic tribunals, he said:

"Before such a tribunal counsel have no right of audience and there are no effective means of testing by cross-examination the truth of the statements which may be made."

All I would say is that much water has passed under the bridges since 1929. The dictum may be correct when confined to tribunals dealing with minor matters where the rules may properly exclude legal representation. (*Re Macqueen and Nottingham Caledonian Society*, (1861) 9 CBNS 793, seems to have been such a case). The dictum does not apply, however, to tribunals dealing with matters which affect a man's reputation or livelihood or any matters of serious import. Natural justice then requires that he can be defended, if he wishes, by counsel or solicitor."

Lord Justices Davies and Russell concurred with the above opinion. Russell L. J. went to the extent of stating that it is a common Law right of the plaintiff to do by agent or representative, including counsel, that which under procedure he is entitled to do, namely question witnesses and address the stewards.

6. With great respect, I embolden myself to disagree with the view expressed by the great Law Lords. While I agree that it is a fundamental right of a person to be heard before he is condemned of any charge, that right would not comprehend the right to be represented by an agent including an advocate, except where on the facts and in the circumstances of the case, principles of natural justice require that he should be allowed a hearing through any agent or advocate. Physical incapacity to defend himself would be one instance. Engagement of a legally trained person or advocate by the prosecution may be another ground which would entitle an accused to engage an agent or advocate to defend him.

7. In England also, the opinion on this question is divided as can be seen from the judgment of Maugham, J., in (1929) 1 Ch 602, to which Denning, M. R. himself has referred. Dealing with the difference between a court of justice and

a domestic tribunal and the right of representation through an advocate, the learned Judge stated:—

"Speaking generally, it is useful to bear in mind the very wide differences between the principles applicable to Courts of Justice and those applicable to domestic tribunals. In the former the accused is entitled to be tried by the judge according to the evidence legally adduced and has a right to be represented by a skilled legal advocate. All the procedure of a modern trial, including the examination and cross-examination of the witnesses and the summing-up, if any, is based on these two circumstances. A domestic tribunal is in general a tribunal composed of laymen. It has no power to administer an oath and, a circumstance which is perhaps of greater importance, no party has the power to compel the attendance of witnesses. It is not bound by the rules of evidence; it is indeed probably ignorant of them. It may act, and it sometimes must act, on mere hearsay, and in many cases the members present or some of them (like an English jury in ancient days) are themselves both the witnesses and the judges. Before such a tribunal counsel have no right of audience and there are no effective means for testing by cross-examination the truth of the statements that may be made."

It is true that much water has passed under bridges, since the above decision was rendered. But the difference between the character of a proceeding before a court of justice and domestic tribunal remains the same; and therefore the right to be heard through an advocate in a court of law cannot be extended to, or claimed in a proceeding before a domestic tribunal. There are several statutes in our country which expressly prohibit representation through an advocate before statutory tribunals. There is no doubt that advocates form part of the machinery for administration of justice. Nobody is more conscious of the fact than myself that administration of justice by our courts of law cannot be effectively and expeditiously carried out without the assistance of the learned advocates. But the position is not the same as regards many domestic tribunals are concerned. It is a fact, though to be stated with regret, that if advocates are allowed to appear before such tribunals constituted of laymen, they would protract the enquiry and confuse the issues; and it would in some cases even defeat the purpose for which such tribunals are set up. That is why the Legislature has exercised the wisdom of excluding the advocates from domestic enquiries, and not because of any disrespect to this great class of professional men. In this context, it is useful to notice the relevant provision in the

Advocates Act, 1961. Section 30 of the Act states—

"30. Subject to the provisions of this Act, every advocate whose name is entered in the common roll shall be entitled as of right to practise throughout the territories to which this Act extends.—

(i) in all courts including the Supreme Court;

(ii) before any tribunal or person legally authorised to take evidence; and

(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise."

The above provision defines the extent of the right of an advocate to represent a client. I think that it also lays down the limits of the right of a person to be represented by an advocate. There is no case that an advocate has under the above provision a right of appearance for his client before an enquiry officer appointed to conduct an enquiry into an alleged mal-practice committed by a student in an examination. If an advocate has no such right, it follows that a student cannot also have a right to be represented by an advocate. Otherwise it will be creating in an advocate a right which is not given to him by the above statutory provision.

8. I shall now refer to some of the Indian decisions on this Question. In *Rajagopalan v. Collector of Salt Revenue*, AIR 1937 Mad 735, it was conceded before a Division Bench of the Madras High Court that a Government servant has no common law right to be defended by an advocate in a disciplinary enquiry against him. The correctness of this proposition was canvassed in *Veeraswami v. Provincial Government of Madras*, AIR 1948 Mad 379 before another Division Bench of that Court. Horwill, J., who delivered the judgment of the court, affirmed the above proposition, after examining the case law on the subject. His Lordship also pointed out that the decision of the Federal Court in *Quadratullah v. North West Frontier Province*, (AIR 1944 FC 72) supported this proposition. In that case, the Federal Court rejected an argument that the enquiry against the delinquent officer in that case was violative of natural justice, since he was not allowed to be represented by an advocate.

9. In *Kalindi v. T. Locomotive & Engineering Co.*, AIR 1960 SC 914 the Supreme Court held that a workman has no right to be represented by a representative of his union in a domestic enquiry against him for misconduct. The above decision was followed by the Supreme Court in *Brooke Bond India (P) Ltd. v. S. Subba Raman*, (1961) 2 Lab LJ 417 (SC). After referring to its earlier decision, the court said—

"In the present case, the two employees even went further; one of them wanted to be represented through counsel while the other wanted to be re-presented through an outsider. Neither of them apparently wanted to be represented by somebody from the union. In view therefore of the decision in Kalindi case, we cannot agree that, as a counsel or outsider was not allowed to appear on behalf of the employees, there was no fair or full inquiry in the case."

The above decisions were referred to and followed by a much later decision of the Supreme Court in C. L. Subramoniam v. Collector of Customs, Cochin, AIR 1972 SC 2178. The decision of the Court of Appeal in Pett v. Greyhound Association Ltd., and the judgment of Denning, M. R. in that case have been considered by the Supreme Court in C. L. Subramoniam's case, and the court stated that the rule laid down in Pett's case has not commended itself to that court. In the light of the above pronouncement, counsel for the petitioner cannot rely on the above English decision as laying down a common law right applicable to India. The right to be heard through an agent or advocate is not a common law right in this country. All that is required is that the principles of natural justice should be complied with; a person accused of a charge should have a reasonable opportunity for being heard before he is condemned. In the absence of any statutory provision or other rule of procedure, the question whether denial of representation through an advocate amounts to denial of natural justice is one of fact to be decided on the particular facts and circumstances of the case. I have no doubt that a student who is accused of mal-practice in an examination and who is called upon to submit to a domestic enquiry to be conducted by one of the Professors of his college has no right to be represented through an advocate in that enquiry. I must also add that this is an unusual claim. The enquiry officer acted properly in refusing permission to the petitioner to be represented by an advocate.

10. In the result, I quash the impugned order, Ext. P-9, on the short ground that it was passed before the expiry of the period allowed to the petitioner for showing cause against the proposed punishment and without furnishing him copy of the enquiry report so as to enable him to submit his explanation. The respondents will be free to complete the enquiry initiated against the petitioner according to law. This Original Petition is allowed to the above extent and dismissed in other respects. In the

circumstances of the case, the parties will suffer their own costs.

Order accordingly.

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V. P. GOPALAN NAMBIAR AND
K. BHASKARAN, JJ.

George Davis Mookan, Appellant v. Ollukaran Thomakutty Varied and others, Respondents.

A. S. No. 52 of 1971, D/- 23-1-1974.

(A) Civil P. C. (1908), Order 1, Rule 8 and Section 2 (11) — Representative suit on behalf of Church — Relief restraining defendant to function as Metropolitan and to recover possession of articles belonging to Church — Death of defendant pending suit — His nominee impleaded — Whether legal representative — Suit against him whether maintainable.

Where A was appointed as an Administrator of the Church by B, when B himself was suspended as a Metropolitan by order of the Patriarch, but the order of the Patriarch suspending B itself was found as not valid.

Held that B continued to be the Metropolitan at the time when he appointed A as Administrator. Therefore A in his turn could not be regarded as one who 'intermeddled' with the estate of B but could be regarded as one who acted in pursuance of a lawful authority of B. When no relief in such capacity was prayed against A but relief was prayed for only as legal representative on the ground of intermeddling, the same could not be sustained and the suit against A was not maintainable on the only ground as the legal representative of B.

(Para 14)

(B) Evidence Act (1872), Section 114 Illustration (g) — Best evidence rule — Non-production of document — Adverse inference — When to be drawn.

Although the 'best evidence rule' requires proof to be best afforded by document itself, where a party more than once stated, that it was in possession of the document but the party was not asked to produce it much weight to its non-production should not be attached. Adverse inference from non-production of document can be drawn only if the document has been summoned and there was a failure to produce the same. AIR 1967 SC 1134, Foll.

(Para 13)

Cases Referred: Chronological Paras
AIR 1967 SC 1134 = (1967) 1 SCR 153 13
AIR 1962 SC 232 = (1962) 3 SCR 391 7
AIR 1941 Lah 36 = 193 Ind Cas 323 7

S. Easwara Iyer and E. Subramoni, for Appellant; K. P. Radhakrishna Menon CR/FR/B74/74/HGP

and T. S. Venkiteswara Iyer, for Respondents.

GOPALAN NAMBIAR, J.:— O. S. No. 8 of 1965 on the file of the Additional District Court, Trichur, was a representative suit, under Order 1, Rule 8 of the Civil Procedure Code by two members of the Church of the East in India, — referred to as the Chaldean Church, — for a permanent injunction restraining the 1st defendant from functioning as Metropolitan of the Church and for delivery of possession of certain moveable belonging to the Church either to the plaintiffs or to the Receiver appointed by Court. On the allegation that the 1st defendant had brought into being an elected body which was not proper or valid, another suit, O. S. No. 1061 of 1962, Munsiff's Court, Trichur, had been filed, and a Receiver had been appointed in the said suit. The present suit was instituted on 12-8-1965. The sole defendant died on 7-9-1969 at Baghdad. Thereupon, the 2nd defendant, the appellant in this appeal, was impleaded as legal representative by order on M. P. No. 813 of 1969 dated 11-3-1970. According to the plaintiff, the Patriarch of the Church, Mar Eshai Shimun XXIII, is the supreme authority of the Church of the East. It was he who had to ordain the Metropolitan, and who accordingly ordained, the 1st defendant in 1952 (paragraphs 3 (a) and (b) of the plaint). The 1st defendant was alleged to be creating dissensions and divisions among the followers of the Church, and vilifying the Patriarch by his writings. For these acts of insubordination and profanity, the 1st defendant was asked to appear before the Patriarch in San Francisco by Ext. P-4 letter dated 2-7-1963 by the first week of September.

The 1st defendant replied by Ext. D-2 dated 16-7-1963 that it would not be possible for him to comply with the Patriarch's request within the time indicated. By Ext. P-5 dated 26-8-1963, the 1st defendant was told to proceed to Syria with his existing Syrian passport and funds of the Church, and that thereafter, the responsibility for his further transport to San Francisco would be of the Patriarch. To this, the 1st defendant replied by Ext. D-3 dated 4-9-1963 pointing out the difficulties in the way of acceding to the suggestion. Then followed an order of suspension from the Patriarch, Ext. D-4 (same as Ext. P-6) dated 10-1-1964. Injunction was prayed for against the 1st defendant in view of this order of suspension passed by the Patriarch. The 1st defendant pleaded that the Patriarch had no power to suspend the Metropolitan, that the said power vested only in the Synodical Council, and that even if the power were there in the Patriarch, the same had not been properly or validly exercised. On these

pleadings, issues 1 and 2 were raised which were as follows:

"1. Has the defendant been validly suspended by the Patriarch?

2. Is his Holiness Patriarch by himself competent to suspend the defendant from his office as Metropolitan?"

2. The material prayers in the plaint are:

"24. It is therefore prayed that the Hon'ble Court may be pleased to pass a decree:—

(a) restraining the defendant from acting or functioning as Metropolitan or from exercising any of the powers appertaining to his status as Metropolitan of the Church of the East including Ordination of Clergy and using any of the Church Properties like the Sceptre, Crown, Gold Cross, Chain and Robes and religious books which have come to the custody of the defendant in his capacity as Metropolitan;

(b) directing the defendant to deliver possession of the articles mentioned in para. 18 above to the plaintiffs on behalf of the Church or to Receiver appointed by the Court as aforesaid".

(The Receiver referred to herein is the Receiver appointed in O. S. 1061/62, Munsiff's Court, Trichur).

3. The court below held that as, on the death of the 1st defendant, no relief of injunction was claimed against the 2nd defendant, the plaintiff was not entitled to this relief. It held that the suspension of the 1st defendant was valid and proper but left open the question of the validity of the appointment of the Administrator (C. I. Antony) by the Patriarch. In view of the suspension of the 1st defendant, it held that he had no power to ordain the 2nd defendant as Metropolitan, and on this short ground held that the 2nd defendant was not competent to act as Metropolitan or to retain custody of the religious books of the Church. A decree was granted against him to deliver possession of these books to the two Receivers in O. S. No. 1061 of 1962.

4. We should have thought that on the death of the 1st defendant, the prayers (a) and (b) and issues 1 and 2 alike, became academic. Neither of these were amended. But it was said that the 2nd defendant was impleaded as legal representative of the 1st defendant, and the litigation was continued against him as such, and therefore, no amendment of the plaint and the issues was necessary. Thus, controversies which should ordinarily be regarded as having been set at rest, were sought to be kept alive and agitated by hanging them on a convenient peg of the legal representative character of the 1st defendant.

5. In the affidavit filed in support of M. P. No. 813 of 1969 it was said that the 2nd defendant claims to be ordained as the Priest, Bishop and Metropolitan by the 1st defendant after the institution of the suit, and to be entitled to manage the affairs of the Church as Administrator of the Church, in the absence of the defendant, and is in possession of the moveable properties mentioned in prayer (a) in the plaint. Therefore, it was submitted that he was a 'legal representative' of the deceased defendant. In the counter-affidavit, the 2nd defendant, claimed to have been appointed Administrator of the Church of the East while the 1st defendant was in Baghdad, and after his death, appointed Administrator by the Sabhayogam of the Church. He pleaded that it would not be correct to describe him as a legal representative of the 1st defendant. Possession of the plaint properties in prayer (a) was denied. It was stated that there is a library in the Bishop's house where the 2nd defendant was residing.

On these allegations, and having regard to the provisions of Order XXII, Rule 5 of the Civil Procedure Code, and the weighty contentions sought to be hung on a slender peg as noticed earlier, the court below should have "determined" the question whether the 2nd defendant was, or was not, the legal representative, after careful consideration. It did so by far too laconic an order: "Heard; impleading allowed". The plaintiff's contention that the appointment of the 2nd defendant by the 1st, after the latter was placed under suspension, was invalid, and that therefore the 2nd defendant was one without lawful authority or title, more or less in the position of an executor de son tort, and was an intermeddler with the estate of the 1st defendant, and therefore his legal representative, required a closer consideration than it has received.

6. In the grounds of appeal, ground No. 8 generally raised the contention that the suit should have been regarded as having abated on the death of the 1st defendant. By C. M. P. 423 of 1974, which was allowed by us, additional grounds were raised specifically attacking the order on M. P. No. 813 of 1969 impleading the 2nd defendant as legal representative.

7. The court below found in paragraph 35 that out of the various moveables referred to in paragraph 18 of the plaint, only religious books have come into custody of the 2nd defendant, and that the Sceptre, Crown and Gold chain had been taken by the 1st defendant with him, when he went to Baghdad, where he died, and they had not come into possession of the 2nd defendant. But in order to be a legal representative he should

have "intermeddled" with the estate. If his appointment by the 1st defendant was lawful and proper, we do not think he can be regarded as an "intermeddler". In *Andhra Bank Ltd. v. R. Srinivasan*, AIR 1962 SC 232 the Supreme Court, while rejecting the contention that a legatee who obtains only a part of the estate of the deceased under his will, cannot be said to represent his estate, observed that in regard to intermeddlers, they are said to represent the estate even if they are in possession of parcels of the estate, and hence the term 'legal representative' would include different legatees under the will. It was ruled that there is no justification for holding that 'estate' in the definition of 'legal representative' in Section 2 (11) of the Civil Procedure Code must mean the whole estate.

Counsel for the respondents, also relied on the decision in *Mt. Kammon v. Allah Bakhsh*, AIR 1941 Lah 36. There, a mutawalli nominated his successor while suffering from diarrhoea and general debility owing to old age. According to Mohomedan Law, the nomination of a successor by a Mutawalli would be valid only if made during a death illness (*Marz-ul-maut*). It was held that the nomination was invalid, as diarrhoea and general debility, did not amount to a death illness, and that the nominated person could be treated as a legal representative for prosecuting an appeal filed by the predecessor Mutawalli. The decision is in point for holding that an appointment or nomination of a successor by the predecessor, if invalid, and followed by possession of the estate or part thereof, is sufficient to constitute the nominee a legal representative. To show that the appointment of the 2nd defendant was not validly made, the only ground urged by counsel for the respondents was that it was made after the Metropolitan had been suspended by the Patriarch, and he therefore had no power to appoint the 2nd defendant as Administrator, or to ordain him as Metropolitan. This contention requires to be examined.

8. Ext. P-6, the order of suspension, refers to the earlier communication, Ext. P-4, and the 1st defendant's explanation Ex. D-2, and finds that there was deliberate refusal to abide by the orders of the Patriarch directing the Metropolitan to be in San Francisco in the first week of Sept. for the purpose of explaining the charges of insubordination, breeding dissensions in the Church, and vilifying the Patriarch. Certain other allegations were also made against the 1st defendant. It wound up as follows:

"In view of these facts, by virtue of the authority vested in us by Christ and His Holy Church, as prescribed by the Holy Synods and especially by the Synod of Dadisho (424 A. D.) from the time of

the arrival of this our Epistle into your hands, we hereby suspend you from your office as Metropolitan, thereby withdrawing from you all the authority granted you at the time of your consecration, whether spiritual or administrative over that diocese or within the Apostolic structure of the Church of the East universally. But in justice to your plea, though utterly false and unfounded, namely, that you wish to present your case before a Synodical Council, we do hereby declare that you may do so at any time that it be possible, God Willing, to hold such a council; assuring you that you will be given every opportunity to present your case in accordance with the Canon Law of the Holy Apostolic and Catholic Church of the East."

It strikes us that what was inflicted was suspension as a punishment, and not, as found by the court below, a suspension pending enquiry. The averments in paragraph 11 of the plaint are to the effect that on the failure to comply with the command of the Patriarch, the Metropolitan stood automatically suspended by the Canon Law, of his powers and functions as Metropolitan until such time as he appears before the Patriarch and apologises for the default. These are consistent with suspension as a substantive punishment and not as one pending enquiry. It appears also a little difficult to conceive of a suspension by the Patriarch, pending enquiry by the Synodical Council into the charges as vouchsafed by Ex. P-6. Counsel for the respondents referred to Ext. D-1 constitution, (clauses (1) and (25)), Ext. D-39 letter by the 1st defendant to the Patriarch, Ext. D-19, Ext. P-43, and to Ext. P-1 oath (the translation of this oath is disputed by Counsel for the respondents. But paragraph 3 of the plaint has extracted the oath and there has been no denial that the same, as extracted, is not correct). All these appear to make out that the Patriarch is the supreme head of the Church, and the Metropolitan derives his appointment, investiture, and authority, from the Patriarch. We shall assume, that this is so. A final pronouncement on the question is unnecessary, in the view that we take.

9. As for the powers of the Patriarch to order suspension, Ext. P-6 itself would trace it particularly to the Synod of Dadisho (424 A. D.). A copy of the same is Ext. P-7. According to this, the Patriarch will be the judge of all those under him, and his own judgment (judging him?) will be reserved to Christ. Also, those lower in rank than the Catholics are his disciples, and are to be obligated under him and to be judged by him. Ex. P-7 further provides:

"Chapter Eight, Para. Nine. Whosoever is summoned by the Patriarch must

come without delay, but if there be a very important reason which prevents him from doing so, then he should state his reason in writing and under his own signature." (Underlining ours.)

The concluding sentence of Ext. P-7 is:

"He who transgresses those rules is under the automatic ex-communication of the Ecumenical Council."

In addition to Ext. P-7, reliance was placed by counsel for the respondents on Ext. P-8, a Synod of the year 585 A. D. The same directs that any Metropolitan, Bishop, Priest or layman that may belittle, reject or refuse to obey, anything which has been decided upon, or commanded according to the will of the Christ by the Patriarch, such a person we all excommunicate. There is also the following provision in Ext. P-8:

"The Patriarch should also suspend a Bishop or a Metropolitan who is needful of correction in conjunction with a Bishop, but when it is absolutely necessary for the administration and the peace of the Church, he (the Patriarch) is endowed with authority to suspend any Metropolitan or Bishop."

Ext. P-9, a copy of the Synodical Rules, contains various Canons, on some of which, reliance was placed by counsel for the respondents. Canon 5 of the year 544 A. D. (page 182) enjoins that when the Patriarch seeks the Metropolitan, they shall obey quickly and unhesitatingly. Canon 39 (page 530) is as follows:

"In the Assembly of all of us Bishops it was discussed (said) and decided that this work shall be kept forever.

Whenever a deacon is punished by a priest or a priest punished by a Vicar or a Vicar punished by a Bishop or a Bishop punished by a Metropolitan or a Metropolitan by the Patriarch, even though it may be said by the one punished that he is undeservingly punished, let him remain strictly (carefully) under disciplinary action. He who is under disciplinary measures shall remain bound and pray justice of the one who bound him, in the General Assembly and after the trial in the Assembly, let him take their judgment as final and as justice commands. Canon 23 of the year 554 A. D. (pages 196 and 197) reads:

"When the Deacon is punished by a priest, or the priest by the Vicar or the Vicar by the Corepiscopas or the Corepiscopas by Bishop or the Bishop by the Metropolitan or the Metropolitan by the Patriarch even if (he says) that he is punished undeservingly the prohibition shall be obeyed (kept) strictly. The one under disciplinary action shall remain so and pray for justice to the General Assembly before those above the one who took disciplinary action and above him-

self. When the trial in the Assembly is over, let him take their final decision as being ordered by justice". Canon 15 (page 223) of the year A. D. 576 is:

"Apart from this, when there are necessities and Patriarch writes to those who he pleases they shall come quickly and unhesitatingly. But if some known and essential matters (reasons) happen (prevent) they shall inform explicitly in writing about the same. If there be some who do not send letters out of indolence, they shall be liable to judgment and punishment from the Synod."

10. Counsel for the appellant contended that Ext. P-7 Synod of A. D. 424, on which reliance was particularly placed in Ext. P-6, had been superseded by a later canon marked D-24 (a). Ext. D-24 itself is a collection of some selected canons from the Synod of the Church of the East. Ext. D-24 (a), in so far as it is material, reads:

"Concerning this we have decided that whatever the Metropolitan or Patriarch does, must be done through the General Council of the Bishops. Because the more Bishops there are in the Council, the better will it be confirmed and purified and trusted (what they are doing). But if the subject is so urgent and necessary that delay till the bishops assemble could not be brooked and if the subject is most important and necessary which does not allow delay and if waiting for the arrival of the Bishops will cause destruction, because of the emergency of the case, nothing should be done without a council of at least three Bishops, for the Council of three Bishops may be considered as a General Council according to the saying of our Lord Jesus Christ who has said "If two or three gather in my name, there in their midst will I be" if any dare to do otherwise he is guilty unto the judgment which will be pronounced against him by the General Council."

The Court below commented in paragraph 19 that the year of this Synod was not known. As pointed out by counsel for the appellant, the comment is unjustified. The Synod is of Mar Yosip, and there is sufficient evidence that it is later in point of time to the Synod of A. D. 424, specially recited in Ext. P-7. This can be seen from Ext. P-40 which shows that the Synods of Mar Ousip range from A. D. 552 to A. D. 567. Canon 7 in Ext. P-40 is the same as Ext. D-24 (a). But the mere fact that Ext. D-24 (a) is later than Ext. P-7, is of no avail, as some of the canons in Ext. P-8 are later than Ext. D-24 (a), as noticed earlier. We are also of the view that, as contended by counsel for the respondents, Ext. D-24 (a) does not have any application.

11. Ext. P-7, itself allows any important reason which prevents the Metropolitan from obeying the orders of the Patriarch to be stated in writing. Ext. P-8 allows a suspension only when it is absolutely necessary for the administration and the peace of the Church. Canon 39 of the year A. D. 544, and Canon 23 of the same year, all provide that a substantive punishment meted out by the Patriarch should be implicitly obeyed, till a regular appeal for justice to the General Assembly is disposed of. Canon 15 of the year A. D. 576 (page 223 of Ext. P-9) also contemplates an explanation in writing of the exceptional reasons which prevent compliance with the Patriarch's orders.

12. In the light of these, let us examine the position disclosed. We do not think that the order of the Patriarch in Ext. P-4 dated 2-7-1963 asking the Metropolitan to present himself in San Francisco by the first week of September, was capable of compliance having regard to the difficulty of obtaining travel documents in time, and of finding the requisite funds for sustenance in the foreign country. This was explained by the Metropolitan in Ext. D-2 letter D/- 16-7-1963. It was stated that the specific allegations against him may be disclosed, whereupon, he was prepared to reply to them pointwise. The plea was raised that the charge of violation of the Canons should be made before a Synodical Council, especially as the Patriarch, was the accuser, and should not be the Judge as well. Readiness was expressed to answer to all questions in the presence of the Synodical Council in any country where the same may be convened. We do not understand this, as the court below has done, as a readiness irrespective of considerations of time and expense to proceed to any foreign country where the Council may meet. We are unable to discern any disobedience to the Patriarch's command in Ext. D-2 letter.

On the other hand, we think that the reason given for the impossibility to travel to a distant place, San Francisco, within the short time allowed, of nearly one and a half months from the date of Ext. D-2, was a special reason stated in writing within the meaning of what the Canons which we have quoted earlier, envisaged. Ext. P-5 dated 26-8-1963 by which the Patriarch replied to Ext. D-2, stated that the charges are matters for personal questions and explanation. Regarding the difficulty of reaching San Francisco in the short time allowed, it was suggested that the Metropolitan may proceed to Syria "on the passport you now hold". — to quote the letter — meeting the expenses for that part of the journey himself, and that thereafter the trip to United States will be arranged by the Patriarch, on information. It may be noted that Ext. P-5 did not grant any ex-

tension of time for reaching San Francisco, beyond the limit set by Ext. P-4 as the first week of September, Ext. P-5 was replied to by Ext. D-3 dated 4-9-1963, by which the Metropolitan stated that he had informed the Patriarch while he was in India, that he had no passport of any Government or any country, and that the same had also been intimated to the Patriarch by the Metropolitan's General Trustees, in their "last letter". There was no reply to Ext. D-3; but the suspension order evidenced by Ext. P-6, followed.

13. The evidence on record also satisfies us that the Metropolitan was on firm ground in pleading inability to accede to the Patriarch's command or request to be in San Francisco by the first week of September. The Metropolitan was examined as D. W. 1. He stated that he had told the Patriarch that he had no passport of any country. This was when the Patriarch visited India some time 'last year' as mentioned in Ext. P-2. In cross-examination he stated that he had not been granted Indian Citizenship, and that he was in possession of documents to show that he had renounced his Syrian Citizenship (page 39 of the deposition). The matter was not pursued further, and he was not asked or challenged to produce the documents. In re-examination, he again stated that he had renounced Syrian citizenship and that he can produce documents of acceptance. Still he was not required to do so. P. W. 4 one of the trustees of the Church of the East, proved Ext. D-30 which is an attested copy of the certificate granted by the Embassy of the Syrian Republic, New Delhi, stating that the authorities of Syria have allowed the 1st defendant to relinquish his Syrian citizenship and to acquire Indian Nationality. We consider these items of evidence strong enough in support of the 1st defendant's claim that he had renounced the Syrian citizenship and was not in possession of any Syrian passport. This latter fact was stated in Ext. D-3. It was also stated to have been intimated to the Patriarch by the General Trustees in their 'last letter'. There is little on the plaintiff's side to rebut the inference to be drawn from this strong volume of evidence.

But counsel for the respondents contended that the documents to prove renunciation of Syrian citizenship, admitted to be with the 1st defendant had not been produced as required by the 'best evidence rule', and that in the absence of production of the said documents, an adverse inference had to be drawn against the 1st defendant. We are unable to agree. True, 'the best evidence rule' would require proof of renunciation to be best afforded by the document itself; but as the 1st defendant more than once stated that he was in possession of the docu-

ment, and was not asked to produce document, we are not inclined to attach much weight to its non-production; and on the evidence already referred to, we are of the view that there has been satisfactory proof of renunciation of the Syrian citizenship by the 1st defendant. As for drawing an adverse inference as to the production of the document, the decision of the Supreme Court in *Ramrati Kuer v. Swarika Prasad Singh*, (AIR 1967 SC 1134) is clear that the same can be done only if the document had been summoned and there was a failure to produce the same. In the light of this evidence, we are of the view that there was "very important reason", stated in writing, which prevented the 1st defendant from proceeding to San Francisco, within the meaning of the Synod in Ext. P-7 that we have extracted earlier. The other Canons which we have noticed, also contemplate statement in writing of the essential reasons which prevent compliance with the Patriarch's order. The Patriarch does not seem to have applied his mind to the validity of the reasons given by the Metropolitan for non-compliance with his order to proceed to San Francisco; and Ext. P-4 passed without application of the mind to this aspect, is vitiated for that reason also. We are also not satisfied that Ext. P-9 relied upon by counsel for the respondents allows a suspension by the Patriarch, pending enquiry by the Synodical Council. Read as a whole, it contemplates an implicit submission to the orders emanating from the Patriarch, followed by vindication of the stand of the aggrieved person by a regular appeal to the Synodical Council.

14. For these reasons, we think that Ext. P-6 order of suspension was not valid or proper. If so, the 1st defendant continued to be the Metropolitan at the time when he had appointed the 2nd defendant as Administrator. Therefore, the 2nd defendant in his turn cannot be regarded as one who "intermeddled" with the estate of the 1st defendant, but only as one who acted in pursuance of a lawful authority of the 1st defendant. In such capacity no relief was prayed against the 2nd defendant. It was prayed for only as legal representative, on the ground of intermeddling, which we find it impossible to sustain. The result is, we think, the suit against the 2nd defendant was not maintainable on the only ground on which it was laid, namely as the legal representative of the 1st defendant. We therefore allow this appeal, set aside the judgment and decree of the court below, and direct that the suit will stand dismissed with costs both here and in the court below.

Appeal allowed.

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**P. SUBRAMONIAN POTI AND MISS
P. JANAKI AMMA, JJ.**

State Bank of Travancore, Appellant
v. C. T. George and another, Respondents.

A. S. No. 285 of 1970, D/- 19-3-1975.

(A) Usurious Loans Act (1918), Section 3, sub-section (2), clause (b) Proviso (as amended by Madras Act 8 of 1937) — "Agriculturist" — Who is.

Word "agriculturist" in the Madras Amendment is used in its ordinary dictionary sense of a person who actually follows the calling of agriculture. If a person was having agricultural lands and was attending to agricultural operations the mere fact that he was described as a banker in a hypothecation bond executed by him, in absence of any case that he was conducting banking business on the date of the document or on any subsequent date, will not disentitle him from claiming relief under the Usurious Loans Act as amended by Madras Act 8 of 1937 and getting over the liability to pay compound interest. AIR 1942 Mad 533, AIR 1944 Mad 105 and AIR 1954 Mad 488, Rel. on. (Para 3)

(B) Usurious Loans Act (1918), Section 3, sub-section (2), clause (b) Proviso (as amended by Madras Act 8 of 1937) — Compound interest — Instance. (Deed — Construction — Hypothecation bond — Agreement as to payment of compound interest — Construction.)

Where the stipulation in a hypothecation bond is that the executor should pay and obtain receipt for the interest calculated at 9% per annum at the end of every three months and that interest if kept in arrear would be added to the principal and the consolidated amount would bear interest at the same rate and such interest should be paid on the next due date;

It was held that the bond contained an agreement to pay compound interest in the strict sense and that the Court should presume that the interest stipulated was excessive. AIR 1928 PC 35 and AIR 1944 Mad 105, Rel. (Paras 4, 5)

The theory of an implied agreement that the bank should be considered to have made an advance to the customer at the end of each quarter, of a sum equivalent to the interest accrued within that quarter so as to enable the customer to discharge the interest pertaining to that period have no application to an antecedent agreement to pay compound interest or to settle interest at half-yearly or quarterly rests. In the instant case, the creditor's claim is based on a written agreement. That one of the parties is a

bank and that a particular form of book-keeping and accounting is followed in banks are not matters to be taken into consideration in construing such an agreement. Case law discussed.

(Paras 13, 14)

It cannot be said that the executor having signed the statements confirming the correctness of the amounts as entered in the accounts of the bank has admitted his liability to pay interest at the rate stipulated in the bond and there has been a waiver of the right if any under the Usurious Loans Act. No such admission of liability or waiver of the reliefs under the Usurious Loans Act express or implied can be inferred from the mere fact of signing the confirmation slips. Even assuming that the confirmation slips amount to settlement of accounts and admission of the balance due, Section 3 of the Usurious Loans Act empowers the Court to reopen transactions and relieve the debtor of the liability to pay excessive interest. (Para 15)

Cases Referred: Chronological Paras

AIR 1954 Mad 488 = (1954) 1 Mad LJ 170 3

(1945) 1 All ER 641 = 1945 AC 360 11

AIR 1944 Mad 105 = (1943) 2 Mad LJ 504 3, 5

AIR 1943 Mad 157 = (1942) 2 Mad LJ 753 6

AIR 1942 Mad 533 = (1942) 1 Mad LJ 571 3

(1938) 1 All ER 786 = 1938 AC 341 9, 10, 12

AIR 1933 PC 101 = 37 Cal WN 570 14

1932 AC 624 = 101 LJKB 306 8

(1931) 2 KB 81 = 100 LJKB 439 7, 8

AIR 1928 PC 35 = 26 All LJ 488 5

(1922) 1 Ch 126 = 91 LJ Ch 188 11

(1821) 5 B and Ad 34 = 106 ER 1106 9

(1803) 9 Ves 223 = 32 ER 588 9, 12

35 Cochin 542 14

K. C. John, for Appellant; C. M. James Chacko, E. R. Venkateshwaran and Joseph Vadakkal, for Respondent No. 1.

JANAKI AMMA, J.:— The plaintiff, the State Bank of Travancore is the appellant. The first respondent had dealings with the Chaldean Syrian Bank, Trichur by way of overdraft current account. On 6-1-1951, he executed Ext. A-1, a hypothecation bond for Rs. 8,750/- made up of the balance outstanding in his account and the expenses in connection with the deed. Ext. A-1 stipulated that the 1st respondent should pay interest at 9% per annum with quarterly rests. On the same day, the 1st respondent executed Ext. A-2, a possessory mortgage of the same properties for Rs. 1,000/- in favour of one F. C. George, an officer of the Bank. The properties were taken by the 1st respondent on lease-back under Ext. A-3. The pottam was fixed under Ext. A-3 at Rs. 1,500/-. An amount of Rs. 1,410/- was

to be retained by the 1st respondent towards the upkeep and maintenance of the rubber trees and for payment of jenmi dues and interest to the Chaldean Syrian Bank. The balance Rs. 90/- was to be paid as purappad. Interest at the rate of 9% per annum was fixed for arrears of purappad, if any. F. C. George transferred the rights under Exts. A-2 and A-3 to the Chaldean Syrian Bank as per Ext. A-4 dated 10-1-1951. The bank was maintaining separate accounts for the two transactions. Exts. A-5 and A-6 are the copies of the accounts. On 18-3-1965, the bank issued Ext. A-10 notice stating that consequent on the rise in Bank rate, interest would be charged at 12% per annum from 1-3-1965, in case the amount under the loan account was not paid before 31-3-1965. The assets and liabilities of the Chaldean Syrian Bank became merged in the appellant-bank with effect from 1-10-1965 as per the order, Ext. A-11 issued by the Director of Banking under sub-sections (2) and (3) of Section 38 of the State Bank of India (Subsidiary Banks) Act of 1959. The first respondent was called upon by the appellant-bank to confirm the correctness of the amount entered in the bank accounts and the balance due on 1-10-1965 under the two transactions. Exts. A-13 and A-14 are the confirmation statements signed by the first respondent. Thereafter on 4-12-1965, the appellant-bank issued a registered notice calling upon the first respondent to discharge the amount due under the two transactions. On failure on his part to make payments, the suit was instituted on 13-12-1965 for recovery of amounts due. Interest at the rate mentioned in the documents was claimed till 1-10-1965 and thereafter at 12%. The second respondent is a subsequent mortgagee. Several pleas were raised by the first respondent. Those relevant for this appeal are:

(1) that the first respondent being an agriculturist was entitled to relief under the Usurious Loans Act as amended by Act 8 of 1937 (Madras) and was not bound to pay compound interest or interest at the rate of 12% and;

(2) that the first respondent was liable to pay off the debt as per the provisions of Act 31 of 1958.

The first respondent also contended that the confirmatory statements were signed by him without reference to the accounts, which were not available to him and that the said documents would not debar him from claiming whatever reliefs that he was otherwise entitled under law.

2. The District Judge, Kozhikode, who disposed of the case held that the first respondent was an agriculturist coming under Section 3 of the Usurious Loans Act as amended by Madras Act 8 of

1937 which does not favour charging of compound interest in respect of loans by agriculturists. The contention that he waived his rights by signing the confirmation letters, Exts. A-13 and A-14 was not accepted by the trial court. The court refused to reopen the accounts prior to 6-1-1951. Relief under Act 31 of 1958 was not granted to the first respondent. A decree was passed for the principal amounts under Exts. A-1 and A-2 with simple interest at 9% per annum till 1-3-1965 and at 12% per annum thereafter less the amounts appropriated as per the loan accounts, Exts. A-5 and A-6. Aggrieved by the above decree, the plaintiff-bank has come up in appeal. The first respondent has filed cross-objections claiming relief under Act 31 of 1958.

3. We shall first deal with the availability of the benefit under the Usurious Loans Act, on the assumption that the first respondent is not an agriculturist entitled to relief under Act 31 of 1958. Sub-sections (1) and (2) of Sec. 3 of the Usurious Loans Act run as follows:

"3. (1) Notwithstanding anything in the Usury Laws Repeal Act, 1855, where, in any suit to which this Act applies, whether heard *ex parte* or otherwise, the Court has reason to believe,—

(a) that the interest is excessive; and

(b) that the transaction was, as between the parties thereto, substantially unfair,

The court may exercise all or any of the following powers, namely, may,—

(i) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest,

(ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, re-open any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof;

(iii) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just:

Provided that, in the exercise of these powers, the Court shall not—

(i) re-open any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than twelve years from the date of the transaction;

(ii) do anything which affects any decree of a Court.

Explanation:— In the case of a suit brought on a series of transactions the expression 'the transaction' means, for the purposes of proviso (i), the first of such transactions.

2 (a) In this section "excessive" means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan.

(b) In considering whether interest is excessive under this section, the Court shall take into account any amounts charged or paid, whether in money or in kind, for expenses, inquiries, fines, bonuses, premia, renewals or any other charges, and if compound interest is charged, the periods at which it is calculated, and the total advantage which may reasonably be taken to have been expected from the transaction.

(c) In considering the question of risk, the Court shall take into account the presence or absence of security and the value thereof, the financial condition of the debtor and the result of any previous transactions of the debtor, by way of loan, so far as the same were known, or must be taken to have been known to the creditor.

(d) In considering whether a transaction was substantially unfair, the Court shall take into account all circumstances materially affecting the relations of the parties at the time of the loan or tending to show that the transaction was unfair, including the necessities or supposed necessities of the debtor at the time of the loan so far as the same were known, or must be taken to have been known, to the creditor.

Explanation:— Interest may of itself be sufficient evidence that a transaction was substantially unfair".

As per the Madras Act 8 of 1937, a proviso was added to clause (b) of sub-section (2) as follows:

"Provided that in the case of loans to agriculturists, if compound interest is charged, the court shall presume that the interest is excessive."

There is no scope for doubt that the word "agriculturist" in the Madras Amendment extracted above, is used in its ordinary dictionary sense of a person who actually follows the calling of agriculture. The case Venkata Ramanayya v. Mallikharjanadu, AIR 1942 Mad 533 is a decision on the point. If a person has agricultural lands and looks after their cultivation, the fact that he conducts agricultural operations on a commercial scale or that he owns a rice mill will not disentitle him from claiming relief under the Usurious Loans Act and getting over the liability to

pay compound interest. See Venkanna v. Muhammad Rowthar, AIR 1944 Mad 105 and Rajayya v. Ramachandra Rao, AIR 1954 Mad 488. Though the first respondent in the instant case is described as a banker in Ext. A-1, there is no case that he was conducting banking business on the date of the document or on any subsequent date. On the other hand, Ext. A-1 to Ext. A-3 would show that the first respondent was having agricultural lands and was attending to agricultural operations. There is, therefore, no doubt that he is an agriculturist entitled to relief under the Usurious Loans Act as amended by Madras Act 8 of 1937.

4. The stipulation in Ext. A-1 is that the first respondent should pay and obtain receipt for the interest calculated at 9 per cent. per annum at the end of every three months. Interest if kept in arrear would be added to the principal and the consolidated amount would bear interest at the same rate and such interest should be paid on the next due date. The question is whether the above terms amount to an agreement to pay compound interest.

5. In a transaction where compound interest is charged at each settlement of accounts, there is a sinking of the interest in arrear into the principal debt and the composite sum carries interest till the next settlement. After each settlement, the debtor loses his right to have the unpaid interest separated from the principal and dealt with independently. (See Muthu v. Meenakshisundaram, AIR 1928 PC 35 and Venkanna v. Muhammad Rowther, AIR 1944 Mad 105). Compound interest is described in Law Lexicon of British India by Shri P. Ramana-tha Aiyar as follows:

"Compound interest is interest upon interest; where accrued interest is added to the principal sum and the whole treated as a new principal for the calculation of the interest for the next period.

It is to be observed, however, that there are two distinct methods of computing what is loosely termed compound interest. By the first method periodical rests are made and at each rest the principal and the accrued interest thereon is combined into new principal which bears interest until the next rest and so on; this method results in giving interest not only upon the principal and upon the interest on the principal, but also in giving interest upon the interest on the interest and so on ad infinitum until payment, and this is what is meant by "compound interest" when the term is used in its strict sense. By the other method, the accrued interest is not combined with the principal but each instalment of interest on the principal becomes interest on the interest; and although this method is also sometimes called compound interest, it

has been more correctly described as a middle course between simple and compound interest".

Judged in the light of the above, Ext. A-1 contains an agreement to pay compound interest in the strict sense. It follows that in view of the proviso to Section 3 (2) of the Usurious Loans Act which is applicable to the Malabar area, the Court should presume that the interest stipulated in Ext. A-1 is excessive.

6. It is, however, argued on behalf of the appellant that the provision relating to interest in Ext. A-1 does not amount to an agreement to pay compound interest and that it is a term in consonance with the practice which prevails in banks under which to enable payment of interest on the due dates the banks would make advances to the debtor and add the sums so advanced to the principal. Reference has been made in this connection to Pazhaniappa Mudaliar v. Narayana Ayyar, AIR 1943 Mad 157 decided under the Madras Agriculturists' Relief Act, 4 of 1938. In that case, there was a course of dealings following an account opened in the name of the appellants-firm. Payments were made to the firm. There were both debit and credit entries each year. Interest was calculated at the rate of 12% per annum on the appellant's overdraft and deducting counter-interest at the same rate on the payments made by the appellants, the amount of the interest was entered on the debit side of the account and a balance was then struck, such balance bearing interest at the same rate during the next year. The appellants contended that they were agriculturists within the meaning of the Madras Agriculturists' Relief Act and that if the debts due to the respondents were scaled down in accordance with the provisions of the Act, practically nothing would be found payable. It was not disputed that the appellants were agriculturists; but their contention that all the accrued interest should be deemed to be discharged under Section 8 of the Act was not accepted by the trial Court. In appeal, the High Court observed:

"It will be seen that the mode of dealing adopted by the parties is what is usually followed between banker and customer; and it is well established that the effect of this system is to capitalize the interest at the end of each year and treat it as a fresh advance by the bank; in other words, according to the usage prevailing between bankers and customers, it is an implied term of their dealing that the banker is to be treated as having made an advance to the customer at the end of each year or half year as the case may be, of a sum equivalent in amount to the interest accruing during that period, so as to enable the customer to discharge the interest, increasing the prin-

cipal of his debt by a corresponding amount. As pointed out in (1931) 2 KB 81, this usage which has been adopted by the bankers in England for over a century had its origin as a device to secure compound interest by circumventing the usury laws under which agreements for charging compound interest were usurious and illegal; and though the usury laws were subsequently repealed and the necessity for such mode of dealing disappeared, the usage which ascribes to it, as a matter of implied term of contract, the effect referred to above has remained".

The High Court held that the above principle would be applicable to the case and that interest accruing due each year should be deemed to have been paid and discharged and to be no longer outstanding to be wiped out under Section 8 (1) of the Madras Agriculturists' Relief Act.

7. The contention of the appellant is that what was done in the present case was only to follow the above practice of bankers and that there was no adding of interest as such to the principal every three months for calculating interest for the subsequent quarter.

8. In order to appreciate the reasoning and also the principles involved, reference may have to be made to some of the cases wherein the above referred practice has been recognised by the Courts in England. The case *Inland Revenue Commrs. v. Holder*, (1931) 2 KB 81 arose in connection with the Income-tax Act. Under Section 36 of the Income-tax Act of 1918, a claim could be made for repayment of income-tax upon sums paid to banks in respect of interest out of taxed profits without deduction of tax. The person by whom interest was paid was entitled to on proof of the facts to the satisfaction of the Special Commissioners, payment of tax on the amount of the interest. In the case under reference the appellants were interested in a company which had been for many years indebted to its bankers. The appellants gave guarantees to the bank to secure the company's indebtedness. In accordance with the usual custom of the bankers, interest on the amounts owing to the bank from time to time was debited half-yearly to the company's capital account with bank. Payments were made by the company into the account from time to time. On an examination of the bank accounts, it was found that interest was added at half-yearly rests. The appellants contended before the Income-tax Authorities that he was entitled to deduction of the tax on the amount of interest. The question arose as to whether in the light of the accounts maintained by the bankers, there was payment of interest which was a condition precedent for adjustment of the tax on the amount of

interest. It was in this connection that the particular practice among the bankers of making advances for payment of interest was adverted to. Romer, L. J. observed that having regard to the method in which, with the concurrence of the company, the account was kept by the bank, the company must be deemed to have paid each half-year the accruing interest by means of an advance made for that purpose by the bank to the company. There was an appeal from the above decision; but the appeal was disposed of on other grounds, as is seen from the decision in *Holder v. Inland Revenue Commrs.*, 1932 AC 624.

9. The identical question, however, came up for consideration in the case reported in *Paton (Fenton's Trustee) v. Inland Revenue Commrs.*, 1938-1 All ER 786. In the particular case, F borrowed a large sum from a bank in respect of which the bank opened a separate loan account. Each half-year interest at an agreed rate, and without deduction of tax was placed to the debit of the account, and the aggregate amount was treated as principal for the following year. When deduction for interest paid was claimed it was held that in the circumstances of the case, there was no ground for holding that interest was in fact paid by F. "The invariable practice of the bankers" of adding the interest to the principal periodically is referred to at page 795:

"My Lords, the origin of this agreeable fiction whereby debts are to be deemed to be paid without payment may be traced historically to the ingenuity of lenders in devising a method of obtaining compound interest without contravening the usury laws. It was illegal by an antecedent contract to stipulate for the payment of compound interest, but, in the words of Lord Eldon, L. C., in *Ex parte Bevan*, (1803) 9 Ves 223; 35 Digest 200, 270 at p. 224:

..... if you agree to settle accounts at the end of six months, that not being part of the prior contract, and then stipulate, that you will forbear for six months upon those terms (i.e., that the interest shall carry interest for the subsequent six months) that is legal.

On this principle, it was held in *Eaton v. Bell*, (1821) 5 B & Ald 34; 3 Digest 245, 706 that bankers who, with the knowledge of, and without objection by their customers, debited them with interest with half-yearly rests in accordance with their general practice did not offend against the usury laws. This method of dealing with loan accounts, which became common from among bankers, survived the abolition of the usury laws, and is well established as the ordi-

nary usage prevailing between bankers and customers who borrow from them and do not pay the interest as it accrues".

10. The decision in *Holder's* case proceeded on the footing that periodical interest must be held to have been paid when placed to the debit of the account as an additional advance by the bank for the convenience of the obligants. This view was not accepted in *Paton's* case, (1938) 1 All ER 786 — Lord Maugham observed at page 799:

"In accordance with the usual practice of bankers in this country, the system adopted by the bank was that each half-year the accrued interest was added to the amount advanced (including therein any interest previously added to the original amount), and the total sum was carried forward into the next half-year as one capitalised sum. This is a mere matter of entries in the books of the bank, and the result is to give the bank compound interest on the amount due. In particular, I agree that there is nothing in the cases which can lead us to the conclusion that the customer has paid the interest in the circumstances we are considering."

11. Reference may be made here to the observations of Lord Sterndale, M. R., in *Re Morris*, (1922) 1 Ch 126: 28 Digest 72:

"I think the word "capitalisation" used in many of the books quoted is a convenient word, but for the purposes for which it has been used in the argument before us it is a fallacious word, because it is taken as referring to capitalisation for all purposes, income-tax and otherwise. I do not think that is the meaning of the word. In my opinion — not to beg the question — when these sums of interest come to be paid at the end of the time when payment is made, although interest has been charged upon them, and although as a matter of book keeping, they have from time to time been added to capital, they do not cease to be interest of money — that is to say, they are overdue interest upon which interest has been paid."

Whether there was payment of interest when interest was added to capital in the case of a mortgage was considered by the House of Lords in *Inland Revenue Commr. v. Oswald*, 1945-1 All ER Annotated 641. Lord Simonds observed:

"The question in the simplest terms is whether, when the mortgagee capitalises interest, the mortgagor pays it; and the answer, in terms as simple, is that the mortgagee capitalises it just because the mortgagor does not pay it. It is not a form of payment; it is not a substitute for payment; the interest remains unpaid, but it is impressed with a new quality, viz., that it carries interest as if it were capital".

12. Incidentally, we may extract the reference made by Lord Atkin to the case *Ex parte Bevan* in Paton's case which would throw more light on the practice of bankers already mentioned:

"*Ex parte Bevan* was a case of a petition in bankruptcy to be allowed to prove. One objection made was "that in settling accounts half-yearly interest had been turned into principal". At that time the Usury Act, 1713 (12 Ann. Stat. 2, c. 16) was in force, which made illegal a contract to pay interest at a rate higher than 5 per cent. per annum.

It does not appear from the report what was the nature of the debt or what were the occupations of either petitioner or debtor. Lord Eldon, L. C., said, at page 224:

"As to the question of compound interest, it is clear, you cannot a priori agree to let a man have money for twelve months, settling the balance at the end of six months; and that the interest shall carry interest for the subsequent six months; that is, you cannot contract for more than 5 per cent.; agreeing to forbear for six months. But, if you agree to settle accounts at the end of six months, that not being part of the prior contract, and then stipulate, that you will forbear for six months upon those terms, that is legal."

There is here not a suggestion of payment. The only question for Lord Eldon, L. C., was the supposed illegality. An antecedent (a priori) agreement for half-yearly rests and interest upon the balance would be void, but if one settles, i.e., agrees, the balance at the end of 6 months, there is nothing to prevent one from making a fresh start with the total debt, which no doubt includes interest, and agreeing to forbear from suing for the whole debt at a rate of interest meantime."

13. A résumé of the aforesaid English decisions would show the following:—

(1) The practice of bankers settling accounts every six months commenced at a time when the Usury laws were prevailing in England.

(2) Under the Usury laws an antecedent agreement to pay compound interest at half-yearly rests was void.

(3) The device of settling accounts every half-year and making a fresh start with the principal and the interest outstanding and treating it as a new debt was employed to get over the Usury laws and to evade it.

(4) The practice did not involve any advance in fact or actual payment of interest utilising such advance but amounted only to a system of accounting and book-keeping whereby an advance by the bank and a payment of interest outstanding were deemed to have been made and

(5) Such deemed payments are not taken as actual payments for the purpose of statutes which refer to payment of interest.

Though Holder's case is referred to in *P. Mudaliar v. N. Ayyar*, AIR 1943 Mad 157, Paton's case is not seen brought to the notice of the Court. It is evident from the ruling that in actual practice the bankers did not as a matter of fact advance any loan and what was being done was to adopt a particular mode of book-keeping. Therefore, from the mere fact that there was a settlement of accounts every six months, it cannot be said that there was actual payment or discharge of the prior obligation and the parties contracted to a new obligation. It is also seen that whatever be the practice among the bankers, the English decisions referred to have no application to an antecedent agreement to pay compound interest or to settle interest at half-yearly or quarterly rests. In the instant case, the appellant's claim is based on a written agreement. That one of the parties is a bank and that a particular form of book-keeping and accounting is followed in banks are not matters to be taken into consideration in construing such an agreement.

14. In *Raghubandan Prasad Singh v. Commr. of Income-tax*, 37 Cal WN 570 = (AIR 1933 PC 101), the Privy Council held that when a debtor renews his debt so that interest, from the date of such renewal, becomes part of the principal, he does not actually pay the interest and the transaction is not in essence a realisation of principal and interest. In *Antony v. Mala Catholic Union Bank*, (35 Cochin 542), a document stipulating for interest on lines similar to Ext. A-1 came up for consideration. The theory of an implied agreement that the bank should be considered to have made an advance to the customer at the end of each quarter, of a sum equivalent to the interest accrued within that quarter so as to enable the customer to discharge the interest pertaining to that period was not accepted. The Court remarked:

"That is an absolute fallacy. There is no such implied term nor is there evidence of the existence of such a term. The terms of the agreement are quite clear. What the relevant terms in the agreement amount to is this. The bank is allowed to charge compound interest with a rest of three months period." The same is the position with regard to Ext. A-1 in this case.

15. It is then argued that the first respondent having signed Exts. A-13 and A-14 confirming the correctness of the amounts as entered in the accounts of the bank has admitted his liability to pay interest at the rate stipulated in Ext. A-1

and there has been a waiver of the right if any under the Usurious Loans Act. No such admission of liability or waiver of the reliefs under the Usurious Loans Act express or implied can be inferred from the mere fact of signing the confirmation slips. Even assuming that Exts. A-13 and A-14 amount to settlement of accounts and admission of the balance due, Section 3 of the Usurious Loans Act empowers the Court to reopen transactions and relieve the debtor of the liability to pay excessive interest.

16. The aforesaid discussion makes it clear that the stipulation in Ext. A-1 is for payment of compound interest. The appellant being an agriculturist, Act 8 of 1937 (Madras) applies. The court should, therefore, presume that interest is excessive. No circumstances are made out to rebut the presumption. Interest being excessive, the transaction was substantially unfair. The District Judge, Kozhikode, therefore, rightly held that the rate of interest fixed under Ext. A-1 required interference. Interest at the rate of 9% per annum till 1-10-1965 and thereafter at 12 per cent. per annum allowed by the trial court is reasonable on the facts and circumstances of the case. The appeal thus fails and is dismissed with costs.

17. In the Cross-appeal filed by the first respondent, the only point pressed is that he is an agriculturist entitled to relief under Act 31 of 1958. There is no case that the respondent is entitled to relief in respect of the transaction under Ext. A-1 where the loan was admittedly more than Rs. 1,500/-. But in respect of the second transaction the loan amount was only Rs. 1,000/-. If the first respondent was an agriculturist on the relevant date otherwise entitled to relief under Act 31 of 1958, the above debt falls under the category of debt which can be scaled down. The trial Court held that being a person possessed of a large extent of agricultural property where rubber and other trees are grown the first respondent should be deemed to be a person paying agricultural income-tax and, therefore, he is not entitled to relief under the Act. The first respondent would, however, contend that the conclusions arrived at by the trial court are without any basis. There are no materials in the case which go to show that the first respondent was paying agricultural income-tax during the concerned period. There is also no evidence to the effect that the income of the property during the relevant period was such that he would have been in the usual course assessed to agricultural income-tax. On the other hand, it is the admitted case that the first respondent possessed only the property mentioned in Exts. A-1 to A-3. The patta

fixed under Ext. A-3 is only Rs. 1,500/-. If this was the sole agricultural income the first respondent was getting during the relevant period, it could not be said that he was liable to pay agricultural income-tax. The appellant has not adduced any evidence to show that the income from agricultural properties which the first respondent was getting exceeded Rs. 5,000/- per annum. In the circumstances, there are no justifiable grounds for disallowing the first respondent relief under Act 31 of 1958 which has been now replaced by Act 11 of 1970. The Cross-appeal is, therefore, allowed to the above extent. The parties will bear their respective costs.

Order accordingly.

AIR 1975 KERALA 175

G. BALAGANGADHARAN NAIR, J.

Kurian and another, Appellants v. Job and others, Respondents.

Second Appeal No. 507 of 1972, D/-5-3-1975.*

(A) T. P. Act (1882), S. 108 (p) — Lessee constructing permanent structure on land — No consent of the landlord obtained — Violation of Section 108 (p) — Permanent injunction against lessee can be given — (1964) 1 Andh WR 337, Diss.

Section 108 (p) of the T. P. Act prohibits the erection of permanent structures by the lessee on the leased property without the consent of the lessor. Whether a structure is permanent or not has to be decided on the facts of each case considering its nature and extent and the intention with which it is erected. Where the lessee erects a permanent structure in violation of the provisions of Section 108 (p) the lessor is entitled to get a mandatory injunction restraining the lessee from building such a structure. The lessee cannot be allowed to plead that he will remove the structure at the end of the lease. AIR 1951 Pat 600; (1904) ILR 27 Mad 211; AIR 1940 Mad 32 and AIR 1914 All 285, Rel. on; (1964) 1 Andh WR 337, Diss.; AIR 1932 Mad 328 and (1878) 3 AC 709, Ref. (Paras 3, 5, 6)

Cases Referred: Chronological Paras

(1964) 1 Andh WR 337	5
AIR 1951 Pat 600	4
AIR 1940 Mad 32 = (1939) 2 Mad LJ 773	4
AIR 1932 Mad 328 = 62 Mad LJ 496	6
AIR 1914 All 285 = 12 All LJ 175	4
(1904) ILR 27 Mad 211	4
(1878) 3 AC 709 = 39 LT 129	7

*(Against order of Sub. J., Trichur. in A. S. No. 2 of 1967).

FS/GS/C345/75/MNT

M. Abraham, for Appellants; T. S. Venkiteswara Iyer, P. K. Balasubramaniam and O. O. Mathew, for Respondents.

JUDGMENT:— Appellants were the two defendants in a suit for injunction brought by the original plaintiff-respondent, now represented by his legal representatives additional respondents 2 to 4. They are tenants of a non-residential building by the side of the road on the east and a room further west and the intervening space in between. The building and room were taken on rent for running their trade. The building is marked 1, the room 2 and the vacant space 3 in the sketch Ext. C-2 prepared by a Commissioner. The vacant space is the B Schedule to the plaint. The plaintiff sought a prohibitory injunction restraining the defendants from constructing any building in or altering the nature of the B schedule property and a mandatory injunction directing them to remove the structures put up by them without his knowledge or consent. The main ground of the defence was that they were putting up a shed in the B Schedule with the consent of the plaintiff, that they would remove it at the time of surrendering the lease and that in such circumstances the structure was not liable to be demolished. The trial Court found that the structure was put up by the defendants with the consent of the plaintiff and that there was accordingly no ground for granting the injunction. On appeal the Appellate Court held in the first instance that it was not very necessary to consider whether the defendants had the plaintiff's consent as it thought that during the currency of the lease it was open to the defendants to use the B Schedule land for constructing a room and that at the most what the plaintiff could require was restoration of the property to its original condition at the time of the surrender. On this finding the appeal was dismissed. The plaintiff thereupon came to this Court in S. A. 749 of 1968. By the judgment dated January 11, 1971, this Court held that there was no proof of the agreement set up by the defendants permitting construction of the building and that the only question was whether they were entitled as lessees to put up the structure. It was further held that the courts below had made no reference to Section 108 (p), Transfer of Property Act, which prohibits the erection of permanent structures in the leasehold without the consent of the landlord and that as there was no consent the primary question to be decided was whether the structures attempted to be put up by them were permanent structures. This Court accordingly set aside the decision of the appellate court and remanded the appeal for fresh disposal. The Lower Appellate Court has now found that the structure constructed by

the defendants is a permanent one and has in that view issued a mandatory injunction directing them to demolish it within two months, failing which the plaintiffs were allowed to get it removed through court.

2. Counsel for the appellants contended in the first place that in the nature of the direction in the second appeal to determine whether the structure was a permanent one the lower appellate court should have either taken evidence itself or remanded the suit to the trial court for that purpose and that the omission to do so has prejudiced his clients. The judgment in S. A. 749 of 1968 does not indicate that the appellants made any request for opportunity to give evidence. What is more it shows that this court directed that the question whether the structure was a permanent one or not has to be decided on the materials in the court, thus excluding any remand for taking evidence by the lower appellate court. The appellants themselves have no case that they made any motion to give evidence before the lower appellate court. I see no ground to allow a remand particularly as the materials in evidence are sufficient to enable an adjudication.

3. The records show that the appellants started the construction of a granite wall partly behind item No. 1 building and along the northern border of plot No. 3 on the line CDEF in Ext. C-2. The appellate judgment shows that it was admitted that subsequent to the suit the granite wall had been completed with a door and two windows in it and that a tiled roof has also been constructed over plot No. 3, thus converting the whole into a room. The appellate court has held that this constitutes a permanent structure within Section 108 (p), Transfer of Property Act. Whether a structure is permanent or not has to be decided on the facts of each case considering its nature and extent and the intention with which it is erected. Here the construction consists of a room with a tiled roof and a wall of granite and mortar. The nature and extent of the construction and the materials that have gone into the construction are by themselves sufficient to justify the finding about the permanency. That the defendants intended to erect a permanent structure is further clear from their contention in the written statement that they were planning to construct a room for storing their stock-in-trade. They had also contended that they were prepared to remove the construction at the time of surrender of the lease, which again discloses an intention that the structure was to be a permanent and durable one. It was also their contention that the new construction would add to the utility, appearance and

20. To sum up my conclusions are as under:

(i) Court-fee is leviable on appeals under Section 147 of the Madhya Pradesh Town Improvement Trusts Act, 1960 in view of Section 4 of the Court-fees Act.

(ii) Section 8 of the Court-fees Act is applicable to such appeals but that Section only deals with computation of Court-fees; the charging provisions are contained in the Schedules to the Court-fees Act read with Section 4 of the Act.

(iii) Article 11 of Schedule II of the Court-fees Act is not attracted because an award of the Tribunal under the Act is an order having the force of a decree within the meaning of the said Article.

(iv) Court-fee on such appeals by a claimant is payable ad valorem on the amount of compensation claimed by him in excess of that awarded by the Tribunal under Article 1-A of Schedule I of the Court-fees Act read with Section 8 thereof.

(v) In the case of an appeal by the Trust ad valorem Court-fee is payable on the difference between the amount awarded by the Tribunal and the amount which, according to the Trust, should be awarded as compensation, under Article 1-A of schedule I of the Court-fees Act read with Section 8 thereof.

Order accordingly.

AIR 1975 MADHYA PRADESH 193

S. M. N. RAINA AND C. P. SEN, JJ.

Santoshchandra and others, Appellants v. Smt. Gyansundarbai and others, Respondents.

First Appeal No. 149 of 1967, D/- 1-7-1974*.

(A) Specific Relief Act (1963), Section 34, Proviso — Suit for declaration of title by plaintiff in possession — Plaintiff subsequently dispossessed — Relief of possession not sought by amendment of plaint — Plaintiff's right to declaration of title is not affected.

(Paras 6, 7)

Cases Referred:	Chronological	Paras
AIR 1973 SC 2384 = (1974) 1 SCR 322		8
AIR 1973 SC 554 = 1973 Jab LJ 1041		12
AIR 1966 SC 1836 = (1967) 1 SCJ 848		12
AIR 1965 SC 825 = (1965) 1 SCR 26		12
AIR 1950 Cal 386		7

R. K. Pandey, for Appellants; D. M. Dharmadhikari, for Respondents.

RAINA, J.— This is an appeal by the plaintiffs from the judgment and decree of the Court of Additional District Judge, Betul dismissing their suit for a declaration and injunction.

2. The plaintiffs are the sons of Tekchand respondent No. 2. Tekchand was

the adopted son of Jethmal. Mst. Jhunnobai, who was the original defendant No. 1 was the widow of Jethmal. Jhunnobai died during the pendency of the suit and on her death her daughter Mst. Gyansundarbai respondent No. 1 was brought on record as her legal representative. Mst. Tarabai, defendant-respondent No. 3 is the wife of Tekchand.

3. Jethmal died in the year 1947. During his lifetime he had acquired 3 houses. Out of them one was sold by him. So far the facts are not in dispute. The case of the plaintiffs is that the relations between Tekchand and Smt. Jhunnobai being strained. Jethmal made a family arrangement in June, 1946. Under this arrangement he gave a sum of Rs. 12,000/- to Mst. Jhunnobai and she was also given right of residence in the family property. The rest of the property was allotted to Tekchand and the plaintiffs in lieu of their share in the property. Thus, according to the plaintiffs, after this arrangement was made Mst. Jhunnobai had no interest left in the family property. Jhunnobai, however, filed a suit for partition against Tekchand, namely Civil Suit No. 34-A of 1959. A preliminary decree was passed in her favour on 23-7-1962 and subsequently it was made final. It is not disputed that the said decree was executed and Jhunnobai and Tekchand were placed in possession of their shares under the decree. On 14-3-1963 the plaintiffs filed this suit for a declaration and injunction contending that they were not bound by the decree of partition in Civil Suit No. 34-A of 1959 as they were not parties thereto. During the pendency of the suit the plaintiffs made an application for deleting the relief of injunction when the question of Court-fees being inadequate was raised by the defendants. The trial Judge rejected the application and after dismissing the suit on merits, directed the plaintiffs to pay additional Court-fees of Rs. 1055/-. Being aggrieved thereby the plaintiffs have filed this appeal.

4. The plaintiffs raised the question of Court-fees in appeal and the matter was referred by a Division Bench of this Court to a Full Bench which held that the plaintiffs-appellants were not required to seek the relief of injunction and as such were not required to pay Court-fees under Section 7 (iv) (c) or under Section 7 (iv) (d) of the Court-fees Act. It was further held that the Court-fees paid by them was sufficient. After the aforesaid opinion of the Full Bench was recorded this appeal has come up before us for disposal on merits.

5. Before we proceed to consider the appeal on merits we would deal with the contention of the learned counsel for the appellants that the learned trial Judge was in error in rejecting their application for amendment of the plaint so as to delete the relief of injunction. It is for the plaintiff to seek such relief as he chooses and, therefore, there was no justification for rejecting the application

* (From decree of S. M. Afzal Addl. Dist. J., Betul, in Civil Suit No. 10-A of 1963, D/- 17-11-1966).

for amendment. The question whether a suit for bare declaration was maintainable in the circumstances or not is a separate matter and in fact the Full Bench has observed in the concluding paragraph of its opinion that their opinion would not affect the question of tenability of the suit in view of Section 42 of the Specific Relief Act. The learned counsel for the respondents has also no objection to the amendment being allowed. We, therefore, set aside the order of the trial Court rejecting the plaintiffs' application for amendment of the plaint and hereby allow the application and direct that the plaint shall be amended accordingly.

6. The next point for consideration is whether a suit for bare declaration is maintainable in the circumstances of this case. Proviso to Section 34 of the Specific Relief Act, 1963, lays down that no Court shall make any such declaration where the plaintiff being able to seek further relief than mere declaration of title, omits to do so. The object of this proviso is to avoid multiplicity of suits. Where the plaintiff is entitled to some consequential relief directly flowing from the right or title of which he seeks declaration in the suit, he must seek such relief along with the declaration. It is not open to him to seek a declaration in the first instance and a consequential relief at a later stage by 2 separate suits. This provision is mandatory and enjoins the Court not to pass a declaratory decree where the plaintiff omits to seek further relief to which he is entitled as a natural consequence of the declaration.

7. In the instant case it has been urged on behalf of the defendants-respondents that the plaintiffs were bound to seek either the relief of injunction restraining the other side from executing the decree against them or the relief of possession as a consequential relief and for having failed to do so the suit is liable to be dismissed. So far as possession is concerned it was not disputed before us that the plaintiffs were in possession on the date of the suit and they were dispossessed by the defendants during the pendency of the suit in execution of the decree obtained by the late Jhunnobai against the respondents 2 and 3. It is no doubt true that it was open to the plaintiffs to seek the relief of possession by amending the plaint when they lost possession under the decree, in question. But on that ground alone their right to seek a declaration cannot be denied. Ability of the plaintiff to seek further relief within the meaning of Section 34 means ability at the time of the institution of the suit and a suit for declaration which was maintainable at the time of the institution does not cease to be so on the happening of some subsequent event which may necessitate consequential relief. The right of plaintiff to maintain a dec-

laratory suit is not affected by the fact that possession was lost during the pendency of the suit. Thus the mere fact that the plaintiffs did not seek the consequential relief of possession by amending the plaint would not affect their right to seek a declaration of the title if that right was available to them on the date of the suit. A similar view was expressed in *Surendra Narayan Deb v. Bhairabendra Narayan Deb*, AIR 1950 Cal 386.

8. It has been urged on behalf of the respondents that, in any case, it was necessary for the plaintiffs to seek the relief of injunction as the decree in Civil Suit No. 34-A of 1959 was binding on them. It is, no doubt, true that the plaintiffs were not parties to the earlier suit and the decree passed therein. Ordinarily, a person, who is not a party to a decree, is not bound by it and may, therefore, sue for a declaration that it is not binding on him without seeking any further relief. But there are exceptions to this rule. In this connection it would be pertinent to refer to the following observations of their Lordships of the Supreme Court in *Shamsher Singh v. Rajinder Prasad*, AIR 1973 SC 2384 at p. 2387:—

"But there are exceptional cases in which the plaintiff though not a party to the deed or the decree is nevertheless bound thereby. For instance, when a sale or mortgage of joint family property is effected by a manager of a joint Hindu family, the alienation is binding on the other members of the family (even if they are not parties to it) until and unless it is set aside. Similarly, a decree passed against the manager will be binding on the other members of the family. If, therefore, a coparcener sues for a declaration that such an alienation or decree is null and void, the declaration must I think be held to include consequential relief in the same way as in those cases in which the plaintiff is himself a party to the alienation or the decree, which is sought to be declared null and void."

9. So far as a suit for partition is concerned, the general rule is that it must embrace all the joint family properties and all the parties interested in such properties must be made parties to the suit. But if the suit is for partition of the properties not between all the individual coparceners but only between the various branches of the family, the really necessary parties are the heads of the various branches and in such a case it is not obligatory on the plaintiff to implead all the coparceners of each of the branches vide '*Hindu Law*' by Mulla, Thirteenth Edition, at pp. 386-387. The decree in such a suit would be binding on the coparceners who were represented by the head of their branch.

10. As Tekchand, father of the plaintiffs, was a party to the suit for par-

tition brought by Smt. Jhunnobai, it would appear that the plaintiffs are bound by the said decree. We need not, however, go into this question any further because the plaintiffs sought a declaration on the specific allegation that the property in suit was the exclusive and self-acquired property of their grandfather and was acquired by them under a family arrangement. In view of this allegation in the plaint, it was observed by the Full Bench in paragraph 14 that a suit for a declaration simpliciter could lie without seeking the relief of injunction. We, therefore, now proceed to consider whether the claim as laid by the plaintiffs has been established.

11. It is not disputed that the property in such suit was the joint family property of the grandfather. The contention of the plaintiffs is that this property was acquired by them under a family arrangement in 1946. A family arrangement is an arrangement among relations or members of a family in order to settle disputed rights against one another and to avoid litigation in the interest of all concerned.

12. In *Gulam Abbas v. Haji Kayyum Ali*, 1973 J.L.J. 1041 = (AIR 1973 SC 554) their Lordships described a family arrangement in the following terms in paragraph 16 quoting the definition of such arrangement in Halsbury's Laws of England, Third Edition, Vol. 17, pp. 215 and 216:

"A family arrangement is an agreement between members of the same family intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour."

In *Maturi Pullaiah v. Maturi Narasimham*, AIR 1966 SC 1836 their Lordships made the following pertinent observations regarding the nature of family arrangement:

"Though conflict of legal claims in praesenti or in future is generally a condition for the validity of a family arrangement, it is not necessarily so. Even bona fide disputes, present or possible, which may not involve legal claims will suffice."

Their Lordships further observed in the said case that if the arrangement is bona fide and the terms are fair, the Court will readily enforce it. It was further pointed out that such an arrangement will need registration if it creates any interest in praesenti in immovable property.

In *Lakshmi Perumallu v. Krishna Venamma*, AIR 1965 SC 825, their Lordships pointed out that before a Court would enforce a family arrangement it

must be shown that there was an occasion for effecting it and that it was acted upon.

13. From the aforesaid decisions it would appear that following are the essential features of a family arrangement:

(i) It is an agreement between members of the same family for compromising doubtful or disputed rights of the members in the interest of the family as a whole.

(ii) There must be an occasion for effecting the family arrangement.

(iii) A conflict of legal claims in praesenti or in future, or at least bona fide disputes present or possible, is a condition precedent for the validity of a family arrangement.

(iv) A family arrangement would need registration only if it creates any interest in immovable property in praesenti in favour of the parties mentioned therein. If no such interest is created, the document will be valid despite its non-registration.

(v) If a family arrangement is entered into bona fide and the terms thereof are fair, the Court will accept such an arrangement and enforce it.

14. If we carefully examine the pleading and the evidence in this case relating to the family arrangement pleaded by the plaintiffs, it would appear that some of the essential features of such an arrangement are missing. There is nothing to show that there was any compromise of doubtful or disputed claims. All that is pleaded in paragraph 3 of the plaint is that relations between the late Smt. Jhunnobai and Tekchand, her adopted son were strained during the lifetime of Jethmal as they were incapable of pulling on together. There is nothing in the pleadings to indicate that they had any conflicting claims over the family property. There is also no evidence on the point. According to Brijlal (P. W. 1) there used to be quarrels between Tekchand and Jethmal and this led to a partition between them. Ramratan (P. W. 2) made a similar statement. If Jethmal and his wife Jhunnobai could not pull on well with Tekchand there could be a partition of the joint family property; but there could be no reason for Jethmal to allot his own self-acquired property to either Tekchand or his sons by way of family arrangement.

15. There is also a very significant discrepancy between the pleadings and proof relating to the alleged family arrangement. There is not an iota of evidence to suggest that the property in suit was allotted to the plaintiffs under the arrangement; while the pleading is that it was allotted to Tekchand and the plaintiffs in lieu of their share in the family property. The learned trial Judge held that the family arrangement, which has

been referred to as a partition in issue No. 1, was not proved. The finding appears to be reasonable and there is no justification for taking a contrary view. As pointed out by the learned Judge, all that could be reasonably gathered from the evidence was that a sum of Rupees 12,000/- was given to Smt. Jhunnobai but the property in suit, which admittedly was the self-acquired property of Jethmal, was not in any way transferred to either Tekchand or the plaintiffs and did not vest in them.

16. It may here be also mentioned that since the case of the plaintiffs is that the property in suit was the self-acquired property of Jethmal, it could be transferred to Tekchand or the plaintiffs only by a registered document under the alleged arrangement; admittedly there was no transfer of interest to the plaintiffs by any such document. Thus, the plaintiffs have utterly failed to prove that they had acquired any interest in the property under the alleged family arrangement which is referred to as a partition in the issues and the judgment.

17. Since the plaintiffs have failed to make out any title to the property in suit under the family arrangement pleaded by them, their suit is liable to be thrown out on this ground. The property in suit, being the self-acquired property of Jethmal, must have been inherited by Tekchand and Smt. Jhunnobai. The plaintiffs can claim a share in the property as grandsons of Jethmal on his death. Even Smt. Jhunnobai is now dead and the plaintiffs can claim share in her property as her heirs. The plaintiffs, having failed to establish the grounds on which they challenged the earlier partition decree between Smt. Jhunnobai and Tekchand, the dismissal of the suit must be maintained.

18. Whatever rights the plaintiffs have acquired in the property in suit, either as heirs of Jethmal or as heirs of Smt. Jhunnobai, can be worked out in a separate suit. We, therefore, do not find any good reason to interfere with the order of dismissal of the suit.

19. The appeal, therefore, fails and is hereby dismissed with costs. Counsel's fee according to scale, if certified.

Appeal dismissed.

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A. P. SEN AND S. S. SHARMA, JJ.

Durga Prasad, Appellant v. Mst. Parveen and others, Respondents.

First Appeal No. 97 of 1970, D/- 10-2-1975.*

(A) Evidence Act (1872), Sections 123 and 162 — Unpublished record relating to affairs of State — Official file relating to grant of mining lease — Claim of privilege held justified — Duty of Court — (Civil P. C. (1908), Order 11, Rule 19 (2)).

The provisions of Order 11, Rule 19 (2) of the Code of Civil Procedure, must be read subject to Section 162 of the Evidence Act. Hence, when a party summoned to produce certain documents claims a privilege by filing an affidavit, the Court should not accept the affidavit without determining on the material before it whether the documents are of the class to which they are claimed to belong.

(Para 18)

Held that the State was justified in claiming a privilege against the production of the relevant file concerning the grant of the mining lease, as it contained letters written by the Head of the Department to the subordinate officers of the Department and vice versa and between that Department and other Departments and they were, therefore, unpublished official records and were secrets of the State. AIR 1961 SC 493, Rel. on.

(Para 18)

(B) Torts — Vicarious liability. — Liability of State for acts done by its employees.

Held in the facts and circumstances of the case that the theodolite survey conducted by the defendant No. 5, or the demarcation certificate issued by him, were acts done by virtue of the authority conferred on him as Assistant Superintendent of Land Records, under the Mining Manual. Since there were no allegations against defendants 4 and 5 that they had either instigated or helped defendant 1 in the wrongful extraction of ore from the plaintiff's pit and defendants Nos. 4 and 5, as servants of the defendant No. 3, the State had neither acted illegally and contrary to the Mining Rules and Regulations nor in excess of their powers in discharge of their official duties, the defendant No. 3, the State was not vicariously liable for any alleged acts or omissions on their part.

(Paras 29, 30)

(C) Mineral Concession Rules (1949), Rule 41 (xi) — Inspection of area leased for mining — Collector is an Officer so authorised by State Government and ins-

* (From decree of J. A. Khare, Addl. Dist. J., Chhindwara, in Civil Suit No. 1-B of (1962), D/- 25-7-1970).

pection done by him is in discharge of official duty. (Para 30)

(D) Mines and Minerals (Development and Regulation) Act (1957), Sec. 27 — Bar of suit against State or its employees.

A suit against the State Government or its employees is barred by Section 27 where the employees have acted in the discharge of their official duties.

(Para 32)

(E) Civil P. C. (1908), Section 96 — Suit for damages against State for tortious acts of its employees defendants 4 and 5 — Suit dismissed against defendants 4 and 5 for want of proof of alleged acts — Plaintiff not having appealed against decree of dismissal against defendants 4 and 5 his appeal against State alone is not maintainable. (Para 34)

(F) Limitation Act (1908), Section 28 and Article 47 — Suit to set aside final order under Section 145 (6), Criminal Procedure Code — Failure to bring suit within limitation prescribed by Article 47 — Right to property becomes extinguished with retrospective effect.

Where the plaintiff had failed to bring a title suit to set aside the final order passed on 30-12-1960 against him under Section 145 (6), Criminal Procedure Code within the period of three years limitation prescribed by Article 47, Limitation Act, his right to disputed property came to an end by extinguishment of the right or title to the property with retrospective effect by virtue of Section 28, Limitation Act and his suit for damages for wrongful extraction of the ore from the disputed pit not being of the nature contemplated by Article 47 could not be maintained even though brought within the period so prescribed. AIR 1942 PC 64 and (1903) ILR 26 Mad 410 and AIR 1930 Nag 142 and AIR 1937 All 300 and AIR 1957 Ker 117. Rel. on.

(Paras 35, 36 and 40)

(G) T. P. Act (1882), Section 105 — Lease or agreement to lease coupled with License.

A document styled as agreement embodied a permission to work leased area i.e., for commencing the mining operations, pending the execution of a formal lease in accordance with the Mineral Concession Rules, 1949 but a formal mining lease was never executed till date of suit.

Held on a true construction of the document it could not be regarded as a lease. At best it could only be regarded as an agreement to lease, coupled with a license for working the leased area. In the absence of terms showing present demise, the commencement of the lease and its duration the parties to the document did not stand in relation of lessor and lessee till a lease deed was executed in 1965. (Paras 43 to 45)

(H) Civil P. C. (1908), Order 6, R. 2 — Pleading to state material facts — Failure to state — Effect.

Where the plaintiff wants to bring a suit for damages against the State on the basis of Contract, Order 6, Rule 2, Civil P. C. requires the plaintiff to state the material facts. The non-mention of these facts amounts to no pleading and, therefore, no cause of action arises. It is wrong to suggest that the plaint should be read with the notice under Section 80 of the Code of Civil Procedure. Mere vague and indefinite allegations about the impropriety of the acts of servants of State without giving the particulars will be struck out. (Para 46)

(I) Civil P. C. (1908), Order 41, R. 1 — New case in appeal — Suit for damages on basis of tort — Plaintiff cannot be allowed to succeed on ground of breach of covenant for quiet enjoyment for which there is no foundation in pleadings. (T. P. Act (1882), Section 108 (c)).

Where the plaintiff's suit, as framed, was a suit based in tort seeking to hold the State Government liable for the tortious acts of its servants and there are no allegations of any breach of covenant of quiet enjoyment implied in Section 108 (c), T. P. Act, the plaintiff cannot set up a new case in appeal for which there is no foundation in the pleadings. The plaintiff appellant cannot succeed on the basis that the State was liable in damages for breach of covenant for quiet enjoyment.

The covenant implied by Section 108 (c) T. P. Act provides for quiet enjoyment by the lessee without interruption by the lessor or by any other person or persons rightfully claiming by, from or under him. It does not, however, extend to tortious acts of strangers. (Paras 49, 53)

Cases Referred: Chronological Paras
AIR 1962 SC 630 = (1961) 2 Lab LJ 427 46

AIR 1961 SC 493 = (1961) 2 SCR 371 18

AIR 1957 Ker 117 = 1957 Ker LT 395 36

AIR 1957 Madh Pra 135 = 1957 Jab LJ 819 44

ILR (1949) Nag 581 44

AIR 1947 Nag 48 = ILR (1946) Nag 568 42

AIR 1942 PC 64 = 1942 All LJ 718 35

(1942) 46 Cal WN 551 37

AIR 1938 Cal 690 = 67 Cal LJ 136 51

AIR 1938 Nag 441 = 177 Ind Cas 945 51

AIR 1937 PC 146 = 64 Ind App 143 46

AIR 1937 All 300 = 1937 All LJ 225 36

AIR 1937 Lah 930 = 171 Ind Cas 114 51

(1936) 1 KB 399 48

AIR 1933 Mad 465 = 38 Mad LW 263 51

AIR 1930 Nag 142 = 26 Nag LR 160 36, 38

AIR 1929 PC 69 = 56 Ind App 93 50

AIR 1923 Cal 41 = ILR 50 Cal 68 42, 51

AIR 1922 Cal 87 = ILR 49 Cal 948 51

(1903) ILR 26 Mad 410 36

(1901) ILR 25 Bom 269 = 2 Bom LR 1070 51
 (1892) ILR 15 Mad 111 51
 (1891) 2 QBD 680 = 61 LJQB 102 52
 (1880) 5 AC 685 = 50 LJQB 49 46
 (1858) 1 El & El 12 = 117 RR 117 45
 (1675) Vaugh 118 = 86 ER 926 49

S. P. Hakim, for Appellant; K. K. Adhikari, Govt. Advocate, for Respondents.

A. P. SEN, J.:— This appeal, filed by the plaintiff Durga Prasad, is directed against the judgment and decree of the Additional District Judge, Chhindwara, dated 25-7-1970, decreeing his claim for damages for Rs. 36,000/- for wrongful extraction and sale of about 1,800 tons of manganese ore against the defendant No. 1, Mst. Parveen Foujdar, together with interest at 4% per annum thereon from the date of the decree i.e., from 25-7-70 till realisation, as against his claim for recovery of damages amounting to Rupees 50,000/- for loss of profits due to wrongful extraction and sale of manganese ore, and dismissing his suit against the other defendants, including the defendant No. 3, the State of Madhya Pradesh.

By the appeal, the plaintiff seeks a modification of the decree, and prays that the dismissal of the suit against the defendant No. 3, the State of Madhya Pradesh be set aside, and a decree for Rupees 50,000/- as damages be passed against the defendants Nos. 1 and 3. There is no appeal against the dismissal of the suit against the defendants Nos. 4 and 5.

2. The material facts leading to the appeal, briefly, are: By an interim agreement dated 11-6-1952, Ex. P-20, the State Government having sanctioned the grant of mining lease for manganese ore in favour of the plaintiff carrying on business under an assumed name of M/s. Kishanchand and Company in respect of 34.07 acres comprising of several Khasra numbers including part of Khasra No. 21 in village Palaspani of tahsil Sausar known as 'Kachhidhana Mine No. 4', granted him permission 'to commence mining operations' on the said area, pending execution of a formal lease in accordance with the Mineral Concession Rules, 1949. The deed on its terms amounts to nothing more than an executory agreement to lease, coupled with a licence, i.e., authority for the working of the said area, on certain terms and conditions. The defendant No. 1, the late M. F. Foujdar, held a mining lease since the year 1924 of the adjoining area of 28.34 acres comprising of several Khasra numbers including part of Khasra No. 21 in the same village, known as 'Kachhidhana Mine No. 5'. Pursuant to the grant in favour of the plaintiff, the Revenue Inspector, Sausar demarcated the plaintiff's leasehold area under the orders

of the Deputy Commissioner, Chhindwara, under S. I. 1, M. R. 50 (iv) of the Mining Rules, and issued to the plaintiff a demarcation certificate dated 23-12-1952, Ex. P-2. The Revenue Inspector, instead of placing the plaintiff in possession of 34.07 acres, placed him in possession of 34.98 acres, and purported to demarcate both the plaintiff's leased area i.e., Kachhidhana Mine No. 4, and that of the adjoining Mine No. 5 of the defendant No. 1 as well as the common boundary between them, by pointing out some boundary marks, at the spot. On 25-9-1954, the State Government having sanctioned the renewal of the mining lease held by the defendant No. 1, the late M. F. Foujdar, of Kachhidhana Mine No. 5, a similar agreement, Ex. D-6, was executed in favour of the defendant No. 1, permitting him 'to continue his mining operations'.

3. It appears that the plaintiff after the demarcation done by the Revenue Inspector, constructed boundary pillars of permanent nature at the places pointed out by the Revenue Inspector, and also put up a barbed wire fencing over the common boundary. The Revenue Inspector apparently demarcated the leasehold area of the plaintiff as 34.98 acres for 34.07 acres as per the grant, i.e., in excess by 0.91 acre and the plaintiff while constructing the pillars, encroached upon a portion of the leasehold area held by the defendant No. 1 towards the west. Since there was dispute regarding the common boundary of the leasehold areas of the plaintiff and the defendant No. 1, the Deputy Commissioner, Chhindwara ordered that the common boundary be correctly demarcated and accordingly a theodolite survey was carried out by Ratansingh, Surveyor in the establishment of the Director of Land Records in 1955 and the theodolite survey revealed that the leasehold area of the plaintiff bounded by the pillars constructed by him towards the west was in excess by 0.91 acre.

4. The plaintiff brought the suit alleging that he 'held a Mining Lease for manganese ore' of Kachhidhana Mine No. 4 and that the State Government through its officers and servants placed him in possession of the lease area by effecting necessary and correct demarcation thereof with a view to complete the lease agreement of the plaintiff, and to enable him to peacefully enjoy and utilise the rights created on him under the aforesaid lease, and that the boundary according to the lease plan was fixed and shown by the Revenue Inspector to the parties at the spot, to which no objection was raised by the defendant No. 1, at the time of the demarcation or subsequently, and the demarcation was thus accepted as correct and all along acted upon by the parties.

5. The plaintiff further alleges that he sank a pit in a portion of Khasra No. 21 in or about the year 1952 shown by letters ABCD in which his mining operations were in progress; and that he opened another open cast pit in or about the year 1953-54 towards the west of the first pit shown by letters EFGH in red in the plaint map, Ex. P-1 and started his mining operations thereon and raised some manganese ore, without any objection by any one. The mining operations in this pit were, however, temporarily suspended under the advice of the Mining Department to work and raise manganese ore through underground by connecting it with the first pit. It was alleged that the plaintiff was put to a cost of Rs. 24,860/- for opening the pit EFGH. It was further alleged that towards the end of March 1959, the defendants Nos. 1 and 2 wrongfully trespassed upon the plaintiff's pit EFGH shown in red, and started extracting manganese ore therefrom, during the period commencing from April 1959 till the end of March 1960, and that they wrongfully extracted and removed about 1,800 tons of manganese ore, thereby putting the plaintiff to a loss of more than Rs. 50,000/-.

6. On these allegations, the plaintiff claimed a decree for damages of Rs. 50,000/- by way of loss of profits, or in the alternative, Rs. 24,860/- as damages by way of reimbursement of the cost of digging the pit EFGH against all the defendants, jointly and severally or against such of them as may be held liable.

7. The dispute between the parties resulted in proceedings under Section 145 of the Code of Criminal Procedure, and the Sub-Divisional Magistrate, Sausar by his final order dated 30-12-1960, Ex. D-3, declared the defendant No. 1, the late M. F. Foujdar, to be in actual possession of the disputed pit EFGH on the date of the preliminary order i.e., on 6-7-1959, and two months next before the date of such order. During the pendency of these proceedings, the Collector, Chhindwara, apparently in his capacity as the District Magistrate held a spot inspection, along with the Superintendent of Police, Chhindwara, on 22-6-1959, vide his spot inspection report dated 26-6-1959 Ex. D-7, wherein he recorded that the pit EFGH was initially worked by the plaintiff for sometime, on a misunderstanding that the disputed pit was covered, in fact, in his lease hold area, though the pit did not fall within the leased area of the plaintiff, and that the pit EFGH was at that time being worked by the defendant No. 1.

8. The defendant No. 1, the late M. P. Foujdar filed a written statement denying the plaintiff's claim and pleaded,

inter alia that the disputed pit EFGH was included within his Kachhidhana Mine No. 5. He, however, died during the pendency of the suit and his widow, Mst. Parveen Foujdar, the respondent No. 1, though noticed refused to accept the summons and, therefore, suit proceeded ex parte against her. The defendant No. 2, Babulal Poddar, beyond filing the written statement, took no further steps in the suit, which, also proceeded ex parte against him. They have not put in appearance in the appeal.

9. The appeal is mainly directed against the respondent No. 3, the State of Madhya Pradesh, and the whole object of the plaintiff appears to be to secure a decree against the State Government. It is, therefore, necessary to deal with the written statements filed on behalf of the defendants Nos. 3, 4 and 5 in some detail.

10. The defendant No. 3, the State of Madhya Pradesh and its two officials, defendant No. 4 N. H. Chourey, the then Sub-Divisional Officer, Sausar and defendant No. 5 J. P. Kishorey, Assistant Superintendent of Land Records filed separate written statements, contesting the plaintiff's claim. They denied the correctness of the plaint map, Ex. P-1, and pleaded that the alleged demarcation certificate, Ex. P-2, issued by the Revenue Inspector to the plaintiff was not correct and not binding or conclusive, as under the Mining Rules the demarcation of leasehold areas is required to be done by Assistant Superintendent of Land Records and not by Revenue Inspector, and therefore, Assistant Superintendent of Land Records alone was competent to issue such certificate. They admitted that the plaintiff had erected pucca pillars at various places, but denied that the pillars were on the boundary line of Mines Nos. 4 and 5. They also denied that the plaintiff had put up any barbed wire fencing over the alleged boundary line.

11. While admitting that a theodolite survey of the leasehold area of the plaintiff was carried out by a survey party under the directions of the Director of Land Records, Nagpur, in 1955 and that the Director of Land Records had thereafter sent a blue print of the theodolite survey to the Deputy Commissioner, Chhindwara, they alleged that the survey party found a mistake in the demarcation made by the Revenue Inspector in 1952. It was alleged that Ratansingh, Surveyor in the establishment of the Director of Land Records, who made the theodolite survey of the leasehold area, found that the demarcated area bounded by the pillars erected by the plaintiff actually measured 34.98 acres as against the area of 34.07 acres leased out to him i.e., it was in excess by 0.91 acre. Consequently, it was pleaded that the common boundary between the Mines Nos. 4 and 5 had not

been finalised, and that the pillars erected by the plaintiff did not actually show the correct leasehold area of the plaintiff. The State Government also pleaded that the plaintiff did not disclose any cause of action against it and that even otherwise, it was not liable for the alleged acts and omissions, if any on the part of the defendants Nos. 4 and 5, and further that the notice sent by the plaintiff under Section 80 of the Code of Civil Procedure was invalid inasmuch as there was no identity of the plaintiff i.e., between the person who gave the notice and the one who brought the suit, and, therefore, the suit was liable to be dismissed for want of a valid notice under Section 80 of the Code.

12. In addition, the defendant No. 5, J. P. Kishorey, also pleaded that he had re-demarcated the common boundary under the orders of the Collector, and submitted his report to the Collector, who ordered the defendant No. 4, N. H. Chourey, to verify the correctness of the survey on the spot, and that the latter after verifying the same, had reported the same to the Collector.

13. The findings recorded by the learned trial Judge are that: (i) under the orders of the Deputy Commissioner, the plaintiff's area was ascertained and demarcated by the Revenue Inspector along with Kunjbiharilal, Patwari (P. W. 3), and they had indicated the boundary marks between Mines Nos. 4 and 5 and accordingly, the plaintiff raised permanent boundary pillars of bricks at the very points indicated by the Revenue Inspector and thereafter, issued the demarcation certificate, Ex. P-2, dated 23-12-1952, showing the correct area, as per the land plan to the parties, (ii) though there is no reference to any map in Ex. P-20, the interim agreement, executed by the State Government, the map Ex. P-3, which is signed by the Collector Shri Permanand and also bears his official seal, must be taken to be authentic as there is nothing suspicious about it, (iii) the plaintiff map, Ex. P-1, which the plaintiff Durga Prasad (P. W. 7) traced from the map Ex. P-3 must, therefore, be taken to be correct and accordingly it must be held that the pit EFGH falls within the plaintiff's leasehold area, (iv) the plaintiff had opened the pit EFGH for raising manganese ore and was in possession thereof till about end of March 1959, (v) it was not proved that the pit EFGH was within the area leased out to the defendant No. 1 or that this factual position was admitted by the plaintiff. Nor was he bound by the demarcation carried out by the defendant No. 5 in 1959 as per his demarcation certificate dated 27-1-1959, Ex. D-7, indicating that the pit EFGH lay in the area leased out to the defendant No. 1, (vi) the plaintiff had incurred an

approximate expenditure of Rs. 17,388/- for digging the pit EFGH in two stages, but he was not entitled to recover the same from the defendants Nos. 1 and 2, (vii) the defendant No. 1, the late M. F. Foujdar, had wrongfully extracted 1,800 tons of manganese ore from the pit EFGH from April 1959 to March 1960, and thereby put the plaintiff to a loss of about Rs. 36,000/-, (viii) it was not proved that the Collector had either asked the plaintiff not to carry on mining operations in the pit EFGH or had instigated or abetted the defendant No. 1 in any wrongful extraction or sale of manganese ore, (ix) it was also not proved that the defendants Nos. 4 and 5 had acted illegally or had instigated or abetted or in any way helped in any wrongful and illegal acts of the defendants Nos. 1 and 2 in trespassing and illegal mining upon the pit EFGH of the plaintiff and wrongful extraction and sale of manganese ore raised therefrom, (x) consequently, there was no question of fastening any vicarious liability on the defendant No. 3, the State of Madhya Pradesh for the alleged tortious acts of the defendants Nos. 4 and 5, (xi) the defendant No. 3 cannot also be made liable for breach of Section 108 (c) of the Transfer of Property Act because the covenant of quiet enjoyment embodied therein does not protect the tenant against any tortious acts by trespassers, and his remedy lies against the actual wrong-doers and not against the lessor, (xii) the failure of the plaintiff to bring a suit to set aside the final order dated 30-12-1960 passed under Section 145 of the Code of Criminal Procedure by the Sub Divisional Magistrate, Sausar, declaring the defendant No. 1, the late M. F. Foujdar, to be in actual possession over 2.63 acres out of Khasra No. 21 i.e., including the pit EFGH, did not affect the plaintiff's suit for damages and he could not be non-suited on that account, (xiii) the notice under Section 80 of the Code of Civil Procedure complies with the legal requirements and, therefore, the suit was not bad for want of a valid notice, the suit was not governed by Article 14 of the Limitation Act, 1908 but by Article 48, and even assuming Article 47 or 49 or Article 109 was applicable, the suit was not barred by limitation.

On these findings, the learned trial Judge, accordingly, decreed the plaintiff's claim for damages amounting to Rupees 36,000/- as against the defendant No. 1, Mst. Parveen Foujdar, with interest at 4% per annum thereon from the date of decree i.e., from 25-7-1970 till realisation, and dismissed his claim against the other defendants.

14. The points that arise for consideration in this appeal are:

(1) Whether the learned trial Judge was right in holding that the authenticity

of the map, Ex. P-3, which was signed by the Collector Shri Parmanand and also bears his official seal, is beyond question and, therefore, the plaint map Ex. P-1 which the plaintiff Durga Prasad (P. W. 7) traced from it, must be taken to be correct?

(2) Whether the learned trial Judge was right in holding that the pit marked EFGH in the plaint map, Ex. P-1, falls within the plaintiff's leasehold area?

(3) Whether the defendants Nos. 4 and 5 purporting to act as servants of the defendant No. 3 acted illegally and contrary to the Mining Rules and Regulations and far in excess of their powers in discharge of their official duties and, therefore, the defendant No. 3 was vicariously liable for the alleged wrongful acts and omissions on their part, if any, as alleged in para. 15 of the plaint.

(4) Whether the defendants Nos. 4 and 5 in any way abetted, instigated and aided and/or not only connived at but also encouraged, as alleged, in the illegal and wrongful acts of the defendant No. 1 in trespassing upon the plaintiff's pit EFGH towards the end of March 1959 and in extraction and removal of 1,800 tons of manganese ore therefrom from April 1959 till the end of March, 1960?

(5) Whether the plaintiff's suit is barred by Section 27 of the Mines and Minerals (Regulation and Development) Act, 1957?

(6) Whether the plaintiff not having appealed against the dismissal of the suit against the defendants Nos. 4 and 5, the appeal against the defendant No. 3 is not maintainable?

(7) Whether the failure of the plaintiff to bring a suit to set aside the final order of the Sub-Divisional Magistrate, Sausar, passed under Section 145 (6) of the Code of Criminal Procedure rendered the suit as framed not maintainable?

(8) Whether there was breach on the part of the defendant No. 3, the State of Madhya Pradesh, of the covenant of quiet enjoyment implied in Section 108 (c) of the Transfer of Property Act?

(9) Whether the document Ex. P-20 was a lease and, therefore, the parties stood in the relationship of lessor and lessee and the plaintiff's suit was a suit founded on contract?

(10) Whether the defendant No. 3, the State of Madhya Pradesh, as a lessor, was liable for the tortious acts of the defendant No. 1, the late M. F. Foujdar, being a person claiming under the defendant No. 3, i.e., the lessor?

15. Before dealing with the contentions on merits, it is necessary for us to state a few facts. The plaintiff administered interrogatories on the defendant No. 3 under Order 11, Rule 1 of the Code of Civil Procedure, to obtain admissions

from it to facilitate the proof of his own case. In answer to the interrogatories served, the defendant No. 3 filed an affidavit of J. K. Verma, Mining Officer, Chhindwara, dated 18-4-1964 to the effect:—

(i) The Revenue Inspector demarcated the plaintiff's leasehold area under the orders of the Deputy Commissioner.

(ii) The Deputy Commissioner informed the plaintiff by his memo dated 21-4-1960, Ex. P-4, that the theodolite survey done on the basis of the certificate furnished by the Revenue Inspector was not according to rules and hence it could not be accepted as correct.

(iii) The Revenue Inspector, Sausar had pointed out the boundary of the plaintiff's leasehold area and consequently the plaintiff got the pillars erected. The certificate issued by the Revenue Inspector dated 23-12-1952, Ex. P-2, was erroneous because the Revenue Inspector had demarcated the leasehold area of the plaintiff as 34.98 acres for 34.07 acres. This fact was discovered in the theodolite survey of the plaintiff's leasehold area.

(iv) By amendment No. 108 dated 20-7-1942 for sub-para (iv) in S. I. 2 under M. R. 50 (iv), it was provided that a certificate in the prescribed form should be signed by an officer not lower in rank than Assistant Superintendent of Land Records. These instructions are followed from 1942 up-to-date.

(v) Without reference to the plotted sheet of the leasehold area of the plaintiff prepared by Ratansingh, surveyor deposited in the office of the Settlement Commissioner, Madhya Pradesh, it is not possible to say what part of the area bounded by the pillars constructed by the plaintiff was in excess by 0.91 acre, as pointed out by Ratansingh as pleaded in para. 7 of the written statement.

(vi) As there was appreciable difference of 0.91 acre in the certificate issued by the Revenue Inspector and the theodolite survey in the leasehold area of the plaintiff and since there was dispute regarding the common boundary of leasehold areas of the plaintiff and the defendant No. 1, the Deputy Commissioner, Chhindwara ordered that the common boundary of the leasehold areas of the plaintiff and the defendant No. 1 be correctly demarcated.

16. To clarify the point No. (v), i.e., the area bounded by pillars, which was in excess of 0.91 acre, as disclosed on the theodolite survey carried out by Ratansingh, surveyor, by reference to the plotted sheet of the leasehold area prepared by him, the defendant No. 3 filed a supplementary affidavit of P. C. Agarwal, Mining Officer, Chhindwara dated 31-7-1964, the material portion of which reads:—

"The excess of 0.91 acre was pointed out by the Traversor Shri Ratansingh taking into consideration the boundaries as given in the lease plan and arrived at by Theodolite survey on the plotted sheet, by black lines with dots. Lease plan boundary is marked in red pencil and the difference is marked with green pencil. The difference is due to shifting of boundaries as pointed out in the plotted sheet marked with black lines with dots as under:—

1. From pillar No. 1 ... Boundary shifted to 3 ...

..... The total difference in the lease plan and the plotted sheet was thus 0.91 acre.

17. Thereafter the plaintiff served the defendant No. 3 with a notice under Order 11, Rule 12 of the Code, for discovery and production of certain documents. In answer to the notice, the defendant No. 3 filed an affidavit of the Collector stating:—

"I have carefully considered the relevant documents and have come to the conclusion that the same is unpublished official record, relating to affairs of State and their disclosure will be prejudicial to public interest for the following reason:

List of documents summoned.

Record of Mining lease No. 31 of 1951 regarding Manganese Ore granted to Messrs. Kishanchand and Co., Dhau Colliery of Mouza Palaspani area 34.07 acres, Tahsil Sausar, District Chhindwara with the demarcation certificate dated 27-1-1959. I do not, therefore, give permission to any one under Section 123 of the Indian Evidence Act, 1872, to give in evidence and said documents or to give any evidence derived therefrom.

Solemnly affirmed at Chhindwara this day of 22-12-1965.

Sd/- P. Parmanand,
Collector, Chhindwara."

18. The learned Judge did not apply his mind to the application before him and merely accepted the affidavit in which it was claimed that the documents were unpublished official records relating to the affairs of the State. The provisions of Order 11, Rule 19 (2) of the Code of Civil Procedure, must be read subject to Section 162 of the Evidence Act. He should, therefore, have determined whether upon the material before him the documents were, in fact, of the class which could be said to relate to the affairs of the State. The law on the point is laid down by the Supreme Court in *State of Punjab v. Sodhi Sukhdev Singh*, AIR 1961 SC 493. What documents can be said to relate to the affairs of the State was discussed by the Supreme Court in the aforesaid case, and their Lordships after observing that the "affairs of the State" would ordinarily refer to matters

of political or administrative character relating for instance, to the national defence, public peace and security or good neighbourly relations, whose disclosure would be prejudicial to public interest, they further remarked:

"There may be another class of documents, which could claim the said privilege not by reason of their contents as such but by reason of the fact that, if the said documents were disclosed, they would materially affect the freedom and candour or expression of opinion in the determination and execution of public policies. In this class may legitimately be included notes and minutes made by the respective officers on the relevant files, opinions expressed, or reports made, and gist of official decisions reached in the course of the determination of the said questions of policy."

It would, therefore, appear that the defendant No. 3 was justified in claiming privilege against the production of the relevant file concerning the grant of the mining lease, as it contained letters written by the Head of the Department to the subordinate officers of the Department and vice versa and between that Department and other Departments and they were, therefore, unpublished official records and were secrets of the State.

19. The defendant No. 3 was, however, not justified in withholding the production of the reports of the two theodolite surveys carried out in 1955 and 1959 and the papers connected therewith, by claiming privilege that they relate to affairs of the State, or that their disclosure would be prejudicial to public interest. That claim of privilege has rightly not been pressed before us, and we think the learned Judge was justified in holding that the non-production of the documents would warrant the drawing of an adverse inference. Nothing, however, turns on this because the map prepared by Ratansingh, surveyor in the theodolite survey, Ex. D-9, as also the plotted sheet of the leasehold area of the plaintiff prepared by him, Ex. D-10, and the demarcation certificate dated 27-1-1959 issued by the defendant No. 5 in favour of the defendant No. 1, under S. I. 1, M. R. 50 (iv) of the Mining Manual, are on record, and they were referred to by the parties at the hearing, on the basis that they were public documents. There is, therefore, material on which it could be found whether or not the Revenue Inspector had wrongly demarcated the plaintiff's leasehold area as 34.98 acres for 34.07 acres as per the grant, contrary to the orders of the Deputy Commissioner, Chhindwara and against S. I. 1, M. R. 50 (iv), or whether or not the demarcation certificate dated 23-12-1952, Ex. P-2, issued by him in favour of the plaintiff was, therefore, incorrect.

20. The provisions of M. R. 50 (iv) of the Mining Rules, and the material portions of S. I. 1 and 2 thereunder read as follows:

"M. R. 50 (iv). The lessee shall at his own expense erect and at all times maintain and keep in repair boundary marks and pillars according to the demarcation to be shown in a plan annexed to his lease.

S. I. 1. Under this rule the Local Government has laid down the following condition with regard to boundaries which shall be binding upon every applicant accepting a lease:—

(a) The lessee will be required to erect as soon as possible after the execution of his lease suitable boundary marks and pillars of a permanent nature along the boundaries of the lands covered by the lease at every angle in the line of the boundary and at intervals of not more than 660 yards along the boundary. These marks and pillars will be shown on the plan of the said lands attached to the lease at the time of its execution. If the lessee is unable to demarcate his concession correctly without skilled assistance, the Deputy Commissioner will arrange to have the places at which marks are required pointed out by the land record staff and the Revenue Inspector shall in that event certify to the Deputy Commissioner that the concession has been correctly demarcated.

(b) Where the boundaries of the area assigned by a lease have not, at the time of the execution of the lease been ascertained by theodolite survey, the lessee shall be bound to execute a survey agreement, in the form prescribed in Part A, Appendix B, page 143. This survey agreement shall be signed by both parties and shall be registered.

S. I. 2. In such cases after the lease and survey agreement have been executed and the boundary marks and pillars erected in accordance with the foregoing instruction, the Deputy Commissioner should address the Director of Land Records to arrange for the survey, forwarding—

(i) a tracing showing the exact location of the area to be surveyed;

..... (iii) a statement in acres of the area to be surveyed;

(iv) a certificate in the following form which shall be signed by an officer not lower in rank than Assistant Superintendent, Land Records:—

I certify that the demarcation on the spot of the mining lease held by in village tahsil (area approximately acres) agrees generally with the plan attached to the mining lease and that suitable intervisible pillars have been erected by the lessee at

every angle in the line of boundary and at intervals of not more than 660 yards.

2. The following traverse marks will be required to form the basis of the proposed survey. Of these all are in order except the following

21. The suit having been dismissed against the defendant-respondent No. 3, the State of Madhya Pradesh, it is entitled to support the decree on grounds decided against it. We now proceed to deal with the contentions advanced by the parties.

22-26. (After dealing with points 1 and 2 and holding that the plaintiff map Ex. P-1 was not correct and the finding of the learned Judge that the pit marked EFGH fell within the plaintiff's leasehold area was not correct, his Lordship proceeded).

27. Point No. 3: The plaintiff's suit as framed, tries to hold the defendant No. 3 vicariously liable, for the alleged wrongful acts and omissions of the defendants Nos. 4 and 5 in the discharge of their official duties. Independent of this, there is no claim against the defendant No. 3. The only plea against them is that contained in para. 15 of the plaint, which reads:

"15. That the defendants 4 to 5 purporting to act as servants of the defendant No. 3 acted illegally and contrary to the Mining Rules and regulations and far in excess of their powers in discharge of their official duties and abetted, instigated and aided in the wrongful and illegal acts of the defendants 1 and 2 in trespassing and illegal mining upon the pit of the plaintiff and in extraction and removal of ore. By their unwarranted actions, the defendants 4 and 5 not only connived at but also encouraged the illegal and wrongful acts of the defendants 1 and 2 resulting in considerable loss to the plaintiff. The defendants 4 and 5 are, therefore, liable to compensate the plaintiff. The defendant No. 3 as a lessor Government and as employer of the defendants 4 and 5 in commercial functions is liable for official acts of commission and omissions of their servants. The defendants 3, 4 and 5 are therefore impleaded as defendants."

It will be noticed that there is no allegation of any act on the part of the defendant No. 3, which caused interference with the plaintiff's enjoyment of the lease or prevented him from working the mine or extracting minerals therefrom. It will also be noticed that there is no allegation that the defendant No. 3 passed any order to facilitate the wrongful extraction and sale of manganese ore by the defendant No. 1 from the pit marked EFGH in the plaint map, Ex. P-1.

28. The defendants Nos. 4 and 5 undoubtedly acted in lawful exercise of

their powers, functions and duties under the Mines and Minerals (Regulation and Development) Act, 1957, and the Mineral Concession Rules, 1949, framed thereunder. It is needless to stress that due compliance of the terms and conditions of the lease is also liable to be checked by the Officers of the Mining Department. The document, Ex. P-20, i.e., the interim agreement provides, inter alia, by clause (ii) that the lessee shall observe and conform to the requirements of the Mineral Concession Rules, 1949. One of the conditions is the maintenance of correct boundary pillars. This is envisaged by Rule 41 (vi) thereof, which runs:—

"The lessee shall, at his own expense, erect and at all times maintain and keep in good repairs boundary marks and pillars necessary to indicate the demarcation shown in the plan annexed to his lease."

29. The acts now complained of by the learned Counsel for the appellant on the part of the officers and servants of the defendant No. 3, were:

(i) Spot inspection by Shri S. K. S. Chib, Collector, Chhindwara, made on 22-6-1959,

(ii) theodolite survey of the leasehold areas carried out by the defendant No. 5 in 1958, and

(iii) issue of certificate of demarcation dated 27-1-1959 by the defendant No. 5 of the leasehold area of the defendant No. 1 under S. I. 2, M. R. 50 (iv) of the Mining Rules.

These alleged acts are said to furnish a cause of action to the plaintiff. It is said that the issue of the aforesaid demarcation certificate to the defendant No. 1 was the root cause of all the trouble. The learned Counsel has frequently referred to this document, treating it to be a public document. Even assuming that to be so we think that the issue of the demarcation certificate, by itself, does not furnish any cause of action to the plaintiff. The document reads as follows:

"Certificate of Demarcation of the mining lease as prescribed in S. I. 2 M. R. 50 (iv) page 48 of the mining lease.

I certify that the demarcation of the spot of the mining lease held by Shri M. F. Foujdar in village Palaspani, tahsil Sausar (area approximately 28.34 acres) agrees generally with the plan attached to the mining lease and that suitable inter-visible pillars have been erected by the lessee at every angle in the line of boundary and at intervals of not more than 660 yards."

The document is self-explanatory. It only certifies that the area enclosed by the defendant No. 1 by his boundary pillars conforms to the area leased out to him. [The theodolite survey conducted by the defendant No. 5, or the demarcation cer-

tificate issued by him, were acts done by virtue of the authority conferred on him as Assistant Superintendent of Land Records, under the Mining Manual. The learned trial Judge has rightly found that the defendants Nos. 4 and 5, as servants of the defendant No. 3, had not acted illegally and contrary to the Mining Rules and Regulations and in excess of their powers in discharge of their official duties and, therefore, the defendant No. 3 was not vicariously liable for any alleged acts or omissions on their part.

30. Point No. 4: The learned trial Judge has also found on issue No. 8 that the defendants Nos. 4 and 5 had not instigated or abetted or in any way helped the defendant No. 1 in wrongful extraction or sale of manganese ore raised from the pit EFGH. That finding can hardly be assailed. Nothing has been brought to our notice which persuades us to take a different view. It has already been stated that there is no allegation in para. 15 of the plaint, of any act on the part of the defendant No. 3 which resulted in wrongful extraction and sale of manganese ore by the defendant No. 1 from the pit EFGH. It is noteworthy that therein, there is also no allegation of any act on the part of the Collector. At the stage of evidence, however, the plaintiff Durga Prasad (P. W. 7) tried to assert that Shri S. K. S. Chib, the then Collector, during his spot inspection of the site held on 22-6-1959, orally ordered that he should not remove any manganese ore from the pit EFGH. This is nothing but an afterthought. There is no foundation laid in the plaint, and that assertion of his cannot be accepted, for want of a plea. That inspection was held by the Collector in his capacity as the District Magistrate during the pendency of the proceedings under Section 145 of the Code of Criminal Procedure resulting from the dispute between the parties as to possession of the pit EFGH, giving rise to an apprehension of breach of the peace. That it was so is amply clear from the fact that the Collector was accompanied by the Superintendent of Police. Even assuming that Shri Chib acted in his capacity as the Collector, the spot inspection held by him was an act done in the discharge of his official duties. Under Rule 41 (xi) of the Mineral Concession Rules, 1949, the area leased is liable to be inspected by any officer authorised by the Central or the State Government. There can be no doubt whatever that the Collector is an officer so authorised.

31. There is not an iota of evidence that the defendants Nos. 4 and 5 in any way connived at or encouraged the illegal and wrongful acts of the defendant No. 1 in trespassing upon the pit EFGH towards the end of March 1959 and in

extraction and removal of 1,800 tons of manganese ore therefrom from April 1959, till the end of March 1960. Nothing has been brought to our notice to bear this out. This point must, therefore, fail.

32. Point No. 5: According to Section 27 of the Mines and Minerals (Regulation and Development) Act, 1957, no suit lies against any person for anything which is in good faith done or intended to be done under the Act. The section runs as follows:

"27. Protection of action taken in good faith:— No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act."

The defendants Nos. 4 and 5 undoubtedly acted in the discharge of their official duties. No suit, therefore, lies against them, much less against their employer, i.e., the defendant No. 3. That being so, the suit is clearly barred by Section 27 of the Mines and Minerals (Regulation and Development) Act, 1957. The appeal against the defendant No. 3 must, therefore, fail on that account.

33. Point No. 6: As hereinbefore adumbrated, the case of the plaintiff is that the defendant No. 3 is vicariously liable for the alleged wrongful acts and omissions of the defendants Nos. 4 and 5 in the discharge of their official duties. The acts complained of on their part, if any, were indubitably acts performed by them by virtue of authority conferred on them under the Mines and Minerals (Regulation and Development) Act, 1957 and the Mineral Concession Rules, 1949 issued thereunder, as also the Mining Manual.

34. The finding of the learned trial Judge, as already stated, is that it is not proved that they committed any illegal acts or instigated or abetted or in any way helped the defendant No. 1 in wrongful extraction or sale of manganese ore raised from the pit EFGH and, therefore, they were not answerable for the plaintiff's claim. The suit against the defendants Nos. 4 and 5 was accordingly dismissed. The plaintiff not having appealed against the dismissal of the suit against the defendants Nos. 4 and 5, the appeal against the defendant No. 3 is not maintainable.

35. Point No. 7: The appeal must also fail because the suit as framed was not tenable due to the failure of the plaintiff to bring a suit to set aside the final order of the Sub-Divisional Magistrate, Sausar, made under Section 145 (6) of the Code of Criminal Procedure on 30-12-1960. The plaintiff had to bring a suit based on title within three years therefrom as provided for by Article 47 of the Limitation Act. The present suit is not a suit of that kind, and admittedly the

plaintiff has brought no such suit. The failure of the plaintiff to bring such a suit resulted in the extinguishment of his right to the property i.e., the disputed pit marked EFGH in the plaint map, Ex. P-1, by reason of Section 28 of the Limitation Act. The section is an exception to the general principle that limitation bars only the remedy and does not extinguish the right to property. The extinguishment of the right or title of the rightful owner under Section 28 of the Limitation Act will operate to give a good title to the wrong-doer. (See Hem Chand v. Pearey Lal, AIR 1942 PC 64).

36. It is well settled that where the right to immovable property is extinguished, the right to recover damages or rents or profits of the property even prior to such extinguishment will be lost. That is because the extinguishment of such right takes effect retrospectively. (See *Rajah of Venkatagiri v. Isakapalli Subbiah*, (1903) ILR 26 Mad 410. *Jagatram v. Pitai*, 26 Nag LR 160 = (AIR 1930 Nag 142), *Jaidevi Kuari v. Dakshini Din*, AIR 1937 All 300 and *Sankaran Parameswaran Namboori v. Veeramani Pattar Narayana Pattar*, AIR 1957 Ker 117).

37. No doubt, the present suit by the plaintiff for recovery of damages was brought on 19-3-1962, i.e., before the expiry of the period of three years provided by Article 47 of the Limitation Act. But that hardly makes any difference because the suit as framed was not of the kind contemplated by Article 47. The decision in *Maharam Ali v. Mobarak Ali*, (1942) 46 Cal WN 551 relied upon, is distinguishable on facts. There the period mentioned in Article 47 expired during the pendency of a suit for possession based on title. If that were so, there would be no difficulty.

38. The decision of Mohinuddin, A. J. C. in *Jagatram v. Pitai* (supra), is a direct authority for the proposition that where the right to property is extinguished by reason of Section 28, due to the failure of the unsuccessful party to bring a suit under Article 47 of the Limitation Act, he cannot elude the operation of Article 47 by framing a suit as one for damages. There, the final order under Section 145 (6) of the Code of Criminal Procedure was passed on 23rd February, 1922, and the unsuccessful party ought to have filed a suit under Article 47 of the Limitation Act on or before 23rd February, 1925 to recover the property, comprised in the order. On 12th August, 1926, he, however, brought a suit for the recovery of mesne profits. Mohiuddin, A. J. C. held that a person whose right to recover possession is extinguished, his right to recover damages also disappears. The decision of the learned Judge proceeded on the underlying principle that the right to claim damages is an adjunct

of, and flows from the right of ownership and, therefore, is not separate from the right to claim possession. In dealing with the question, Mohiuddin, A. J. C. stated:

"No such suit was filed in this case, and therefore the respondent's right to possession was extinguished under Section 28 of the Limitation Act. On failure of the unsuccessful party to sue to get rid of the order within three years under Article 47 of the Limitation Act, the person in possession acquired a title to the property under Section 28 of the Limitation Act."

"The right to claim damages is not separate from the right to claim possession or joint possession and therefore the respondent had no subsisting right to claim his share of the produce of those fields, whose possession he could not recover. The respondent cannot elude the operation of Article 47 of the Limitation Act by framing his suit as one for damages of his share of the produce. Though in this case the right of the respondent was extinguished in 1925, the extinguishment takes effect retrospectively, and therefore he cannot maintain a suit for recovery of his share of the produce, derived by the appellant from the land before the extinguishment of the right."

39. It is, however, urged that the decision *Jagatram v. Pilai* (supra) is distinguishable. It is said that the distinction lies in the fact that there, the suit for mesne profits was filed after the expiry of three years under Article 47 and, therefore, the person in possession had acquired a title to the property under Section 28 of the Limitation Act whereas in the instant case, the suit for damages was brought by the plaintiff before the expiry of that period. The submission is that on 19-3-1962 i.e., the date of institution of the suit, "the right to such property" within the meaning of Section 28 had not been extinguished and, therefore, the plaintiff had the right to recover damages. It is also said that the suit as framed should be regarded as a suit under Article 47 inasmuch as the minerals lying in the pit EFGH had disappeared and, therefore, the only relief that could be claimed by, or was available to, the plaintiff, was one for damages. It is further said that the defendant No. 3, the State of Madhya Pradesh, was not a party to the proceedings under Section 145 of the Code of Criminal Procedure and was, therefore, not bound by the final order passed therein. There is no substance in any of the contentions.

40. There would have been some substance in the contention that the suit having been brought within three years, the plaintiff's right did not stand extinguished after expiry of that period, or that the suit should be regarded as one under

Article 47, if the plaintiff had sought the relief of possession. It is futile to contend that the plaintiff could not claim the relief of possession. The whole object of a suit contemplated by Article 47 of the Limitation Act is for the establishment of rights by the unsuccessful party. The plaintiff was certainly interested in preserving his leasehold interest against encroachment by a trespasser over a portion of the area leased. He, therefore, had the duty to bring a suit under Article 47 within three years from the date of the final order under Section 145 (6) of the Code of Criminal Procedure. The failure of the plaintiff to bring such a suit within that period, must entail the consequence set forth in Section 28 of the Limitation Act. That was a consequence which ensued during the pendency of the suit, and the right to recover the property encroached upon was lost and, therefore, the suit for damages was not maintainable. There is also no substance in the assertion that the minerals had disappeared, in view of the averments in para. 14 of the plaint that the claim for damages for wrongful extraction and sale of manganese ore amounting to Rs. 50,000/- was limited for the period till the end of March 1960. The extinguishment of right takes effect retrospectively. That being so, the plaintiff could not be awarded any damages, and the appeal must fail.

41. Points Nos. 8, 9 and 10: These involve a common question and, therefore, it would be convenient to deal with them together.

42. The most crucial point urged in the appeal is that there was breach on the part of the defendant No. 3, the State of Madhya Pradesh, of the covenant of quiet enjoyment implied in Section 108 (c) of the Transfer of Property Act. Counsel for the appellant claims to recover damages on the basis that this suit was a suit founded in contract, and not in tort. He strenuously argues that the obligation of the State Government as a lessor to ensure the covenant of quiet enjoyment which is implied in Section 108 (c) of the Transfer of Property Act, is a contractual obligation because the relationship of lessor and lessee was a matter of contract. It is said that by virtue of that relationship, a duty arose on the part of the defendant No. 3 not only to put the plaintiff into possession of the leasehold area but also to secure his quiet enjoyment. The submission is that the document, Ex. P-20, is a lease. It is urged that by virtue of the so-called lease, Ex. P-20, the plaintiff was put in possession of 30.07 acres as demarcated by the Revenue Inspector vide his demarcation certificate dated 23-12-1952, Ex. P-2, and the area so demarcated was bounded by the boundary pillars raised by the plaintiff under S. I. 1, M. R. 50 (iv). The plaintiff's posses-

sion as demarcated, whether rightly or wrongly, continues to be valid until there was a fresh theodolite survey, and till then the demarcation by the Revenue Inspector as certified to the then Deputy Commissioner was final. It is also said that the defendant No. 1, the late M. F. Foujdar, was a person claiming under the defendant No. 3 i.e., the lessor, and, therefore, the plaintiff was entitled to recover damages from the defendant No. 3 not only for any wrongful acts and omissions on the part of its servants in the discharge of their official duties, i.e., the defendants Nos. 4 and 5, but also for the wrongful act of trespass by the defendant No. 1 upon the plaintiff's pit EFGH, in March 1959, and his wrongful extraction and removal of manganese ore therefrom from April 1959 till the end of March 1960. In support of the contention, reliance is placed on Naorang Singh v. A. J. Meik, AIR 1923 Cal 41 and Narayan v. Gokuldas, ILR (1946) Nag 568 = (AIR 1947 Nag 48).

43. The fallacy of the arguments of Counsel for the appellant is apparent. The document, Ex. P-20, is not a mining lease. The terms of the document are clear enough. It is not a lease but a licence. The document is styled as an agreement, and embodies the grant of permission for the working of the leased area i.e., for commencing mining operations, pending the execution of a formal lease in accordance with the Mineral Concession Rules, 1949. It is now accepted before us that the mining lease was, in fact, not executed till the year 1965.

44. The reason for the delay lay in the fact that the Mineral Concession Rules, 1949 did not prescribe the form of a mining lease. Nonetheless, the standard form of a mining lease was provided in the Mining Manual of the Central Provinces and Berar, Fourth Edition, pp. 121-142. These Rules were replaced by the Mineral Concession Rules, 1960, Rule 31 whereof provided:

"31. Lease to be executed within six months:—

(1) Where, on an application for the grant of a mining lease an order has been made for the grant of such lease, a lease deed in Form K or in a Form as near thereto as circumstances of each case may require shall be executed within six months of the order or within such further period as the State Government may allow in this behalf, and if no such lease deed is executed within the said period due to any default on the part of the applicant, the State Government may revoke the order granting the lease and in that event the application fee shall be forfeited to the State Government.

(2) The date of the commencement of the period for which a mining lease is

granted shall be the date on which the deed is executed under sub-rule (1)."

Form K prescribed thereunder was substantially the same as the standard form of a mining lease given in the Mining Manual. We are aware of the view taken in the State of Madhya Pradesh v. M. Hassonjee and Sons, AIR 1957 Madh Pra 135 that in the absence of any rules having been framed the question of conformity of a lease with the rules does not arise. That, however, is of no avail to the plaintiff. At best, the document, Ex. P-20 could only be regarded as an agreement to lease, coupled with a licence i.e., permission for working of the leased area. Whether the document operates as a lease or as an agreement to lease is a matter of construction and intention. When a document, though in form an agreement to lease, finally ascertains the terms of the lease, and gives the lessee a right of exclusive possession either immediately or at a future date, the document is said to effect an actual demise and it operates as a lease. There are no such terms in the document, Ex. P-20. Nor was there any present demise. On the contrary, the parties contemplated the execution of a formal deed. It is well settled that when the parties to a contract contemplate the execution of a formal deed, the matter is still at the stage of agreement though it may have reached finality. (See Shamji-bhai v. Jagoo Hemchand Shah, ILR (1949) Nag 581). It is a matter of construction in every case, and more so when no terms of technical significance, as here, are found to be present. The use of the words 'lessor' and 'lessee' in the document, Ex. P-20, was not determinative of the nature of the transaction. There was no actual demise by the document, Ex. P-20. The distinction between a lease and an agreement to lease is well known.

45. The commencement of a lease must be certain in the first instance, or capable of being ascertained with certainty afterwards, so that both the time when it begins and the time when it ends, is fixed. If the lease commences in the future, it is sufficient if it is capable of being definitely ascertained when the lease takes effect. There is no term as to the duration in the document, Ex. P-20. The mere fact that a mining lease was executed in the year 1965 hardly makes any difference. The law is stated in Mulla's Transfer of Property Act, Sixth Edition at pp. 645-6 thus:

"A lease may commence either in the present or the future. If it is expressed to commence from a past day, that is only for the purpose of computation, and the interest of the lessee begins from the date of execution. Thus, in Bird v. Baker, (1858) 1 El & El 12, by a lease dated the 19th July, 1851, premises were demised 'to hold from the 25th

December, 1849 for and during and until the full end and term of fourteen years thence next ensuing' with a proviso enabling the demise to be determined at the expiration of the first seven years thereof, and it was held that the seven years were to be reckoned from the 25th December, 1849. But the reference to that date was only a method of calculation and did not convey an interest before the date of execution. Before execution no interest passes; and conversely, the lessee is not liable for breaches of covenants before execution."

It must, therefore, be held that there was no lease in existence till 1965, and prior to execution of the mining lease in that year, the parties did not stand in the relation of lessor and lessee and consequently the defendant No. 3 was not liable for any breach of the covenant of quiet enjoyment implied in Section 108 (c) of the Transfer of Property Act.

46. That apart, the plaintiff has made no proper foundation for a claim based on contract. His claim for damages is based on the impropriety of the action of the defendants Nos. 4 and 5. The plea, as contained in para. 15 of the plaint, is vague and indefinite, lacking in particulars. Under Order 6, Rule 2 of the Code of Civil Procedure, the plaintiff should have stated material facts. The non-mention of these facts amounts to no pleading and, therefore, no cause of action arises. It is wrong to suggest that the plaint should be read with the notice under Section 80 of the Code of Civil Procedure. In the *Union of India v. Pandurang Kashinath*, AIR 1962 SC 630 their Lordships have stated:

"It is well known that when an improper conduct is alleged, it must be set out with all particulars. In *Wallingford v. Mutual Society*, (1880) 5 AC 685 (697). Lord Selborne observed:

'with regard to fraud, if there be any principle which is perfectly well settled, it is general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.'

We think what was said about fraud would equally apply to any improper conduct: (See *Bharat Dharma Syndicate v. Harish Chandra*, 64 Ind App 143 = (AIR 1937 PC 146))."

The principle behind this rule is well known. To take the present case, if a plea, as contained in para. 15 of the plaint, is considered sufficient where it is merely stated that the defendants Nos. 4 and 5 purporting to act as servants of defendant No. 3 acted illegally and contrary to the Mining Rules and Regulations and far in excess of their powers in the discharge of their official duties, it would be impos-

sible for the defendant No. 3 to adequately meet the allegation, unless there were particulars of the acts complained of. The allegations contained in para. 15 of the plaint are, therefore, to be struck out.

47. The plaintiff's suit, as framed, against the defendant No. 3 is not a suit based on contract, but a suit in tort. It is sought to be made vicariously liable for the wrongful acts and omissions on the part of its employees i.e., the defendants Nos. 4 and 5, on the allegation that they acted contrary to the Mining Rules and Regulations and far in excess of their powers in the discharge of their official duties. There is no allegation anywhere that the defendant No. 1 was a person acting under the defendant No. 3. Nor is there any allegation of any breach of the covenant of quiet enjoyment implied in Section 108 (c) of the Transfer of Property Act. The plaintiff's case, therefore, rests on tort, not on the wrongful acts of the defendant No. 1, but on the plea that the defendants Nos. 4 and 5 instigated or abetted in the commission of those acts, without any particulars thereof.

48. We think that an accurate statement of the law is best set out in the judgment of Greer, L. J., in *Jarvis v. Moy, Davies, Smith, Vandervell and Co.*, (1936) 1 KB 399 at p. 407 which is given below:

"The distinction in the modern view, for this purpose, between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."

49. The determinations in a cause should be founded upon a case to be found in the pleadings or involved in or consistent with the case thereby made. The appellant cannot, therefore, set up a new case for which there is no foundation in the pleadings. The plaintiff's suit, as framed, was a suit based on tort seeking to hold the State Government liable for the tortious acts of its servants. As already stated, there is no allegation of any breach of the covenant of quiet enjoyment implied in Section 108 (c) of the Transfer of Property Act. The covenant implied therein provides for quiet enjoyment by the lessee without interruption by the lessor or by any other person or persons rightfully claiming by, from or under him. It does not, however, extend to tortious acts of strangers. The law is stated in Mulla's Transfer of Property Act, Sixth Edition, pp. 691-2:

peared for the petitioner in these writ petitions was that the first respondent, Land Acquisition Officer, had not taken into account the tenure of the land in determining the market value of the land as provided for in Section 23 of the Act. According to the learned Advocate-General, the lands in the inam village were subject to the obligation of paying jodi or quit rent, in addition to the full assessment as imposed by the Tamil Nadu Inam Assessment Act, 1956 (Tamil Nadu Act XL of 1956); this recurring obligation imposed on the land should have been taken into account in determining the market value of the lands in question; but the Land Acquisition Officer simply compared the sales relating to ryotwari lands in the adjacent village for the purpose of ascertaining the compensation; and consequently the failure of the Land Acquisition Officer to take into account the tenure of the land, namely, the lands being inam lands has vitiated his award.

5. As against this contention of the learned Advocate-General, Mr. M. K. Nambiar, learned counsel for the Inamdars and persons interested in lands, advanced two arguments. One is that having issued G. O. Ms. No. 1111, Revenue, dated 3-6-1969, the Government is estopped from contending that the Land Acquisition Officer had erred in ascertaining the market value of the lands without reference to the tenure of the lands. The second is that in any event, the State is not entitled to apply for any writ of certiorari to quash the award made by the first respondent, having regard to the nature of the award under the law as well as under the decisions of Courts.

6. As far as the first point urged by Mr. M. K. Nambiar is concerned, I am clearly of the opinion that his argument is misconceived. From what I have stated above, with reference to G. O. Ms. No. 1111, Revenue, dated 3-6-1969, it is clear that the Government decided to proceed only under the Land Acquisition Act, and it did not purport to claim or assert its rights under the Abolition Act referred to already. The argument of Mr. Nambiar proceeds on the misapprehension that seeking to have the awards, in the present cases quashed, the Government is putting forward its right to the lands in question under the Abolition Act. As I have pointed out already, all that the learned Advocate-General contended before this Court was that the Land Acquisition Officer, when he determines the market value of the lands as provided for in Section 23 (1) of the Act, should take into account the recurring liability and the obligation to which the land was subject for the purpose of ascertaining the market value of land and in that context

it was stated that the inam lands suffered a greater disadvantage in that they were subjected to the payment of jodi or quit rent in addition to the full assessment, while ryotwari lands were liable to pay only the kist and therefore when the Land Acquisition Officer purported to assess the compensation or market value of the lands in question he should have taken into account this recurring liability of the Inam lands and this the Land Acquisition Officer had failed to do. Therefore, the argument of the learned Advocate-General is based exclusively on the provisions contained in Section 23 of the Act and it is not based upon any assertion of right on the part of the Government under the provisions of the Abolition Act. Even if the Abolition Act had not been in existence, still the inam character of the lands will have a bearing on the determination or ascertainment of the market value of the lands and the grievance of the Government is that the Land Acquisition Officer has failed to take that into account. As a matter of fact, the first respondent, namely, the Land Acquisition Officer has filed a counter-affidavit before this Court putting forward the contention that it was not his duty to take into account the tenure of the land in determining the compensation. Apart from contending that G. O. Ms. No. 1111 Revenue dated 3-6-1969 constituted an estoppel preventing the Government from putting forward any claim on the basis of its rights under the Abolition Act, Mr. Nambiar did not dispute the contention of the learned Advocate-General that under the Act itself, the Land Acquisition Officer was under an obligation to assess the market value of the lands after taking into account the nature and the tenure of the land and he has failed to do so in these cases.

7. However, the above conclusion of mine does not in any way help the petitioner in these writ petitions. The other contention of Mr. M. K. Nambiar, to which I have already drawn attention, is that the award made by the Land Acquisition Officer under Sections 11 and 12 of the Act is not a decision or determination of any rights of the parties so as to bring the same within the certiorari jurisdiction of this Court. The learned counsel contended that the making of an award by the Land Acquisition Officer amounts only to an offer made by that officer on behalf of the Government to the persons interested in the lands by way of compensation for the lands compulsorily acquired by the Government, that when the offer is made, the Land Acquisition Officer is acting as the agent of the Government, that the offer so made by the Land Acquisition Officer as the agent

of the Government is binding on the Government and that the Government cannot challenge the same by means of a petition for the issue of Writ of certiorari. In my opinion, this contention of the learned counsel is well founded, having regard to the provisions of the Act as well as the decisions to which I shall draw attention.

8. It is not necessary for me to refer to the relevant provisions of the Act, since they have been referred to in the various decisions themselves which I shall refer to immediately.

9. The earliest of the cases to which attention has been drawn is that of the High Court of Calcutta in *Ezra v. The Secretary of State*, (1903) ILR 30 Cal 36. In this case, a suit was instituted by the owner of a land for a declaration that all the proceedings taken by the local Government in the matter of acquisition of the land were void and for a mandatory injunction restraining the Government as well as the Bank of Bengal for whom the land was acquired from taking any step whatever towards taking possession of the said premises. One of the contentions put forward on behalf of the plaintiff was that the proceedings before the Land Acquisition Collector were illegal and in fraud of the Act; that he proceeded on the estimate sanctioned by the Government and did not form his judgment on the evidence before him; and that as a judicial officer he was confined to the evidence given in Court. It is this contention of the plaintiff in the suit that was negatived by a Bench of the Calcutta High Court, after an elaborate reference to the provisions of the Act. The Court pointed out:

"Throughout the proceedings the Collector acts as the agent of Government for the purposes of acquisition, clothed with certain powers, to require the attendance of persons to make statements relevant to the matters, which he has to enquire into. He is, in no sense of the term, a judicial officer, nor is the proceeding before him a judicial proceeding."

The Court proceeded to hold:

"The considerations to which we have referred satisfy us that the Collector acts in the matter of the enquiry and the valuation of the land only as an agent of the Government, and not as a judicial officer; and that consequently, although the Government or the Company at whose instance the Government is acquiring the land is bound by his proceedings, the persons interested are not concluded by his finding regarding the value of the land or the compensation to be awarded. His enquiry and his valuation

are departmental in their character for the purpose of enabling the Government to make a tender through him to the persons interested. Such tender once made is binding on the Government, and the Government cannot require that the value fixed by its own officer acting on its behalf should be open to question at its own instance before the Civil Court." This view of the Calcutta High Court was affirmed by the Privy Council on appeal in *Ezra v. Secretary of State for India*, (1905) ILR 32 Cal 605 (PC). The Judicial Committee observed:—

"The sections directly relevant (besides the 9th already set out) are the 11th, 12th, 13th, 14th, 15th and 18th. These sections, and the question as a whole, are very satisfactorily discussed in the judgment under appeal, and their Lordships do not think it necessary to repeat the reasoning. It is, to say the least, perfectly intelligible that the expert official charged with the duty of fixing a value should be possessed of all the information in the hands of the department, and should at the same time avail himself of all that is offered at the enquiry, his ultimate duty being not to conclude the owner by his so-called award, but to fix the sum, which in his best judgment is the value and should be offered".

The Chief Court of Punjab in *Macdonald v. The Secretary of State for India in Council*, (1909) 4 Ind Cas 914 pointed out:

"We accept, of course, the well-established proposition that the action of the Collector under the Act is purely administrative, and we are prepared to admit that to a large extent the Collector may conduct his enquiry through other agencies."

They also expressed the view that an award under the Act is in the nature of a tender made by the Government to the owner of the land.

10. In *Padamsi Narayan v. The Collector of Thana*, ILR 46 Bom 366 = (AIR 1922 Bom 161), Macleod, C. J., pointed out that an award made under Section 11 is an offer by the Government to the person interested in the land to be acquired of the compensation to be paid.

11. The Supreme Court had to consider the nature of the functions performed by the Collector as well as the nature of the award made by him under the provisions of the Act in *Raja Harish Chandra Raj Singh v. The Deputy Land Acquisition Officer*, AIR 1961 SC 1500. The Supreme Court referred to with approval principles laid down by the Calcutta High Court in (1903) ILR 30 Cal 36, as well as the decision of the Privy Council in (1905) ILR 32 Cal 605 and the decision of the Punjab Chief Court in (1909)

4 Ind Cas 914 referred to already. The Supreme Court pointed out:

"In dealing with this question it is relevant to bear in mind the legal character of the award made by the Collector under Section 12. In a sense it is a decision of the Collector reached by him after holding an enquiry as prescribed by the Act. It is a decision, *inter alia*, in respect of the amount of compensation which should be paid to the person interested in the property acquired; but legally the award cannot be treated as a decision; it is in law an offer or tender of the compensation determined by the Collector to the owner of the property under acquisition. If the owner accepts the offer no further proceeding is required to be taken; the amount is paid and compensation proceedings are concluded. If however, the owner does not accept the offer, Section 18 gives him the statutory right of having the question determined by Court, and it is the amount of compensation which the Court may determine that would bind both the owner and the Collector. In that case it is on the amount thus determined judicially that the acquisition proceedings would be concluded. It is because of this nature of the award that the award can be appropriately described as a tender or offer made by the Collector on behalf of the Government to the owner of the property for his acceptance."

That question arose in the context of the construction of the proviso to Section 18 of the Act, dealing with the period of limitation for claiming a reference to the Court by a person interested in the land. The question that had to be considered by the Supreme Court was whether the expression, "the date of the award" occurring in the proviso to Section 18 meant literally the date on which the award was made or it meant date on which the award was communicated to the persons concerned or the date on which the person concerned came to acquire knowledge of the award. It is only in that context the Supreme Court made the above observations. As a matter of fact, the Supreme Court went to the extent of pointing out that if the award made by the Collector is in law no more than an offer made on behalf of the Government to the owner of the property, then the making of the award, as properly understood, must involve the communication of the offer to the party concerned, that is the normal requirement under the contract law and that its applicability to cases of award made under the Act cannot be reasonably excluded. Therefore, the above decisions make it quite clear that the making of an award by the Collector, under the provisions of the Act does not constitute a decision or determination on the

part of the Collector and that it merely constitutes an ascertainment of the market value of the property by the Collector administratively as an agent of the Government to enable the Government to offer that amount by way of compensation to the person concerned. If so, it follows that an award made by a Collector under the provisions of the Act cannot be said to be a decision or determination by a judicial or quasi-judicial officer so as to bring it within the certiorari jurisdiction of this Court under Article 226 of the Constitution of India.

12. Mr. Nambiar for the purpose of emphasising his contention drew my attention to certain provisions contained in the Land Acquisition Manual issued by the State of Tamil Nadu. As a matter of fact, the affidavits filed in support of these writ petitions themselves contend that Chapter XVII of the Land Acquisition Manual lays down guidelines for ascertaining or assessing the value of the land in an estate and for the apportionment of the same and that the first respondent herein has failed to follow those guidelines. The learned Advocate-General very fairly conceded that the said Chapter XVII constituted merely administrative instructions given by the Government to its officers and that therefore they did not have statutory force so as to clothe them with enforceable character. At the same time the learned Advocate-General contended that the Collector should have followed those guidelines given in Chapter XVII. It is in that context Mr. Nambiar drew my attention to certain other provisions contained in the Land Acquisition Manual itself, according to which the Collector acts only as an agent of the Government and the award made by the Collector is binding on the Government. In paragraph 2 of Chapter II of the same Manual, it is stated:

"The Collector acts as the Agent of the State Government for the purpose of acquisition. He is clothed with certain powers to require the attendance of persons to make statements relevant to the matter which he has to investigate; but he is in no sense of the term a judicial Officer and the proceedings before him are not judicial proceedings." Obviously and factually this statement in the Manual is based on the decision of the Judicial Committee in (1905) ILR 32 Cal 605. The same Manual in Chapter VIII states:

"The award is an offer made by the Collector regarding the amount tendered by him to the owner of the land and is binding on the Government for whom the Collector acts as the agent. If the owner of the land accepts the offer, the award becomes final at once."

The contention of Mr. Nambiar is that it is not only the decisions of the Courts that hold that the Collector functions as an agent of the Government in ascertaining the compensation that such an ascertainment of com-

pensation is an offer made by him on behalf of the Government to the owner of the land and that such ascertainment is binding on the Government, but the Government also has all along been proceeding only on the basis that the Collector is functioning only as its agent and the award made by him is binding on it. In my opinion, this contention of Mr. Nambiar is well founded.

13. It can also be noticed in this context that Secs. 18 and 25 of the Act support this conclusion. Section 18 gives a right to a person interested in the land to apply to the Collector for referring the matter to the Court. The Government is not considered to be a person interested and therefore the Government does not have a right under Section 18 to call for a reference to a Civil Court against the award made by a Collector under Sections 11 and 12. Under Section 25 (1) of the Act, when the applicant has made a claim to compensation pursuant to any notice given under Section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under Section 11. These provisions also therefore make it clear that the amount awarded by the Collector is the irreducible minimum which the Government offers to the owner of the land by way of compensation and even when the owner of the land or the person interested takes up the matter to the Court the Court shall not give him anything less than the amount awarded by the Collector under Section 11. These provisions themselves indicate that the amount awarded by the Collector is the final amount as far as the Government is concerned and it is binding on the Government. As a matter of fact, Section 12 (1) itself states that the award shall be filed in the Collector's office and shall, except as provided in the Act thereafter be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, or the true area and value of the land, and the apportionment of the compensation among the persons interested. The only provision destroying this finality is that contained in Section 18 which gives a right to a person interested to ask for a reference and not to the Government to ask for a reference. Therefore, Sections 12, 18 and 25 themselves will show that the amount awarded by the Collector under Section 11 is final as far as the Government is concerned and is binding on the Government and the Government cannot call that in question in any Court. This conclusion is independent of the other conclusion, namely, the award made by the Collector under Section 11 is not judicial in character and does not constitute a judicial or quasi-judicial determination so as to bring it within the certiorari jurisdiction of this Court under Article 226 of the Constitution of India.

14. The learned Advocate-General drew my attention to certain other decisions. He cited the decision of the Privy Council in *M. Samiullah v. Collector of Aligarh* AIR 1946 PC 75 and relied on the following passage occurring in that judgment:

"It is clear therefore that the Land Acquisition Officer, in awarding the amount of compensation under Sec. 11, is performing a statutory duty, a duty the exercise of which, in cases where land is to be acquired for a public purpose, concerns the public, since it affects the expenditure of public money. In assessing compensation he is bound to exercise his own judgment as to the correct basis of valuation, and his judgment cannot be controlled by an agreement between the parties interested."

The next decision on which reliance was placed by him is that of the Patna High Court in *Pannalal Maheshwari v. State of Bihar*, AIR 1955 Pat 63. In that case, the Patna High Court held that the Collector was under the statutory duty to make an enquiry into the valuation of the land and into the respective interest of the persons claiming compensation and to make an award in respect of the matters mentioned in Section 11, and that Section 12 imposed a further duty upon the Land Acquisition Officer to file the award in the Collector's office and to give immediate notice of his award to such of the persons interested as were not present personally or by their representatives when the award was made. On this basis the Court held that a writ in the nature of mandamus should be issued under Article 226 of the Constitution commanding the Collector to perform the statutory duty imposed upon him under Sections 11 and 12 of Act.

15. The next decision relied is that of a single Judge of the Allahabad High Court in *Baru Mal Jain v. State of Uttar Pradesh* AIR 1962 All 61. That judgment dealt with the question as to when the Collector could be said to have made his award finally under Section 11 of the Act and rejected the suggestion that the Land Acquisition Officer could make a subsequent award dictated by the Land Reforms Commissioner.

16. In my opinion, none of these decisions helps the case of the State in these writ petitions. There is no inconsistency, between the duty being statutory and at the same time it being administrative in character. Simply because a writ of mandamus can be issued to compel a Collector to perform his duty under Sections 11 and 12 of the Act, it cannot be contended that when the Collector has performed his duty and made an award, that award has become a judicial one so as to attract the certiorari jurisdiction of the Court. Again simply because the source of the authority or the power of the Collector is the statute, it does not necessarily follow that the act done pursuant to that statutory power constitutes a judicial act. All

that the above decisions point out is that the Collector is under a statutory obligation to make an award in terms of Sections 11 and 12 of the Act. As a matter of fact, the Allahabad High Court in the decision referred to above pointed out that it cannot be denied that the proceedings under the Act for awarding compensation are administrative in nature.

17. The last decision on which reliance was placed by the learned Advocate-General is that of the Supreme Court in *Suri Ramatanu Co-operative Housing Society Ltd. v. State of Maharashtra* AIR 1970 SC 1771. In paragraph 22 of this judgment, the Court observed:

"Section 33 of the Act deals with compensation. The amount of compensation under the Act can be determined by agreement between the State Government and the person to be compensated. Where on the other hand no such agreement can be reached, the State Government shall refer the case to the Collector. That is sub-section (3) of Section 33 of the Act. The proviso to that sub-section is that no compensation exceeding such amount as the State Government may by general orders specify to be paid for such acquisition shall be determined by the Collector without the previous approval of the State Government or such officer as the State Government may appoint in that behalf. This proviso was construed on behalf of the petitioner to be a fetter on the judicial powers of the Collector to determine compensation. Sub-section (5) of Section 33 of the Act states that in determining the amount of compensation, the collector shall be guided by the provisions contained in Sections 23 and 24 and other relevant provisions of the Land Acquisition Act. The provisions indicate that if the Collector will determine an amount higher than what the State Government may by general orders specify, the approval of the State Government will be necessary, there is no ceiling fixed by Government. Finally, there is an appeal to the Court from the decision of the Collector. The decision of the Court will finally determine the amount of compensation. We are of opinion that there is no restriction on the powers of the Collector in the matter of determination of compensation, although the approval of Government may be necessary in the Government interest."

I am unable to hold that this decision is of any assistance to the petitioner, because in that case the Court was dealing with the Maharashtra Industrial Development Act, 1961 (3 of 1962) and was not dealing with the nature or character of the action of the Collector under Sections 11 and 12 of the Act. As a matter of fact, the Supreme Court held that the two Acts are dissimilar in situations and circumstances. Even independent of this consideration, the passage extracted above, on which alone reliance was placed, does not in any way help the case of the petitioner in these writ petitions.

18. Apart from the above considerations, the decision of the Supreme Court in AIR 1961 SC 1500 referred to already clearly and categorically lays down the proposition that an award made by a Collector under Section 11 of the Act is not a decision and that it is only an offer made by him on behalf of the Government to the owner of the land. That decision will clearly lead to the inevitable conclusion that the award of the Collector made under Section 11 of the Act cannot be questioned by way of a petition for the issue of a writ of certiorari under Article 226 of the Constitution of India.

19. Under these circumstances, the writ petitions fail and they are dismissed. There will be no order as to costs.

Petitions dismissed.

AIR 1975 MADRAS 309 RAMAPRASADA RAO AND NATARAJAN, JJ.

O. Ramalingam and others, Appellants
v. The Director, Daily Thanthi, Madras and
another, Respondents.

Appeal No. 463 of 1968, D/- 11-4-1974.*

(A) Constitution of India, Article 194 —
Newspaper publication of report of parliamentary proceedings defaming a person —
Civil liability — Qualified privilege not
available when malice is proved.

For escaping liability in damages regarding such defamation three tests must be satisfied, namely accurate and faithful publication, general importance of it and absence of animus injurandi. If the impugned publication is proved to be malicious then person responsible for such publication cannot escape tortious liability by claiming qualified privilege.

Held on facts that all the defendants were liable in that the impugned publication was partially false to the knowledge of one of the defendants. (AIR 1961 Punj 215; AIR 1961 SC 613; AIR 1970 Bom 424, Referred to), (Paras 6, 7, 11, 13)

Cases Referred: Chronological Paras
AIR 1970 Bom 424 = 72 Bom LR 94 11
AIR 1961 SC 613 = (1961) 3 SCR. 486 6
AIR 1961 Punj 215 = 63 Pun LR 794 6
K. V. Sankaran, K. Ranganathan and
Yamunan, for Appellants; V. Shanmugham
and T. L. Radhakrishnan, for Respondents.

NATARAJAN J.:— The defendants in O. S. No. 5497 of 1967 on the file of the First Additional City Civil Judge, Madras are the appellants.

2. Plaintiffs 1 and 2, who are respectively the Director and General Manager

*(Against decree of I Addl. J., Madras, in Original Suit. No. 5497 of 1967 D/- 21-6-1968).

KR/LR/E705/74/CSJ

of the Newspaper publication, "Daily Thanthi" came forward with an action alleging that by reason of a publication effected by the defendants in the issue of the Tamil daily "Navamani" dated 4-2-1966 (to be read as 5-2-1966 in respect of moffussil areas), the defendants had defamed the plaintiffs and were therefore liable to pay damages. The third defendant is the publisher and proprietor of the Tamil daily "Navamani" and defendants 1 and 2 are respectively the Editor and printer of the said daily. In the publication of "Navamani" dated 4-2-1966 the defendants caused a report to be published in the front page which, among other things, contained words to the effect that the employees of "Daily Thanthi" were being victimised for their membership in trade unions and that the Management of "Daily Thanthi" had resorted to beating its employees. The plaintiffs alleged that the defendants had falsely and maliciously edited, printed and published the report relating to "Daily Thanthi" containing the offending words, that the defendants by making the said publication, had intended to convey to the public that the plaintiffs had descended to the low level of beating their employees with sticks and by reason of such malicious allegations, the plaintiffs had been gravely injured in their credit and reputation and had been brought to odium and contempt in the eyes of the public and had thereby suffered pain and humiliation. Quantifying the damages claimed by them at Rs. 25,000/-, the plaintiffs sought a decree of court in their favour for the said sum of Rs. 25,000/- together with interest at 6 per cent per annum from the date of the plaint till the date of realisation and costs of the suit. The defendants justified the publication effected by them and contended that the publication related to an adjournment motion tabled on the floor of the Madras Legislative Assembly by Thiru M. Kalyanasundaram, M. L. A. who moved the adjournment on behalf of the workers of "Daily Thanthi" and the proceedings of the House in relation to the said adjournment motion. They averred that the report, though not a verbatim one, was a faithful summarisation of the proceedings in the House and the publication had been effected in the normal course of the publishing activity of "Navamani" and its wonted practice of publishing the proceedings of the Legislature. To point out that the defendants had not done anything abnormal or extraordinary, the defendants contended that some other newspapers also had published the proceedings of the House relating to the adjournment motion tabled by Thiru M. Kalyanasundaram. An express denial was made by the defendants of having effected the publication either falsely or maliciously and in furtherance of any oblique motive to make the public believe that the plaintiffs had descended to such unbecoming act as beating their employees. The defendants characterised as incorrect allegations, the

plaint averments that the plaintiffs had been gravely injured in their credit and reputation and had been brought to public odium and contempt and the resultant suffering of pain and humiliation by the plaintiffs.

3. In any event, the defendants contended that, the publication made in "Navamani" which the plaintiffs claim as being false and malicious in content and defamatory in character, was a protected act by virtue of its being a privileged and faithful publication of the proceedings of the Assembly relating to a matter of public importance. On all those grounds, the defendants refuted the claim of the plaintiffs for damages.

4. The learned First Additional Judge, City Civil Court, set the following issues for trial in the suit:—

(1) Is the publication dated 4-2-1966 entitled (Original in Tamil Omitted —Ed.) per se defamatory?

(2) If so, is the publication protected, being a privileged publication?

(3) To what damages, if any, is the plaintiff entitled?

5. Having regard to the stand taken by the defendants, viz., that the publication complained of, which has been marked in the case as Exhibit A-1, was not defended by them on the ground that it was not per se defamatory, but only on the ground that the publication was a privileged one by virtue of its being a faithful and accurate report of the proceedings in the Legislative Assembly, the learned trial Judge held on issue No. 1 that the impugned publication was per se defamatory. After elaborately considering the question, with reference to English and Indian decisions, whether the defendants were entitled to claim absolute privilege in respect of the publication, he held that the defendants were only entitled to a qualified privilege and further held that such qualified privilege cannot also be claimed by the defendants as the publication was vitiated by malice, and consequently, he answered issue No. 2 in favour of the plaintiffs. On the question of damages covered under issue No. 3, the learned trial Judge concluded that a sum of Rs. 5,000/- would be a reasonable compensation awarded to the plaintiffs for the injury sustained by them, but nevertheless, held that the defendants should suffer full costs as the plaintiffs, who had, of necessity, to evaluate their claim only on an estimated basis, ought not to suffer by reason of their claim for damages being allowed only in part. In accordance with such conclusions, the learned trial Judge gave judgment in favour of the plaintiffs and decreed them damages of Rs. 5000/- and full costs, and it is as against that that the defendants have come up in appeal.

6. It is common ground that Exhibit A-1 relates to an adjournment motion tabled in the Assembly by Thiru M. Kalyanasundaram with reference to the safety and welfare

of the employees of "Daily Thanthi" and that Exhibit A-1 is not an article by the editor or one of the reporters of the third defendant. It is equally a matter of settled ground that any speech made on the floor of the Parliament or a Legislative Assembly by a respective member of the august forums will be absolutely privileged. In the instant case, the grievance projected for consideration by the plaintiffs is not that Thiru Kalyanasundaram made false and defamatory remarks on the Management of "Daily Thanthi" and cast aspersions on its fair and respectable name, but that the defendants, who were responsible for the editing, printing and publication of the Tamil daily "Navamani" which had a circulation of about 25000 copies per day at the relevant time, would not be entitled to claim absolute or qualified privilege, taking umbrage under the plea that what was published was a faithful depiction of the proceedings in the Legislative Assembly over a matter concerning public importance. Undoubtedly, a newspaper publication of Parliamentary proceedings, which terminology would include Assembly proceedings as well, cannot be placed on the same pedestal as a speech made by the Legislator himself on the floor of the House and treated as an absolutely privileged one. Vide: Gatley on Libel and Slander, 6th Edition, page 201, Chapter 13, relating to "Qualified Privilege, Duty and Interest", Paragraph 442 (Main Classes) which states that such publications can claim only qualified privilege.

"The following classes of statement (some of which owe their protection to statute) illustrate, but do not exhaust the general principle; for we may not substitute a catalogue for a principle'.

- (1)
- (2)
- (3)
- (4)
- (5)
- (6) Reports of parliamentary proceedings.

(7) Extracts from, or abstracts of, parliamentary reports, papers, votes, or proceedings published by the authority of Parliament."

As a matter of fact, even the very member of Parliament or Legislative Assembly, who is privileged to make even a libellous statement on the floor of the House without any hazard of a legal action in respect of the speech, cannot repeat the speech or publish even an exact reproduction of what was said by him during the debate of the House outside the House. In Harbhajan Singh v. State of Punjab, AIR 1961 Punj 215 the Punjab High Court held as follows:

"The members of the Legislative Assembly and of the Parliament are absolutely privileged and they can make with immunity libellous statements while participating in the deliberations of the House and the Court

has no jurisdiction to entertain an action in respect of defamatory utterances by them as the members, under the law, are not amenable to civil or criminal action, despite the fact that the statements are grossly defamatory and deliberately false. This privilege, however, does not extend to a statement published by a member, outside the House even though it may be an exact reproduction of what was said during the debate."

The Supreme Court, in Jatis Chandra v. Hari Sadhan AIR 1961 SC 613 laid down as follows:

"So long as Parliament does not crystallise the legal position by its own legislation, the privileges, powers and immunities of a House of a State Legislature or Parliament or of its members are the same as those of the House of Commons. There is no absolute privilege attaching to the publication of extracts from proceedings in the House of Commons. So far as a member of the House of Commons is concerned, he has an absolute privilege in respect of what he has spoken within the four walls of the House, but there is only a qualified privilege in his favour even in respect of what he has himself said in the House, if he causes the same to be published in the public Press." The dictum is therefore well established now that a newspaper report of proceedings in a Legislative forum, as the one we are concerned with in the instant case, is not entitled to an absolute privilege, but only to qualified privilege. Having regard to the settled state of affairs, Mr. K. V. Sankaran, learned counsel for the defendants, frankly conceded that he was not seeking to justify the publication under Exhibit A-1 from the standpoint of absolute privilege, but only from the standpoint of qualified privilege, which, according to the learned counsel, is unreservedly invocable by the defendants in their role as editor, printer and publisher of a newspaper. It therefore becomes necessary for us to consider whether the defendants, by objectively contending the dictum of qualified privilege, can resist the claim of the plaintiffs for damages.

7. Any party who wishes to project objectively a coverage under the umbrella of qualified privilege must primordially satisfy three cardinal tests, viz., (1) that the publication is a true and faithful report of the proceedings, (2) that the published matter is of importance to the public and (3) that it was not actuated by any malice or oblique motive. With regard to the second feature concerning the publication being a matter of public importance, Mr. Sankaran would contend that the proceedings of the State Legislature must unquestionably be held to be matters of public importance, and would draw support for his argument by making reference to other newspapers also publishing in the columns of their dailies the adjournment motion tabled by Thiru Kalyanasundaram regarding the service conditions of

the workers of "Daily Thanthi". In particular, he placed reliance on Exhibits B-2 and B-3, which are respectively an issue of the Tamil Daily "Sudesamithran" dated 4-2-1966 and an issue of the English Daily "The Hindu" dated 5-2-1966, wherein also publication has been made regarding the adjournment motion tabled by Thiru Kalyanasundaram on 4-2-1966 on the floor of the House. Yet another factor on which great stress was laid by the learned counsel in this behalf is the admission of the first plaintiff as P. W. 1 in his cross-examination that an adjournment motion in the Assembly is an important item for publication. Refuting the contentions of Mr. Sankaran, Mr. V. Shanmugham, learned counsel for the plaintiffs, points out that the Speaker of the Assembly withheld his consent to the motion of adjournment on the score that it was not a matter of public importance, and argued that the publication, merely because it related to a matter raised in the Assembly and had been published by other newspapers as well, cannot axiomatically be granted recognition as a matter of public importance and thereby deemed to satisfy the second pre-requisite inhering to the legal doctrine of qualified privilege. We shall advert to this controversy after referring to the arguments of the counsel about the publication being a true and faithful record of the speech made by the Legislator and the proceedings of the House in connection therewith.

8. As we have already stated, besides the publication being a matter of public importance, another *sine qua non* to attract the umbrage offered by the shield of qualified privilege is that the publication must be a true and faithful report of the proceedings. Mr. Sankaran would contend that Exhibit A-1, far from being an incorrect or garbled version of the proceedings of the House, is really a considerate report from the view-point of the plaintiff and therefore, there is hardly any grace in the plaintiffs contending that the publication depicts them in blacker tones than what the maker of the speech himself had depicted. At this juncture, we may point that Exhibit A-1 is not a reproduction or a verbatim report of the proceedings of the House. D. W. 1 the sub-Editor of "Navamani" has candidly stated that he does not know Shorthand, that the discussion on the floor of the House went on for about ten or fifteen minutes, that when the discussion went on he carved the speeches in his mind, that he then went over to the press room and reduced the speech of Thiru Kalyanasundaram into a summary, that he did not add anything more to what the tabler of the motion had spoken and that, on the other hand, he omitted words. ("Original in Tamil omitted —Ed.)

9. In order to prove that the version published as under Exhibit A-1 has not done any injustice or violation to the speech of Thiru Kalyanasundaram made on the floor of the House, the defendants have fil-

ed Exhibit B-1 (which is the same as Exhibit A-2) which is an official report of the Madras Assembly Legislative Debates (Volumes 33-7, Pages 591-592). Besides Exhibit B-1, the defendants have also placed reliance on Exhibits B-2 and B-3 to maintain their claim that the publication effected under Exhibit A-1 is neither a garbled nor an inaccurate reporting of the proceedings in the House. As against such a stand taken by the defendants, Mr. Shanmugham learned counsel for the plaintiffs, advances the argument that Exhibit A-1 makes no reference to the denials made by the Chief Minister of instances being brought to the notice of the Government of the workers of "Daily Thanthi" being persecuted for their trade union activities by the Management and propounds the theory that wilful suppression has been made in Exhibit A-1, of the Assembly proceedings for achieving the motivated objective of depicting the Management of "Daily Thanthi" in black and disreputable colour. Even so, the publications made by "Sudesamithran" and "The Hindu", under Exhibits B-2 and B-3, are relied on by the counsel for the plaintiffs for comparative study with Exhibit A-1, to point out that Exhibits B-2 and B-3 do not make reference to the workers being victimised ("Original in Tamil omitted —Ed.)" and the management of "Daily Thanthi" descending to the level of beating its workers. As a matter of fact, the first plaintiff, who has given evidence as P. W. 1, has affirmed in his evidence that the Management of "Daily Thanthi" has no grievance whatever in so far as Exhibits B-2 and B-3 publications are concerned, because they do not make reference to the workers of "Daily Thanthi" being beaten by the Management and being victimised for their trade union activities. Having made reference to the differing arguments advanced by counsel for both sides on two of the three ingredients which are inextricably woven into the fabric of the doctrine of qualified privilege, we are of opinion, that in the view we are taking of the third essential ingredient of the doctrine, it is unnecessary to go into the question as to whether the publication under Exhibit A-1 is a faithful and true report of the proceedings and whether the matter covered by the publication is one of public importance.

10. The third primordial requisite which must be successfully pleaded and established by means of acceptable evidence before a Court in a manner known to law for a publication being taken out of the pale of any legal action on the principle of qualified privilege is that the publication was effected without malice. In our opinion, the quintessence of a defence based on the principle of qualified privilege is that the utterance or the publication complained of was done for bona fide reasons and not actuated by any malice. In this context, it is necessary to take a look at the symbolical image of the shield offered by the principle of

qualified privilege and the reason for the law giving such a concession to a person who is faced with an action for making a defamatory speech or publication. We can achieve our object in this behalf by referring to the following passages occurring in Gately on Libel and Slander, 6th Edition. In paragraph 441, at page 201, the concept of qualified privilege is defined thus:

"There are occasions upon which, on grounds of public policy and convenience a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue. . . . These occasions are called occasions of qualified privilege, for the protection which the law, on grounds of public policy, affords is not absolute, but depends on the honesty of purpose with which the defamatory statement is made".

The reason for such a defence being made available in law is given in the following words in paragraph 443 (at page 202):

"Statements published on an occasion of qualified privilege are protected for the common convenience and welfare of the society. It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some (self of) common interest." In such cases no matter how harsh, hasty, untrue or libellous the publication would be, but for the circumstances the law declares it privileged because the amount of public inconvenience from the restriction of freedom of speech or writing would far out-balance that arising from the infliction of a private injury. It may be unfortunate that a person against whom a charge that is not true is made should have no redress, but it would be contrary to public policy and the general interest of business and society that persons should be hampered in the discharge of their duty or the exercise of their rights by constant fears of actions for slander. It is better for the general good that the individuals should occasionally suffer than the freedom of communications between persons in certain relations should be in any way impeded."

11. Such right which is given to the publisher of a statement to make an inroad into the personal rights of an individual in the interests of the public is, however, subject to the primordial condition that the publication is not blemished or tainted with the mental factor of malice or what is known as *animus injuriandi* in Roman Dutch law. Such publication besides satisfying the test of being a fair and accurate report and of being deemed by the publisher to be a matter of public importance, must also be made with bona fide intentions and an element of honesty.

If such element of honesty and such content of bona fides are absent and, on the other hand, it is found that malice is the motivating reason for the publication, then, however true and accurate the report may be or however important the matter concerned is, in so far as the public interest is concerned, yet the protective cloak of qualified privilege offered by law for the publication must be read asunder so as to make the publisher vulnerable for the consequences of his act, in so far as it has roused the person aggrieved by the publication to action. Gately has dealt with this aspect of the matter in the following passage occurring at paragraph 602.

"The publication in print of an extract from, or abstract of, any Parliamentary report, paper, vote, or proceedings published by or under the authority of either House of Parliament is privileged, provided the defendant proves that he published such extract or abstract bona fide and without malice." (Italics ours.)

Again, it is stated in paragraph 601 that the privilege extended in common law to a fair accurate report in a newspaper or otherwise of any debate or proceedings in either House of Parliament or in any Committee thereof will be lost on proof that the defendant published the report maliciously. Such being the law, a probe is called for of the impugned publication to find out whether the element of malice, which the plaintiffs allege looms large in the publication effected by the defendants, is detectable and deducible in a manner known to law. Before proceeding to conduct the probe, we may also point out that in respect of false and defamatory publications which are projected under the mantle of qualified privilege, the presumption of malice which would normally be raised in respect of false and defamatory publications will initially stand rebutted by the privilege claimed by the publisher and in all such cases it is the bounden duty of the plaintiff to plead and prove express malice on the part of the person responsible for the publication, and, once the plaintiff proves express malice, the defence of qualified privilege will co instanti vanish. Gately has dealt with this phase of the subject in paragraph 761 as follows:

"The principle upon which the law of qualified privilege rests is this: that where words are published which are both false and defamatory, the law presumes malice on the part of the person who publishes them. The publication may, however, take place under circumstances which create a qualified privilege. If so, the presumption of malice is rebutted by the privilege. . . . The plaintiff has to prove express malice on the part of the person responsible for the publication. The effect of proving express malice is somethings spoken of as defeating the privilege. Although the occasion re-

mains a privileged occasion, the privilege afforded by the occasion ceases to be an effective weapon of defence. Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this, the defence vanishes and it becomes immaterial that the publication was on a privileged occasion."

In *R. K. Karanjia v. K. M. D. Thackersey* AIR 1970 Bom 424 at page 433 it is stated as follows:

"Malice in law, which is presumed in every false and defamatory statement, stands rebutted by a privileged occasion.

"In such a case, in order to make libel actionable, the burden of proving actual or express malice is always on the plaintiff."

It is in this background the contention of the plaintiff that the impugned publication is vitiated by malice has got to be evaluated.

12. The second defendant who is the printer and News Editor of "Navamani" has admitted in his evidence that before joining the "Navamani" publication as its Editor in 1966, he was the Assistant News Editor in "Daily Thanthi" for thirteen years, that during such tenure of service there was a dispute regarding implementation of the recommendations of the Wage Board for working journalists, that the Management ultimately settled the dispute by paying a sum of Rupees 55,000/- to ten journalists on the register of its employment and that he was one among the ten journalists who were so paid. In cross-examination he has stated that the Management of "Daily Thanthi" took disciplinary action against him and that the charge against him was that he conducted an illegal strike. From the admissions of the second defendant as D. W. 2 it may thus be seen that he was a former employee of "Daily Thanthi" and that he left the services of "Daily Thanthi" after disputes and misunderstandings had arisen between him and the Management. Though the second defendant had ceased to be an employee of "Daily Thanthi", it is seen from the evidence of P. W. 1 that the second defendant did not treat his disputes with the Management as a closed affair and that all the scores had been settled. It would appear that on 29-11-1965 there was an agitation by some of the workers of "Daily Thanthi" in front of the office and according to P. W. 1, the second defendant was one of those who participated in the demonstration. This was followed by a bigger demonstration on 30-11-1965 and P. Ws. 1 and 2 have both stated that the second defendant was participant in the demonstration on that day also. On both the days of agitation, the demonstrators are said to have shouted slogans to the effect. "Original in Tamil omitted —Ed." P. W. 2 has stated in his evidence that the second defendant took part in the demonstrations because of his misunderstandings with "Daily Thanthi" Management. It is in respect of these demonstrations. Thiru Kal-

yanasundaram tabled his adjournment motion on the floor of the House on 4-2-1966, and, according to the speech made by him, the Management of "Daily Thanthi" had resorted to beating its employees and penalising its workers for their trade union activities. P. Ws. 1 and 2 would impliedly say that no worker was beaten on the days of the demonstrations and it is therefore the contention of the plaintiffs that Exhibit A-1 publication effected by the defendants was false as well as malicious. In the plaint it is averred that the impugned publication was falsely and maliciously edited, printed and published by the defendants. In his evidence P. W. 1 has stated as follows: "In the issue dated 4-2-1966, city edition, the defendants have published falsely and maliciously a news item about our Management. It is Exhibit A-1. I say 'falsely' because it is false news. At the time of publishing the said news they knew and meant and intended to mean that we, the Management, had descended to beat our employees with sticks. That is wholly incorrect. It was published maliciously without any regard for truth or fact. I say 'maliciously' because their intention is to bring down our reputation in the eyes of the public." Though such express allegations have been made about the defendants and the publication effected by them, and in particular about the part played by the second defendant, significantly enough the defendants have not refuted the plaint averments or the evidence of P. Ws. 1 and 2. All that D. W. 1 had stated in his evidence is that he had no particular intention to harm the "Daily Thanthi's" reputation. For his part, D. W. 2, who is the News Editor and who is responsible with the Publisher for every item of publication in the newspaper, has nowhere stated that he did not participate in the demonstrations which were staged by the workers of "Daily Thanthi" on the 29th and the 30th of November, 1965. Even so, he has not stated that the workers of the "Daily Thanthi" were beaten by the Management on the 29th or the 30th and that he was a witness to such base acts by the Management. On the other hand, D. W. 2 when confronted with the question as to whether he can vouchsafe for the truth of the matter contained in Exhibit A-1 publication, has given the following answer; "I do not know, whether that news item (Exhibit A-1) was true or was not true." It is thus seen that we have, on the one hand, the categorical assertion of the plaintiffs that the second defendant, though he ceased to be an employee of "Daily Thanthi", did participate in the demonstrations held by the workers in front of the "Daily Thanthi" office on the 29th and the 30th of November 1965, that the Management did not indulge in any base or ignoble acts on those days and that nevertheless, the second defendant did publish Exhibit A-1 unmindful of the fact that the reference therein to the Management of

"Daily Thanthi" beating its employees was false and on the other hand a hesitant attempt by the defendants to wriggle out of the situation caused by the publication by feigning ignorance as to the truth or otherwise of the matters contained in Exhibit A-1. Having regard to the specific averments made by the plaintiffs and the total failure of the defendants to meet the case of the plaintiffs or even deny the charge levelled by the plaintiffs unhesitatingly, the contention of the plaintiffs that the publication under Exhibit A-1 is unmistakably actuated by malice, is established beyond the realm of any doubt. We are not satisfied with the statement of the second defendant, and that too, made in answer to the suggestion put to him in cross-examination, that it was not correct to say that on account of misunderstandings between him and the Management of "Daily Thanthi", Exhibit A-1 was published in "Navamani" despite its being an incorrect publication.

13. Mr. Sankaran, however, seeks to rescue the second defendant from his position of disadvantage by contending that exhibit A-1 publication was made without the knowledge of the second defendant and that the second defendant can be called upon to face the consequences of the publication only in consequence of his statutory responsibility as the Editor of the Newspaper. We are not at all impressed by this argument. It is no doubt true, D. W. 2 has stated in his evidence that he saw Exhibit A-1 news only after its publication and that he is admitting responsibility for the publication only as an Editor of the newspaper and thereby, a person statutorily responsible for all the publications effected in "Navamani". In contrast to such answers given by D. W. 2 in cross-examination, we may point out, what his stand was in the chief-examination, with reference to the publication under Exhibit A-1. Therein, he has stated as follows: "I saw Exhibit A-1. I published the news as it was sent to me by D. W. 1. I did not change the news". After having given such answers, D. W. 2 seems to have realised the consequences of his statements and has tried to wriggle out of his answers by stating that the particular news did not pass through his hands and he came to know about the publication only after it was printed and published. If really D. W. 2 had not seen the publication before it was effected, he would not have said that he saw Exhibit A-1 and that he did not effect any change in the text of exhibit A-1. We have therefore no hesitation in holding that D. W. 2 has unsuccessfully tried to contend, after initially admitting that the report did pass through his hands before being published, that he had no control over the publication, only to get over the charge of the plaintiffs that though he knew the contents of Exhibit A-1 to be false and incorrect, and yet he published the same on account of animus injuriandi and the

malice he entertained towards the Management of "Daily Thanthi". It therefore follows that when the second defendant effected the publication, the contents of which were false and incorrect to his knowledge, the irresistible conclusion that such publication would lead to is that it was not made honestly, but was made with malice and dishonest motive. We may again quote with advantage the following passage of Gately which lays down as to what construction should follow when a defendant is proved to have published a matter which he knew to be false at the time he made the publication:

"Where words are published on a privileged occasion, the mere proof that they are false is not evidence of malice. Even though the statement should be untrue in fact, the defendant will be held justified by the occasion unless it can be shown to have proceeded from a malicious mind. Mere falsehood is certainly no disproof of bona fides. To prove that the defendant knew that the statement was false or that he had no genuine belief in its truth when he made it would, usually, be conclusive evidence of malice. If a man is proved to have stated that which he knew to be false, no one need enquire further. Everybody assumes thenceforth that it was malicious, that he did do a wrong thing from some wrong motive. Indeed it is difficult to imagine better proof of malice than the promulgation of an injurious statement in the knowledge of its falsity."

We are therefore clearly of opinion that in as much as the second defendant, being the Editor of "Navamani", published Exhibit A-1, portions of which were admittedly false to the knowledge of the second defendant when the publication was effected, the second defendant as well as the first and third defendants, must certainly be held to have defamed the plaintiffs and that they are not entitled to don the protective mantle of qualified privilege to escape in law the consequence of their action.

14. It only now remains for us to consider the arguments advanced by counsel on both sides as regards the quantum of damages. Though the plaintiffs had quantified their claim of damages at Rs. 25,000/-, they have not let in any evidence to show the basis on which they assessed the damages at such figure. The learned trial Judge, whilst awarding the sum of Rs. 5,000/- to the plaintiffs as against their claim of Rupees 25,000/- towards damages, has not given any reason as to how he arrived at this figure. Mr. Sankaran would contend that inasmuch as the second defendant is only earning Rs. 490/- as the Printer and News Editor of "Navamani" and the third defendant, though the Publisher and Proprietor of "Navamani", is nothing more than the President of the Co-operative Society which publishes the newspaper in question, even the award of Rs. 5,000/- is excessive, and that

only a nominal sum should be awarded as damages and that the real objective of the plaintiffs was not to penalise the defendants by mulcting them with a burdensome award, but only the vindication of their honour. There is considerable force in this argument of Mr. Sankaran, but at the same time, we do not concede the position that a nominal award would meet the ends of justice in this case, as there is not even a formal expression of regret by the defendants. Taking all factors into consideration, we are of opinion that a sum of Rs. 2,000/- would be a just and reasonable sum to be awarded as damages in this case as against the defendants. We see no justification for the learned trial Judge having awarded full costs to the plaintiffs. Costs which should follow the event should normally be in consonance with the sum decreed in favour of a plaintiff and it is only in exceptional cases that full costs should be awarded even though the claim made by the plaintiff is not allowed in full. We see no such exceptional circumstances present in this case, to justify costs being awarded in respect of the disallowed portion of the suit claim also.

15. In the result, while confirming the finding of the trial Court on Issues Nos. 1 and 2, we hold that the plaintiffs' suit will stand decreed as against the defendants and that the defendants should pay to the plaintiffs damages in the sum of Rs. 2,000/- with proportionate costs in the trial Court, as against the sum of Rs. 5,000/- and full costs awarded by the trial Judge. To this extent the appeal will stand allowed and will stand dismissed in other respects. The Judgment of the trial Court will stand modified to the extent it has been varied by our Judgment in this appeal. Each party is directed to bear his costs in this appeal.

Appeal partly allowed.

AIR 1975 MADRAS 316

KAILASAM AND
MAHARAJAN, JJ.

Venkatammal, Appellant v. Sinna Venkatarama Chettiar and others, Respondents.
Letters Patent Appeal No. 48 of 1970,
D/- 30-4-1974.*

(A) Hindu Law — Joint family — Alienation — Alienation by coparcener of undivided share — Rights of alienee and alienee from him — Latter is entitled to claim partition and allotment of coparcener's share to him.

When the sale is of an undivided interest of a coparcener in the whole of the joint family, the purchaser would be entitled to get the share that is allotted to his vendor. What the alienee gets is a right to property

*(Against Judgment of Ramanujam, J. in S. A. No. 1645 of 1965 D/- 3-10-1965.)

LR/AS/F99/74/MBR

that might be allotted to his vendor in the general partition suit, though he would not be entitled to joint possession with the other coparceners and to claim mesne profits till a decree is passed in the partition suit. Such a right to file a suit and demand allotment of the property falling to the share of the vendor is a right to property which could be transferred. The objection to an alienation of a specific item that no right to property had been conveyed, is not available in the case of transfer of a share of an undivided coparcener. The right in the case of an alienee of a share is more than a right in personam and is mutable. The only objection is that an alienee of an alienee from the undivided coparcener has no privity of contract with the coparcener, and, as such, he could not insist on the right of the coparcener to claim a partition. But he is entitled to claim partition and allotment of the co-parcener's share to him, as a right to property has been transferred to the alienee of a share of the co-parcener. (Case law discussed). (Para 22)

Cases Referred: Chronological Paras
AIR 1971 Mad 174 = (1971) 1 Mad LJ 329 18
AIR 1966 SC 470 = (1966) 1 SCR 628 21
AIR 1959 Andh Pra 523 = (1959) 2 Andh WR 79 (FB) 12, 17, 18
AIR 1956 Andhra 188 = 1956 Andh LT 322 (FB) 16, 22
AIR 1953 SC 487 = 1954 SCR 177 20
AIR 1952 Mad 419 = (1952) 1 Mad LJ 308 (FB) 15
AIR 1948 Mad 1 = (1947) 2 Mad LJ 166 (FB) 16
AIR 1948 Mad 464 = 1948-1 Mad LJ 478 13, 17
AIR 1935 Mad 1011 = 1935 Mad WN 788 16
AIR 1921 Mad 172 = ILR 44 Mad 605 14
AIR 1921 Mad 384 = ILR 44 Mad 167 = 39 Mad LJ 706 12, 13, 16, 17
AIR 1920 Mad 316 = ILR 43 Mad 309 12, 13, 17
AIR 1915 Mad 453 = ILR 39 Mad 265 14
AIR 1914 Mad 440 (2) = ILR 38 Mad 684 13, 14, 17
(1902) ILR 25 Mad 690 (FB) 16, 17
N. Sivamani and N. Krishna Mitra, for Appellant; S. Sitarama Iyer, for Respondents.

KAILASAM, J.:— The plaintiff is the appellant. She filed the suit for redemption of a mortgage and for partition and possession. The suit property S. No. 449 is of an extent of 8.2 acres in Kalingiyam village. The property was owned by one Raman Chetty, who had eight sons. He usufructually mortgaged the western half for Rs. 150/- in favour of one Ranganna Gounder under Ex. A-7 dated 10-6-1919. The eastern half was subsequently mortgaged usufructually by him, to Narayana Chetty under Ex. A-8 dated 1-10-1923. The plaintiff claims title to 15/42 share under three sale deeds of Ex. A-14 dated 4-5-1951, Ex. A-15 dated 27-11-1950 and Ex. A-16 dated 27-3-1961.

2. Peria Venkataraman, first son of Raman Chetty sold his 1/7th share to Karuppan Chetty under Ex. A-4 dated 20-5-1924, Karuppan Chetty died leaving his sons Peria Raman and Chinna Raman. Under Ex. A-14 dated 4-8-1961 Peria Raman and Chinna Raman sold their 1/7th share to the plaintiff. The first son Peria Venkataraman and another son Narayanan died and Kumban and defendants 1 to 4 constituted the members of the Hindu Family each being entitled to 1/5th share out of the remaining 6/7th share that remained. Under Ex A-5 dated 16-10-1940, the fourth defendant sold his 1/6th share to Karuppan Chetty. Under Ex A-15 dated 27-11-1950 Karuppan Chetty sold his 1/6th share to the plaintiff. The plaintiff thus became entitled to 13/42 share, that is, 1/7th share under Ex. A-14 and 1/6th share under Ex A-15. Subsequent to the death of Kumban, defendants 1 to 4 got the properties by survivorship, each being entitled to 1/4th of 6/7th share, namely 3/14 share, each. Out of this, the fourth defendant had already sold his 1/6th share under Ex A-5 dated 15-10-1940, thus retaining 3/14 minus 1/6th = 1/21 share, Under Ex A-16 dated 27-3-1961, the fourth defendant sold his 1/21 share to the plaintiff for Rs. 450/-. Thus, the plaintiff became entitled to 15/42 share under Exs. A-14 to A-16.

3. The mortgagee under Ex A-7 that is, Ranganna Gounder died leaving his son Perumal Goundan. Perumal Goundan assigned half of his rights in favour of one Venkatarama Chettiar on 29-6-1932 under Ex. B-23 for Rs. 75/- and his son Venkatarama assigned his rights in favour of the fifth defendant under Ex A-2 dated 11-11-1952. The remaining half of the mortgagee's right was also assigned to one Ramakkal on 8-5-1935. Ramakkal, the assignee of other half assigned her mortgage rights on 12-6-1936 in favour of one Ramaswamy Gounder, who assigned it again in favour of the 6th defendant, Karuppan Chetty and deceased father of defendants 6, 7 and 8. The mortgagee under Ex A-8 dated 1-10-1923 assigned it on 31-5-1967 under Ex B-24 for Rs. 100/- in favour of one Palani. Palani assigned it in favour of the fourth defendant under Ex A-3 dated 19-4-1950. As the fourth defendant is one of the heirs of the mortgagor, there had been a merger of interest in the mortgage so far as the fourth defendant is concerned. Defendants 1 to 4 claim to have discharged the mortgage debt due to defendants 6 to 8. They also pleaded that in any event the mortgage debt had been discharged and completely wiped off by reason of the provisions of Madras Act, IV of 1938.

4. The plaintiff's suit was contested by defendants 2 and 3.

5. Defendants 4 to 8 remained *ex parte*.

6. The defence is that the plaintiff is not a sharer and has no right to redeem the mortgages. Defendants 2 and 3 claim

that they are entitled to one half share in the property absolutely. They contended that Peria Venkatarama Chetty the first son of Raman Chetty got separated from his father and was not given any share in the suit property and his sale to Karuppan Chetty cannot confer any right. They further claimed that the suit property was in their enjoyment for over 20 years and defendants 2 and 3 discharged the mortgage in 1945 according to Madras Act, IV of 1938. They further contended that neither the plaintiff nor the other defendants were in possession and enjoyment of the property. They contended that the suit was barred by limitation and that the earlier suit O. S. No. 279 of 1953 filed by the plaintiff for redemption operated as *res judicata*.

7. The trial court found that under Exs. A-14 and A-15 the plaintiff purchased 13/42 share in the suit property and she was not entitled to 1/21 share as per Ex A-16. It also held that the plaintiff was not a purchaser directly from the coparcener but was an alienee from the alienee of the coparcener of an undivided interest. In the circumstances, the trial court held that the remedy of the plaintiff was to claim damages for breach of covenant of title and not for redemption and partition. It also found that the plaintiff had not been in possession within 12 years of his suit and that defendants 2 and 3 had acquired title by adverse possession. It further held that the judgment in O. S. No. 279 of 1953 operated as *res judicata* and that the defendants were not entitled to any claim for improvements. The trial Court also rejected the plea of discharge raised by defendants 2 and 3 and held that there was no proof that the plaintiff or the predecessor-in-interest abandoned the rights to the suit property. Finally, it held that the suit was barred under Order 2, Rule 2 C. P. C.

8. On appeal, the lower appellate Court held that the plaintiff had not proved his title with reference to 1/21 share under Ex A-16. It also found that the second alienee could acquire the right of the first alienee viz., the right to sue for partition. Apart from that right, it also found that an alienee from the alienee cannot get further rights and that the plaintiff's suit was barred under Article 144 of Limitation Act. Differing from the trial Court, it held that the suit was not barred by *res judicata* or under Order 2, Rule 2 C. P. C.

9. In the second appeal, the plaintiff's right to sue for partition was negatived. The suit was held to be not barred under Article 144 of the Limitation Act. The right of the plaintiff to maintain the suit for redemption was upheld and the suit was remanded to the trial Court for ascertainment of the amount due by the plaintiff for redemption.

10. The plaintiff has preferred the Letters Patent Appeal against the decision

of the learned single Judge, that she had no right to sue for partition of her share.

11. The important question that arises for consideration is whether an alienee from an alienee of a coparcener's share is entitled to enforce his right to claim partition and allotment of the co-parcener's share to him.

12. The answer to this problem is not free from difficulty, as judicial opinion is not uniform. The right of an alienee from a coparcener to step into the shoes of his alienor and to work out his right by filing a suit for partition is accepted. One school of thought is that this right based on equitable principles should not be extended thereby making further inroads into the joint family system while the other school is of the view that whatever rights the alienee from the undivided coparcener may get should be held to be heritable and transferable. The learned single Judge has followed the decision of the Full Bench of the Andhra High Court in *Gurunadham v. Venkata Rao*. (1959) 2 Andh WR 79 = AIR 1959 Andh Pra 523 (FB) which approved the decision two division benches of this Court in *Sabapathy Pillay v. Thandavaraya Odayar*, ILR 43 Mad 309 = (AIR 1920 Mad 316) and *Dhadha Sahib v. Muhammad Sultan Sahib*, ILR 44 Mad 167 = (AIR 1921 Mad 384). The question that was referred for determination by the Full Bench of the Andhra High Court was as follows:—

"Whether an alienee of an alienee of a specific item of property from a Hindu coparcener can maintain a suit for general partition and claim the allotment of that specific item?"

13. It may be noted that in the case before us what was alienated was the share of an undivided co-parcener and not a specific item. The alienee does not get any right to the property, but acquired an equity to stand in the shoes of his alienor and work out his rights in a suit for general partition but he is not entitled to joint possession along with the non-alienating co-parceners. He cannot also claim mesne profits. He can, in a partition suit, ask for allotment of the share of an alienating coparcener of the specific item alienated to him, if that does not adversely affect the rights of the other coparceners. An alienee of an undivided share of the coparcenary property can get his alienor's share allotted to him. If it is a specific item of property, he would be entitled to recover the property, if that could be allotted to the share of his alienor. While some Courts have held that the alienee of a specific item can get 'substituted property' other courts have held that he cannot get any other property, but can only get a charge over the share of his alienor. In 39 Mad LJ 706 = (AIR 1921 Mad 384) there was a private sale of a specific item of joint family property by the coparcener. The purchaser conveyed it to another person. The property was not

allotted in the family partition to the alienating coparcener. The court held that the plaintiff had not bought the land from a Hindu coparcener who according to Hindu law would have a right to demand partition of the family property and to get the share due to him. The plaintiff had bought certain specific land from the first defendant, who is a Mahomedan and between them there can be no question of working out any such equity. The Court stated the position thus:

"When analysed, the position is simply this. A sells a particular parcel of land to B. It is found that A has no title to the land. Can it be said that B is entitled to ask A to convey to him some other land in place of what he bought. When stated in these words, the position of the plaintiff would be quite untenable and it is difficult to see why the character of the superior title by which the title of the vendor in the land which he purported to sell is defeated, should make any difference to the Vendee's rights. As the vendor's title to the land in dispute has been superseded by a superior title, the only remedy open to the vendee is damages for breach of warranty of title."

The decision, therefore, is that if the alienee could not sell the specific item, which was conveyed to him by the undivided coparcener, he is not entitled to any other item but can only claim for damages for breach of warranty of title. The Court also expressed certain reservations regarding the decision in *Nanjayya v. Shanmuga*, ILR 38 Mad 684 = (AIR 1914 Mad 440 (2)) and *Sabapathi Pillai v. Thandavaraya Odayar*, ILR 43 Mad 309 = (AIR 1920 Mad 316) that the alienee would be entitled to other property allotted to the alienor if he does not get the specific item sold to him allotted in a partition. In conclusion the Court held:

"We are of opinion that if we were to hold that the plaintiff is entitled to whatever land the first defendant might have got in substitution for what he had purchased from his vendor we would be giving him property which he never bargained for."

The decision would be an authority for the proposition that when an alienee from an undivided coparcener of a specific item could not get that item allotted on partition to him, he cannot ask for some other property. The Bench has also held that the equity which is available to the alienee from an undivided coparcener is not available to the alienee of an alienee. ILR 43 Mad 309 = (AIR 1920 Mad 316) was a case of a purchaser from a purchaser at Court auction in execution of a money decree passed against a Hindu coparcener. Subsequent to the Court sale, there was a family partition at which only some of the items purchased in Court sale were assigned to the judgment-debtor. The vendee claimed allotment of an extent of land equivalent to that which he had lost, out of the other

lands that had fallen to the share of the judgment-debtor. It was decided that the purchaser was only entitled to such of the properties as fell to the share of the judgment debtor at the partition and as were included in the sale certificate. The court held that there was no privity of contract between the judgment debtor and the auction purchaser and no warranty of title to the lands sold in the court auction. In *Subbiah v. Venkateswarlu*, AIR 1948 Mad 464, Horwill, J. held that the only remedy of the alienee from the alienor arises out of their contract, that is, a right to damages for breach of covenant of title.

14. In ILR 38 Mad 684 = (AIR 1914 Mad 440 (2)) *Bakewell, J.* summed up the position regarding the right of an alienee from an undivided coparcener thus:

"Since the transferee only acquires an equity to compel a partition he has only a right in personam and not a right in rem, and the transferor remains a member of the family and retains all the rights which attach to membership, including the right to an increased share upon the death of another coparcener. An alienation by a coparcener of a particular item of the family property, or of a specific share in such an item, differs in some respects from an alienation of the whole or a fraction of the interest of the transferor in the general assets of the family. Since a member of a joint family has no right to a specific share of any particular property of that family, an assignment by him of such a share to a stranger conveys no interest whatever to the transferee; if, however, the grantor should subsequently become entitled to the property included in the grant, then on a well-settled principle of equity which is embodied in Section 43 of the Transfer of Property Act, 1882, he cannot deny the title of the transferee and is bound to make the grant effectual."

In *Baluswami Aiyar v. Lakshmana Aiyar*, ILR 44 Mad 605 at p. 624 = (AIR 1921 Mad 172 at p. 175), *Kumaraswami Sastri J.*, stated that the nature of the equity which is recognised in favour of a purchaser for value of a coparcener's share, is purely a personal right and is subject to any superior equities which the co-parcener may have against the alienor. In *Raja Sahib of Bobbili v. Venkataramanujulu Naidu*, ILR 39 Mad 265 = (AIR 1915 Mad 453) the question arose whether the Court auction purchaser of an undivided share belonging to the coparcener is entitled to claim mesne profits as against the coparceners in the suit filed by him for partition and delivery of the share purchased by him. The Court accepting the view expressed in ILR 38 Mad 684 = (AIR 1914 Mad 440 (2)) held:

"The right of the alienee to enforce partition does not rest on any text of the Hindu law but on the equitable doctrine that a purchaser for value should be allowed to stand

in his vendor's shoes and work out his rights by a partition and it seems to us that the doctrine need not be extended beyond what is absolutely necessary to enable the vendee to work out his rights. In the suit for partition which may be filed by the alienee it may be that the property conveyed to him falls to some other coparcener and it is difficult to see how this fact could be reconciled with the theory that by purchase he becomes entitled to a vested interest in the share of his coparceners in the property alienated as from the date of the alienation."

(Underlining ours)

They proceed to state:

"There are also clear authorities that the mere fact that a coparcener makes an alienation does not put an end to status of the coparcenary as between himself and the other members of his family and if this be so it would be unfair that the other members of the family should be required to bear the expenses of the alienating coparcener and the members of his family and also to set apart a portion of the income of the properties for meeting the claim of the alienee."

Viewing from the standpoint of hardship, they held that the balance was in favour of the members of the joint family. It may be seen that the Full Bench was not willing to extend the equitable rights conferred on the alienee beyond what was absolutely necessary.

15. A Full Bench of this Court in *Peramanayakam v. Sivaraman*, 1952-1 Mad LJ 308 = (AIR 1952 Mad 419) (FB) dealt with the nature of the interest which an alienee from an undivided coparcener acquired. The Full Bench held that neither an alienation of the entirety of the interest of a coparcener in Mitakshara joint family nor the adjudication of a coparcener as an insolvent would have the effect disrupting the status of the family. It also held that the alienee from an undivided coparcener is not entitled to claim joint possession. *Satyanarayana Rao J.*, expressed the view that the vendee's right was a transferable right and vested present interest. *Viswanatha Sastri J.*, held that a transferee took a present vested interest in property. Four out of five Judges were inclined to take the view that the right was not merely a right in personam but was a legal right.

16. In *Aiyagari Venkataramayya v. Aiyagari Ramayya*, (1902) ILR 25 Mad 690 (FB) it was held:

"that the right of the purchaser is no doubt an equitable claim in the sense that he must be a transferee for value and in cases where the transfer relates to a specific portion of the family property, he has no legal right, and more than the transferor himself, to insist on that specific portion be-

ing allotted to the share of the vendor, Being a purchaser for value he will have an equity to have such portion or so much thereof as is practicable, so allotted, if that can be done without prejudice to the interests of the other sharers.

This right of the purchaser could be worked out in a suit filed by him for partition of the entire joint family properties impleading all the coparceners as parties to the suit. If a suit for general partition filed at the instance of the coparceners is pending the purchaser could get himself impleaded as a party to the suit and work out his rights If the sale is of the undivided interest of a coparcener in the whole of the joint family property, the purchaser would get whatever is allotted to the share of that coparcener in a suit for partition. In such a case, the purchaser gets all that he bargained for If however the sale is of a specific portion or a specific item of the family property there is a risk that it might turn out that in a partition of the whole property, it might be impracticable or inequitable to allot to the share of the vendor or judgment-debtor as the case might be, the whole or part of the property sold to the purchaser. If the property sold cannot be set apart for the share of the vendor or the judgment-debtor at the partition the question arose whether the purchaser has the right to recover the property of an equivalent value from other properties allotted to the vendor or judgment-debtor at the partition?"

It was further held that when it is found impracticable or inequitable to allot to the transferor's share the whole or any portion of the specific property transferred, the transfer will become inoperative either in whole or in part, as the case may be and in that case the transferee can 'only' have an equitable claim for compensation against the alienor. (underlining ours) This view was followed by Varadachariar, J. in *Ramanna Chettiar v. Manickam Chettiar*, AIR 1935 Mad 1011; *Dhadha Sahib v. Mahomed Sultan Sahib*, AIR 1921 Mad 384, already referred to has also held that the alienee cannot get any other property in substitution for what he had purchased, as it would result in giving him property for which he never bargained for. A Full Bench of this Court in *Koru Issaku v. Seetharamaraju*, AIR 1948 Mad 1 (FB), held that the doctrine of substituted security was applicable to a case where a co-sharer mortgagor mortgaged a specific property forming part of the properties held by him jointly with the other co-sharers and at a partition among the co-sharers, some property other than the mortgaged property was allotted to the share of the mortgagor. It was held that it would be inequitable that the mortgagor should be permitted to hold the substituted lands free of the burden of mortgage, which he had purported to create on a part of the joint property though he might not

legally have been competent to alienate that part. It was held that the mortgage as such would not bind the substituted property. But the mortgagee would be entitled to an equitable charge for the realisation of the mortgage money, such charge not being enforceable against a bona fide purchaser of the substituted property without notice of charge. This view that the mortgagor would have a charge on the substituted property, was commented upon by a Bench of the Andhra High Court in *Subbayya v. Srirangam*, AIR 1956 Andhra 188 (FB) which expressed that the decision required further consideration. The Full Bench of the Andhra High Court held that it is not permissible to apply the doctrine of substituted security to the case of a sale of a specific item of joint family property by a coparcener as if he were the owner of that property. The position, therefore, is that when an alienee of a specific item of property from an undivided coparcener is unable to obtain that specific property, his remedy, if he is a mortgagee, is by way of a charge on the other properties allotted to the alienating coparcener according to the Full Bench of our High Court in AIR 1948 Mad 1 (FB) and only to an equitable claim for compensation according to the Full Bench of the Andhra High Court in AIR 1956 Andhra 188 (FB). So, the right of an alienee of a specific item of property from an undivided coparcener is to file a suit for general partition or get himself impleaded as a party in the partition suit and ask for the allotment of the particular item allotted to him and if that cannot be done due to equities available to the other coparceners the alienee can only ask for a charge on the other properties allotted to his alienor or claim compensation for his loss. The question is whether this right is heritable and transferable.

17. We have, at some length, referred to the decisions in ILR 43 Mad 309 = (AIR 1920 Mad 316); 39 Mad LJ 706 = (AIR 1921 Mad 384) and AIR 1948 Mad 464. In (1959) 2 Andh WR 79 = (AIR 1959 Andh Pra 523) (FB), after referring to the aforesaid decisions, the Full Bench of Andhra Pradesh High Court came to the conclusion that the equity, which fixes itself to an alienee from a coparcener, is not transferable, that the equity is peculiar to the first vendee from a coparcener and is not transferable, and that consequently the position of the second alienee cannot be equited to that of the first alienee in that regard. It is noteworthy that all the cases cited above, which held that an alienee of an alienee from a coparcener would not have the equitable right of an alienee from a coparcener, referred to an alienation by coparcener of a specific item of joint family property. In the case of an alienation of a specific item of property, the alienor has no right to the same and as such he is selling the property to which he has no right. The right of an alienee to file a suit for general partition or to get himself impleaded in that

suit and ask for allotment of a specific item, is not a right to property which is in existence at the time of alienation. The right, when exercised by joining in a suit for general partition, would crystallise when the property purchased by him is allotted to him on equitable grounds. The alienee may not get that item allotted to him in the partition, in which case his only right is to sue for damages. The passages underlined by us in (1902) ILR 25 Mad 690 (FB) and ILR 38 Mad 684 = (AIR 1914 Mad 440 (2)) would indicate that no right to property is conveyed.

18. It is clear that, if the alienee of a specific item of property has filed a suit for general partition or has joined in a suit by the members of the joint family for partition and has asked for allotment of a specific item or some other properties to the alienating coparcener, the right of a transferee of the alienee would be governed by the ordinary law, that is, pending the suit, he could transfer his right and, in the event of his death, his legal representatives would be entitled to continue the suit. In fact, this situation is referred to by the Full Bench in 1959-2 Andh WR 79 at p. 84 = (AIR 1959 Andh Pra 523 at p. 526) where the learned Judges expressed the view that different considerations might arise in a case where the first vendee, after invoking the equity by filing a suit for partition and for allotment to the coparcener of the share allotted to him, assigned his interest to another person. In such a situation, the provisions of Order 22, Rule 10, Civil Procedure Code would come into play and the second alienee may request that a decree might be passed in his favour instead of his assignor. There could be no difficulty if the alienee from an undivided coparcener as well as the subsequent alienee join in a suit for general partition and ask for working out of their rights. Ismail J., had to deal with such a case in *Setlu Ramalinga Menattarayar v. Veerasami Chettiar*, 1971-1 Mad LJ 329 = (AIR 1971 Mad 174), wherein an alienee from an undivided coparcener as well as an alienee from the alienee joined in a suit. In such a case, there could be no difficulty in working out the rights of both the alienees

19. The question that still remains to be considered is whether an alienee of an alienee from an undivided coparcener of a specific item of property could by himself maintain a suit, when the equitable right by filing a suit had not been exercised by the alienee from the coparcener himself. If the view is taken that the right of the alienee of a specific item of property from the coparcener is a right in personam and that the equitable right need not be extended beyond what is absolutely necessary to enable the vendee to work out his rights or that if it is considered that an alienee of an alienee from an undivided coparcener has no privity of contract between himself and the alienating coparcener in order to claim the right of

the alienating coparcener to enforce the partition, the right of an alienee of an alienee from an undivided coparcener by himself to maintain a suit for partition is doubtful. We find it difficult to accept the view of Ismail J. that, in a suit for general partition, an alienee of an alienee of a specific item of property from an undivided coparcener has all the rights of the alienee of the coparcener himself.

20. We shall now refer to a few decisions of the Supreme Court where an alienee of an alienee from coparcener was given relief. In *Sidheshwar Mukherjee v. Bhubneshwar Prasad Narian Singh*, 1954 SCR 177 = (AIR 1953 SC 487), one of the members of the joint family, Bhubneshwar Prasad, borrowed a sum of money from one Panchanan Banerjee on the basis of a promissory note, Panchanan instituted a suit against the member of the joint family, Bhubaneshwar Prasad, and obtained a decree against him. In execution of the decree, he brought the right, title and interest of the judgment-debtor in the properties to sale, and purchased the same. Subsequently, Panchanan sold the interest purchased by him in execution of the decree to the plaintiff. On the strength of conveyance of the interest, the plaintiff instituted the suit, claiming a share in the properties. The question as to whether the alienee in such a case could maintain a suit, was not raised. But the Supreme Court held that it is open to the creditor, who has obtained a decree against a member of a joint Hindu family to attach and sell the interest of his debtor in the joint family property and, after purchase, to have the interest separated by a suit for partition. In this case, the question of the right of an alienee of an alienee from a coparcener of a specific item of property did not arise and the transfer of the decree was after the Court sale. Hence this case will not be of any assistance.

21. In *Manikayala Rao v. Narasimhaswami*, AIR 1966 SC 470, the plaintiff, in a money suit, obtained a decree against one Narasimhaswamy and his four sons who were members of a Mitakshara Hindu family. In execution of the decree, the shares of the four sons in the joint family properties were put up to auction and were purchased by one Sivayya, whose successors-in-interest were the appellants before the Supreme Court. The father's share was not put up for sale because an application for his adjudication as insolvent was then pending. The sale to Sivayya was duly confirmed. Thereafter, Sivayya sold the properties purchased by him at the auction to one Prakasalingam. Joint possession of the properties purchased by Prakasalingam along with the other members of the joint family in actual possession was delivered. Thereafter, Prakasalingam retransferred the properties to Sivayya. In that case, the right of Sivayya was not disputed on the ground that he was not the direct

alienee from the judgment-debtor. The suit had already been filed by Sivayya, the alienee and the shares of the four sons were sold and possession was also delivered.

22. It is unnecessary for us to pursue this question any further as, in the present case, the alienation by the coparcener was of his share in the joint family properties. Where a share of an undivided coparcener is alienated, the position is different. Where there is a sale of undivided share of a coparcener, he is alienating property, to which he has good and present title. As observed by Viswanatha Sastri J., in AIR 1956 Andhra 188 (FB) at p. 191, where the undivided share, which is the subject-matter, is inherently and by its very nature mutatable, it is a necessary incident of the sale that it should convey the property into which the undivided share has been transformed. When the sale is of an undivided interest of a coparcener in the whole of the joint family, the purchaser would be entitled to get the share that is allotted to his vendor. What the alienee gets is a right to property, that is, the property that might be allotted to his vendor in the general partition suit, though he would not be entitled to joint possession with the other coparceners and to claim mesne profits till a decree is passed in the partition suit. Such a right to file a suit and demand allotment of the property falling to the share of the vendor is a right to property which could be transferred. The objection to an alienation of a specific item that no right to property had been conveyed, is not available in the case of transfer of a share of an undivided coparcener. The right in the case of an alienee of a share is more than a right in personam and is mutatable. The only objection, which is common to both to an alienee of an alienee of a share and an alienee of an alienee of a specific item of property from an undivided coparcener, is that an alienee of an alienee from the coparcener has no privity of contract with the coparcener, and, as such an alienee of an alienee from the undivided coparcener could not insist on the right of the coparcener to claim a partition. But even here, we feel that, as a right to property has been transferred to the alienee of a share of the coparcener, it is very difficult to resist the right of an alienee of an alienee of a share from an undivided coparcener to maintain a suit for partition for working out his right. The decisions which we have referred to, as already stated, are all cases of sales of specific items of property and, on that basis held that no right in property has been conveyed. Further, we feel that, in considering the right of an alienee of an alienee of a share from an undivided coparcener, we have to take note of the changed circumstances of society and law. Great inroads had been made into the Hindu joint family system by Legislation, as, for instance, the right of the widow of an undivided coparcener to property and also an undivided coparcener's right to dispose of

his undivided interest by a will. Taking all these into consideration, we feel that it is proper to hold that the right of an alienee of an alienee of the share from an undivided coparcener is a right by himself to maintain a suit for working out his equitable right of asking for a partition and allotment of the share of the alienating coparcener. Such a right in our opinion, is heritable and transferable. The Hindu law principle that the equitable right of an alienee from an undivided coparcener should not be extended, could be qualified to this extent by permitting an alienee of an alienee of a share to maintain suit by himself. As we are not concerned with the right of an alienee of an alienee of a specific item of property from an undivided coparcener, we refrain from expressing any final opinion in regard to the same.

23. Before we conclude, we would like to place on record our appreciation of the valuable assistance rendered by counsel on both sides, Mr. Sivamani and Mr. S. V. Jayaraman. In the result the appeal is allowed with costs,

Appeal allowed.

AIR 1975 MADRAS 322

MOHAN J.

Mrs. Valerie Theresa Persich, Petitioner v. Mervyn Aloysius Persich, Respondent.

O. M. S. No. 13 of 1971, D/- 2-4-1974.

(A) Indian Divorce Act (1869), Section 22 — Suit for divorce on ground of desertion before the completion of 2 years of desertion is premature. (Para 6)

(B) Indian Divorce Act (4 of 1869), Section 22 — "Cruelty" — What is.

The word "cruelty" is not defined in the Act. The question of cruelty must be considered in the light of the whole of the matrimonial relationship. Regard must be had to the physical and mental conditions of the parties, to the character of social status, the impact of the personality and conduct of one spouse on the mind of the other and all incidents and quarrels between the spouses must be weighed from that point of view.

The vital fact is to see first whether there was injury or apprehended injury to health and then to decide whether sum total of the reprehensible conduct was sufficiently weighty to say that from a reasonable person's point of view the conduct is such that the petitioner ought not to be called upon to endure it. Unwarranted imputations of unchastity would themselves amount to cruelty. It comprises not merely physical violence but also of injurious reproaches, accusations and taunts. (Case Law discussed). (Para 8)

AS/BS/A30/75/KNA

Where the evidence established that the husband of the plaintiff used to get drunk, beat her with sticks and slap her causing her to swoon resulting in her being hospitalised, made imputations against her chastity, used the word "bloody" often when he beat her, made her sign bonds in favour of Pathans for debts borrowed by him with the consequence that the Pathans used to visit the house and make her feel humiliated, it was held that the husband was guilty of cruelty, entitling her to seek judicial separation. (Paras 16, 17, 18)

(C) Indian Divorce Act (4 of 1869), Sections 41, 42 — Custody of children — Welfare of children — Mother's custody ordered.

Where the children had been brought up by the mother as nice children, showering maternal affection on them and the father never made any attempt to look after their welfare the Court considered that it was for the welfare of the minors that they should be brought up by the mother and ordered accordingly. (Paras 19, 20)

(D) Indian Divorce Act (4 of 1869), Sections 37, 42 — When the salary of the husband was in the range of Rs. 300/- a month the Court on decreeing a judicial separation, ordered Rs. 60/- to be paid to the wife monthly, and Rs. 30/- to each of the minor children. (Para 21)

Cases Referred: Chronological Paras

AIR 1970 Ker 316 = 1970 Ker LJ 304	14
AIR 1966 Mad 153 = (1966) 1 Mad LJ 1 (FB)	12
AIR 1963 Pat 93 = 1962 BLJR 717	18
AIR 1963 Punj 242	18
(1963) 2 All ER 966 = (1963) 3 WLR 176	8, 14
(1957) 1 All ER 848 = (1957) 2 WLR 683	6
(1956) 1 All ER 432 = (1956) 2 WLR 661	8
(1952) AC 525 = (1952) 1 All ER 875	7, 8
AIR 1946 Mad 110 = (1945) 2 Mad LJ 463	19
1921 P. D. 438 = 90 LJP 363	8
1897 A. C. 395 = 66 LJP 122	8

N. Veeramani, for Petitioner; A. Balaraman, J. Stanisls, R. Thanikachalam and R. Gopalakrishnan, for Respondent.

ORDER:— Petition for judicial separation, custody of children and payment of maintenance to wife and children on the grounds of 'desertion and cruelty'.

(1) The averments in the petition by the wife are as follows:

She was married to respondent on 26-12-1962 as per Roman Catholic Church rites in the Church of Our Lady of Good Health, Saidapet, as evidenced by the certificate marked Ex. P. 1. After her marriage her life was one of misery and the respondent was deeply in debt having borrowed from

number of 'Pathans'. On 30-9-1963 she gave birth to a boy Jeffray Persich and when she was convalescing after birth of the boy at her parents' house she sprang a surprise visit to her matrimonial home and found dirty glasses and cigarette bits littered all over the place and her sudden appearance surprised the respondent who struck her on the face and back, as a result of which health suffered and she was obliged to extend the maternity leave. On 28-12-1963 there was a quarrel on account of marriage invitation of the petitioner's brother not being extended to the respondent's brother and the respondent used most abusive and obscene language as a result of which she fainted and she was taken to the E. S. I. Hospital and then to the Mental Hospital. Even for trivial things the petitioner was called by names and was beaten. The respondent was addicted to drinking, gambling and is in the habit of going to races for which purpose she was compelled by the husband to borrow from 'Pathans' and whenever she refused she was called 'whore' the word the respondent often used. On one occasion when there was a quarrel and as a result of the intervention of the manager of the petitioner's company, it was pacified but yet the life did not improve. On 16-5-1969, a quarrel arose with reference to the meeting of the household expenses and thereafter the respondent left with the intention of abandoning the matrimonial home permanently. Throughout the married life the respondent never took care about the welfare or the maintenance of the children. Added to this there was physical ill-treatment which was a daily feature and she was also accused of immorality. These according to her, constitute physical and mental cruelty. The respondent had no reason or proper cause for desertion.

2. The respondent has filed a counter statement denying these allegations and contends that he was never in the habit of borrowing nor was he going to races. According to him he never used to beat his wife. At the behest of the petitioner, he left for Bombay with the intention of permanently settling there but since he could not get a job he returned. From Bombay he had sent presents for 'Christmas' to his wife and children in December, 1965. On his return he found that the petitioner had developed illicit intimacy with one Ronnie Rodrigues with whom she eloped. When she was reprimanded she prostrated before him and requested him to give her a chance to open a new leaf. Again in May, 1968 the petitioner was misbehaving indecently with a co-worker in the petitioner's office. When the petitioner was questioned she quarreled with the respondent. He submits that the petitioner is not maintaining the children properly due to her adulterous course of conduct. She was detaining the children with an ulterior motive. Of late, the petitioner has developed illicit intimacy with one

Rajani Kantha Rao and therefore she is guilty of adultery and continues to lead an immoral life, thereby annoy the respondent mentally and has made the life for the respondent a total misery. Under these circumstances he states that the petitioner cannot invoke the clemency of this Court just to escape from her past and present misdeeds and adulterous life. Thus he prays for the dismissal of the petition.

3. On these pleadings the following issues have been framed:

(i) Whether the respondent is guilty of cruelty as alleged in the petition?

(ii) Whether the respondent is guilty of desertion as alleged in the petition?

(iii) Is the petitioner guilty of adultery as stated by the respondent and therefore not entitled to relief of judicial separation?

(iv) Who is entitled to the custody of children? and

(v) What relief, if any, the parties are entitled?

4. Before dealing with the various issues, I am bound to state that having regard to the young age of the parties who may not be in a position to fully understand the stresses and strains or the wear and tear of married life and who are likely to be more emotional even for trivial causes, I advised them to settle their differences, amicably and start leading a new life. For this purpose, I called them to my Chambers and advised them individually and together also. The husband was willing to take back his wife whereas the wife was somewhat stubborn and did not want to go back and started crying before me. This may be due to the deep rooted fear of the wife that any reunion could bring about more disaster contrary to what was given out as the evidence which is discussed below, will tend to show. I also called the children separately to ascertain their wishes. Both of them expressed their strong desire to be with the mother and did not at all want to go back to the father who according to them, never took care of them.

5. Issue No. 2. This issue may be taken up first. The desertion according to the petitioner is on 16-5-1969 when the respondent left the matrimonial home with the permanent intention of abandoning co-habitation with the petitioner. The learned counsel for the respondent argues that having regard to the wording of Section 22 of the Indian Divorce Act, 1869 (hereinafter referred to as the Act) the petition falls short of 4 months and hence premature. Section 22 of the Act reads as follows:

"No decree shall hereafter be made for a decree a Mensa-et-toro but the husband or wife may obtain a decree for judicial separation, on the ground of adultery or cruelty or desertion without reasonable excuse for two years or upwards and such decree shall have the effect of Divorce-a-Mensa-et-toro, under the existing law and such other legal effects as hereinafter mentioned".

6. From this, it is obvious that desertion must have been for a period of two years or upwards. The petition in this case has been filed on 29th January 1971, i. e. even before the period of two years had elapsed and hence the petition is premature and the contention of the respondent is well founded. *Dey v. Dey* (1957) 1 All ER 848 (at p. 849) is a clear authority for this proposition. The wording of Section 22 quoted above is also emphatic. Hence this ground of desertion need not be dealt with in greater detail. If the petition is based only on the ground of desertion it will fail for the reason stated above. But there is yet another ground viz. cruelty and therefore the question will be whether the petitioner has made out her case on that ground. The same is considered under issue No. 1.

7. Issues Nos. 1 and 3: The word 'cruelty' is not defined under the Act and therefore it is a word which should take its meaning from the context. To use the words of Lord Tucker in *Jamieson v. Jamieson* (1952 A. C. 525) "Judges have always carefully refrained from attempting a comprehensive definition of cruelty for the purposes of matrimonial suits and experience has shown the wisdom of this course. It is, in my view, equally undesirable if not impossible — by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in the cases where no physical violence is averred".

8. In *Russel v. Russel* (1897 A. C. 395) cruelty was defined as, conduct on the part of one's spouse of such a character as to cause danger to life, limb or health (body or mental) of the other spouse or as to give a reasonable apprehension of such danger to the other spouse. In the case of physical cruelty while it is not required there should be repeated acts of violence, or a single act of violence of an aggravated nature, if the Court thinks that under the circumstances it is likely to occur again and cause real suffering, it will interfere (See *Foster v. Foster* (1921 PD 438). Further as pointed out in *Waters v. Waters* ((1956) 1 All ER 432) in all cases of cruelty the rule is that the whole matrimonial relations should be considered. Regard must be had to the physical and mental conditions of the parties and also to the character of social status. In this connection *Rayden on Divorce* (8th Edition at p. 122). can be usefully referred to:

"The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches complaints, insults or taunts".

The position is summed up in *Halsbury's Laws of England* in Vol. 12 Lord Simonds 3rd Edition, page 270, paragraph 516 as below:

"The general rule in all questions of cruelty is that the whole matrimonial relations must be considered and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations and taunts. Before coming to a conclusion the judge must consider the impact of the personality and conduct of one spouse on the mind of the other and all incidents and quarrels between the spouses must be weighed from that point of view. In determining what constitutes cruelty regard must be had to the circumstances of each particular case keeping always in view the physical and mental conditions of the parties and their character and social status."

The approach to this question should be as observed by Lord Pearce in *Gollins v. Gollins* ((1963) 2 All ER 966 at p. 992).

I agree with Lord Merriman whose practice in cases of mental cruelty was always to make up his mind, first whether there was injury or apprehended injury to health. In the light of that vital fact the Court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently weighty to say that from a reasonable person's point of view, after consideration of any excuse which this respondent might have in the circumstances the conduct, is such that this petitioner ought not to be called on to endure it. What on paper may seem little more than a series of pinpricks."

said Lord Norman in 1952 A. C. 525 may present a very different aspect when it has been developed in evidence.

"The quality of every piece of conduct is affected by its conduct and by that it precedes and follows it".

9. Having regard to the principles set out above, the evidence in the instant case may be examined. P. W. 2 the petitioner has spoken to the various acts of cruelty committed by her husband. In fact, she prefaces her matrimonial life as "it was nothing but misery. For hardly a month, my husband was all right. Later on, he was addicted to bad habits and I did not enjoy life with him and he used to beat me, scold me, etc. But some times he used to cajole me and there was nothing but sorrow and lot of 'Pathans' used to visit the house and I used to feel very humiliated and distressed. I used to suffer myself without revealing to anybody". According to her on 28-12-1963, her husband quarrelled with her and went away and later on she was taken to E. S. I. Hospital since she got swooned and thereafter she was taken to the Mental Hospital since she was upset after that incident. She also says about the quarrel when she paid a surprise visit to her matrimonial home, a few days after giving birth to a son in 1963. Again, in December, 1966, there were quarrels. In May, 1968, there was a quarrel and

her husband slapped her and drove her out. Likewise, in May, 1969, when the husband was asked to procure some funds, to run the family, she was beaten. In spite of her protestations to give up the race going, gambling and the evil habit of drinking, he persisted in the same and used to slap her. In May 1969, he left the family with his box. Since he was heavily indebted, 'Pathans' used to visit her house and he used to force her to sign some bonds for securing loans and used to leave the house after beating her and she never signed any bond voluntarily. In cross-examination, she would depose on a number of occasions 'the said Pathans' used to come on motor cycles and that she had answered them: her husband used to hide inside a cloak room. When she was asked what was the language used by the husband while beating she said "Bloody etc. were all the words that will come out from his mouth frequently." As a result of the beating, her lips got cut and there was pain all over the body but she used to suffer in silence by treating herself but never made a complaint to others. She says she was beaten with sticks and sometimes with his hands and fists and she also fainted. To a pointed question that these allegations are false and that is why she did not seek good offices of the Priest, she states that it is not false and her children knew it. She was asked about her adulterous conduct that she was found embracing one Perira in the school compound and that she had developed illicit intimacy with Ronnie Rodrigues, Rajani Kant and Kanakaraj. She denied all of them. P. W. 1, the servant maid also speaks about the quarrels and beating and how the husband was addicted to evil ways and about the visit of 'Pathans'. In the cross-examination she would state that she saw the husband beating the wife. According to her she has seen the wife crying many times in the morning before going to the office on account of these quarrels.

10. On the side of the respondent, the husband is examined as R. W. 1. He has admitted the borrowings from 'Pathans' but according to him it was only once and that he beat her only on those occasions when he could not put up with her adulterous conduct or insults. According to him, she went to Mental Hospital as she was possessed of evil spirits and she behaved abnormally in that particular afternoon. As regards the charges of adultery he would say whatever he had heard from others was averred in the counter statements, though it was not possible for him to prove the same. He would sum up and say that he was prepared to take her back in spite of her elopement with Rodrigues and previous immoral conduct with others, since it is 'One sided love affair' and this he is prepared to do for the welfare of the children.

11. R. W. 2 the sister of the respondent, would state that her brother, the hus-

band was not addicted to evil ways and that he was very kind and considerate to his wife and that she suspected illicit intimacy with one Ronney Rodrigues since the wife used to go early in the mornings and one day she noticed that she had nothing covered her body above the waist in his (Ronnie Rodrigues') presence.

12. The learned counsel for the petitioner on this evidence contends that the letter by Ronald Rodrigues (Ex. R. 1) has been fabricated for the purpose of this case and such letters can be produced at any time. There is no proof that it was the said Ronald Rodrigues who wrote it and even that letter according to him does not prove adultery and mere vague allegations of disolute living are not evidence of adultery and for this purpose he relies upon *Ambujam G. Ammal v. M. R. Arumugham* (1966) 1 Mad LJ 1 = (AIR 1966 Mad 153) (FB). The evidence of P. Ws. 1 and 2 clearly establishes the cruelty, both physical and mental and there is no reason to disbelieve them.

13. It is further contended that the evidence of R. W. 1 and R. W. 2 being interested could not be accepted. Even if accepted, it does not in any way, belittle the cruelty meted out to the petitioner.

14. The learned counsel for the respondent on the other hand relying on *Madhavan Pillai v. Katharine* (AIR 1970 Ker 316) states that having regard to all the circumstances and keeping in view the mental conditions of the parties and their character and social status, these acts, would not constitute cruelty. According to him drinking is a fashion in that community to which the parties belong and stray acts of violence would not constitute cruelty. He also relies on ((1963) 2 All ER 986) and contends that the test would be as laid down at page 992 of the decision wherein it is stated that:

"It is impossible to give a comprehensive definition of cruelty but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or apprehension of it, it is, I think cruelty, if a reasonable person after taking due account of the temperament and all the other particular circumstances would consider that the conduct complained of is such that this spouse could not be called on to endure it".

15. Applying the said test here, he argues that there is no injury to health or apprehension of it.

16. I am unable to accept this contention. The evidence of P. W. 2 extracted above read with the averments of the petition, clearly establish that the health of the wife did deteriorate on account of cruelty meted out to her. There is no reason as to why she should be called upon to endure it.

17. The over-all evidence would tend to show that the husband has been in debts. Whatever may be the reasons which compelled him to borrow, he did force the wife

to sign the bonds. But the husband would have it that she signed voluntarily. I do not accept that statement. The beating and quarrels have been the daily features in the matrimonial life. The evidence of the petitioner as corroborated by P. W. 1, the servant maid, would clearly prove the physical cruelty suffered by the wife at the hands of the respondent. Both of them have spoken cogently to the occasions of quarrels and the harsh treatment meted out to her by the husband. In fact, in my chambers when I called her and advised her to go back to her husband she would go to the extent of saying she would rather commit suicide than going back; and she apprehended every danger to her life from her husband. This grave apprehension in her mind is an important factor in deciding the question of cruelty. Her evidence is also clear to the effect that when she was beaten after the birth of the boy she was obliged to extend her maternity leave since there was a deterioration in her health as a result of the beating. There is a clear averment to this effect in the petition itself. Excepting a bare denial of beating or finding a justification for the occasional beating the husband does not come out with the truth. The evidence of R. W. 2, the sister, apart from being interested does not appear to be true at all and I do not believe her when she says that the husband was affectionate and kind. This apart, the counter statement does not, in any way, meet the allegations of cruelty but sets out the various allegations of illicit intimacy with so many persons. These accusations of immorality are easy to make but difficult to repel. The husband has been accusing her always of immorality but there is no proof forthcoming of this adulterous course of conduct. These allegations standing as they are unproved, would undoubtedly cause great mental distress; more so, to a wife decently placed having hopes of a peaceful married life. In assessing the mental cruelty this is also a fact which is to be taken note of.

18. The unwarranted imputations of unchastity would themselves constitute cruelty. In fact, the Courts have gone to the extent of holding that such unfounded imputations would constitute cruelty (*Vide Iqbal Karur v. S. Pritam Singh v. S. Manak Singh* (AIR 1963 Punj 242); *Putel Devi v. Gopi Mandal*. (AIR 1963 Pat 93)). In this situation of acrimony and mutual distrust, it is no wonder the wife would go to the extent of saying that she would not go back to her husband, since she is always having an apprehension that the husband may seek revenge is some way. The statement of her husband that he has "one sided love" is wholly unacceptable to me since his idea seems to be to evade his obligations of payment of maintenance and take care of the welfare of the children. Having regard to the entire married life of the parties, the beating and the quarrels which have been a daily feature according to the wife, but only

occasional according to the husband, coupled with these accusations of immorality, I have no doubt that these acts would constitute great mental distress and real apprehension of harm and injury to the wife. Added to this, she has also suffered great humiliation when she was forced to execute the bond in favour of 'Pathans' and what she got back in return for such refusal was good thrashing. Therefore, the question is, should the wife suffer all these humiliations, distress, mental agony and apprehend danger to her personal health and suffer them in silence as she states by putting up with all these, consoling herself that the marriage is a life long union. Is she not entitled to a decent or comfortable or even a life without worries? The law is no doubt rigorous before dissolving a marriage but the rigour of law should not deny a wife of her legitimate life. After all, home is where the heart finds its greatest comfort. Thus, I answer issues Nos. 1 and 3 in favour of the petitioner.

19. Issue No. (4): The learned counsel for the petitioner contended that having regard to the evidence of P. Ws. 1 and 2, she alone is maintaining children showering all affection on them, and the father not having cared for them, the petitioner must be entrusted with the custody of the children and in such cases the welfare of the minors alone is of primary importance as laid down in *Seeyali Veettill Abubacker v. Ovinakath Vayyailapurayi Mariyumma* (1945) 2 Mad LJ 463 = (AIR 1946 Mad 110). On the other hand, it is argued by the learned counsel for the respondent that he being the father, he is entitled to the custody of the children. Earlier in my judgment, I have referred to the fact of the wishes of the minors who expressed their keen desire to live with their mother and would not like to go to their father. Considering their tender age and bearing in mind the welfare of the minors, I hold they would be best brought up by the mother. In fact, they have been provided with all their wants hitherto by her alone. She has brought them up as nice children which was evident from their good behaviour and smartness. Right from young age she alone has been showering all the maternal affection which the children deserve. Under these circumstances, I am of the view that they should continue to live with their mother and consequently she alone should be held to be entitled to the custody of the children.

20. I may add in this connection that the father has never taken care of the minors nor even made any attempt to look after their welfare and his statement that he had sent for them and provided the necessary wants is wholly inconceivable. In fact, he has not even paid the maintenance ordered by this Court during the pendency of this proceeding.

21. Issue No. 5: The husband is earning a sum of Rs. 500/- a month but his

salary is only in the range of Rs. 300/- Having regard to this fact, I think that the interests of justice would be met, by directing the husband to pay a sum of Rs. 60/- per month to the wife and Rs. 30/- per month to each of the minor children by way of maintenance.

22. In the result, I allow the petition and there will be a decree in favour of the petitioner. In the circumstances of the case, there will be no order as to costs.
Petition allowed.

AIR 1975 MADRAS 327

MOHAN, J.

Hariram, Petitioner v. K. I. Zachariah, and another, Respondents.

Petn. No. 37 of 1974, D/- 10-2-1975.

(A) Presidency Towns Insolvency Act (1909), Section 9 (e) — Attachment in execution of ex parte decree for more than 21 days — Decree subsequently set aside — Act of insolvency is not thereby wiped out.

In execution of an ex parte decree of the Small Cause Court the judgment-debtor's property was attached and the attachment remained in force for more than 21 days. The ex parte decree was thereafter set aside. Held that the setting aside of the decree cannot render the attachment null and void and it cannot be said that the creditor of the judgment-debtor cannot found an insolvency petition against his debtor on the basis of the attachment for 21 days. (Para 19)

Once an act of insolvency is committed it cannot be purged by subsequent events, such as the setting aside of the ex parte decree. AIR 1966 SC 918, Rel. on, AIR 1927 Mad 153; (1906) ILR 29 Mad 175 and AIR 1963 Mad 217 (FB), Dist.

(Paras 19 and 20)
Cases Referred: Chronological Paras
AIR 1966 SC 918 = (1966) 2 SCJ 350 12,
15
AIR 1963 Mad 217 = (1963) 1 Mad LJ 113
(FB) 12, 17, 19
AIR 1927 Mad 153 = 51 Mad LJ 680 12,
14
(1906) ILR 29 Mad 175 18

G. Nandalal, for Petitioner; Abdul Wahab, for Respondents.

ORDER:— This is a petition under Section 9 (e) of the Presidency Towns Insolvency Act (hereinafter referred to as the Act) seeking to adjudicate the respondents as insolvents on the ground that attachment of the movables of the debtors were subsisting for a period exceeding 21 days.

2. By an ex parte order passed on 24-7-1974, the respondents were adjudicated as insolvents. That order was later on set aside. Subsequently, on behalf of the second

DS/ES/B272/75/KNA

respondent (I. S. K. Menon), it was stated that there was no defence to the petition and, therefore, he was adjudicated insolvent by an order of Sethuraman J. dated 10-8-1974. Hence, the only question that survives is whether the first respondent could be adjudicated as insolvent.

3. In the counter-affidavit, the stand is taken by him that he is not the proprietor of the shop, Zacharia Stores, at No. 39 Purasawalkam High Road, Madras 7, and that the shop belongs to his son. Further, he was not carrying on business within the jurisdiction of this Court within one year prior to the presentation of the petition. As the attached movables do not belong to this respondent, the alleged subsistence of attachment would not enable the petitioner to seek adjudication. Further, inasmuch as the ex parte decree in O. S. 1637 of 1973 in execution of which alone the movables were attached, had been set aside, the basis of the attachment itself is gone, and, therefore, it cannot form the basis of adjudication.

4. On the side of the petitioner, Exs. P. 1 to P. 15 have been marked, while Exhibits on the respondent's side consist of R. 1 to R. 7. On behalf of the petitioner, P. W. 1, the petitioning creditor, was examined and he speaks to the fact of attachment and that the amount was borrowed for the benefit of the first respondent. The first respondent has been examined as R. W. 1, who, in his oral evidence would state that the promissory note on which the decree was sought was a printed form and the blanks were filled up by his son and because the creditor insisted upon R. W. 1 signing it, he signed it as the proprietor of Zacharia Stores, since the creditor wanted it that way.

5. R. W. 2 is the son of R. W. 1 and he would claim to be the proprietor of Zacharia Stores and E. A. 7511 of 1974 in E. P. 219 of 1974 was filed on behalf of his father seeking to claim the movables, but the reason for not pursuing the same was by then the ex parte order forming the basis of the execution petition was set aside.

6. In this state of pleadings and evidence, the two questions that arise for consideration are (1) whether the first respondent is the proprietor of Zacharia Stores and (2) inasmuch as the ex parte decree, in execution of which the movables came to be attached, was set aside subsequently, whether it could be said that the prior valid attachment subsisted for more than 21 days.

7. As regards the first question, Ex. P. 2, the report of the bailiff says that at the time when the attachment was effected, the respondent was present and he pleaded only his inability to pay the decree amount. This report of attachment was dated 17-5-1974, but the first respondent would claim that he had discontinued his business and in support of which he would produce Exs. R. 2 and R. 3. They do not advance the case of

the first respondent, since the assessee is only Zacharia Stores and it cannot be contended merely because R. W. 2 represented the matter before the Deputy Commercial Tax Officer that he was the proprietor or any description therein, would be of no consequence, and undoubtedly, better proof will be required to hold that R. W. 2 alone is the proprietor and not R. W. 1.

8. Then again, there is Ex. P. 7. That is a reply given to the advocate, which has also been signed by R. W. 1 as proprietor of Zacharia Stores. In addition to that, it is admitted by R. W. 1 that he issued a number of cheques towards such debt.

9. Though there is a dispute relating to the amount due, a careful perusal of Exs. P. 9 to P. 11, ledgers and Exs. P. 12 to P. 14, day books, it is clear that the amount that is claimed is due. Though notice was issued to the debtor under Ex. P. 15 to produce his account, so that he might prove his version that the amounts as claimed by the creditor, are not due, he has not chosen to do so. Besides, there is Ex. P. 8 which also contains an admission about the amount due. Therefore, considering the accounts, viz., Exs. P. 9 to P. 11 and P. 12 to P. 14, undoubtedly, the amount stated in the petition is due. Thus, I come to the conclusion that R. W. 1 is the Proprietor of Zacharia Stores and that the debt is due by him.

10. Coming to the next question, the following facts require to be noted.

11. O. S. 1637 of 1973 on the file of the City Civil Court, was decreed on 5-7-1973. E. P. 219 of 1974 for the attachment of the movables was ordered on 29-1-1974. Against the first respondent, a warrant was issued on 17-5-1974, and with police aid, the attachment of moveables was effected. The Insolvency petition was filed on 15-6-1974. But, since there was an ex parte adjudication of both the respondents as insolvents on 29-7-1974, by Sethuraman J. an endorsement was made in the execution petition concerning this fact, whereupon the execution petition was dismissed on 9-8-1974. Later on, 24-8-1974, the ex parte decree in O. S. No. 1637 of 1973 itself was set aside.

12. Section 9 of the Act says that a debtor commits an act of insolvency in each of the following cases, namely—

“(e) if any of his property has been sold or attached for a period of not less than 21 days in execution of the decree of any Court for the payment of money;...” The learned counsel for the petitioning creditor, Mr. G. Nandalal draws my attention to the decisions in *In re Sundaram Iyer*, 1963 1 Mad LJ 113 = (AIR 1963 Mad 217 (FB)). *Malludora v. Seetharathnam*, 1966-2 SCJ 350 = (AIR 1966 SC 918) and *Venkatarama Aiyar v. Buran Sheriff*, AIR 1927 Mad 153 and contends that the subsequent events do not alter the position and the fact that the ex parte decree came to be set aside later on will be of no consequence.

13. Mr. Abdul Wahab, learned counsel for the respondent, in meeting this submission also relies upon the same Full Bench judgment on which the petitioning creditor places his reliance and contends that once an ex parte decree itself is set aside, the basis of the attachment itself is gone and, therefore, the attachment must be considered to be non est in law, and no rights could be considered to flow on the foot of such an attachment.

14. In Venkatarama Aiyar v. Buran Sheriff, AIR 1927 Mad 153, the only question that came up for consideration was whether the creditor should continue to be a creditor at the time when the order of adjudication is passed or whether it will be sufficient if the creditor happened to be so, at the time of the presentation of the petition. The Division Bench held that under the statute, what is required is that it is enough if the petitioning creditor happens to be a creditor at the time of the presentation of the petition. This decision, in my opinion, does not have any bearing on the question that arises in this case.

15. In the decision of the Supreme Court in 1966-2 SCJ 350 = (AIR 1966 SC 918) it was held that the jurisdiction of the insolvency Court commences when an act of insolvency takes place and the sale of a person's property in execution of a decree for payment of money is an act of insolvency under Section 6. Once such an act is committed, it cannot be explained or purged by subsequent events. Therefore, by paying some of the creditors, the insolvent cannot claim to wipe it off. Thus, an act of insolvency remains and is not purged by payment of a decretal amount after the sale in execution of the money decree.

16. This decision also does not directly decide the point in issue, except stating in an indirect way, that by payment of the decretal amount after the sale in execution, the act of insolvency cannot be purged.

17. I will turn my attention now to the decision in (1963) 1 Mad LJ 113 = (AIR 1963 Mad 217 (FB)). At page 118, concerning this aspect of the matter, what has been laid down is this—

"The language of Section 9 (e) of the Presidency Towns Insolvency Act would seem to indicate that what all is necessary to constitute the act of insolvency is a de facto sale or an attachment for 21 days. It is open to the construction that once the sale is held by the property being knocked down to the highest bidder or if the attachment subsists for 21 days, the act of insolvency is complete and indefeasible. But, we do not think that this is the true meaning of the section. Of course, there must be a factual sale or the continuance of attachment for the prescribed period. That would not be enough to comply with the section. In our opinion, the sale or attachment must also

be valid in law. If the sale is set aside or that attachment is cancelled in due course of judicial proceedings on the ground that the sale ought not to have been held or the attachment ought not to have been ordered, those acts of sale or attachment as the case may be, must be deemed to have had no judicial existence. They must be treated as 'non est' in law. No rights can flow from them and accrued rights, if any, on foot of them must also cease. The act of insolvency grounded on a sale or attachment in execution of a money decree loses its foundation the moment such sale or attachment is wiped out as a result of judicial adjudication."

18. There is one other case which I may usefully refer. That case is Chettiattil Muhamed v. Kunhi Koru (1906) ILR 29 Mad 175, wherein in pursuance of an ex parte decree attachment of the properties was ordered on 19-2-1900 and the attachment itself was actually made on 10-3-1900. But, even earlier on 3-2-1900 itself, the ex parte decree had been set aside. In ignorance of the same, the Court to which the decree had been transferred for execution ordered the above said attachment. When the matter came up before this Court, it was laid down by a Division Bench as follows—

"When the attachment was made, and even when the order for attachment was made, there was no decree in existence and we are entirely unable to see how any order of attachment so made could have any force or validity. We cannot agree with the District Judge that the fact that the decree had been transferred for execution to another Court could give the attachment any additional validity. The attachment not being based on any decree in existence at the time was null and void, and the fact that a decree was subsequently passed in terms of the decree that was set aside had not the effect of restoring the original decree nor could it operate to render the attachment valid". The facts of this case are clearly distinguishable because on the date of the attachment, there was decree in existence and, therefore, this ruling is of no assistance to the debtor.

19. Reverting my attention to the decision in In re Sundaram Iyer 1963-1 Mad LJ 113 = (AIR 1963 Mad 217 FB), it may be noted that this is not a case where the order of attachment had been set aside as a result of judicial adjudication. The execution petition had merely been closed and it is impossible to hold that merely because the ex parte decree came to be set aside long after the statutory period of 21 days, contemplated under Section 9 (e) of the Act, it can be said that it was null and void and that the creditor cannot found his insolvency petition on that basis. The decision of the Supreme Court cited above, is a clear authority for the position, once an act of insolvency is committed, it cannot be purged by subsequent events.

20. So, from any point of view, it cannot be held that merely because the ex parte decree came to be set aside on a later occasion, the act of 'insolvency got wiped out. On this reasoning, the first respondent is adjudicated insolvent and the Official Assignee is appointed receiver to take charge of the estate and administer the same.

21. Accordingly, the petition will stand allowed. But, there will be no order as to costs.

Petition allowed.

AIR 1975 MADRAS 330

VEERASWAMI C. J. AND NATARAJAN J.

In re N. Narasimhan and another, Petitioners.

Original Petn. No. 40 of 1973, D/-6-1-1975.

(A) Succession Act (1925), Section 283 — In a petition of probate, a caveator cannot claim title in himself in conflict with that of a testator or testatrix. AIR 1972 Mad 212, Overruled.

In a probate proceeding a caveator will not be entitled to raise title in himself to the whole or any part of the estate of the deceased. The interest in the estate of the deceased mentioned in Section 283 is but that interest which by citation a person called upon may claim to have in the estate of the deceased and not the interest which the deceased did not own, but the claimant coming into picture by citation claims to be vested in himself. The test for purposes of Section 283 (1) (c) is that a person disputing the right of a testator to deal with the property as his own, cannot be properly regarded as having an interest in the estate of the deceased. A caveator is neither a plaintiff nor a defendant and cannot by mere citation be allowed to convert a probate proceeding into a suit for resolving disputed title. AIR 1972 Mad 212 Overruled; AIR 1931 Mad 37, Approved; AIR 1954 SC 280 and AIR 1925 Mad 803 and AIR 1926 Mad 1193, Foll.

(Para 2)

Cases	Referred:	Chronological	Paras
AIR 1972 Mad 212	= (1972) 1	Mad LJ	4
AIR 1954 SC 280	= 1953	BLJR	690
AIR 1931 Mad 37	= 59	Mad LJ	529
AIR 1928 Mad 803	= 54	Mad LJ	382
AIR 1926 Mad 1193	= 51	Mad LJ	563

S. Raghavan, for Petitioners; M. S. Sethia, for Respondent.

VEERASWAMI C. J.:— Mohan J., having found a conflict between Komalangi-mal v. Sowbagiammal, 59 Mad LJ 529 = (AIR 1931 Mad 37) decided by a Division Bench and Jayakumar v. Ramarathnam, (1972) 1 Mad LJ 4 = (AIR 1972 Mad 212), of a single Judge, has referred the particular question, whether in a petition for probate

a caveator can properly claim title in himself in conflict with that of the testator or testatrix.

2. The scope of a probate petition is confined to an enquiry as to the disposing state of the mind of the testator or testatrix and the disposition of his or her property by will. Any caveat entered into will also be confined to the scope of the petition. A person who claims interest in the estate of the testatrix will have the locus standi to maintain the caveat, the scope, of caveat enquiry being no more than what it is in that of the probate proceedings themselves. This proposition, which is elementary, is long since established, both on principle and by practice, of this Court on the probate side. Section 283 of the Indian Succession Act, which concerns itself with the powers of the probate Court provides that it may issue citations calling upon all persons "claiming to have any interest in the estate of the deceased to come and see the proceedings before 'the grant of probate or letters of administration'". The next section dealing with caveat provides that a caveat shall be made as nearly as circumstances admit in the form set forth in Schedule V. That Schedule is merely that 'Let nothing be done in the matter of the estate of A. B., late of . . . deceased, who died on the . . . day of . . . at . . . without notice to C. D. of'. Reading these two provisions, it is explicit that citation is permissible in respect of a person claiming to have any interest in the estate of the deceased, the object of the notice being to let him have an opportunity to come and see the proceedings before the grant of probate or letters of administration. Once caveat is entered, no further steps should be taken without notice to the caveator. Our attention has been invited to Sections 220, 222, 232, and certain other provisions dealing with probate and letters of administration. But we do not think that except that they contain general provisions, they have any direct decisive application in deciding the question before us. The answer to the question will depend upon the interpretation to be placed on the words 'any interest in the estate of the deceased' in clause (c) and Section 283 (1). From Sowbagiammal v. Komalangi-mal, 54 Mad LJ 382 = (AIR 1928 Mad 803) which was decided by Venkatasubba Rao J., and which was affirmed by Komalangi-mal v. Sowbagiammal 59 Mad LJ 529 = (AIR 1931 Mad 37), the law has always been that in a probate proceeding a caveator will not be entitled to raise title in himself to the whole or any part of the estate of the deceased. The interest in the estate of the deceased mentioned in Section 283 is but that interest which by citation a person called upon may claim to have in the estate of the deceased and not the interest which the deceased did not own, but the claimant coming into the picture by citation claims to be vested in himself. In other words, title of the testator or testatrix to the whole or any

part of the property which is the subject-matter of disposition is entirely and necessarily outside the scope of probate proceedings and that question will have to be settled by a regular trial. That was what was pointed out to be the principle and practice of this Court by Venkatasubba Rao J. in 54 Mad LJ 382 = (AIR 1928 Mad 803). That was a fully considered judgment in which all the relative decided cases including Hanumantha Rao v. Latchamma 51 Mad LJ 563 = (AIR 1926 Mad 1193) were noticed and the learned Judge summed up the test for purposes of S. 283 (1) (c), as being that a person disputing the right of a testator to deal with property as his own, cannot be properly regarded as having an interest in the estate of the deceased. This view of the statutory provision was accepted to be the right view by two learned Judges in 59 Mad LJ 529 = (AIR 1931 Mad 37) who had occasion to consider 51 Mad LJ 563 = (AIR 1926 Mad 1193). That being so, Maharajan J. in (1972) 1 Mad LJ 4 = (AIR 1972 Mad 212) was bound by 59 Mad LJ 529 = (AIR 1931 Mad 37) and was not free to follow 51 Mad LJ 563 = (AIR 1926 Mad 1193). Though the question was not directly posed and answered in Iswardoo Narain Singh v. Kamta Devi. AIR 1954 SC 280, the observation below is of some utility in the present context—

“The Court of probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court.”

The practice on the probate side of the Original Side of this Court was really based on that of the English Probate Court. There is a clear cut distinction between the various types of the Probate Court and as pointed out in 16 Halsbury's Laws of England, 3rd Edn, Lord Simonds Edition, page 160 “the person cited to see proceedings is neither a plaintiff nor a defendant in the action, but he is brought before the Court in order that his interests may be bound.” A caveator is in no better position and by mere entry of caveat, a proceeding for probate cannot be and should not be allowed to be converted into a suit for resolving disputed title.

3. That the above is the true position in law could not and has not been disputed by Mr. M. S. Sethu on the other side. But what he says is that an application has been taken out to discharge the defendant even when he put the caveat and that though the disputed question of title to the property would be outside the purview of the probate proceedings, there were other questions well within those proceedings and therefore he should not be discharged. We

have no doubt that the learned Judge sitting on the probate side would consider such questions, but not the question of disputed title.

4. We answer the reference accordingly and remit the matter of probate for a decision by the learned Judge, sitting on the probate side.

Reference answered accordingly.

AIR 1975 MADRAS 331

MAHARAJAN J.

N. R. Radhakrishnan, Appellant v. N. Dhanalakshmi, Respondent.

A. A. O. No. 188 of 1971, D/- 28-10-1974.*

(A) Hindu Marriage Act (1955), Section 9 — Restitution of conjugal rights — Right of the husband to require his wife to live with him — Not unqualified — Wife gainfully employed in a place away from husband's home — Restitution cannot be granted.

Under pristine Hindu Law, a Hindu wife's first duty to her husband is to submit herself obediently and to remain under his roof and protection. But then legislative enactments like the Hindu Marriage Act have made considerable inroads upon the unqualified rights that the Hindu husband previously enjoyed over the wife. The Court cannot in every case when the wife withdraws from the society of the husband pass a decree for restitution of conjugal rights against her unless she has done so without reasonable cause. The withdrawal from the society of the husband may be merely physical without any intention to shun his company, as in this case, where the wife is gainfully employed in a place away from the husband's home without the least intention of denying to her husband her society and company. 1974 T. L. N. J. 351 (Mad), Followed. AIR 1965 Andh Pra 407, Distinguished. (Paras 2, 3)

Cases Referred: Chronological Paras
1974 TLNJ 351 (Mad) 2
AIR 1965 Andh Pra 407 = (1965) 1 Andh
WR 426 2

JUDGMENT:— This is an appeal by the husband against the judgment of the second Additional District Judge, Pondicherry, dismissing his petition under Sec. 9 of the Hindu Marriage Act, 1955 for a decree directing the respondent, his wife, to perform conjugal duties by coming and living with the appellant. At the time of the marriage between the parties, which took place on 29-9-1966 both the appellant Radhakrishnan and his wife Dhanalakshmi were gainfully employed. The appellant was a driver

* (Against Order of 2nd Addl. Dist. J., Pondicherry in O. P. No. 11 of 1969)

ES/ES/B663/75/DRG

in the State Transport undertaking at Madras, whereas the respondent, who is a trained teacher, was employed as a school mistress in an elementary school conducted by the Madras Corporation. In fact, even for four or five years prior to the marriage, the respondent was in the service of the Corporation as a school mistress. After the marriage, certain trivial misunderstandings appear to have broken out between the parties, whereupon the appellant expressed to the State Transport undertaking his willingness to go to Pondicherry, whereupon he was transferred to Pondicherry. Subsequently, he was transferred to Krishnagiri. It is the complaint of the wife that it is within the husband's power to get a transfer back to the Madras city and live with her. The main complaint of the husband is that in spite of his calling upon his wife to resign her job in the Corporation service and join him at Krishnagiri, she has unreasonably refused to resign her post and give him her company at Krishnagiri. On the other hand, the wife would contend that it is with a view to tease her that the husband got out of Madras on his own volition and that in the circumstances in which she finds herself, it is unsafe for her to resign the job and look up to her husband for the maintenance of herself and her child. Admittedly, a girl has been begotten by her to her husband and she is seven years old and is living with her. It is also the respondent's complaint that her husband used to beat her often whenever she refused to part with her jewels which he used to demand for the purpose of conversion into cash. In these circumstances, can it be stated that she is, without reasonable excuse, withdrawing from the society of her husband? It is not as if the husband is a well-to-do man who can afford to maintain his wife and daughter out of the meagre sum of Rs. 200 which he earns as a driver. While it is open to him to get a transfer from Krishnagiri to Madras, it is not open to the wife to get a transfer from the Madras Corporation service to any elementary school at Krishnagiri. The only method by which she can give her company to her husband is by burning her boats — resigning her job—and abandoning herself to the mercies of her husband. The other method which if the couple are sensible, they can reasonably follow is that each may visit the other in his or her place at week-ends, and come away after a day's stay at the place of his or her avocation.

2. Learned counsel for the appellant contends, on the strength of the ruling in *Vuyyuru Pothuraju v. Vuyyuru Radha* AIR 1965 A. P. 407, that it is the bounden duty of a Hindu wife to live with her husband wherever he may choose to reside and that it is the right of the husband to require his wife to live with him and that courts cannot deprive him of his right except under special circumstances which absolve the wife from that duty. In the case before their Lordships

the wife was not gainfully employed, whereas in this case she is. As I observed in *Sulochana v. Selva Madhavan*, 1974 T. L. N. J. 351—

“Under pristine Hindu law, a Hindu wife's first duty to her husband is to submit herself obediently and to remain under his roof and protection. But then legislative enactments like the Hindu Marriage Act have made considerable inroads upon the unqualified rights that the Hindu husband previously enjoyed over the wife. The Court cannot in every case when the wife withdraws from the society of the husband pass a decree for restitution of conjugal rights against her unless she has done so without reasonable cause. The withdrawal from the society of the husband may be merely physical without any intention to shun his company, as in this case, where the wife is gainfully employed in a place away from the husband's home without the least intention of denying to her husband her society and company. The withdrawal from the society of the husband may be psychological as in a case where the wife may live with the husband under the same roof and yet refuse to perform her marital duties towards him. It is for the court to consider in either case what is the animus with which the wife has withdrawn from the society of the husband and whether she has done so without reasonable cause”.

2A. In this case, even in her counter the respondent has said as follows—

“The petitioner by his opting to go to Pondicherry on transfer from Madras caused deprivation of the company of the respondent. The respondent in fact never refused to live with the petitioner and invited him forgetting all his illtreatment and vices to come and live with her in her house. But it is the petitioner who is adamant about being in Pondicherry sticking to his same old bad habits.”

3. It is, therefore, clear that the respondent is not refusing, much less unreasonably refusing, to give her wifely company to the appellant. There is, therefore, no legal ground for granting restitution of conjugal rights, which would necessarily involve the resignation by the respondent of a valuable job which fetches her Rs. 250 per mensem and without which she and her child may probably be thrown out to the wolves.

4. The Court below was right in dismissing the husband's petition for restitution. I confirm its order and dismiss this appeal. Having regard to the relationship between the parties, I refuse to pass any order as to costs.

Appeal dismissed.

AIR 1975 MADRAS 333
RAMAPRASADA RAO AND
MAHARAJAN, JJ.

N. Ethirajulu Naidu, Appellant v. K. R. Chinnikrishnan Chettiar, Respondent.

Appeal No. 138 of 1968, D/- 2-8-1974*.

(A) Evidence Act (1872), Sections 18, 101 — Admission — Admission by defendant that he signed on blank sheet of paper is not admission of execution of document — Burden of Proof.

Execution of a document implies intelligent and conscious appreciation of the contents thereof. Hence where the defendant admitted only that he put his signature on a blank piece of paper which he alleged had possibly been utilised for fabricating the document the onus of proving due execution must be thrown on the plaintiff.

(Para 6)
 (B) Contract Act (1872), Section 25 (3) — Account stated relating to claim entirely time barred — It cannot save bar of limitation unless there is express promise to pay. AIR 1949 Nag 229 and AIR 1942 Nag 92 and AIR 1953 Ker 31 (FB), Followed; AIR 1934 PC 147, Referred to. (Para 9)

(C) Contract Act (1872), Section 25 (3) — Limitation Act (1963), Section 18 — Acknowledgment under Section 18 Limitation Act and promise under Section 25 (3) Contract Act — Difference between.

The distinction between an acknowledgment under Section 18 of the Limitation Act 1963 and a promise within the meaning of Section 25 (3) of the Contract Act is of great importance. Both have the effect of creating a fresh starting point of limitation, if they are in writing signed by the party or his authorised agent. But while an acknowledgment under the Limitation Act in order to be valid, must be made before the expiry of the period of limitation, a promise under Section 25, sub-section (3) of the Contract Act, to pay a debt may be made after the debt has become barred by limitation.

(Para 8)
Cases Referred: Chronological Paras
 AIR 1958 Ker 31 = 1957 Ker LJ 895 9
 (FB)
 AIR 1949 Nag 229 = 1949 Nag LJ 138 9
 AIR 1942 Nag 92 = 1942 Nag LJ 248 9
 AIR 1940 Mad 678 = (1940) 1 Mad LJ 882 8
 AIR 1934 PC 147 = 61 Ind App 273 9
 AIR 1933 Lah 209 = 34 Pun LR 430 8
 (1912) 14 Bom LR 1020 = 17 Ind Cas 722 8
 1910 Mad WN 547 = 7 Ind Cas 901 8
 (1908) ILR 30 All 268 = 5 All LJ 274 8
 (1906) ILR 33 Cal 1047 = 33 Ind App 165 8

MAHARAJAN, J.:— The defendant appeals. The suit out of which the appeal

* (Against decree of City Civil J. Madras in O. S. No. 2537 of 1967).

CS/ES/A886/75/JHS

arises was laid by Chinnikrishnan Chettiar, the plaintiff, against the appellant Ethirajulu Naidu for the recovery of a sum of Rs. 9850 allegedly due on an account stated by the plaintiff and signed by the defendant on 30-5-1964. In the plaint, it was alleged that the defendant borrowed from the plaintiff a sum of Rs. 7000 agreeing to repay the same with interest at 12 per cent per annum thereon. According to the plaint, on 30-5-1964, the plaintiff demanded from the defendant the repayment of Rs. 8330 representing Rs. 7000 on account of principal and Rupees 1330 on account of interest. On the date of demand, 30-5-1964, the defendant is alleged to have paid a sum of Rs. 500 towards interest and demanded an account, whereupon an account stated was prepared then and there by the plaintiff. The defendant after verifying the same put his signature to it on the same day, 30-5-1964. It was further alleged in the plaint that on 30-3-1965, the defendant paid a further sum of Rs. 500 towards interest, but failed and neglected to pay the balance. Hence the suit.

2. The defendant in his answer denied that he ever borrowed any amount at any time from the plaintiff. He also denied specifically the alleged borrowing of a sum of Rs. 7000, the demand by the plaintiff for the repayment on 30-5-1964, the alleged payment of a sum of Rs. 500 towards interest on that date, the preparation by the plaintiff on the account stated and the alleged acknowledgment by the defendant of the account stated by putting his signature thereto. The defendant also denied that on 30-3-1965 he paid a sum of Rs. 500 towards the alleged dues. The case of the defendant was that he, as a tin-can manufacturer, used to receive supply of old tin sheets and new tin sheets from the plaintiff and would manufacture out of that material snuff boxes and supply the same in different sizes to the plaintiff, who is a dealer in snuff. In the course of the dealings, the plaintiff used to take the signature of the defendant in a note book as a token of his having received the raw materials. The defendant is an illiterate person, who had learnt only to sign his name in Tamil and English for the purpose of bank transactions in the course of his business. There were occasions when the defendant signed his name in the plaintiff's note book, on the plaintiff telling him that he would later fill the space above the defendant's signature with the terms of the agreement as to the rate of the labour charges for manufacture of tin boxes. The defendant also used to sign his name in a chittai whenever labour charges are paid to him by the plaintiff. Misunderstandings broke out between the plaintiff and the defendant in April 1967, with reference to the labour charges. According to the defendant, the plaintiff must have made use of the signature of the defendant in the plaintiff's note book acknowledging receipt of raw materials or receipt of labour charges for the purpose of

cooking up the account on foot of which this suit has been filed.

3. The Fifth Assistant Judge, City Civil Court, Madras, before whom the suit was filed, framed the following issues—

1. Whether the defendant borrowed Rs. 7000 from the plaintiff?

2. Whether the defendant is not liable for the suit claim?

3. To what relief, if any, is the plaintiff entitled?

Upon a consideration of the oral and documentary evidence adduced by the parties, the trial Court answered all the issues against the defendant and granted a decree as prayed for with costs. It is against this judgment, the defendant has preferred this claim.

4. In appeal grounds, it is pleaded *inter alia*, that the plaintiff's claim is barred by limitation because on the plaintiff's own showing, the loan is alleged to have been advanced in 1959 and there was no payment made in writing by the appellant towards the said loan upto 1964, and in the absence of such payment in writing within three years from the date of the loan or an unconditional acknowledgment of the liability in writing within the said period, the loan must have become barred by limitation even as early as 1963. Another plea urged by the appellant is that even if Ex. A. 1, the alleged account stated were construed as an acknowledgment, the acknowledgment itself having been made after the debt had become barred by limitation, would be ineffective to save the plaintiff's claim from the bar of limitation.

4. The points that arise for determination are:— (1) Whether the loan said to have been advanced by the plaintiff to the defendant is true; (2) Whether Ex. A. 1 is in the nature of an account stated or in the nature of a valid acknowledgment; (3) Whether, in any event, the suit claim is in time?

5. Point No. 1: Though in the plaint, the date of the advancement of the loan has not been mentioned, P. W. 1 the plaintiff, stated for the first time from the witness box that he advanced the loan of Rs. 7000 to the defendant in January 1959 and that the defendant agreed to repay the loan with interest at 12 per cent per annum. It is astonishing that the plaintiff did not take the trouble of obtaining a promissory note or at least a voucher from the defendant to evidence the payment of this huge amount. Admittedly, he had not advanced any loan to the defendant on any prior occasion. The plaintiff's explanation is that out of confidence, which he reposed in the defendant, he did not obtain any promissory note from him. One wonders why he should not have issued a cheque for Rs. 7000 to the defendant instead of paying the whole amount in cash. According to the plaintiff, he paid this amount in his own office when his employees were working and he is unable

to say whether any of his employees knew about the alleged payment to the defendant. The plaintiff is admittedly an income-tax assessee, and he is carrying on business in the name of Radha and Co, in which he had invested about five lakhs of rupees. The plaintiff further admits that he is maintaining accounts. But curiously enough, he hastens to add that the payment of Rs. 7000 is not entered in his accounts. The excuses he trots out for not entering this loan in his accounts is that the amount does not represent the shop amount. Admittedly, he has bank accounts, and if he had withdrawn his own moneys from the bank for the purpose of advancing this loan, his bank pass book ought to evidence it. Lest the non-production of the bank accounts should be adversely commented upon the plaintiff would proceed to say that he got this amount of Rs. 7000 from his brother and gave it to the defendant. The question arises whether his brother was in possession of adequate funds for advancing this amount. According to the plaintiff his brother was employed under a Marwari getting a monthly salary of Rs. 200. But on closer cross-examination, the plaintiff had to admit that in 1959, his brother was unemployed. His brother has not been examined to support the plaintiff's story that he advanced the amount. The plaintiff admits that there is no record to show that he took this amount from his brother, and that his brother himself has noted the payment of this amount in his accounts. According to the plaintiff, he repaid this sum of Rs. 7000 to his brother in two instalments viz. Rupees 2000 in 1956 and the balance in 1967. These repayments must be disclosed by the entries in his accounts as income-tax assessee. But those accounts have not been produced. The plaintiff wants the Court to believe that from January 1959, to 30-5-1964, the defendant paid him Rs. 4000 odd by way of interest towards the loan obtained by him. There is not a scrap of paper to evidence this statement. According to the plaintiff on 30-5-1964, when Ex. A. 1, was prepared, the accounts were looked into by the defendant in the office of the plaintiff, and the account stated as per Ex. A. 1 was prepared then and there, and the defendant after verifying the same put his signature thereto. If it is true that the plaintiff had advanced Rs. 7000 in January 1959, and the defendant had paid over Rs. 4000 by way of interest in numerous instalments from January 1959 to 30-5-1964, and if there were no accounts kept by the plaintiff to evidence either the payment or the repayments alleged, one is at a loss to understand with reference to which account Ex. A. 1 was prepared on 30-5-1964 and with reference to which books the defendant was able to verify the correctness of the three suspiciously bald entries, which are entered in Ex. A. 1. Be it noted that Ex. A. 1 itself makes no reference whatsoever to the loan of Rs. 7000 advanced in January 1959, or to the alleged repayments

by the defendant of Rs. 4999 or the dates and particulars thereof. The very first entry in Ex. A. 1, which is in Tamil, is to following effect—

“Arrears due by tin factory Ethirajulu Naidu on account of balance of principal Rs. 7000.”

The entry does not explain as to how it was arrived at. The next entry runs as follows—

“Interest arrears upto 15-5-1964 — Rs. 1330.”

Below this entry is given the amount of Rs. 8330, which is evidently the total of the balance of principal and interest. Below this entry, the third and the last entry is found, and it runs as follows—

“30-5-64, Received Rs. 500.”

Below this entry, the balance is struck and the amount of Rs. 7830 entered. One line is left blank below the balance and in the next line, we find the signature of the defendant with the date 30-5-1964 underneath it. Ex. A. 1 is headed ‘K. R. Chinnikrishna Chetti, Radha and Co.’ The heading is in different ink and pen from the entries that follow. The paper upon which Ex. A. 1 has been engrossed is incredibly flimsy. It is a slip of ruled paper forming half of a quarter sheet. Evidently, it has been torn off from an exercise note book. The plaintiff himself admits that he tore the paper from a note book kept in his shop and wrote all the entries in Ex. A. 1. The defendant as D. W. 1 while admitting that the signature in Ex. A. 1 is his, says that it has been torn from the Chittai book maintained by the plaintiff. He says that he used to sign in the chittai book whenever he received tin sheets from the plaintiff for the purpose of manufacturing snuff boxes. It is also his case that he used to wait in the plaintiff's shop till 1 p. m., and he used to go away in a hurry after signing the blank sheets in the chittai and that one of such blank sheets in the chittai must have been exploited by the plaintiff for concocting Ex. A. 1. Having regard to the intrinsic infirmities, in Ex. A. 1, the surrounding circumstances and the antecedent conduct of the parties, we think that the version of the defendant, who is an illiterate person, is more acceptable than that of the plaintiff. It is not as if Ex. A. 1 is a document which evidences an independent transaction. The liability thereunder had its genesis, according to the plaintiff himself even in 1959. If what he says is true, ample evidence must be available to prove the alleged dealings from 1959 upto 30-5-1964. The amazing failure of the plaintiff to prove the antecedent dealings resulting in Ex. A. 1 by evidence aliunde strengthens our misgivings about the genuineness of the entries in Ex. A. 1. We have little doubt that the plaintiff has utterly failed to prove that he prepared the account stated on 30-5-1964, or that the entries therein are true or that the defendant affixed his signature thereto after verifying the correctness of the entries

and in acknowledgment of his liability thereunder.

6. The trial Court has, without a strict scrutiny of the relevant circumstances, ascribed undue weight to two circumstances. The first is that the defendant has admitted his signature in Ex. A. 1. According to the trial Court, “the fact that Ex. A. 1 contains the signature of the defendant is prima facie proof that the defendant had acknowledged his liability to pay the amount of Rs. 7830 contained in Ex. A. 1 to the plaintiff . . . Hence there is absolutely no difficulty in holding that the defendant had acknowledged the correctness of the ‘account stated’ in Ex. A. 1.” The lower court has overlooked the fact that the execution of a document implies intelligent and conscious appreciation of the contents thereof and the facts connected therewith; and where the defendant admitted only that he had put his signature in a blank piece of paper, which, he alleged, had possibly been utilised for fabricating Ex. A. 1 it cannot be regarded as his having admitted the execution of Ex. A. 1. The onus of proving that a particular paper, which is the basis of a suit was duly executed by the defendant, must, therefore, have been thrown upon the shoulders of the plaintiff.

7. The second circumstance that undoubtedly influenced the trial court was that in Ex. A. 2, the reply sent by the defendant to the plaintiff's notice Ex. B-1, the defence adumbrated by the defendant in his answer had not been set forth in all its detail. The plaintiff's notice, which was sent by an advocate, did not even mention the case of the plaintiff that he had advanced a sum of Rs. 7000 by way of loan to the defendant in January 1959 or that the defendant had repaid a sum of Rs. 4000 in several instalments upto 30-5-1964. There is, therefore, more reason to criticise the plaintiff's notice for its lacunae than to criticise the defendant's reply which was prepared, not by a trained lawyer, but by D. W. 2, who is a part-time accountant of the defendant. Though details are not given in the reply, the defendant has unambiguously denied the truth of the ‘account stated’ and his liability thereunder. We, therefore, disagree with the trial court and answer this point in favour of the appellant.

8. Points Nos. 2 and 3: The expression ‘account stated’ is not a magical incantation, which can exempt a time-barred debt from the bar of limitation. Ex. A. 1 has been characterised in the plaint as an ‘account stated’, evidently with a view to save the plaintiff's claim from getting time-barred. According to the plaintiff, the original loan of Rs. 7000 was advanced by him to the defendant in January 1959. Assuming that Ex. A. 1 is true and genuine, it came into existence on the plaintiff's own showing, on 30-5-1964, that is to say, more than 5 years and 4 months after the date of the original loan. Admittedly, the defendant did not in

writing acknowledge his liability under the loan of January 1959, at any time within three years thereafter. On 30-5-1964, therefore, the plaintiff's claim had become barred by time. There are no words in Ex. A. 1, above the signature of the defendant, to show that he acknowledged the liability to pay the balance of Rs. 7840 under the alleged loan. Even assuming that there were an acknowledgment it would be merely an acknowledgment of a time-barred debt and could not in law operate to revive the debt and give it a new lease of life. No doubt, under Section 25 (3) of the Indian Contract Act, a promise to pay a time-barred debt would be valid and enforceable provided it is made in writing and signed by the person to be charged therewith or by his agent generally or specially authorised in that behalf, to pay whole or in part a debt of which the creditor might have enforced payment, but for the law for the limitation of suits. But there is no such promise contained in Ex. A. 1. Learned counsel for the respondent wants us to construe Ex. A. 1 as embodying an implied promise to pay a time-barred debt. What the section requires is an express promise made in writing and signed by the person to be charged therewith. Nothing short of an express promise, therefore, will provide a fresh period of limitation. It is settled law that an implied promise is not sufficient. In fact, in *Govinda Nair v. Achutan Nair*, AIR 1940 Mad 678, this court held as follows—

“The promise referred to in S. 25, sub-sec. (3) Contract Act, must be an express one and cannot be held to be sufficient if the intention to pay is unexpressed and has to be gathered from a number of circumstances. In other words, there must be a distinct promise to pay before the document could be said to fall within the provisions of this section — See *Ramaswami Pillai v. Kuppuswami Pillai*, 1910 Mad WN 547; *Govind Das v. Sarjudas*, (1908) ILR 30 All 268; *Manraj Sath v. Sethrup Chand* (1906) ILR 33 Cal 1047, and *Mukhilal v. Gul Muhammad*, AIR 1933 Lah 209.”

The distinction between an acknowledgment under Section 18 of the Limitation Act 1963 and a promise within the meaning of Section 25 (3) of the Contract Act is of great importance. Both have the effect of creating a fresh starting point of limitation, if they are in writing signed by the party or his authorised agent. But while an acknowledgment under the Limitation Act in order to be valid, must be made before the expiry of the period of limitation, a promise under Section 25, sub-section (3) of the Contract Act, to pay a debt may be made after the debt has become barred by limitation. Ex. A. 1 which purports to be an account stated, may conceivably amount to an acknowledgment, but it is of no avail to the plaintiff because it is an acknowledgment of a time-barred debt. As it contains no express words

promising to pay a time-barred debt, it will not avail the plaintiff either. In *Jethibai v. Putlibai* (1912) 14 Bom LR 1020, an account stated has been held to be a mere acknowledgment, as distinguished from a promise to pay under Section 25 (3) of the Indian Contract Act.

9. Confronted with these difficulties, learned counsel for the respondent endeavoured to make out that Ex. A. 1 being an account stated, no question of limitation arises. We shall, therefore, examine what is pith and substance of an account stated. In *Bishunchand v. Girdharilal* AIR 1934 PC 147, their Lordships of the Judicial Committee of the Privy Council explained the nature of an account stated in the following words:—

“The essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and by treating the items so agreed on the one side as discharging the items on the other side pro tanto, go on to agree that the balance only is payable. Such a transaction is in truth bilateral, and creates a new debt and a new cause of action. There are mutual promises, the one side agreeing to accept the amount of the balance of the debt as true (because there must in such cases be, at least in the end, a creditor to whom the balance is due), and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such an extent, so that there will be complete satisfaction on payment of the agreed balance. Hence, there is mutual consideration to support the promises on either side and to constitute the new cause of action.”

The observations above quoted show that the essence of an account stated being bilateral the promise to pay made by one party is good enough consideration for the promise made by the other. Such a contract being fully supported by consideration is enforceable at law, and would constitute a new cause of action. But, where in an account of the nature of Ex. A. 1, the relationship between the debtor and the creditor is unilateral, the implied promise of the debtor to pay the creditors a time-barred debt would be an agreement made without consideration, and, therefore, void under Section 25 of the Indian Contract Act, subject of course to the exception contained in sub-section (3) of Section 25 of the Act. In fact, in AIR 1934 P. C. 147, their Lordships, while holding that an account stated would constitute a new cause of action, even though some of the items were statute barred expressly left the question open whether the same principle would be applied if all the items in the account stated were statute-barred. Subsequent to the ruling of the Privy Council, the open question has been settled by three High Courts in India. The first is, *Ganesh Prasad*

ties by their joint labour such properties, in absence of clear indication to the contrary, would also be presumed to be owned by them as joint family properties and their male issues would necessarily acquire a right by birth in such properties vide the case of Satyanarayan v. Lakhiram, ILR (1959) Cut 526. Though there is no express pleading that the properties were acquired by joint labour of Chuin and Nisakar, there is evidence to that effect, as disclosed in the testimony of defendant No. 6 himself. The presumptions of Hindu Law as indicated, therefore, arise and such presumptions have not been rebutted by the plaintiffs. That apart, it appears from the deed of gift that Chuin treated the properties as joint family properties. There is a clear recital in Ex. 7 by Chuin that he along with defendant No. 6 and their respective wives were jointly enjoying and possessing these properties. The import of this recital is clear that Chuin was treating the suit properties as joint family properties and the aforesaid presumptions get reinforced by it. In view of the aforesaid circumstances, I think that the lower appellate court was correct in his ultimate conclusion that the suit properties acquired by Chuin and Nisakar were joint family properties in their hands and, at any rate, Chuin treated the same as such, and proceeded to dispose of the suit on that footing.

8. In the result, therefore, there is no merit in this appeal which is dismissed but without costs.

Appeal dismissed.

AIR 1975 ORISSA 161

S. K. RAY, J.

Suresh Chandra Bal and others, Appellants v. Niranjana Bal, Respondent.

First Appeal No. 163 of 1972, D/- 6-1-1975.*

(A) Succession Act (1925), S. 266 — Probate of will — Genuineness of will and executor's testamentary capacity — Burden of proof — Principle — Registration of will — Inference — (Evidence Act (1872), Ss. 101-104).

The onus is heavy on the propounder to prove that the will was executed by the testator voluntarily with his free will and mind. The presumption of genuineness of the will arising out of the fact of its registration cannot be of any avail to the propounder where the evidence shows that the registration was done in a perfunctory manner and the officer registering the will did not read it over to the testator nor did he bring home to him that he was admitting the execution of a will. Registration by itself cannot dispel all the

suspicious circumstances surrounding the execution of a will. (Para 10)

Where the caveator did not expressly plead undue influence or coercion, but with sufficient clarity indicated that the will was an act of forgery and was executed when the testator was not in a sound disposing state of mind then even though the initial onus of proof of fraud, undue influence is on the caveator, nevertheless, it is for the legatee to satisfy the court that the will was not affected by any of these infirmities. The principle is that the burden of proof is always on the person who seeks to sustain a transaction entered into with a Pardanashin lady or an illiterate person to establish that the said document was executed by them after clearly understanding the nature of the transaction, and unless that burden is discharged the physical act of signing the document cannot be treated as the mental act of its author. AIR 1959 SC 443 and AIR 1962 SC 567 and AIR 1965 SC 354 and AIR 1962 Andh Pra 178, Rel. on. (Paras 11, 12, 13)

Cases Referred :	Chronological	Paras
AIR 1965 SC 354 = (1964) 6 SCR 814		8
AIR 1962 SC 567 = (1962) 3 SCR 195		8
AIR 1962 Andh Pra 178		8
AIR 1959 SC 443 = 1959 SCJ 507		8

M. Sinha, for Appellants; R. Ch. Mohanty, P. K. Patnaik and J. P. Das, for Respondent.

JUDGMENT :— The respondent filed an application under Sections 266 and 276 of the Indian Succession Act, 1925 for grant of probate of the registered will dated 2-8-1968 of one Kinu Bal who died on 17-11-1968. This was registered as O. S. No. 1 of 1971 in the court of the District Judge, Cuttack. By decision dated 11-5-1972 the District Judge directed issuance of letters of administration with a copy of the will annexed in favour of the applicant Niranjana Bal on his furnishing security to the extent of Rs. 15,000/-. The appellants who had appeared in response to citations issued by the District Judge claiming an interest in the estate of the deceased being aggrieved with the aforesaid decision have filed the present appeal.

2. The appellant No. 1 lodged caveat against the grant of probate of the will with the District Judge. In his written statement the appellant No. 1 challenged the genuineness of the will and the testamentary capacity of the testator on various grounds set out in paras 3, 4, 5 and 6 thereof. In para 3 the will was alleged to be a forged document and the averments therein were said to be false, fabricated and outcome of fraud on the testator. In paras 4, 5 and 6 the allegations were that the testator due to long illness had become completely imbecile, had lost his power of understanding and never understood the contents of the alleged will, and, therefore, had not the testamentary capacity. Further it has been said that the will has not been validly attested according to law.

*(From order of P. K. Mohanty, Dist. J., Cuttack in O. S. No. 1 of 1971, D/- 11-5-1972).

3. The sole question for determination in this appeal is whether the will is genuine or not and whether the testator had testamentary capacity in executing the same.

4. Appellant No. 1 filed Title Suit No. 4/29 of 1966/63 on 18-3-1963 for partition of joint family properties against the testator claiming to be his adopted son. Three days later, on 21-3-1963, the testator also filed Title Suit No. 5/44 of 1966/63 for a declaration that the appellant No. 1 was not his adopted son. These two suits were disposed of by judgment dated 14-3-1967 in which it was found that the appellant had in fact been adopted by the testator, but the adoption was invalid in law being in contravention of the provisions of Section 9 (2) of the Hindu Adoptions and Maintenance Act. In those suits two other questions were agitated, viz., whether the testator had made an earlier adoption of one Prahallad and on the latter's death, adopted the appellant for the second time and whether Buli Bewa was the married wife of the said Prahallad and, as such, the daughter-in-law of the testator. The finding was that Prahallad had not been adopted by the testator but Buli was his wife. Two First appeals were carried to this court from the decision in those two suits which were numbered as 153 of 1967 and 125 of 1970. These two first appeals have been disposed of today in which it has been held that the appellant is the adopted son of the testator, that Prahallad had been earlier adopted, and that Buli Bewa is his widow. It may also be noted here that the propounder of the will has admitted in his application for grant of probate that Buli Bewa is the daughter-in-law of the testator.

5. The propounder's case, as appears from the evidence led by him, is that the testator was quite hale and hearty when he executed and registered the will on 2-8-1968. In fact, he went from his village to Chandol a distance of two miles on foot and therefrom to Kendrapara by bus and from bus stand he went to the Sub-Registrar's office, half a mile away, by walking and executed the will. The will was scribed by P. W. 1 on instruction of the testator. The contents of the will were then read over and explained to the testator who thereafter signed the same. The testator was not suffering from any kind of illness as suggested by the caveators.

6. The relevant recitals in the will are: His adopted son Prahallad having died issueless in 1958 leaving behind his widow Buli Bewa, the testator lived in great sorrow with his widowed daughter-in-law. Considering his desolate condition the legatee who is his nephew voluntarily managed his properties for the last five years and also looked after his personal comfort and did all his work according to his wishes. For all these reasons the testator developed great affection for the legatee, and being assured in his mind that the legatee would manage his properties

and would look after him till his death and would perform his obsequies thereafter executed this will, bequeathing all his properties to the legatee and providing that his widowed daughter-in-law to be maintained out of the income of the said properties during her lifetime.

7. The appellants, as already stated, have impugned this will on the ground of want of testamentary capacity of testator. The propounder has examined three witnesses and has proved the will Ext. 1. The caveators, on the other hand, have examined eight witnesses and exhibited a number of documents. On a consideration of the evidence, the District Judge has held:—

".....I have no hesitation to hold that the will was duly executed and attested and that the testator was in a sound disposing state of mind at the time of its execution"

8. The Supreme Court in a number of cases has laid down guidelines for dealing with cases of this nature where the issue is regarding the genuineness or otherwise of the will and sound disposing state of mind of the testator. It is appropriate to briefly indicate these principles in the background of which the evidence has to be scanned.

In the case of *H. Venkatachala Iyengar v. B. M. Thimmajamma*, AIR 1959 SC 443 their Lordships said that the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of Sections 67 and 68 of the Evidence Act and Sections 59 and 63 of the Indian Succession Act. Under Section 67 of the Evidence Act the signature of the testator must be proved to be in his handwriting which can be done by proof of opinion of Experts or by evidence of persons acquainted with the handwriting of the testator and the will has to be proved like any other document except as to the special requirements of attestation prescribed by S. 63 of the Indian Succession Act. It is certainly idle to expect proof with mathematical certainty, but the test to be applied would be the usual test of the satisfaction of a prudent mind in such matters. Since in the case of proof of wills the testator having died cannot say whether it is his will or not, an element of solemnity in the decision of the question as to the genuineness of the will is introduced. The burden is on the propounder to establish by satisfactory evidence that "the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will." This onus can be taken to be discharged only on proof of essential facts just indicated. Where there are suspicious circumstances surrounding the execution of a will, like the signature of the testator being shaky and doubtful which is not removed by evidence of the signature

being that of the testator, the mind of the testator appearing to be feeble and debilitated which creates a doubt as to the mental capacity of the testator, disposition made in the will appearing to be unnatural, improbable or unfair in the light of relevant circumstances indicating thereby that the said disposition may not be the result of the testator's free will and mind, the initial onus of the propounder becomes very heavy. Unless these suspicious circumstances are satisfactorily explained the court will be reluctant to treat the document as the last will of the testator and a product of his free will and mind. Their Lordships further go to say :

"It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."

Where propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. In deciding the question whether the will is the last will of the testator borne out of a free will and mind the judicial conscience of the court must be fully satisfied. Their Lordships further said :—

"It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties.

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It is no doubt true that on the proof of the signature of the deceased or his acknowledgement that he has signed the will he will be presumed to have known the provisions of the instrument he has signed; but the said presumption is liable to be rebutted by proof of suspicious circumstances. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. That inevitably would be a question of fact in each case."

In the case of Rani Purnima Debi v. Kumar Khagendra Narayan Deb, AIR 1962 SC 567 their Lordships said that the fact of registration of a will is a circumstance prov-

ing its genuineness. But that by itself will not be sufficient to dispel all suspicions regarding it where suspicion exists, without submitting the evidence of registration to a close examination. "If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of the property and thereafter he admitted its execution and signed it in token thereof, the registration will dispel the doubt as to the genuineness of the will. But if the evidence as to the registration shows that it was done in perfunctory manner, that the officer registering the will did not read it over to the testator or did not bring home to him that he was admitting the execution of a will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the will) that the testator knew that it was a will the execution of which he was admitting, the fact that the will was registered would not be of much value." In this case the earlier case of AIR 1959 SC 443 was referred to and relied upon.

In the case of Ramchandra Rambux v. Champabai, AIR 1965 SC 354 the same principle was reiterated in the following words :—

"Where there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator." Their Lordships further said :—

"In order to judge the credibility of the witnesses, the court is not confined only to the way in which the witnesses have deposed or to the demeanour of witnesses, but it is open to it to look into the surrounding circumstances as well as the probabilities, so that it may be able to form a correct idea of the trustworthiness of the witnesses."

In judging the genuineness or otherwise of the will the oral evidence must be appreciated in conjunction with surrounding circumstances which have been brought out in the evidence or which appear from the nature and contents of the documents adduced.

The aforesaid principles regarding the onus of proof of the will and the nature of proof have been reiterated in the case of Ryali Kameswara Rao v. Bendapudi Suryaprakasarao, AIR 1962 Andh Pra 178.

9. The suspicious circumstances which appear from the evidence on record are as follows :—

(a) The testator had about 4 acres of land, valued by the propounder at Rs. 4,000/- and yet the testator has provided nothing more than mere maintenance for his widowed daughter-in-law during her lifetime which again has neither been specified nor charged on the properties bequeathed to the legatee.

(b) It appears from Exts. B and C that the testator had adopted the appellant No. 1. But subsequently for some reason litigation had commenced between him and appellant No. 1 regarding the factum of adoption. It is after the disposal of the adoption suit on 14-3-1967 in his favour that the testator proceeded to execute the will. It had been found in the adoption suit that the testator had, in fact, adopted the appellant No. 1, but it was found invalid on some legal ground which could not be in the mind of the testator at the time of adoption. In the analogous First Appeals No. 153 of 1967 and No. 126 of 1970, the adoption has been found to be valid and, accordingly, appellant No. 1 is a coparcener with the testator in respect of the properties which being joint family properties could not be bequeathed entirely by will. Similarly, in view of the admitted position that he had adopted Prahallad who, as will appear from Exts. B and C died sometime in 1958, after coming into force of the Hindu Succession Act, 1956, the said widowed daughter-in-law had admittedly a share in the properties and yet under this will she has been deprived of her interest in the property and has been given a mere maintenance in lieu thereof.

(c) The propounder has taken active part in execution and registration of the will under which he has got substantial benefit. The respondent has been described as the universal legatee and the entire property movable and immoveable has been given to him. According to P. W. 1 the scribe, Niranjan Bal, the legatee, accompanied the testator and told him that the will was to be executed in his favour and approved the draft. It is the legatee again who saw the draft and approved it before it was finally scribed. It is the legatee again who went to P. W. 1 to take return of the will after registration. He was also present at the time of execution of the will.

(d) The testator was so ill that he had to be admitted into Kendrapara Hospital on 2-8-1968, in an unconscious state. It appears from the evidence of D. W. 6 Dr. Lokanath Das that he was treating the testator at the village, but as the illness did not respond to his treatment, he advised his removal to the Kendrapara Hospital and made arrangements for it on 1-8-1968.

10. The onus, therefore, is heavy on the propounder to prove that the will was executed by the testator voluntarily with his free will and mind. The presumption of genuineness of the will arising out of the fact of its registration cannot be of any avail to the propounder in this case, because the evidence shows that the registration was done in a perfunctory manner and the officer registering the will did not read it over to the testator nor did he bring home to him that he was admitting the execution of a will, nor did he satisfy himself in some other way that it was a will the execution of which he was admitting. Thus registration of the will by itself cannot

dispel all the suspicious circumstances surrounding the execution of the will. It is significant to note that the propounder has not summoned the Sub-Registrar to prove that the registration was properly done, despite allegation of fraud and want of testimonial capacity made by the appellant. That the testator was ill on the date of execution and registration of the will is clear from the evidence of D. W. 6, the village doctor, and D. W. 8, doctor of Kendrapara hospital. According to D. W. 6 the testator was suffering from diarrhoea, anemia and asthma and his face and legs were swollen on 1-8-1968. He was suffering from all these ailments since about 15 days prior thereto. He was unable to respond to the repeated calls except by uttering "Hum" and was not in a position to understand things. It appears from the testimony of the hospital doctor (D. W. 8) and Ex. A, the bed head ticket, that the testator was admitted into hospital on 2-8-1968 suffering from diarrhoea and extreme dehydration. His temperature was 97.6° and pulse rate was 80 per minute and feeble. He was unconscious at the time of admission. D. W. 8 says that he considered the condition of the testator to be serious, though he attained slight consciousness after medicine and glucose injection were administered. D. W. 8 and Ex. A both corroborate D. W. 6, the village doctor. Till 5-8-1968 the condition of the patient continued to be critical and D. W. 8 was not willing to discharge him even on 8-8-1968. He, however, discharged him against his better medical opinion when Kusha Pradhan, a relation of the testator insisted on his removal on his own responsibility and made an endorsement to that effect on the reverse of the bed head ticket (Ex. A). This endorsement shows that the patient was not in a fit state of mind to decide for himself whether to remain in the hospital or to be taken to his village where there was no facility for adequate treatment of his illness. There is no reason to discard the evidence of these two medical witnesses and in view of their testimony it is impossible to give credence to the evidence of P. Ws. 1, 2 and 3 who say that the testator was in a sound state of body and mind at the time of execution of the will. D. W. 1, an attesting witness to the will substantially supports the caveator's case, namely that the testator was suffering from serious type of dysentery and asthma and occasionally from diarrhoea for about one year prior to the date of execution and registration of the will, and he was not in a position to understand the questions put by the Sub-Registrar to him and to give intelligible coherent answers. When the Sub-Registrar asked the testator whether he had executed the will, the latter did not give any answer and remained silent. The legatee at that juncture pacified all the possible suspicions by telling the Sub-Registrar that the testator due to dysentery and weakness was unable to speak and replied for the testator that the will had been properly

executed. According to him nobody read over the contents of the will and explained the same to the testator in presence of the Sub-Registrar. Having regard to this sort of evidence, it is extremely doubtful that the testator was in sound disposing state of mind and executed the will with his free will and mind. Another suspicious circumstance in this connection is that the testator did not sign with the pen with which the will was scribed and the signature of the testator is so placed in the third page of the will that it indicates as if the writing of the will was done on paper subsequent to the testator putting his signature thereon. On the reverse of the first page of the will originally the signature of the testator was dated 2/3 and the figure '3' appears to have been subsequently converted to '8'.

11. Though the caveator did not expressly plead in his written statement that the will was executed under undue influence or coercion, but he has with sufficient clarity indicated that the will was an act of forgery and was executed by the testator when he was not in a sound disposing state of mind, in other words, he has specifically raised the point of absence of testamentary capacity of the testator. In the peculiar circumstances of the case, even though the initial onus of proof of fraud, undue influence is on the caveator, nevertheless, it is for the legatee to satisfy the conscience of the court that the act of execution of the will was not affected by any of these infirmities as a part of his initial onus which he has failed to discharge.

12. The testator who examined himself in his adoption suit (First Appeal No. 153 of 1967), judgment of which has been exhibited in this case, had stated that he was illiterate and could sign with difficulty. His signatures on the will itself indicate that he had not a steady and mature hand. In the circumstances, the special cloak of protection that is thrown on Pardanashin women in respect of transactions entered into by them should also be extended to the testator who is an illiterate person, in respect of the execution of the will, and the same principle which is involved in determining whether documents taken from Pardanashin women have been executed by the (woman) voluntarily and freely should apply to the present case. The principle is that the burden of proof is always on the person who seeks to sustain a transaction entered into with a Pardanashin lady or an illiterate person to establish that the said document was executed by them after clearly understanding the nature of the transaction, and unless that burden is discharged the physical act of signing the document cannot be treated as the mental act of its author. The legatee has failed to discharge this burden, in respect of the will Ex. 1.

13. Considering all the suspicious circumstances enumerated above and the medical evidence and scrutinising the entire evidence carefully, I must say that the evidence led

by the legatee falls short of satisfying me, in the circumstances of this case, that the testator knew that the will which he executed was an act of his free will and mind, or that he had testamentary capacity or was in a sound disposing state of mind when he executed the same. I must say that the learned District Judge did not analyse and appreciate the evidence in the context of the legal principles enunciated by the Supreme Court as enumerated above and that led to an error in his ultimate conclusion.

14. In the result, the appeal must succeed and accordingly, it is allowed and the respondent's petition for grant of probate of the will annexed to the petition is dismissed. The appellants are entitled to costs throughout.

Appeal allowed with costs.

Appeal allowed.

AIR 1975 ORISSA 165

G. K. MISRA, C. J.

Saura Bauri and others, Petitioners v. Subudhi Laxminarayana and others, Opposite Parties.

Civil Revn. No. 415 of 1973, D/- 10-12-1974.*

(A) Limitation Act (1963), Arts. 64, 65 — Suit on both proprietary and possessory title — Onus on plaintiff to prove proprietary title — Adverse possession by defendants — Effect.

Where plaintiffs' claim relies both on proprietary and possessory title, the onus is on the plaintiffs to prove their proprietary title. If plaintiffs have title, that can be dislodged only by proof of acquisition of title by adverse possession by defendants. If defendants have acquired title by adverse possession then plaintiffs' suit for declaration of title is liable to be dismissed. If on the other hand plaintiffs fail to prove independent proprietary title they would also succeed to get possession of the disputed lands if they prove that they were in earlier possession and were dispossessed by defendants who claim no independent title. If the possession of defendants falls short of the requisite prescriptive period of 12 years and the plaintiffs have anterior possession then plaintiffs would not be entitled to declaration of title, but to mere recovery of possession. ILR (1963) Cut 482, Foll. (Paras 3, 4)

Cases Referred: Chronological Paras
ILR (1963) Cut 482 4

Y. S. N. Murty, for Petitioners; B. Pal, for Opposite Parties.

ORDER:— Plaintiffs' suit was for declaration of title and recovery of possession of disputed lands fully described in the schedule attached to the plaint. Their case is that

*(From order of P. Misra Sub. J., Nayagada in T. A. No. 5 of 1973, D/- 14-8-1973).

BS/CS/A599/75/HGP

they and their ancestors have been enjoying the lands long since, and defendants 1 to 4 have no right, title and interest in the disputed lands. Taking advantage of a wrong entry in the record of rights these defendants trespassed upon the disputed lands in 1962. The suit was filed in 1967 seeking declaration of title and recovery of possession and other reliefs.

Defendants 1 to 4 contested the suit alleging that they have been in possession of the disputed lands from 1951 onwards and they have acquired title by adverse possession. They do not claim any independent title apart from adverse possession.

2. The trial court recorded the following findings:—

- (1) Defendants 1 to 4 are in possession of the disputed lands from 1951 (1961?);
- (2) Plaintiffs were in possession of the disputed lands from 1948 to 1961;
- (3) The disputed lands stood originally recorded in the name of Choudhury Sundaranarayan;
- (4) Plaintiffs have not established their independent title to the disputed lands.

The learned trial court however declared the title of the plaintiffs and allowed recovery of possession of the suit lands on his finding that the plaintiffs were in anterior possession and defendants 1 to 4 were subsequent trespassers.

Against the trial court decree defendants 1 to 4 filed an appeal before the Subordinate Judge, Rayagada. He set aside the judgment of the trial court and directed that plaintiff would be given an opportunity to correct Ext. 1 (Record of rights) with that of estate patta No. 6. Opportunity was given to the parties to give further evidence.

It is against the appellate order remanding the suit that this civil revision has been filed.

3. It would be apparent from narration of facts that plaintiffs claim relief both on proprietary and possessory title. The onus is on the plaintiffs to prove their proprietary title. If plaintiffs have title, that can be dislodged only by proof of acquisition of title by adverse possession by defendants 1 to 4. If contesting defendants have acquired title by adverse possession then plaintiff's suit for declaration of title is liable to be dismissed.

4. If on the other hand plaintiff fail to prove independent proprietary title they would also succeed to get possession of the disputed lands if they prove that they were in earlier possession and were dispossessed by defendants 1 to 4 who claim no independent title. In other words, if the possession of defendants 1 to 4 falls short of the requisite prescriptive period of 12 years and the plaintiffs have anterior possession then plaintiffs would not be entitled to declaration of title, but mere recovery of possession. The law on the subject has been fully discussed in ILR (1963) Cut 482, (Gadadhar Sahu v. Karsanbasta Patel).

5. Both the parties have entered into evidence and question of giving them opportunity to adduce further evidence does not arise. The learned lower appellate court exercised his jurisdiction illegally in resorting to a short circuit and remanding the case to the trial court. His judgment directing remand is hereby set aside.

6. When the case would go back to the lower appellate court he would address himself to the following questions on the basis of materials on record:—

- (1) Have the plaintiffs title to the disputed lands?
- (2) Have defendants 1 to 4 acquired title to the disputed lands by adverse possession?
- (3) Were the plaintiffs in possession of the disputed lands earlier than the defendants, and if so for what period?
- (4) If the defendants have acquired no title by adverse possession and the plaintiffs had anterior possession and were dispossessed by defendants 1 to 4, then a decree for possession should be granted in favour of the plaintiffs without passing a decree for declaration of title.

7. On the aforesaid analysis, the judgment of the lower appellate court is set aside and the case is sent back to him for disposal in accordance with law and directions given above. The civil revision is allowed as indicated above. Costs will abide the result.

Case remanded.

AIR 1975 ORISSA 166

R. N. MISRA AND
P. K. MOHANTI, JJ.

Rama Krushna Swain, Appellant v. Smt. Fulamani Kamila and another, Respondents.
A. H. O. No. 25 of 1973, D/- 18-11-1974.*

(A) Letters Patent (Orissa), Cl. 11 — In deciding appeal court has not the fetters of S. 100, Civil P. C. (Para 4)

(B) Civil P. C. (1908), O. 23, R. 3 — Enquiry under — Scope of — AIR 1956 Bom 569, Dissented from; (1973) 2 Cut WR 1727, Reversed.

The enquiry envisaged under the Rule admits of two questions being examined, that is:—

- (1) (a) whether there has been an adjustment or compromise;
- (b) whether such adjustment or compromise is lawful and
- (2) challenge on ground of undue influence, fraud, or misrepresentation make an agreement voidable and not void and when a compromise

*(From judgment of Single J. of this Court reported in (1973) 2 Cut WR 1727).

is challenged on such ground, the matter is not within the ambit of Rule 3 and must be left to be decided by an independent suit. AIR 1956 Bom 569, Dissented from; Order in (1973) 2 Cut WR 1727, Reversed. (Para 8)

Cases Referred :	Chronological	Paras
AIR 1963 Raj 63 = 1962 Raj LW 651	6	
AIR 1961 All 529	6	
ILR (1961) 1 Andh Pra 302 = 1961 Andh LT 8	6	
AIR 1959 Ker 130 = 1958 Ker LJ 1005	6	
AIR 1957 All 450	6	
AIR 1956 Bom 569	7	
AIR 1953 Hyd 62 = ILR (1952) Hyd 706	6	
AIR 1952 Cal 73	6	
AIR 1950 Mad 728 = (1950) 1 Mad LJ 524	6	
AIR 1940 Bom 60 = 41 Bom LR 1290	6	
AIR 1935 All 137 = 1934 All LJ 1183	6	
AIR 1930 PC 158 = 57 Ind App 133	7	
AIR 1928 All 494 = 26 All LJ 691	6	

R. Mohanty, for Appellant; P. C. Mohapatra, D. Mohanty and G. Sahu, for Respondents.

R. N. MISRA, J.:—Baina and Banamali were two brothers. Baina died in the year 1950 leaving behind his widow Fulamani (Plaintiff). Banamali started oppressing the plaintiff with a view to grabbing the properties. Plaintiff, therefore, sought protection of defendant No. 1. Defendant No. 1 taking advantage of the fact that plaintiff was a pardanasin and illiterate lady had an eye on her properties. He got a sale deed executed by plaintiff, but she having come to know of the evil designs of defendant No. 1 objected before the Sub-Registrar. After enquiry, an order was duly made under the Registration Act for registration of the document. The plaintiff, therefore, instituted Title Suit No. 16 of 1966 for a declaration that defendant No. 1 acquired no title under the sale deed dated 15-2-1966. She impleaded an alienee from her as second defendant.

The suit was posted for trial to 28-2-68. On 24-2-1968, plaintiff and defendant No. 1 filed a petition of compromise. Plaintiff applied for expunging the name of the second defendant from the record and parties asked for advancing the date of the trial to 24-2-1968 so that the suit could be disposed of in terms of the compromise. On 24-2-1968, the Court made the following order:—

"Plaintiff and defendant No. 1, file a compromise petition and two more petitions, one for putting up the record today for recording the compromise and another to expunge defendant No. 2 from record since the plaintiff seeks no relief against defendant No. 2. Learned Advocate for defendant No. 2 appears and prays to postpone the recording of compromise till the date fixed since he wants to cite some rulings against such compromise between plaintiff and defendant No. 1. Heard Advocates of both parties. I find no

valid ground to postpone the recording of compromise but the final order on the suit will be passed later on. The compromise is read over and explained to plaintiff and defendant No. 1 and they admit the same to be correct.

Put up on the date fixed."

On 28-2-1968, defendant No. 2 filed a petition for being transposed as plaintiff. On 9-3-1968, to which date the matter was posted inviting objections against defendant No. 2's application, plaintiff filed an application saying that the compromise placed before the court was not in accordance with the terms agreed upon.

2. The learned Subordinate Judge entered into an enquiry purporting to be under Order 23, Rule 3 of the Code of Civil Procedure and after hearing parties rejected the applications of the plaintiff and defendant No. 2 on a finding that the compromise dated February 24, 1968, was lawful and should, therefore, be recorded.

3. Against this decision of the learned Subordinate Judge, Miscellaneous appeal No. 158 of 1969 was carried to this court under Order 43, Rule 1 (m) of the Code of Civil Procedure and came to be disposed of by our learned brother B. K. Ray, J. on 26th October, 1973. The learned Single Judge came to hold that the plaintiff had not signed the compromise deed after understanding its terms and, therefore, there was no agreement as set up by defendant No. 1 for adjustment of the suit. The stand taken by defendant No. 1 that the question of undue influence and fraud pleaded by plaintiff must be left to be disposed of by an independent suit was negatived. The order disposing of the suit in terms of the compromise was thus vacated. Defendant No. 1 challenges the appellate decision of the learned Single Judge.

4. Plaintiff's stand in her objection to the compromise was that it was the outcome of fraud practised on her. Defendant No. 1 had taken the stand both before the learned Trial Judge as also the learned Single Judge of this court that an enquiry on the ground of fraud did not come within the ambit of Order 23, Rule 3 of the Code of Civil Procedure and, therefore, she should have been left to an independent suit. Order 23, Rule 3 of the Code is to the following effect:—

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole of any part of the subject-matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

Where one party alleges that the suit has been adjusted by a lawful agreement and applies to the court to record the agreement and to pass a decree in accordance therewith, but the other party denies the agreement, a

situation arises where the party claiming adjustment has to prove to the satisfaction of the court that the suit has been adjusted. Two aspects would be relevant to such an enquiry, namely, (i) whether there has been an adjustment and (ii) whether such adjustment is by a lawful agreement or compromise. Satisfaction of the court can be reached only when the party asking the court to record the compromise satisfies it on both these counts. On both these aspects the findings of the learned Single Judge are against defendant No. 1. Mr. Ranjit Mohanty on behalf of defendant No. 1 challenges both the findings. It is not disputed at the Bar that while disposing of a Letters Patent Appeal, the court has not the fetters of Section 110 of the Code of Civil Procedure.

5. The petition of compromise between plaintiff and defendant No. 1 was presented in court on 24-2-1968. Plaintiff's stand is that she happens to be a pardanashin and illiterate lady, the contents of the document had not been read over to her and she was made to sign the document without understanding its contents. Even if there be truth in such stand, plaintiff must have come to know the terms of the compromise when the same were read over and explained to her in court. The last part of order No. 43 dated 24-2-1968 in the suit is as follows:—

".....The compromise is read over and explained to plaintiff and defendant No. 1 and they admit the same to be correct." The order recorded by the learned Subordinate Judge goes a long way against plaintiff's stand. Heavy burden lay on her to show that the aforesaid order was erroneous, that is, as a fact, the compromise was not read over and explained to the parties and they had not admitted the same to be correct. Court's proceedings are sacrosanct and when the Presiding officer of a Court records an order particularly as to what happened in the proceeding before him, due sanctity has to be attached thereto. Thus apart from the burden lying on a party who wants to negative the presumptions arising under Sec. 114 of the Evidence Act, heavier burden lies when an order of the Court recording the proceedings is challenged on the ground that it does not reflect the true position. Plaintiff has rested content by examining herself alone to discharge this heavy burden. She made no statement about it in her evidence-in-chief. In cross-examination by defendant No. 1, the following has been brought out from her:—

"It is not a fact that the Court read over and explained the contents of the compromise. We all admitted its terms I have come to Court on 24-2-1968 along with defendant No. 1. It is not a fact that the Peskar of the Court read out the terms of the compromise to us in our presence and we admitted the correctness of the same." Plaintiff did file an objection before the learned Subordinate Judge against the compromise on 9-3-1968. Therein no whisper was made

that an erroneous order had been recorded by the learned Subordinate Judge on 24-2-1968. Ordinarily in a situation like this, a party is required to approach the very court for rectification of an error of this type. Nothing was, however, done in the trial court to have alteration of the order dated 24-2-1968. The learned Single Judge has drawn adverse inference against defendant No. 1 for non-examination of the Peskar. We do not think, defendant No. 1 had any burden to discharge. It was open to him to remain content by placing reliance on the order of the court. The order of the court by itself was sufficient protection so far as he was concerned and he had no necessity to lead evidence in support of the order for its reinforcement. We would accordingly hold that even if plaintiff had not been explained the contents of the compromise at the time she signed the same, the terms of the compromise were read over and explained to her in Court and after due understanding thereof, she admitted the terms to be correct.

6. Next comes the question as to whether the agreement was lawful. There seems to be some dispute about the meaning of the term "lawful." We shall now proceed to examine this aspect. In the case of Qadri Jahan Begam v. Fazal Ahmad, AIR 1928 All 494, the Court indicated that the word "lawful" refers to agreements which in their very terms or nature are voidable at the option of one of the parties thereto, because they have been brought about by undue influence, coercion or fraud.

In the case of Hussain Yar Beg v. Radha Kishan, AIR 1935 All 137, the same view was reiterated and it was further indicated that a party alleging fraud cannot be allowed to avoid the compromise admittedly executed by it in proceedings started by an application under Order 23, Rule 3 of the Code. Rule 3 is mandatory in its terms and provides that if it is proved to the satisfaction of the Court that a suit has been adjusted by a lawful compromise, the court has no option but to order such compromise to be recorded and pass a decree in accordance thereof.

In the case of Mst. Shujarat v. Mohd. Raza, AIR 1957 All 450, the Court pointed out that the rule required a Court, when it was pointed out to it that the suit has in the whole or in part been adjusted by a lawful agreement, to record that agreement, and to pass a decree accordingly. The court, before it will proceed to record the agreement, or pass a decree in accordance therewith, will require to be satisfied that the agreement pleaded by any party has in fact been reached. Whether the agreement so reached between the parties is voidable or can otherwise be avoided by any party thereto on any other ground, is a different matter from the fact whether the agreement itself has been reached between them. Similar view was taken in a later decision in the case of Ram Asrey v. Rameshwar Prasad, AIR 1961 All 529. In

the case of Syed Liakat Hussain v. Syed Khasim Hussain, ILR (1961) Andh Pra 302, the Andhra Pradesh High Court has also taken the same view.

In the case of Western Electric Co. v. Kailash Chand, AIR 1940 Bom 60, Kania, J. (as the learned Judge then was) held that the term "lawful agreement" excludes not only unlawful agreements the object or consideration for which is unlawful as defined in the Contract Act, but all agreements which on the face of them are void and, therefore, will not be enforced by the court. For this purpose no inquiry is necessary because the terms of the agreement themselves will show the defect. The Court, therefore, has to consider whether on the face of the agreement it is lawful or not. The word "lawful" cannot be construed as wide enough to include an inquiry whether the agreement is voidable or not.

In the case of Harbans Singh v. Bawa Singh, AIR 1952 Cal 73, the view indicated in the earlier decisions of the Allahabad High Court and the aforesaid Bombay decision was approved and the learned Judge stated:—

"Under the provisions of Rule 3 of Order 23 the Court must order a compromise to be recorded where it is proved to its satisfaction that a suit had been adjusted wholly or in part by any 'lawful agreement or compromise'. Fraud, undue influence or coercion make a contract voidable and not void. The question arises whether in an application under Order 23, Rule 3 the Court must consider the contract as not a lawful agreement or compromise because one party seeks to avoid it on the ground of fraud, undue influence or coercion, ..."

After referring to the decisions indicated above, the learned Judge came to hold that the enquiry on the ground of fraud was beyond the scope of Rule 3.

A Bench of the Hyderabad High Court in the case of A. Mohiuddin v. Abdurrahman, AIR 1953 Hyd 62 held that the words of Order 23, Rule 3 of the Code of Civil Procedure signify that where a suit has been adjusted by lawful agreement, it is obligatory on the court to order such agreement or compromise to be recorded. Where, therefore, one of the parties applies for setting aside a compromise petition filed by both the parties on the ground that his signature on the petition was obtained by undue influence, his remedy is to file a regular suit for avoiding the compromise which is voidable at his option. He cannot move the court to set it aside in the same proceedings.

Dealing with the question in issue, a Bench of the Kerala High Court in the case of Krishan v. Ravarappam, AIR 1959 Ker 130 stated that the word 'lawful' in Order 23, Rule 3 refers to agreements which in their very terms or nature are not 'unlawful' and may, therefore, include agreements which are

voidable at the option of one of the parties thereto, because they have been brought about by undue influence, coercion or fraud. A contract which is brought about either by undue influence, misrepresentation or fraud is under Section 19 (a) of the Contract Act, merely voidable and not absolutely illegal or unlawful.

A Bench of the Madras High Court in the case of Kuppuswami v. Pavanambal, AIR 1950 Mad 728, dealing with the matter stated:

".....It has been held that under O. 23, R. 3, Civil P. C., a compromise cannot be attacked by allegations that it is a voidable compromise brought about by fraud, undue influence and duress. Provided the compromise is lawful, that is, not contrary to law, the court is obliged to record it. The mere fact that it may be voidable is no reason for a court refusing to record it....."

In the case of Putto Lal v. Sumersinghji, AIR 1963 Raj 63, a Division Bench examined the legal position at length and came to hold:—

"The meaning of the word 'lawful' in the phrase 'any lawful agreement or compromise' occurring in Order 23, Rule 3 is that the agreement or compromise must not be unlawful by the nature of its terms or on the face of it. In other words, it would be unlawful if the consideration or the object of the agreement is forbidden by law, or is of such a nature that if permitted it would defeat the provision of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy as provided by Section 23 of the Contract Act. Again, the agreement would be unlawful, if it is void on the very face of it at law such as where it may be by way of wager or in restraint of the marriage of any person or for any other similar reason. Thus it would certainly be the duty of the Court where it is asked to record a compromise under this provision to see that the compromise is or is not lawful in this sense; and if it is not so lawful it must refuse to record it. But where the contention is not that the object or the consideration of the agreement was unlawful in the sense indicated above, or that it was void on the face of it, but that it was brought about by undue influence or fraud or coercion, then such an agreement, provided of course it is proved to have been made, should not be condemned as unlawful within the meaning of this provision for it is only voidable and not void. And being voidable it could be avoided and displaced only after proper investigation and adjudication in a proceeding appropriate for the purpose, that is a suit; and until that is done, such agreements should be accepted to be lawful for the limited purposes of Order 23, Rule 3. The reason is that any full-fledged investigation in this regard in what after all is said and done in an interlocutory proceeding would be highly inconvenient and the result thereof could by

no means be properly accepted as conclusive for all purposes. Therefore, the courts have heavily leaned towards the view that a party disputing the compromise on any such ground should be left free to seek its remedy in this behalf by means of a separate suit with the result that the compromise should not be refused to be recorded on any such grounds as last-mentioned; and the court should nevertheless record the compromise and pass a decree in accordance with it provided of course the other requirements of the rule are satisfied."

7. Our learned brother has placed reliance on a Single Bench decision of the Bombay High Court taking a contrary view in the case of *Misrilal v. Sobhachand*, AIR 1956 Bom 569. This Bombay decision has not been accepted as laying down good law by two other High Courts, namely, Kerala High Court and Rajasthan High Court in the two decisions referred to above. That apart the learned Single Judge deciding the case reported in AIR 1956 Bom 569 was bound by the earlier Single Bench decision of the same court in the case of *Western Electric Co. v. Kailas Chand*, AIR 1940 Bom 60 and could not have taken a different view. Some of these decisions which we have cited above were noticed by our learned brother, but he is of the view that they do not lay down the correct law. Our learned brother also relied upon a decision of the Privy Council in the case of *Sourendra Nath v. Tarubala Dasi*, AIR 1930 PC 158. As we find, the Judicial Committee nowhere took a view different from what has been laid down as the law by various High Courts in India. The main question for consideration was as to whether an Advocate had the authority to compromise which bound his client. Therefore, the question of the meaning of the word 'lawful' occurring in Rule 3 of Order 23 of the Code was not under consideration. On the other hand, the learned Law Lords indicated that the words of Rule 3 do not in terms appear to confer a discretion in the Court in the matter of recording a compromise and passing a decree according to it and once it is established that the suit has been adjusted wholly or in part by a lawful compromise, it is the duty of the Court to record the same.

8. We have not been shown any decision of this Court though we called upon counsel for parties to cite such precedents, if any. There is, in our opinion, consensus in the judicial opinion on the interpretation of Rule 3 of Order 23 of the Code, namely, the enquiry envisaged under the Rule admits of two questions being examined, that is:—

- (1) (a) whether there has been an adjustment or compromise;
- (b) whether such adjustment or compromise is lawful and
- (2) challenge on ground of undue influence, fraud, or misrepresentation make an agreement voidable and

not void and when a compromise is challenged on such ground, the matter is not within the ambit of Rule 3 and must be left to be decided by an independent suit.

9. We would accordingly hold that the conclusion reached by our learned brother on the question of the scope of the enquiry is contrary to law even if the facts found by him with regard to the nature of the compromise were correct, namely that the plaintiff had been defrauded; it was a matter which could be only gone into in an independent suit and not in the enquiry under O. 23, R. 3 of the Code of Civil Procedure. In that view of the matter, the appeal has to succeed. We would set aside the decision of the learned Single Judge and restore that of the learned Subordinate Judge. We direct parties to bear their own costs of this appeal.

10. We must make it clear that if an independent suit on the ground of fraud, undue influence or misrepresentation is filed, our decision will not operate as *res judicata* as we have reached no decision on such score.

MOHANTI, J.:— I agree.

Ordered accordingly.

AIR 1975 ORISSA 170

R. N. MISRA AND K. B. PANDA, JJ.

Ashok Das, Petitioner v. Additional District Magistrate Cuttack and others, Opposite Parties.

O. J. C. No. 1125 of 1974, D/- 2-11-1974.

(A) Maintenance of Internal Security Act (1971), S. 3 (1) (a) (ii) — Detention under — First incident eight months old — Subsequent incidents more than five months old — Incident disconnected with those alleged later — Not forming a live link — Cannot be used as grounds of detention. (Para 7)

(B) Maintenance of Internal Security Act (1971), S. 3 (1) (a) (ii) — "Law and order" and "Public order" differentiated — Detenu involved in three private disputes — Detention could not be supported on grounds that detenu was acting in a manner prejudicial to public order. AIR 1970 SC 1228, Foll.

(Para 9)

Cases Referred: Chronological Paras
AIR 1970 SC 1228 = (1970) 3 SCR 288 9

B. M. Patnaik for Petitioner; Govt. Advocate, for Opposite Parties.

R. N. MISRA, J.:— This is an application for a writ of habeas corpus directed against the order of detention of the petitioner passed by opposite party No. 1 on 16-10-1974 in exercise of powers conferred under Section 3 (1) (a) (ii) of the Maintenance of Internal Security Act, 1971 (hereinafter referred to as the Act) read with Section 3 (2) (b) and Section 5 thereof.

AS/AS/A98/75/SVM

2. The petitioner is a sitting member of the Orissa State Legislative Assembly and represents the Korai Constituency within the district of Cuttack. In support of the order of detention, the following grounds were provided to him :—

"A. You have committed the following successive atrocious acts which have had seriously disturbing impact on the local community by terrorising the latter and disturbing the even tempo of the life of the local community in Jajpur Town and several other areas of Jajpur Subdivision.

(a) On 23-2-1974 night at about 0.30 A. M. you along with Rabindranarayan Singh, Hiranya Kishore Kanungo, Kamalakanta Biswal and others, entered into the Congress Election office at Jajpur Road and assaulted the inmates present and you physically lifted one Suresh Chandra Naik and carried him away in your Jeep. In this connection, Korai P. S. Case No. 17/74 Section 143/448/323/342, I. P. C. has been started and is under investigation.

(b) On 1-8-1974 evening in a public meeting at Sujampur Bus Stand under Jajpur P. S. you made public utterances hurling threats at one Dwarikanath Singh alias Lala to quit Sujampur within two months failing which you would attack him in order to force him to quit that place. You also instigated the local people present in the meeting to lend their support to you to carry out the above mentioned illegal acts.

(c) On 16-9-1974 one Rangadhar Naik of Barchana P. S. area while present in a Tea Stall at Jajpur Town was physically lifted by your followers Sarat Naik and others and was produced before you. As per your further direction, he was assaulted and numerous burning injuries were caused on his person by means of burning cigarettes. In this connection Jajpur P. S. Case No. 176/74 under Sections 342/324/323/379/34, I. P. C. is under investigation.

(d) On 9-10-1974 night under your direction, your followers Babana Nana and others physically lifted one Sarat Kumar Das of Jajpur town and produced him before you in the shop of Siba Das of Jajpur town where you assaulted the said Sarat Kumar Das whereafter you took Sarat Kumar Das to your house at Bahabalpur by force where you falsely charged Sarat Kumar Das to have incurred a loan of Rs. 3,000/- from your father and threatened him to repay the said amount. In this connection Jajpur P. S. Case No. 189/74 under Sections 147/342/323, I. P. C. is under investigation.

B. You have incited members of the public at Sukinda by inflammatory speech urging the people to resort to violence and bloodshed and to paralyse the Government machinery so that the people's demand for adequate supply of essential foodgrains can be fulfilled, as would be obvious from the following details :—

On 6-10-1974, in a public meeting of Sukinda Dolamandap, you instigated the people to resort to violence by means of lathi for fulfilment of their demands and told them that if the B. D. O. would be killed, rice would be available on the next day. You categorically incited the people to kill the B. D. O. and told them that the police will not be able to do anything except arresting and releasing them on bail. You further asked the people to break the hands of the Food Minister. You also took pride that you gave a punch to the Governor on the floor of the assembly. You incited the people to see that things are on fire on 17-10-1974 and that the Government machinery is paralysed. You told the people that you did not believe in non-violence and only relished violence and bloodshed. According to you, non-violence came only after violence and that demands can be fulfilled only by resorting to violence and by making use of lathi. You issued a leaflet with heading "A Sangram Kahinki" wherein you appealed to the public that it would be better to die with Government's bullets rather than by starvation.

Your above acts and public utterances have been seriously affecting the maintenance of public order and hence the imperative and immediate need of invoking the provisions contained in Section 3 (1) (a) (ii) of the Maintenance of Internal Security Act, 1971 (Act 26 of 1971).

In consideration of the above, I am personally satisfied that with a view to prevent you from acting in a manner prejudicial to the maintenance of public order, it is necessary to do so and I have, therefore, passed an order under Section 3 (1) (a) (ii) read with sub-section (2) (b) of S. 3 of the Maintenance of Internal Security Act, 1971 (Act 26 of 1971)."

3. The detenu has alleged in his application that he belongs to the Bhartiya Lok Dal and on account of his political activities, the Chief Minister of the State had developed animosity against him and his detention is an act of political vendetta. It has been further alleged that the detaining authority has made the order of detention at the behest of the Chief Minister and without application of his independent mind to the facts and circumstances of the case. On 17-10-1974, the Bharatiya Lok Dal had decided to hold demonstrations all over Orissa raising certain demands mostly connected with the food scarcity and problems arising out of it. The order of detention was made maliciously with a view to frustrating the demonstration in Jajpur where the detenu was in charge of the organisation and, therefore, at 6.30 P. M. on 16-10-1974, that is, the previous evening of the proposed demonstration, the detenu was taken into custody.

Apart from the contentions that the order of detention has been made at the behest of the Chief Minister and is a mala fide act, the detenu has also contended that the grounds

were not germane so far as maintenance of public order was concerned; the material particulars have not been furnished and, therefore, the detenu has been deprived of making an effective representation against the detention; the petitioner as a leader of the local public was entitled to educate them politely and the speech alleged to have been delivered, pamphlets said to have been published and the activities alleged to have been carried on could not be objected to as these were fundamental rights of the detenu guaranteed to him under the Constitution. The detenu has denied the allegation that he had ever called upon the people to murder the B. D. O. or to break the hands of the Food Minister. He admits to have issued the leaflets but takes the stand that its contents are not at all objectionable.

Though not specifically raised in the writ application, counsel for the detenu raised two more contentions, namely, the materials upon which reliance was placed for reaching the satisfaction did not support the facts stated in the grounds which led the detaining authority to reach his satisfaction that detention of the petitioner was warranted and on the same charges when criminal proceedings are pending detention could not be ordered.

4. The detaining authority in his return to the rule nisi has justified the order of detention and has denied the allegation that the order of detention has been made at the instance of the Chief Minister. In an additional affidavit filed by the detaining authority, he has made some clarifications.

5. Mr. Patnaik for the petitioner made it clear at the commencement of the hearing that apart from the bare allegation in the writ application that the detaining authority did not apply his mind independently to the matter and was prevailed upon by the Chief Minister in making the order of detention, there is no material to support the same. In view of the categorical denial by the detaining authority and in the absence of the proof of the allegation, we must hold that there is no merit in the contention that the detaining authority had not applied his mind and was persuaded to make the order at the instance of the Chief Minister.

6. The detention order has been challenged on several grounds, but in our view, it is unnecessary to examine all the contentions in view of the fact that the legal position is settled beyond doubt that if any of the grounds of detention turns out to be bad the order of detention has to go. We could accordingly examine two contentions advanced on behalf of the detenu for the purpose of this case, namely:—

- (1) Whether the allegation in regard to the incident of 23-2-1974 could be utilised as a ground of detention?
- (2) Whether the grounds furnished are germane for the order of detention on the score that detention was necessary

for preventing the detenu from acting in a manner prejudicial to maintenance of public order?

Contention No. 1.

7. The first ground of detention is on the basis of an event which took place during the night of 23-2-1974. This incident was immediately before the election to the State Legislative Assembly took place. The detenu was a candidate of the Pragati Party (now merged in the B. L. D.) which was opposing the Congress party in the election. It has been alleged that the detenu and some of his followers entered into the election office of the Congress party at Jajpur Road, assaulted certain inmates present there and physically lifted one Suresh Ch. Naik and took him away in detenu's jeep. This incident is almost eight months prior to the order of detention. The next incidents which have been referred to are of August and September, with a gap of more than five months from the first incident. The setting in which the incident of 23rd of February, 1974, is said to have taken place is very different from the other incidents. Indisputably the incident of February, 1974 was during the electioneering campaign when the tempo of election was high. This, in our view, is an unconnected event and there is no live link between this incident and the subsequent incidents. Learned Government Advocate took the stand that this could form a part of the chain of events for reaching satisfaction. Law is settled by now that the time lag is not the deciding factor. What is more important is the live link and that the incidents alleged should form part of a single chain so that satisfaction could be reasonably reached. In our view this incident is disconnected with the incidents alleged later and was not available to be used as a ground of detention. This ground, therefore, could not be utilised for the purpose of detention.

Contention No. 2.

8. The incidents of 1st of August, 1974 and 16th of September, 1974, as also 9th of October, 1974 appear to be of another type. The detenu seems to have had personal animosity against one Dwarikanath Singh, a resident of Sujanpur. The detenu held out threats against Dwarikanath intending to keep him away from the area. This seems to be the outcome of personal animosity between the detenu on one hand and Dwarikanath on the other and does not seem to be a matter with which the people at large in the locality or the even tempo of social life in the area could be connected.

Similarly the incident of 16th of September, 1974, centres round the assault on one Rangadhar Naik, who appears to have abused the detenu on an earlier occasion. This also seems to be a personal dispute between the two and does not seem to have any bearing on the even tempo of life in the locality. The allegation regarding the incident of 9-10-1974 with reference to Sarat Kumar Das is also an incident of that type.

9. "Public order" and "law and order" were appropriately differentiated by the Supreme Court in the case of *Arun Ghosh v. State of West Bengal*, AIR 1970 SC 1228. It was pointed out that the true distinction between the areas of 'law and order' and 'public order' is one of degree and extent of the reach of the act in question upon society. Acts similar in nature, but committed in different contexts and circumstances might cause different reactions: in one case it might amount to a breach of 'law and order' and in another, breach of 'public order'. Though 'public order' has not been defined, the distinction between 'law and order' and 'public order' has been clearly drawn and ordinarily a problem of law and order cannot constitute itself to be a problem against public order. The allegations in this case, as we have already indicated, clearly show that the detenu was involved in three private disputes; on the 1st of August, 1974, it was with reference to one Dwarikanath Singh against whom the detenu had animosity; on 16-9-1974, the centre of attack was one Rangadhar Naik, who was reported to have abused the detenu and, therefore, the detenu was interested in avenging his grievance and on 9-10-1974, one Sarat Kumar Das was the centre of attack on account of private animosity. These are instances which, in our opinion, have nothing to do with the public order in the locality and are breaches of law and rightly prosecutions have been launched against the detenu and his alleged gangmen. The ordinary law of the land can take care of these situations and there was no necessity for preventive action to be taken by invoking the extraordinary power vested in the detaining authority to meet aggravated situations. It must be borne in mind that the law of preventive detention confers extraordinary powers on the detaining authority which are not meant to be used to meet ordinary situations like the ones indicated here and since the consequences of an order of detention are serious and it takes away the individual liberty of a citizen so preciously enshrined in the Constitution without affording an opportunity of trial, the detaining authority is not entitled to invoke such extraordinary power in cases which can be adequately dealt with by the common law of the land. We are, thus satisfied that these three incidents given in the order of detention do not support the detention on the ground that the detenu was acting in a manner prejudicial to public order.

10. The legal position being settled that when one ground fails the order of detention fails because the order of detention is based upon subjective satisfaction of the detaining authority and when one prop is removed, it is not for the court to resurrect the order on the remaining grounds, the order of detention in this case must fail. Without examining the other contentions, we would quash the order of detention and direct that the petitioner be set at liberty forthwith.

PANDA, J. :— I agree.

Writ allowed.

AIR 1975 ORISSA 173

S. K. RAY, ACTG. C. J.

Ananda Behera and others, Petitioners v. Nilkamal Behera and others, Opposite Parties.

C. R. No. 69 of 1974, D/- 9-10-1974.*

(A) Civil P. C. (1908), O. 9, R. 13 — Order setting aside ex parte decree on ground that suit is of high valuation, is not sustainable. (Para 3)

(B) Civil P. C. (1908), O. 9, R. 13 — Order, setting aside decree, awarding costs — Costs accepted "without prejudice to file revision" — Party accepting costs whether can challenge the order.

An ex parte decree was set aside by an order awarding costs to the plaintiff who, while accepting the costs, passed a receipt containing the endorsement "without prejudice to file revision against order under Rule 9, Order 13" Held that the party clearly did not relinquish its right to go up in revision despite the fact of actual receipt of costs. So also, it never approbated a part of the order by physical receipt of the money when at the time of receipt of the amount it had explicitly reserved its right of revision. AIR 1956 Pat 425, Rel. on. (Para 4)

(C) Civil P. C. (1908), S. 115 — Discretion under — Order under O. 9, R. 13 without jurisdiction and in violation of the express provisions — High Court can set aside the order. AIR 1969 Ori 28, Dist. (Para 5)

Cases Referred: Chronological Paras
AIR 1969 Ori 28 5
AIR 1956 Pat 425 = 1956 BLJR 229 4

Mr. S. Mohanty, for Petitioners; Mr. N. K. Misra, for Opposite Parties.

ORDER :— This is a plaintiffs' application in revision to quash the order of the Subordinate Judge, Baripada dated 15-12-1973 setting aside an ex parte decree passed in a partition suit at the instance of the defendants in that suit. The grounds for setting aside the ex parte decree were that defendants 1 and 2 who were looking after the case on behalf of all the defendants were lying ill, on the date of hearing of the suit which was posted to 16-3-1973. Evidence was adduced in support of the ground of illness. Ultimately the Subordinate Judge in the last paragraph of her order has stated as follows :—

"The petition for setting aside the ex parte decree does not deserve to be allowed

* (Against order of Smt. S. Devi, Sub. Judge, Baripada, in Misc. Case No. 37 of 1973, D/- 15-12-1973).

on account of the circumstances discussed above. However, as the suit property is worth Rs. 16,000/-, the petition will be allowed and ex parte order will be set aside provided the petitioners pay Rs. 100/- as cost and compensation to the opposite parties-plaintiffs by 21-12-1973."

On the very day when the aforesaid order was passed, the defendants tendered Rs. 100/- directed to be paid as costs to the plaintiffs' lawyer who on receipt of the amount made the following endorsement in the order-sheet :

"Received Rs. 100/- without prejudice to file revision against the order."

This endorsement is dated 21-12-1973.

2. Order 9, Rule 13, Civil P. C. specifies the grounds on which an ex parte decree can be set aside. It provides that an ex parte decree may be set aside if the Court is satisfied that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing.

3. As the Subordinate Judge has found, none of the grounds was established by the defendants. Therefore, she had no jurisdiction at all to set aside the ex parte decree, after finding that the grounds envisaged under Order 9, Rule 13, Civil P. C. were, not proved, on compassionate ground that suit is of high valuation. Therefore, on merits, the order would not be sustainable and is liable to be set aside.

4. Mr. Misra, however, takes a point that once the plaintiffs have accepted the costs awarded by the impugned order and have thereby accepted a part of the order, they cannot be allowed to reprobate the other part which is against them. In other words, once they have accepted the costs they cannot now challenge the order setting aside the ex parte decree. In support of this proposition he has relied upon a number of decisions. There is no doubt that where there is a conditional order and the party accepts one part of the order which benefits him, he cannot reprobate the other part of the order which is against him. But that principle is subject to one qualification, namely, that it is always to be determined whether the party accepting costs has in fact approbated or not. That is always a question of fact to be decided upon all circumstances in the case. If the facts apparent or appearing on the face of record do not establish that the plaintiff in reality by accepting the costs approbated a part of the order, then the aforesaid principle would not apply. But it appears from the endorsement of the lawyer for the plaintiffs extracted above that he never intended to approbate any part of the order on behalf of his clients by accepting costs. He has clearly stated there that he has not relinquished the right of his clients to go up in revision against that order despite the fact of his actual receipt of the money. He says that his acceptance is without prejudice to the rights of his clients.

The words "without prejudice" came in for interpretation in the case of Umesh Jha v. State, AIR 1956 Pat 425. There it was held,

"The words 'without prejudice' import into any transaction that the parties have agreed that as between themselves the receipt of money by one and its payment by the other shall not of themselves have any legal effect on the rights of the parties, but they shall be open to settlement by legal controversy as if the money had not been paid." Therefore, in deciding whether he has approbated a part of the order or not it will be decided on the footing as if the costs had not been accepted by the plaintiffs' lawyer. In the circumstances narrated above, I am clearly of opinion that the lawyer for the plaintiffs never approbated a part of the order on behalf of his clients by physical receipt of the money when at the time of receipt of that amount he has explicitly reserved his right to move the court in revision. Therefore, in my opinion, this point fails.

5. The second limb of argument of Mr. Misra is that even if the impugned order is not sustainable in law, nevertheless, the power of revision of this court under Section 115, Civil P. C. being discretionary the order under revision should not be interfered with. He placed reliance upon a decision of this court in the case of Dinamani v. Bimbadhar, AIR 1969 Ori 28. There it has been held,

"It is discretionary with the High Court as the word used is 'may'. Even where the court acts contrary to law on a question which impinges on the question of jurisdiction the High Court is not bound to interfere if the conduct and the act of the petitioner do not arouse its conscience."

I think he cannot invoke the aid of this decision for the simple reason that the order setting aside the ex parte decree passed by the Subordinate Judge was passed against the mandate of express provision of law, namely, Order 9, Rule 13, Civil P. C. and, as such, was without jurisdiction. The error is not merely an error of law. On the contrary on an overall consideration of the facts of the case I do not think that the discretion envisaged in the aforesaid decision should be exercised. This is a pure partition suit between the two brothers in which the contesting defendants' main plea was one of adverse possession, in other words, one of ouster and a claim to certain item of property as self-acquired property. In these circumstances, I do not think that I would be justified in exercising my discretion under Section 115, Civil P. C. to ignore the order which has been passed completely without jurisdiction and in violation of the express provision of Order 9, Rule 13, Civil P. C. I would, therefore, set aside the order under revision and direct the plaintiffs to refund Rs. 100/- to the defendants or their lawyer in the trial court within one month from today, if not already refunded. In case, neither the defendants nor

their lawyer accepts the money, the plaintiff shall deposit the same in the trial court.

6. It is, however, needless to say that the defendants have right to go in appeal against the ex parte decree, if they have not lost their right by limitation. The revision is allowed. In the circumstances, there would be no order for costs.

Revision allowed.

AIR 1975 ORISSA 175

S. K. RAY, ACTG. C. J. AND
K. B. PANDA, J.

Sundar Sahu, Appellant v. Jogeswar Das, Respondent.

A. H. O. No. 12 of 1973, D/- 30-9-1974.*

(A) Civil P. C. (1908), S. 52 — Decree against some of legal representatives — Rule of representation of estate — Illustrative case.

In a partition suit by A against his brothers B and C a preliminary decree was passed whereunder A, B and C were held entitled to 1/3 share each. A died after the preliminary decree. Thereafter a creditor of A filed a money suit impleading B, C and X who was the son of B. In this suit X claimed to be the adopted son of A. This position was not disputed by B and C and the suit was decreed against X and dismissed against B and C and the property of deceased A only was made liable for the debt. In the final decree for partition the court held that X was not the adopted son of A. A compromise final decree was, however, passed whereunder it was directed that A's 1/3 share should devolve half and half on B and his sons as one unit and C and his sons as another unit. Thus X got 1/30 share in the entire property as representing the estate of A. The question whether this 1/30 share coming to X as also the rest of the estate of A coming into the hands of B and C was liable to be proceeded against in execution of the money decree was answered in the affirmative. X as holder of some interests in A's estate under the final decree for partition or as an inter-meddlor in such estate was a legal representative of A and by the rule of representation of the estate, the estate of A was liable to be attached and sold in the hands of all the legal representatives, whoever they may be, even if they may or may not have been impleaded in the money suit. AIR 1966 SC 792, Rel. on. (Para 5)

Cases Referred: Chronological Paras
AIR 1966 SC 792 = (1966) 1 SCR 937 5
M. A. No. 106 of 1962, D/- 11-11-1963 (Orissa) 3

R. N. Sihna and S. N. Sinha, for Appellant; B. K. Pal, for Respondent.

*(Against decision of B. K. Ray, J., D/- 1-1-1973).

S. K. RAY, ACTG. C. J.:— This appeal is by the judgment-debtor claimant in Execution Case No. 102 of 1960 from the decision of a learned Single Judge of this court dated 1-1-1973 preferred under clause 10 of the Letters Patent read with Article 12 of the Orissa High Court's Order, 1948.

2. This litigation has a chequered background which it is necessary here to recount in order to appreciate the points involved.

Chamar, Sundar and Bhikari were three brothers. Sundar had four sons, one of whom was Makhan. Chamar incurred a loan from one Jogeswar, the decree-holder-respondent in this appeal, and died without repaying the same. Before his death he filed a partition suit (T. S. No. 28 of 1950) in the court of the Subordinate Judge, Sambalpur, claiming his share against his two brothers, namely, Sundar and Bhikari and their sons. A preliminary decree was passed in the said suit on 18-3-1955 in which Chamar's share was determined to be one-third. Likewise the share of Sundar and his sons as one unit and the share of Bhikari and his sons as another unit were determined at one-third each. Subsequent to this preliminary decree, as stated above, Chamar died on 2-3-1957. The respondent-creditor filed money suit No. 58 of 1957 against Sundar and Bhikari and the former's natural son Makhan for realisation of his loan which he had advanced to Chamar under a handnote dated 9-6-1954 for a sum of Rs. 900/-. In this suit Makhan claimed to be the adopted son of Chamar. This money suit was decreed on contest with costs on 25-8-1958 against Makhan on his own admission that he was the adopted son of Chamar, but was dismissed also on contest against Sundar and Bhikari.

Subsequent to this decree, on 8-12-1958, a compromise final decree in the partition suit was passed. In the course of the final decree proceeding Bhikari, one of the brothers of Chamar, filed a petition stating that since Chamar had died on 2-3-1957, he and his brother Sundar were his sole legal representatives and prayed that Chamar's name be struck off and that his share be divided between him and brother Sundar in two equal shares. The learned Subordinate Judge disposed of this application by his order on 13-11-1957 in which he held that Makhan was not the adopted son of Chamar and directed that the share of the deceased Chamar devolved on Sundar and his sons as one unit and Bhikari and his sons as another unit. On the basis of this determination the final decree was passed. This order of the Subordinate Judge dated 13-11-1957 and final decree dated 8-12-1958 have become final between the parties as no appeal was preferred from it by any of the concerned parties. It is true that under the Hindu law, Chamar's one-third interest on his death, after the passing of the preliminary decree disrupting the joint status, would devolve on his two brothers, namely,

Sundar and Bhikari by succession and their sons would have no interest in the same, but the learned Subordinate Judge allotted one-half of Chamar's share to Sundar and his sons and the other half to Bhikari and his sons whereby the sons on the strength of the final decree got a share in Chamar's interest which otherwise they would not have got. Rightly or wrongly the final decree has become final between the parties and it is no longer open to any of the parties to the partition suit to contest the correctness of that final decree by which the sons of Sundar and Bhikari have acquired a share in Chamar's one-third interest.

3. The respondent-decree-holder levied execution of his money decree in Execution Case No. 102 of 1960 against Makhan alone and sought to attach Chamar's share in the hands of Makhan. He apparently proceeded against Makhan alone, because in his suit Makhan claimed to be the adopted son of Chamar and it was also so held. The decree-holder sought to attach and sell one-tenth share of Makhan. The judgment-debtor filed an objection under Section 47, Civil P. C. contending that when Chamar's interest had been distributed among Sundar and his sons on the one hand and Bhikari and his sons on the other, the one-tenth interest of his, allotted to him, should not be exclusively liable to discharge his decretal dues. This objection was upheld and the matter came before this court in M. A. No. 106 of 1962. Hon'ble Mr. Justice G. K. Misra (as he then was) by his judgment dated 11-11-1963 held,

- "(a) If some portion of the properties of Chamar has come to the hands of the judgment-debtor, if not by inheritance but by the compromise decree, then in respect of that property he is definitely an intermediary and comes clearly within the definition of legal representative.
- (b) In this case, the decree is passed against Makhan as the legal representative of deceased Chamar. The decree is for payment of money out of the property of the deceased Chamar. On the plain language of the section, the decree is executable against the property of the deceased in the hands of judgment-debtor.
- (c) If any of the property of the deceased Chamar is found in the hands of the judgment-debtor, then such property is liable to be attached and sold in execution."

This M. A. No. 106 of 1962 was allowed and the case was remanded to the trial court.

After remand, the executing court passed an order on 5-12-1964 in which he said,

"Thus I am convinced that in fact some of the properties of the deceased Chamar are in possession of the judgment-debtor and his father and the decree is to be proceeded against 1/15th share and not 1/10th share as

given out in the execution petition. Let the decree-holder amend the execution petition accordingly and proceed against the judgment-debtor."

This order was appealed from in Misc. Appeal No. 3/2 of 1965 and was confirmed. The judgment-debtor came to this court from such confirming appellate order in M. A. No. 159 of 1965 in which Hon'ble Mr. Justice G. K. Misra (as he then was) passed his judgment on 4-9-1968 holding,

"Both the courts below have gone into evidence and come to the conclusion that by the compromise decree dated 1-10-1958 Makhan got 1/5th interest in Chamar's share in the joint family property including the house. Against this concurrent finding this Misc. Appeal has been filed by Makhan.

The only point urged by Mr. Sinha is that Makhan's interest in Chamar's share in the joint family property under the compromise decree is only 1/30th and not 1/15th, Mr. Pal accepts Mr. Sinha's contention. The judgment of the courts below must accordingly be modified. Makhan would be held to have only 1/30th interest in Chamar's 1/3rd share in the entire joint family property."

4. When the matter came back to the executing court after the aforesaid decision of this court in M. A. No. 159 of 1965, Sundar, father of Makhan, filed a claim petition under Order 21, Rule 58, Civil P. C. contending that the execution cannot proceed against the property which he inherited from Chamar or against his own share in the joint family properties. This application was registered as Misc. Case No. 19 of 1965. The executing court upheld the claim. The order of the executing court was set aside in first appeal by the first appellate court in M. A. 44/12/3 of 1965. The decree-holder thereupon came to this court in M. A. No. 43 of 1968 which was heard by Hon'ble Mr. Justice R. N. Misra and disposed of on 19-11-1969. The learned Judge held,

- "(a) Thereunder even if Sundar is liable, it has to be shown that it was Chamar's property in the hands of Sundar. By the time Chamar died, he did not have his interest carved out in specie. Therefore it is very difficult to find out what that 1/3rd interest of Chamar actually represents.
- (b) I do not propose to express any final views in the case as the matter has to go back to the lower appellate court for determination as to whether Sundar in the circumstances can be held to be liable for the satisfaction of the money decree."

After remand the executing court dismissed Execution Case No. 102 of 1960 and allowed the appellant's petition under Order 21, Rule 58, Civil P. C. The decree-holder thereupon appealed to this court in M. A. No. 166 of 1971 which was heard and disposed of by the learned Single Judge as aforesaid.

5. The contention of Mr. Pal, the learned counsel for the decree-holder, was to the following effect :—

“As per the definition in Section 2 (11), Civil P. C., one who in law represents the estate of a deceased person or one who intermeddles with the estate of the deceased, is a legal representative. Under Section 52 of the said Code where a decree is passed against a party as the legal representative of a deceased person and the decree is for payment of money out of the property of the deceased, it may be executed by attachment and sale of any such property. Therefore, Makhan being one of several persons to whom the share of Chamar was allotted under the final decree in the partition suit is a legal representative either as a person who in law represents the estate of Chamar or as a person who intermeddles with such estate. Hence the decree in the money suit instituted by the appellant having been passed against Makhan as the legal representative of Chamar and the decree being for payment of money out of the properties of the deceased, it may be executed by attachment and sale of any such property. According to him, whatever may be the law of inheritance, under the partition decree Makhan having been given a share in the estate of the deceased Chamar, the appellant is entitled to execute the decree at least in respect of the share allotted to Makhan under the partition decree and this share as per the decision in M. A. No. 159 of 1965 having been determined to be 1/30th interest of the total joint family properties belonging to Chamar, Sundar and Bhikari, the courts below should have allowed the execution to proceed in respect of the same interest.”

The contention of Mr. Sinha, the learned counsel for the judgment-debtor, as advanced before the learned Single Judge was to the following effect :—

“The creditor is entitled to realise his dues against the deceased debtor out of his assets in whosever hands they may be. But before realising his dues the appellant-creditor has to obtain a decree against the true legal representative of the deceased debtor. In the present case, the decree has been obtained only against Makhan which can be executed only against him. But as Makhan has not inherited any property of Chamar and Chamar's properties have been inherited by Sundar and Bhikari, the creditor cannot proceed against the properties inherited by Sundar and Bhikari after the death of Chamar since under the Hindu Law of inheritance his properties would be inherited by his two brothers, only.”

The learned Single Judge accepted the contention of Mr. Pal and rejected that of Mr. Sinha and, in our opinion, very rightly. In the instant case the decree-holder, on account of his doubt as to the identity of the real legal representative of the deceased Chamar and as a matter of abundant caution, bona

fide impleaded all the male members who were likely to inherit Chamar, in his Money Suit No. 58/57. Makhan in that suit expressly alleged to be the sole legal heir of the deceased Chamar and, as such, represented the estate of the deceased. His father and his uncle who were also co-defendants with him did not dispute this stand of Makhan and allowed the Court to pass the decree against Makhan on that footing. The decree which was ultimately passed in the said Money Suit No. 58 of 1957 provided as follows :—

“It is ordered that the suit be decreed on contest with costs against defendant No. 1 alone and it is dismissed on contest against defendants 2 and 3 without costs. The property of deceased Chamar will only be liable for payment of loan.”

Sundar and Bhikari were aware that Chamar's estate was expressly made liable for repayment of the loan though they were not made personally liable. In these circumstances, applying the principle enunciated by the Supreme Court in the case of Mohd. Sulaiman v. Mohd. Ismail, AIR 1966 SC 792 and the other cases referred to by the learned Single Judge, Makhan must be held to have represented the estate of the deceased Chamar in the money suit and the decree passed in the money suit will bind the entire estate, whoever might be the actual legal representative. Therefore, by operation of the rule of representation of the estate enunciated by the Supreme Court, the estate of Chamar will be liable to be attached and sold in the hands of the legal representatives of Chamar, whoever they may be even though they might not have been impleaded in the decree-holder's money suit. If so, such parts of Chamar's estate which have come into the hands of Sundar and Bhikari under the final partition decree, would be liable to be attached and sold in execution of the respondent's money decree. The only effect of dismissal of M. S. 58/57 against them would be that they would not be personally liable.

Makhan either as a holder of some interest in Chamar's estate under the final decree or as an intermeddler in such an estate would be a legal representative of the deceased Chamar as the definition of “legal representative” in Section 2 (11), Civil P. C. would fully apply to Makhan. There is no doubt that respondent can execute his decree against Makhan's 1/30th share in Chamar's estate. It was so held in M. A. 159/65 and accepted by the decree-holder. The controversy now is whether the rest of the estate of Chamar coming into the hands of Sundar and Bhikari would be liable to be attached and sold and that controversy has been resolved above by applying the rule of representation of the estate. In result, such of the estate of Chamar which has come into the hands of Sundar will be liable to be attached and sold and, accordingly, his objection must fail and the executing court was wrong in dismissing the entire execution case.

6. A minor subordinate point has been taken that the application of Sundar under Order 21, Rule 58, Civil P. C. filed in the executing court is not maintainable because he is a judgment-debtor within the meaning of Explanation to Section 47, Civil P. C. and as such, all questions regarding execution, satisfaction and discharge of the decree passed in the money suit can only be raised before the executing court under Section 47, Civil P. C. A bare reading of the Explanation to Section 47, Civil P. C. makes the position clear. Under this Explanation Sundar would be a judgment-debtor because the money suit in which he was a party had been dismissed against him. So more appropriately he should have presented his application, nomenclatured as one under Order 21, Rule 58, Civil P. C. under Section 47, Civil P. C. That, however, is a technical stand. If the application is maintainable under Section 47, Civil P. C., it cannot be thrown out merely because it has been nomenclatured as one presented under Order 21, Rule 58, Civil P. C. Taking into account the substance of the application and the fact that it was dealt with by the executing court, this point of maintainability is of no practical importance at this stage specially in view of our decision on the main questions rendered above.

7. We are of opinion that the decision of the learned single Judge was correct and, accordingly, this appeal fails and is dismissed. But in the peculiar circumstances of the case there would be no order for costs of this court.

PANDA, J.:— I agree.

Appeal dismissed.

AIR 1975 ORISSA 178

S. K. RAY, J.

Balaram Naik and others, Petitioners v. Krushna Kumari, Opposite Party.

Civil Revn. No. 106 of 1974, D/- 15-1-1975.*

(A) Civil P. C. (1908), S. 151 — **Plaint rejected under O. 7, R. 11 for non-payment of court-fee — Cause for non-payment in time was illness — Application for restoration of suit under S. 151 is tenable.**

While considering the sufficiency for the cause for the default on a particular date, the court should not be swayed by considerations of the past neglect or conduct of the party who is showing cause for his default.

(Para 6)

When the Court was satisfied that the plaintiff was ill for a period of 3 or 4 days prior to the date on which the deficit court-fee was to be paid, the Court was wrong in

* (From order of S. K. Panda Munsif Jaipur, in Misc Case No. 147 of 1973, D/- 29-10-1973).

refusing to give relief on the ground of his previous inactivity. AIR 1972 Pat 289; AIR 1962 SC 527; AIR 1966 Orissa 24; (1972) 38 Cut LT 519, Rel. on; AIR 1964 SC 993; Referred to. (Paras 5, 6)

Cases Referred :	Chronological	Paras
(1972) 38 Cut LT 519		5
AIR 1972 Pat 289 = 1972 BLJR 327		5
AIR 1966 Orissa 24 = 31 Cut LT 769		5
AIR 1964 SC 993 = 1964 SCD 715		5
AIR 1962 SC 527 = 1962 Supp (1) SCR 450		5

B. H. Mohanty, for Petitioners; M. Patra, for Opposite Party.

ORDER:— The petitioners filed Money Suit No. 144 of 1973 in the court of the Munsif, Jaipur for recovery of Rs. 2,046.06. They filed their plaint with deficit court-fee and took time to pay the balance. Time was granted till 12-7-1973 for payment of court-fee. In default of payment of court-fee on 12-7-1973 the plaint was rejected under O. 7, R. 11, Civil P. C.

2. The petitioners thereafter filed an application under Section 151, Civil P. C. for recalling the order dated 12-7-1973 and to permit them to pay the deficit court-fee. This petition of theirs was registered as Misc. Case No. 147 of 1973. The ground shown for recalling the order was that the petitioner No. 1 Balaram Naik was looking after the case on behalf of all the petitioners in the trial court and he fell ill with filarial fever and become completely immobile four days before the date fixed for payment of court-fee and in consequence of such illness he was not able to take steps for payment of court-fee on the scheduled date.

3. The petitioner No. 1 examined himself and one witness in proof of his illness since 8-7-1973 till 12-7-1973. Though the learned Munsif was inclined to accept this plea of illness, nevertheless, he refused to recall the order rejecting the plaint on the sole ground that the petitioner No. 1 failed to show that he took any steps for payment of court-fee between 12-5-1973 and 7-7-1973; in other words, in determining whether there was sufficient cause for the default on the material date, he took into account the past conduct of the petitioner No. 1. Being aggrieved with the aforesaid order of dismissal of the petition under Section 151, Civil P. C. the present revision application has been filed.

4. This revision petition was filed on 6-3-1974, 5 days beyond the expiry of the period of limitation. A petition under Section 5 of the Limitation Act was also filed along with this revision application for condonation of delay. By order dated 27-3-1974 notice on the question of admission and hearing was directed to be issued. The question of limitation was also directed to be considered at the time of admission. The revision petition was heard on merits with the consent of parties as also on the question of limitation.

Mr. Patra for the opposite party has filed a counter to the petition under Section 5 of the Limitation Act and has also raised a preliminary point that the petition for restoration under Section 151, Civil P. C. was not maintainable in law.

5. I will now proceed to examine the merits of Mr. Patra's contention as regards the maintainability of the petition under Section 151, Civil P. C. This section provides:—

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

The Supreme Court in the case of *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527, has clearly stated that the inherent powers of the court are in addition to the powers specifically conferred on the court by the Code. They are complementary to those powers and therefore it must be held that the court is free to exercise them for the purposes mentioned in Section 151, Civil P. C. when the exercise of those powers is not in any way in conflict with what has been expressly provided for in the Code or against the intention of the Legislature. Their Lordships, however, proceeded to caution that the inherent powers are to be exercised by the court in very exceptional circumstances for which the Code lays down no procedure. Their Lordships of the Supreme Court in the case of *Arjun Singh v. Mohindra Kumar*, 1964 SCD 715 = (AIR 1964 SC 993), have proceeded to lay down the following dictum:

"It is unnecessary to embark on any detailed or exhaustive examination of the circumstances and situations in which it could be predicated that a Court has the inherent jurisdiction which is saved by Section 151, Civil Procedure Code. It is sufficient if we proceed on the accepted and admitted limitations to the existence of such a jurisdiction. It is common ground that inherent power of the court cannot override the express provisions of the law. In other words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the court or the jurisdiction that may be exercised in relation to a matter, the inherent power of the court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates."

It appears from the aforesaid principles laid down by the Supreme Court that it is always permissible for the court to exercise its inherent powers under Section 151, Civil P. C. for the ends of justice in the matter, provided such exercise of power does not conflict expressly or impliedly with any provisions of the Civil P. C. in respect of the self-same matter. It seems to follow that

where an order is passed by a court, which is appealable, in consequence of which a suit is dismissed, the same may be recalled or revised and the suit restored in exercise of inherent powers of the court for the ends of justice, because specific provision for an appeal is not a provision which can be said to be overridden by or be said to be in conflict with Section 151 so as to prohibit exercise of inherent power of the court in recalling the order for the purpose of restoring the suit. This view was adopted by this court in the case of *Kunjabehari Das v. Chanchala Das*, 31 Cut LT 769 = (AIR 1966 Orissa 24). In this case an ex parte decree was passed against the defendant. He filed an application under Order 9, Rule 13 which was also dismissed for default. An application was filed under Section 151, Civil P. C. for setting aside the said order of dismissal. The order of dismissal of the petition for restoration under Order 9, Rule 13 is appealable under Order 43, Rule 1 (c) or (d). Nevertheless, this court held that mere availability of an alternative remedy by way of appeal would not by itself debar exercise of the inherent powers of the court under Section 151, Civil P. C. This view was also accepted in another case of this court (*Nanak Chand Khandelwala v. Fakir Chand Khandelwala*, (1972) 38 Cut LT 519). Thus, even if the order rejecting the plaint for non-payment of deficit court-fee is appealable as a decree, nevertheless, the court can restore the suit if satisfied that the plaintiff was physically unable to pay the deficit court-fee on grounds of illness notwithstanding availability of alternative remedy by way of appeal. It is clear that if a plaintiff appeals from the order of rejection of the plaint, there will be no material on record to satisfy the appellate court that he was ill and was accordingly, unable to pay the court-fee. The plaintiff would be without any means of bringing those facts to prove sufficiency of cause for his default in carrying out the court's order on due date. Order 9 does not apply and there is no other specific provision in the Code which would entitle the plaintiff to plead his illness for recalling the order of rejection of the plaint and for being permitted to pay the deficit court-fee. This is just to meet situations of this nature that inherent powers of the court under Section 151, Civil P. C. are invoked for ends of justice.

In the case of *Damodar Prasad v. Aditya Maharaj*, AIR 1972 Pat 289, the plaint was rejected for non-payment of the court-fee. An application was filed under Section 151, Civil P. C. for restoration of the suit. It was held that such a petition was maintainable.

There are, of course, decisions which take a contrary view; but, in my opinion, the view taken by this Court in earlier cases appears to be the better view. Courts in the country exist for administration of justice, which is their paramount consideration, not of technicalities. Nothing short of express provision limiting such powers should be permitted to

whittle down the scope and amplitude of the inherent powers envisaged under Section 151, Civil P. C. In my opinion, the preliminary point raised by Mr. Patra must fail.

6. It has been settled by the Supreme Court that while considering the sufficiency of cause for the default on a particular date the court should not be swayed by considerations of past neglect or conduct of the party who is showing cause for his default. In view of this principle, the learned Munsif was obviously wrong, after being satisfied about the illness of the petitioner No. 1 for a period of 3 to 4 days prior to the date on which the deficit court-fee was to be paid, to still refuse to give relief on the sole ground of his previous inactivity. If the matter rested here, I would have had no hesitation in quashing the order refusing to recall the order dated 12-7-1973 and consequentially also the order rejecting the plaint and in directing him to fix a time for payment of court-fee.

7. The revision petition itself, however, is barred by limitation. The petition under Section 5 of the Limitation Act has stated the cause for the delay in para 3 thereof as follows:—

"That Balaram Naik petitioner No. 1 was looking after the suit out of which this Revision arises for himself and for other petitioners who are his brothers in the Trial court. While he was preparing to come to Cuttack in connection with the filing of the Revision, he fell ill on 20th February, 1974 and has been suffering from fever and various other complications since then. He has not yet recovered and is lying bed ridden. So far the other two petitioners are concerned, they are innocent villagers and are not aware of the litigation affairs. It is on account of this, the Revision could not be filed in time and there has been delay of about 6 days in filing this revision. The said Balaram Naik is under medical treatment and a certificate from his attending physician will be filed later on....."

On the aforesaid ground, delay is sought to be condoned. This petition was sworn to by petitioner No. 2. Counter was filed by the opposite party. The averments in para 3 of the petition for condonation of delay was stoutly denied in the counter. This counter was filed on 4-11-1974, and a copy of it was also served on the counsel for the petitioners that very day. About 24 days later, hearing on the question of limitation as well as on merits took place on 28-11-1974. But the petitioners never filed the medical certificate as undertaken in their petition under Section 5 of the Limitation Act. In absence of such medical certificate the grounds for condonation of delay cannot be said to have been made out. It must, therefore, necessarily be held that the petitioners have failed to show sufficient cause for condonation of delay. In the circumstances, the petition is bound to be dismissed as barred by limitation.

8. In the net result, the petition is dismissed, but in the circumstances without costs.

Revision dismissed without costs.

Petition dismissed.

AIR 1975 ORISSA 180

K. B. PANDA, J.

Sobha Dei and another, Appellants v. Bhima and others, Respondents.

First Appeal No. 18 of 1969, D/- 26-3-1974.*

(A) **Hindu Minority and Guardianship Act (1956), S. 6 (a) — Minor son more than five years old living with mother — Maintenance suit on his behalf by mother against father — Maintainability.**

The father being the natural guardian of the minor the mother is incompetent to represent the minor as next friend against him. Such a suit against a natural guardian who has not been declared to be incompetent by a court is not maintainable. AIR 1968 Patna 318, Rel. on: (Para 7)

(B) **Hindu Adoptions and Maintenance Act (1956), S. 18 — Maintenance and separate residence — Mere drinking habit of husband is not sufficient to sustain claim in the absence of evidence of ill treatment or cruelty.**

(Para 9)

Cases Referred: Chronological Paras
AIR 1968 Pat 318 = 1968 BLJR 898 7

L. K. Das Gupta, J. H. Mitra and S. K. Dutta, for Appellants; P. Mohanty, R. N. Sinha and K. K. Das, for Respondents.

JUDGMENT:— Plaintiff-appellant No. 1 is the mother and plaintiff-appellant No. 2 is minor son. Appellant No. 1 had brought a suit claiming past and future maintenance for herself and for her minor son against defendant No. 1 praying the same to be a charge on the property of D.1 which has been dismissed in toto.

2. The admitted facts are that appellant No. 1 is the married wife of Bhima Sahu, defendant-respondent No. 1. Appellant No. 2 is their son born to them on 12-8-1956. Both the parties belong to Cuttack town. Defendants 1, 2 and 3 are the sons of late Jai Sahu who died on 8-10-1960. Defendant No. 4 is the widow of Jai Sahu and defendant No. 5 is alleged to be the second married wife of defendant No. 1.

3. According to the plaint allegation the defendants are members of a Mitakshara joint family and late Jai Sahu was a prosperous business man. Defendant No. 1 is also carrying a business in Station Bazar, Cuttack and earning a profit of about Rs. 1,000/- per

*(From order of D. Hote 5th Addl. Sub. J., Cuttack in T. S. No. 81 of 1962, D/- 31-3-1965).

month. It is said that defendant No. 1 took to drinking and on her protest began abusing and assaulting plaintiff No. 1 towards the end of December, 1959. The plaintiff was thereafter neglected by defendant No. 1. She fell seriously ill towards January, 1960 and at the instance of the mother-in-law of the plaintiff she was sent to her father's place towards the end of January 1960 which was a Saraswati Puja day with her son leaving her ornaments behind. Her father spent about Rs. 150/- towards her treatment and brought her round but defendant No. 1 did not contribute a pie. After she got cured the plaintiff's father requested the mother of defendant No. 1 to take back the plaintiff but to no effect. Therefore the plaintiff issued a pleader's registered notice on 18-4-1960 asking defendant No. 1 to pay maintenance and to return her ornaments etc. To this D.1 sent a reply on 26-4-1960. Thereafter there were two Panchayatis over this matter on 31-7-1960 and 30-10-1960 but without any success. Defendant No. 1 coming to know that the plaintiff was going to file a suit for maintenance served a notice on the plaintiff's father on 5-12-1960 to which a reply was sent on 25-12-1960. It is further alleged that defendant No. 1 married defendant No. 5 in April 1960 and both are living as husband and wife. Hence she claimed separate maintenance and residence on the ground of physical and mental cruelty, continued neglect, ill treatment and desertion by defendant No. 1 and subsequent marriage with defendant No. 5. She brought the suit towards December, 1961 claiming maintenance at the rate of Rs. 100/- per month for herself and at the rate of Rs. 50/- for her minor son and Rs. 25/- for the educational expenses of plaintiff No. 2.

4. Defendant No. 1 filed a separate written statement from the one filed by defendant Nos. 2 to 4. Defendant No. 5 was set ex parte. The case of D.1 was that he did not take to drinking, did not illtreat or neglect her nor has deserted her. His case was that the plaintiff wanted to live separate and persuaded the defendant to become separate. After separation the share that fell to them was a small room and so she did not like to stay there. On the Saraswati Puja Day of the year 1960 she voluntarily went to her father's house with her father. She took her ornaments, wearing apparels and all her belongings. She also took her son (plaintiff No. 2) against the wishes of defendant No. 1 and did not return though her father had promised to send her back within a week. Defendant No. 1 also sent his mother and others to persuade the father of plaintiff No. 1 to send his daughter but to no effect. Finally, finding no other alternative defendant No. 1 personally went and requested the father of plaintiff No. 1 to send his wife but to no effect. Rather, the father wanted that defendant No. 1 should come and stay with him in his house because it was impossible for his daughter to stay in such poor conditions with

defendant No. 1. The story of the plaintiff's illness or treatment is totally denied. The jointness of the family and the income of the family as alleged in the plaint were also denied. It was asserted that she wanted to enjoy a free life and that is why she preferred to remain with her father. He denied his marriage with defendant No. 5 and further asserted that he was ever anxious to have his son, to educate him as well as plaintiff No. 1, to have a happy conjugal life, but it is the plaintiff's mischievous nature that has deprived him of both.

Defendant No. 1 denied that late Jai Sahu was a prosperous business man and that he had only a small betel shop with poor income without any landed property excepting a house in Cuttack town in a plot of three gunthas of land with three rooms only, belonging to the entire joint family.

5. The learned lower court framed as many as 10 issues. The plaintiff examined 10 witnesses out of whom P. W. 7 is a Homeopath who is said to have treated the plaintiff during her illness. P. W. 3 is a rikshaw puller who brought her to her father's place on the Saraswati Puja Day, 1960. P. W. 4 is a barber who deposed to have seen while the plaintiff came to her father's place in 1960; P. W. 2 has produced the Municipality Birth Register showing that one Bhimsen Sahu of Ward No. 12 had been blessed with a son; and P. W. 9 is a Compounder of Dr. Ahalya Kumari Devi who has stated that D. W. 5 gave birth to a son through plaintiff No. 1. On the defence side there are 5 witnesses of whom D. W. 5 is defendant No. 1, D. W. 4 is a barber and the other three are neighbours.

On an assessment of the evidence, the learned lower court did not hold that the story of illtreatment, desertion or the second marriage of defendant No. 1 has been proved and so dismissed the suit of plaintiff No. 1.

So far as the case of plaintiff No. 2 is concerned, he held that plaintiff No. 1 is incompetent to bring the suit on behalf of plaintiff No. 2 and thus dismissed it.

6. Mr. Das Gupta, learned counsel for the plaintiff-appellants contended—

- (i) that the finding of the learned lower court rejecting the claim of maintenance for plaintiff No. 2 is erroneous; and
- (ii) that there is ample evidence about the desertion of the plaintiff and marriage of defendant No. 1 with defendant No. 5 and so under Sec. 18 of the Hindu Adoptions and Maintenance Act the learned lower court should have decreed the suit for maintenance.

7. On the first point Mr. Das Gupta's contention was that plaintiff No. 2 being the admitted minor son of the contesting parties and admittedly plaintiff No. 2 being with plaintiff No. 1, and defendant No. 1 not hav-

ing sent anything towards his maintenance all these years, the learned lower court should have necessarily granted maintenance for the minor child. This argument though apparently sounds plausible, yet in law, is not sustainable. According to Section 6 of the Hindu Minority and Guardianship Act, 1956 the natural guardian of a Hindu minor in respect of the minor's person as well as the properties is the father and after him the mother, provided that the custody of the minor who has not completed the age of 5 years shall ordinarily be with the mother. In this case by the time the plaintiff brought the suit plaintiff No. 2 had already crossed his 5th year. As such, she was not competent to represent the minor as next friend against the natural guardian — the father. Mr. Das Gupta could not cite any authority for the proposition that anybody else can bring a suit for maintenance against the natural guardian on the ground that the natural guardian had not provided anything towards the maintenance of the minor who was or is in his or her custody. To me it seems, such a suit against a natural guardian, who has not been declared to be incompetent by a court of law on the grounds mentioned in Section 6 of the Act, cannot lie. In the case of Narain Singh v. Sapurna Kuer reported in AIR 1968 Pat 318 it has been held that—

"The mother has been described under Section 6 (a) of the Act as a natural guardian of the Hindu minor, but that is only after the father of a minor. As long as the father is alive the mother cannot claim to be the competent natural guardian of a Hindu minor. The position was not very much different in regard to father and mother of a minor even before this new Act came into force x x x. If the mother of a Hindu minor is not a de facto guardian and if she cannot act as the natural guardian in presence of the father of the Hindu Minor, then, although Section 11 may not be attracted in terms against the transaction made by such mother, yet, she will derive no authority whatsoever to act as a guardian for the purpose of disposing of the minor's property as she will not come under any of the categories given in Section 4 of the Act.

In a case where the father refuses to act as the natural guardian or has neglected to discharge his obligations as a natural guardian in respect of a minor and his affairs and properties, another person, more so, the minor's mother, can take recourse to legal proceedings and obtain the powers to act as the guardian of the minor."

8. In the instant case no such order has been obtained from court for the mother to act as the guardian of the child. As it appears during the pendency of the suit the father had brought a proceeding claiming the custody of the child which was resisted by plaintiff No. 1. A petition has been filed to take that as additional evidence to show that the defendant had withdrawn that proceeding.

The circumstances in which it was withdrawn are not known. Yet the fact remains that the plaintiff resisted the claim. In this suit she stated that—

"I am not willing to send my son to my husband's house even if my husband is willing to meet his maintenance and education expense."

That being the attitude of the mother hardly can she represent the minor claiming maintenance against the natural guardian — the father. If such claims are entertained against the natural guardian, it would lead to disastrous consequences for even a stranger posing to act as the benefactor of the minor keeping such a minor in his custody can bring a claim against the natural guardian. For instance even a teacher can come up with a suit against a natural guardian the father. Law appears very clear and Mr. Das Gupta could not cite any authority to the contrary to support his contention. Accordingly, concurring with the learned lower court I would hold that in the context of facts of this case the mother, plaintiff No. 1 is incompetent to bring a suit for maintenance on behalf of the minor against the father.

9. Coming to the case of plaintiff No. 1 Mr. Das Gupta conceded that there is no evidence of cruelty except the uncorroborated testimony of the plaintiff. He further conceded that evidence of such cruelty cannot be brought unless it is of such a nature that it attracted the attention of the neighbours or outsiders. Evidently that is not the allegation here. The only allegation of the plaintiff is that the defendant had bad habit of drinking and assaulted and ill-treated her for which she complained before her mother-in-law. Mr. Das Gupta urged that in the circumstances the mother-in-law should have been examined and her non-examination would lead to the presumption that there had been ill treatment. I do not think such a presumption is permissible and to that extent also. The substantial allegation against the husband is that he took to drinking and ill-treated her. The evidence regarding the drinking habit of the defendant is very poor. P. W. 5 says that he had seen the defendant in an intoxicated state 4 to 5 times and he presumes that he was drunk as he was shouting. There is no positive evidence that he had taken to such habits. That apart, law does not say that if a husband takes to drinking that would entitle the wife for separate residence and maintenance. What is material is ill treatment and cruelty, and not drinking. In this case there is absolutely no evidence of any ill treatment or cruelty either mental or physical to the plaintiff, and so that ground fails.

(i) coming to the question of desertion the evidence on the side of the plaintiff is equally shaky. Mr. Das Gupta contended that the very fact that even after 10 years defendant No. 1 had not sued for restitution

of conjugal life is evidence of the fact that he has deserted the plaintiff. I do not think such a presumption can also be drawn inasmuch as restitution of conjugal right is a remedy which both the parties can afford to seek. If D.1 has not brought the suit for restitution of conjugal right, it was up to plaintiff to do the same. But she also did not choose to do so, but instead, within hardly three months of her coming away from the defendant, issued a pleader's notice (Ext. 1) which runs thus :—

"From :

Shri Jugal Kishore Dutta, Pleader,
Cuttack.

To

Sri Bhima Sahu, Shop Keeper, Station
Bazar, P. O. Chauliaganj, Cuttack.
Dated, Cuttack, the 18th April, 1960.

Dear Sir,

Under instructions from Sobha Dei, your legal married wife, I beg to state the following :—

When about 2 1/2 years ago my client was very seriously ill and you did not take any care of her, your mother sent her to her father's place who after proper treatment got her cured. After recovery my client and her father both sent words to your mother several times and her father also directly approached your mother more than once to take her to your place but you have not taken any steps in that respect.

My client has noticed several times that you have fallen into bad habits and that is the reason why you do not like to take your wife and son. My client's father spent Rupees 150/- for her treatment and she does not press for the amount. When my client left your place she had left at your house gold and silver ornaments of her valued at Rs. 1,000/- and gold and silver ornaments of the son valued at Rs. 400/-.

Please return those ornaments as well as pay her maintenance at the rate of Rs. 100/- per month amounting to Rs. 3,000/- (three thousand) failing which legal consequence will follow.

Yours faithfully,
Sd/- J. K. Dutta."

To this a reply was given under Ext. 1/a through the Pleader Sri J. K. Dutta by the defendant No. 1 through his Advocate Sri B. C. Das Gupta, Advocate, Cuttack which runs thus :—

"From :

Sri B. C. Das Gupta, Advocate,
Cuttack.

To

Sri J. K. Dutta, Pleader, Cuttack.
Dated, Cuttack, the 26th April, 1960.

Dear Sir,

My client Sri Bhima Sahu is in receipt of you notice dated 8-4-1960.

Under the instructions of my client I am sending this reply to the said notice.

The allegation of illness of Sobha Dei (my client's wife) 2 1/2 years ago is false. There

was no occasion for my client or his mother to send Sobha Dei to her father's place for treatment which, if necessity arose, they were quite competent to do. Your client's father never got her treated for any malady nor did he spend Rs. 150/- on that score; these are all a series of lies.

Your insinuation about my client's falling into bad habits is equally a malicious suggestion made by your client's father.

In fact Sobha Dei went to her father's place during the last Saraswati Puja i.e. about 3 months ago and in spite of repeated requests from my clients' side, she is not being sent back by her parents for ulterior purpose.

The allegation of ornaments worth Rs. 1,000/- being left in my client's house is another malicious false-hood emanating from your client.

My client is ever ready to take back his wife and child for whose absence he is much depressed.

Finally I would request you to kindly advise your client's parents to send back Sobha Dei and her son to my client's house so that the cordial relationship may not be broken.

Yours faithfully,
Sd. B. C. Dasgupta,
Advocate,

The 26th April, 1960."

(ii) Thereafter a pleader's notice was sent to the father of the plaintiff No. 1 by defendant No. 1 through his Advocate Sri A. K. Das (Ext. 1/b dated 5-12-1960). It was substantially to the effect to return Sobha Dei (plaintiff No. 1) and her son (plaintiff No. 2) to D.1. The relevant portion of the letter is thus :

".....by this notice I request you to send my client's wife Sobha Dei and his minor son Debendranath Sahu to his house within ten days of the receipt of this notice, without fail, failing which he (my client) will be forced to take legal action and you will be held responsible for the consequences which will follow."

To this a reply through pleader Jugal Kishore Dutta was sent to the Advocate A. K. Das to the effect that—

".....there were repeated attempts by him (Banamali) and ultimately there were two Panchayatis one on 31-7-1960 and one on 30-10-1960 when your client Bhima Sahu publicly declared that he wont take his wife to his house. This is simply to avoid the effect of legal remedies which are open to his wife.

Your notice is simply an eye-wash and does not represent the real intention of your client.

Yours faithfully,
Sd/- Jugal Kishor Dutta
Advocate."

Cuttack,
The 15th Dec., 1960.

(iii) From these exchanges of registered notices it seems that the relationship had be-

come strained by the end of 1960. One significant aspect of these notices is that there is no allegation from the wife's side that the husband had re-married and so his invitation to take back the wife and the son was an 'eye-wash'. This assumes importance in view of the fact that evidence has been led to the effect that defendant No. 1 was not willing to take back his wife and son and had expressed in Panchayati held in that connection that he would not take them as he has already married. The witnesses who referred to such admission of D.1 in the Panchayati are P. Ws. 6 and 8. The parties belong to oil-man cast. The alleged Panchayati was not before any caste head-man and the proceedings are not there. From this scanty evidence it cannot be said that the plaintiff has proved desertion and in that respect I concur with the finding of the learned lower court.

10. What remains for consideration is if the plaintiff has succeeded in proving the second marriage of the D.1. Evidence has been led that this second marriage of D.1 with D.5 was held on 5-4-1960. Mr. Das Gupta contended that this marriage having been performed in a clandestine manner to evade the law, there could not be any better and positive evidence about the same. In fact the evidence on this aspect of the case is very weak. Nobody says when or where the marriage was performed. Some indirect evidence has been led in this respect by P. Ws. 1, 5, 6 and 8 and I do not think that would be sufficient to establish the factum of marriage which ought to be established like any other fact. Much reliance was placed on the alleged admission of D.1 in the Panchayati and an evidence of distribution of some sweets said to have been made on the occasion but I do not think that establishes the second marriage. The other thing relied on is the Municipal Birth Register showing the birth of a child in the clinic of Dr. Ahalya Devi on 6-6-1963 and the father of the said child was Bhimsen Sahu of Ranihat. The learned lower court has discussed this evidence and has rejected the same on the ground that Bhimsen Sahu mentioned in this exhibit 2 cannot be identified with D.1 inasmuch as the ward numbers differ. Be that as it may, most significant is the non-mention of this alleged marriage in the pleaders' notices issued to D.1 although specific allegations of cruelty, ill treatment and desertion were there. In Ext. 1 dated 18-4-1960 it is stated—

"When about 2 1/2 years ago my client was very seriously ill and you did not take any care of her, your mother sent her to her father's place who after proper treatment got her cured."

It is the admitted case of the parties that on the Saraswati Puja Day of 1960 which is towards the last week of January that the plaintiff left for her father's place with her child. Thus this assertion of leaving the house of D.1 2 1/2 years back is false. From Ext. 1 it appears as though the plaintiff was more

anxious for return of her ornaments and for maintenance. Even in the second letter dated 15-12-1960 there is no whisper about the second marriage though the Panchayati is said to have been held on 30-7-1960 and 30-10-1960 where D.1 is alleged to have refused to take back his wife to his house "as he had married again." So concurring with the learned lower court I would hold that the plaintiff has also signally failed to establish the second marriage of D.1 with D.5.

In the result, therefore, both the contentions of Mr. Dasgupta on behalf of the appellants having failed, the appeal is dismissed but in the circumstances without costs.

Appeal dismissed.

AIR 1975 ORISSA 184

S. K. RAY, J.

Ajit Prasad Narayan Singh, Petitioner v. Smt. Nandini Satpathy, Respondent.

Election Petn. No. 1 of 1973, D/- 14-1-1974.

(A) Representation of the People Act (1951), S. 80 — Election matters under Special Election Law — Determination of — Equitable considerations have no place. AIR 1954 SC 510 and AIR 1959 SC 93, Rel. on.

(Para 8)

(B) Representation of the People Act (1951), Ss. 80, 81, 82, 83, 86 (1), 117 — Non-compliance with Ss. 81, 82, 117 is fatal — Non-compliance with S. 83 — Effect — Presentation of petition — Failure to file true copy of petition along with petition entails dismissal of petition — Burden of proof.

(a) The dismissal of an election petition is compulsory under Section 86 (1) in the case of non-compliance with the mandatory provisions of Ss. 81, 82 and 117. (Para 16)

The election petitioner, *haz* *prima facie* to satisfy the High Court that his application is in accordance with the Sections 81, 82 and 117 of the Act before the High Court can proceed further with the merits of the case. Hence, if neither party adduced evidence, the election petition is liable to be dismissed in limine. (Paras 12, 14 and 15)

(b) Non-compliance or indifferent compliance with the provisions of Section 83 would not, however, have the same compulsive consequence of dismissal of the petition and the High Court may permit the petitioner to fulfil the requirements of that Section later. Section 86 (5) corroborates this view. Everything that is permissible to be done under the Civil Procedure Code in the matter of permitting irregularities to be cured, may also similarly be done with respect to the election petition. This section is not mandatory and Section 86 (1) does not enjoin a dismissal of the election petition for non-compliance with the provisions of Section 83. It must be held that the

election petition is not liable to be rejected on account of any infirmity in the verification or on account of material particulars of corrupt practice not being duly supported by affidavit.

(Paras 16 and 29)

(c) To determine whether the petition was presented or not, it is immaterial as to how the ministerial officer treated the petition subsequent to the presentation. The fact that after the presentation of the petition before the Deputy Registrar, other acts which are expected to be performed by other officers, were not duly carried out, does not necessarily lead to the conclusion that the presentation to the Deputy Registrar was untrue. (Para 24)

If an election petition is not accompanied by a true copy attested by the petitioner under his own hand, it must be held that Section 81 (3) has not been complied with which would perforce entail a dismissal of the election petition. If a true and attested copy had been filed along with the petition but a discrepant copy has been served, that would not entail dismissal of the petition because it would not violate any mandatory requirement of law.

(Paras 25 and 30)

(C) Representation of the People Act (1951), S. 81, Explanation, S. 62, S. 2 (e) — Representation of the People Act (1950), S. 16 — “Elector” — Points to be proved — Burden of proof.

Reading Section 81 (2) Explanation along with Section 62 and Section 16 of the Representation of the People Act, 1950 it is clear that in order to maintain his petition calling in question the by-election, the petitioner is to prove:

- (a) his name is entered in the electoral roll; and
- (b) he has not incurred any of the disqualifications.

The initial burden of proving these two facts is on the petitioner. Even though one of such facts is a negative one in nature, yet the initial burden may be discharged by a mere assertion of the petitioner that he has not incurred any of the disqualifications by the time of holding of the by-election in question. It is only after the *prima facie* evidence is led by the petitioner that the burden would shift on to the shoulder of the respondent.

(Para 17)

The fact that the petitioner's name is in the electoral roll, does not absolve the petitioner from proving his identity with the name in the roll. If this is proved the absence of disqualification envisaged by Section 16 of the Act of 1950 may be presumed.

(Para 19)

Where the petitioner omits to connect the identity of the person in the entry in electoral roll with himself either by his own statement or by other evidence, the only available conclusion is that he has failed to prove that he is an elector under Section 81 (1) Explanation, who was entitled to vote at the election to which the election petition relates.

(Para 21)

(D) Representation of the People Act (1951), S. 86 (1) — Subsequent tampering with petition after proper presentation — Does not attract sub-section (1).

The matter of dismissal is to be determined with reference to facts at the time of presentation of the election petition and, therefore, subsequent tampering, even if true, would not attract Section 86 (1). (Para 31)

(E) Representation of the People Act (1951), S. 80 — Election petition — Election to State Legislative Assembly — Assembly dissolved subsequent to election petition — Petition does not become infructuous.

An election petition in respect of an election of a member to the State Legislative Assembly is not liable to be dismissed on the ground that it has become infructuous on account of dissolution of the State Legislative Assembly under the Proclamation issued by the President under Article 356 of the Constitution. The reason is that corrupt practices alleged in the election petition, if proved against the respondent, render him liable to be disqualified. (Para 33)

(F) Representation of the People Act (1951), S. 81 — Limitation — Computation of period. (General Clauses Act (1897), S. 9).

In computing the period of 45 days, within which, an election petition should be filed, the date when the polling took place should be excluded. (Para 15)

(G) Evidence Act (1872), S. 31 — Admissions — Effect of — Presumption from.

It is a well-known principle in law that what is admitted by a party to be true must be presumed to be true unless the contrary is shown and that that admission, though not conclusive is decisive of the matter it admits. It is, of course, open to the party against whom the admission is proved to show that it is wrong. (Para 26)

(H) Evidence Act (1872), Ss. 101 to 104 — Burden of proof as a matter of law and pleading and burden of proof as a matter of adducing evidence — Distinction — Shift of onus.

There is an essential distinction between the “burden of proof” as a matter of law and pleading and as a matter of adducing evidence. The burden in the first sense is always upon the party who comes to Court to get a decision on the existence of certain facts he asserts; but the burden to prove in the sense of adducing evidence “shifts from time to time” having regard to the evidence adduced by one party or the other or the presumption of fact or law raised in favour of one or the other. (Para 14)

(I) Representation of the People Act (1951), S. 81 — Election petitions — Onus of proof.

The general onus of proof in election petitions is always on the election petitioner.

(Para 14)

(J) Civil P. C. (1908), O. 14, R. 2 — Representation of the People Act (1951), S. 86

— Preliminary Issue — Election law — Duty of Court.

It is incumbent upon the High Court, when the requirements of the mandatory provisions of election law are not complied with, to determine those issues as preliminary issues. AIR 1973 SC 2513, Rel. on. (Para 2)

(K) Civil P. C. (1908), S. 151 — Application to reopen case and receive evidence at the stage of arguments — Not allowed as having been too late. (Para 22)

(L) Representation of the People Act (1951), S. 86 — Civil P. C. (1908), O. 8, Rr. 3 and 5 — Pleadings — Allegation in election petition — Non-admission or denial in written statement — Specific issue framed — Effect.

Where certain facts which were within the special knowledge of Election-petitioner were alleged in the petition, and the written statement was "that the facts stated in paragraph (1) of the election petition are not admitted" and that such facts "which are not specifically admitted shall be deemed to have been denied" it was held that the averments in the said paragraph could not be said to have been admitted. AIR 1939 PC 117, Warner v. Sampson; (1959) 1 All ER 120, Bullen v. Leake; "Precedents and Pleadings" Page 664, S. 2, Rel. on. (Para 20)

When parties have framed a specific issue as to whether the petitioner is an elector or not and were aware that it involved a substantial question, the petitioner cannot rely upon the rule of pleading to infer an admission in substitution of lack of evidence. AIR 1966 SC 735, Rel. on. (Para 20)

Cases Referred:	Chronological	Paras
AIR 1973 SC 717 = (1973) 1 SCC 95		18
AIR 1973 SC 2464 = (1974) 1 SCJ 387		12
AIR 1973 SC 2513 = (1973) 2 SCC 759		12
AIR 1970 SC 340 = (1970) 1 SCR 845		18
AIR 1969 SC 872 = (1969) 1 SCR 179		11
AIR 1966 SC 735 = (1966) 2 SCR 286		20
AIR 1966 All 39 = 1965 All LJ 339		20
AIR 1966 Guj 116 = (1965) 6 Guj LR 458		17
AIR 1966 Pat 75		20
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AIR 1964 SC 1027 = (1964) 6 SCR 213		10
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(1843) 114 ER 1034 = 4 QB 626		21
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S. Misra (1) and M. N. Das, for Petitioner; G. Rath, R. Mohanty, C. V. Murty, B. B. Mohanty, P. Palit, R. C. Ram, A. Mohanty and B. Pal, for Respondent.

ORDER:— The respondent, Smt. Nandini Satpathy, was elected as a member of the Orissa Legislative Assembly in a by-election from the Cuttack City Assembly Constituency. The polling in this Constituency took place on 26-11-1972. On 10-1-1973, which was the last date under the law for the presentation of an election petition, Shri Ajit Prasad Narayan Singh, alleging himself to be an "elector" of the aforesaid Constituency presented or filed the election petition in question challenging the election of the respondent on the ground, inter alia, that the respondent has herself committed various corrupt practices or has connived at commission of such corrupt practices by other persons. Till 19-6-1973, this petition was being dealt with by the Chief Justice who settled the Issues and some interim matters and on 28-6-1973, he passed the following order:—

"Put up three weeks after when a judge will be selected for trying the election case. All these interim matters will be put up before him."

and then assigned me as the Judge to try further the election petition.

2. The petitioner and the respondent respectively filed their draft Issues on 10-5-1973 and 9-5-1973. Thereafter, on 16-5-1973, Mr. Rath, learned counsel for the respondent submitted recast Issues which were thirtyone in number and they were accepted as Issues framed by this Court. These Issues are both of fact and of law. It was agreed by the parties, and I am also of the same view, that Issues 6 to 8, part of Issue No. 10 (as to the question of correctness of the affidavit), 11, 12, 14 and 15 should be disposed of preliminarily, because, the entire election case may be disposed of on these Issues without going into its merits. Subsequently, on 12-11-1973, the respondent filed a petition praying that Issues 1, 3 and 4 may also be tried as preliminary Issues. This was objected to by the petitioner on the ground that matters of merit are interlinked with these three issues. But on a perusal of these Issues, it appears to me that they should also be determined as preliminary Issues. These Issues have been drafted on the basis of allegations of the respondent that requirements of Sections 81, 82, 83 and 117 of the Representation of the People Act, 1951 (hereinafter referred to as the "Act") have not been complied with. The Supreme Court has said in the case of Krishan Chander v. Ram Lal, AIR 1973 SC 2513 that it is incumbent upon the High Court, where the allegation is that requirements of mandatory provisions of election law are not complied with, to determine those Issues as preliminary Issues. I, therefore, proceed to decide Issues 1, 3, 4, 6, 7, 8, part of Issue Nos. 10, 11, 12, 14 and 15 as preliminary Issues, all of which have a direct bearing on the question of maintainability of the election petition.

3. These Issues are extracted herein below:—

- (1) Is the election petition maintainable?
- (3) Is the petition not in accordance with law?
- (4) Is the petition barred by limitation?
- (6) Is the petition liable to be dismissed for non-compliance with the provisions of Sections 81, 82, 83 and 117 of the Representation of the People Act, 1951?
- (7) Whether the verification of petitioner is invalid and the petition is liable to be rejected on that score?
- (8) Whether the petition is liable to be rejected on account of material discrepancy between the original petition and the copy served on the respondent?
- (10) Are the material particulars of corrupt practice (part) alleged in the election petition not duly supported by an affidavit? If so, is the petition liable to be dismissed on that account?
- (11) Has the original petition been subsequently tampered with, altered and corrected without authority of law and/or without a formal petition by way of amendment? If so, is the petition liable to be dismissed under Section 86 (1) of the Representation of the People Act, 1951?
- (12) Has any alteration and modification been made in the verification and affidavit annexed to the petition without authority of law? If so, has the petition become invalid, infructuous and liable to be dismissed under S. 86 (1) of the Representation of the People Act, 1951?
- (14) Whether the relief claimed by the petitioner has become infructuous on account of the dissolution of the Orissa State Legislative Assembly vide the Proclamation issued by the President under Article 356 of the Constitution of India and the petition is liable to be dismissed?
- (15) Is the petitioner an elector and entitled to vote at the election from the Cuttack City Assembly Constituency by-election held on 26-11-1972?

4. The main allegations underlying all these issues, now being tried preliminarily, relate to non-compliance of the requirements of Sections 81, 83 and 117 of the Act. It is, therefore, necessary at the outset, to review the law as laid down by the Supreme Court from time to time regarding the effect of such non-compliance and its consequences which is penal in nature, as provided in Section 86 (1) of the Act.

5. For the purpose of appreciating the Supreme Court cases, dealing with nature of Sections 80, 83 and 117 of the Act and consequences of non-fulfilment of their requirements, it is convenient to extract them:

"80. Election petitions. — No election shall be called in question except by an election petition presented in accordance with the provisions of this Part.

81. Presentation of petitions.

- (1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of S. 100 and S. 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned candidate, at the election and the dates of their election are different, the later of those two dates.

Explanation.— In this sub-section, 'elector' means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

- (2) Omitted by Act 47 of 1956.

- (3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.

83. Contents of petition—

- (1) An election petition—
 - (a)(not relevant for the present purpose);
 - (b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and
 - (c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings.

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

- (2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

117. Security for costs.—

- (1) At the time of presenting an election petition, the petitioner shall deposit in the High Court in accordance with the rules of the High Court a sum of two thousand rupees as security for the costs of the petition.
- (2)

6. The question of the nature of right to vote or stand as a candidate for election and the nature of the jurisdiction conferred upon the Judge or Tribunal to examine and determine matters relating to election has been examined in the case of N. P. Ponnuswami v. Returning Officer, Namakkal, AIR 1952 SC 64. The learned Judges extracted a pas-

sage with approval from the judgment of Lord Cairns in the case of *Theberge v. Laundry*, (1876) 2 AC 102, who was dealing with the special nature of the jurisdiction of the election Tribunal acting under election law, which runs as follows:

".....They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in such a way that should as soon as possible become conclusive; and enable the constitution of the Legislative Assembly to be distinctly and speedily known."

At another place Lord Cairns observed as follows:—

"Now, the subject-matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising, and hardly in consonance with the general scheme of the Legislation, if, with regard to rights and privileges, of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior Court which the legislative assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgment of the Legislative Assembly, or of that Court which the Legislative Assembly had substituted in its place."

The learned Judges of the Supreme Court after extracting the aforesaid passage proceeded to set out the principles as emerging from them, which are:—

- "(1) The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

- (2) Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it."

7. In the case of *Jagan Nath v. Jaswant Singh*, AIR 1954 SC 210, the Supreme Court again considered the effect of non-compliance of procedural requirements of election law. The learned Judges stated as follows:

"The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the Common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. None of these propositions however has any application if the special law itself confers authority on a Tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it.

It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that law or by corrupt practices. In cases where the election law does not prescribe the consequence or does not lay down penalty for non-compliance with certain procedural requirements of that law, the jurisdiction of the Tribunal entrusted with the trial of the case is not affected."

The learned Judges were considering the effect of non-compliance of Section 82 of the Act in the context of Sections 81, 83 and 117 thereof. The Act did neither prescribe any consequence nor laid down any penalty for non-compliance of Section 83, while Sec. 85 (now Section 86 of the Act) provided for a penalty in case of non-compliance of Sections 81, 82 and 117 of the Act by enjoining upon the Election Commissioner to dismiss the election petition. They accordingly held that non-compliance of the requirement of

Section 83 did not entail a compulsory dismissal of the election petition while impliedly indicating that non-compliance of Sections 81, 82 and 117 did involve such a consequence.

8. In the case of Rattan Anmol Singh v. Atma Ram, AIR 1954 SC 510, the learned Judges of the Supreme Court were dealing with a case of absence of attestation on nomination paper subscribed by an illiterate person as required by Section 33 of the Act, and whether the Returning Officer was bound to reject it under Section 36, sub-section (2) (d) of the Act. It was held that the defect was not of a technical nature, but was of a substantial character and Section 36 being mandatory, the Returning Officer at the time of scrutiny could not permit rectification of the defect. The learned Judges further proceeded to say that even if evidence had been led to satisfy the Returning Officer about the identity of the person subscribing to the nomination paper, and thereby fulfilled the purpose of attestation and consequently removed the lacuna of its absence, nevertheless, the position could not change and Section 36 which was mandatory and enjoined upon the Returning Officer to refuse any nomination paper which failed to comply with the requirement of Section 33, would still have its compulsive effect. In other words, what the learned Judges intended to say was that equitable considerations of common law court administering common law, have no place in determining election matters under the special election law.

9. In the case of Baru Ram v. Smt. Prasanni, AIR 1959 SC 93, the learned Judges of the Supreme Court were considering the validity of the action of the Returning Officer rejecting the nomination paper under Section 36 (2) (b) of the Act. One of the matters which the Returning Officer was required to be satisfied about under Section 36 of the Act was whether the candidate who is not an elector in the Constituency in question is in fact an elector of a different Constituency, before rejecting the nomination paper. Section 33 (5) of the Act requires the candidate to supply the certified copy containing the relevant entry of the electoral roll to establish the fact that the candidate is an elector in the Constituency in question and Sec. 36 (2) (b) provides that in default of producing the certified copy, the nomination paper is liable to be rejected. In this case, the certified copy was not produced and the nomination paper was rejected. In the aforesaid circumstances, the learned Judges laid down the following dictum:—

“Whenever the statute requires a particular act to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence it would be difficult to accept the argument that the failure to comply with the said requirement should lead to any other consequence. There is no doubt that the essential object of the scrutiny of nomination papers

is that the returning officer should be satisfied that the candidate who is not an elector in the constituency in question, is in fact an elector of a different constituency. The satisfaction of the returning officer is thus the matter of substance in these proceedings; Section 33 (5) requires the candidate to supply the prescribed copy and Section 36 (2) (b) provides that on his failure to comply with the said requirement his nomination paper is liable to be rejected. In other words, this is a case where the statute requires the candidate to produce the prescribed evidence and provides a penalty for his failure to do so. If the candidate fails to produce the relevant copy, the consequence prescribed by S. 36 (2) (b) must inevitably follow:—

Where the statute requires specific facts to be proved in a specific way and it also provides for the consequence of non-compliance with the said requirement it would be difficult to resist the application of the penalty clause on the ground that such an application is based on a technical approach.....”

(the aforesaid passages are extracted from the headnote)

This case reiterated the principles laid down in the previous decisions of the Supreme Court in AIR 1954 SC 210 and 510 (supra).

10. In the case of Ch. Subbarao v. Member Election Tribunal, Hyderabad, AIR 1964 SC 1027, the learned judges of the Supreme Court held—

“.....an election petition was not to be equated to an action at law or in equity, but that as the rights were purely the creature of statute, if the statute rendered any particular requirement mandatory, the courts possessed and could exercise no dispensing power to waive non-compliance.”

The learned Judges again said—

“It cannot be urged that the jurisdiction of the Election Tribunal under Section 80 (3) to dismiss an election petition which does not comply with the provisions of Section 81 is attracted only if there is a defect in the petition itself and that a defect merely in the copy accompanying the petition would not be a case of a petition not complying with the provisions of Section 81 so as to require or even permit the Tribunal to dismiss the petition. When Section 81 (3) requires an election petition to be accompanied by the requisite number of copies, it becomes a requirement for the presentation of the election petition to the Commission, and therefore a condition precedent for the proper presentation of an election petition. If that is a requirement of Section 81, no distinction can be drawn between the requirements of sub-sections (1) and (2) and of sub-section (3). If there is a total and complete non-compliance with the provisions of Section 81 (3), the election petition might not be ‘an election petition presented in accordance with the provisions of this Part’ within Section 80 of the Act. If there had been such a non-compli-

since with the requirement of sub-section (3) not merely the Election Commission under Section 85 but the Election Tribunal under Section 90 (3) would prima facie not merely be justified but would be required to dismiss the election petition."

It may be noticed that in this particular case, the learned Judges were considering whether the copy accompanying the election petition was a true copy or not. Required number of copies were filed and the copies bore two signatures of the petitioner authenticating both the contents of the petition as well as the verification, but the petitioner had omitted to insert the words "true copy" before and above the signature. It was contended that Section 81 (3) of the Act had not been complied with. This contention was negated as the copies were found to be true copies and omission to insert "true copy" did not matter as the section itself did not indicate the manner of authentication of a copy as a true copy. That, however, does not affect the decision that Section 85 (now Section 86) is mandatory and must be strictly complied with.

11. The Supreme Court has reiterated the aforesaid principles in the case of K. V. Rao v. B. N. Reddi, AIR 1969 SC 872, in which it has been stated that the trial of an election petition is not the same thing as the trial of a suit and the trial of an election petition and the powers of the Court in respect of it are all circumscribed by the Act. Regarding applicability of Limitation Act, the learned Judges observed—

".....the Limitation Act cannot apply to proceedings like an election petition inasmuch as the Representation of the People Act is a complete and self-contained code which does not admit of the introduction of the principles or the provisions of law contained in the Indian Limitation Act." They, however, say that Sections 9 and 10 of the General Clauses Act, 1897, providing for computation of time which are in pari materia with Sections 12 (1) and (4) of the Limitation Act would apply to such a petition. They also say elsewhere in the judgment—

".....No right is however given to the High Court to entertain an election petition which does not comply with the provisions of S. 81, S. 82 or S. 117." and

".....Under Section 86 (1) it is incumbent on the High Court to dismiss an election petition which does not comply with the provisions of Section 81 or Section 82. Again the High Court must dismiss an election petition if security for costs be not given in terms of Section 117 of the Act."

12. In 1973, the Supreme Court in two cases reiterated the aforesaid principles. The first is the case of Charan Lal v. Nandkishore, AIR 1973 SC 2464, where it has been said —

"The right to challenge an election conferred by Article 329 (b) of the Constitution being a statutory right, the terms of that

statute have to be complied with. If no discretion to condone the delay in presentation of the petition or to absolve the petitioner from payment of security for costs is conferred, it cannot be exercised under any general law or any principle of equity. There is no provision in the Act empowering the High Court to absolve the petitioner from making any security deposit or to reduce the amount required to be deposited under the Act."

(quoted from Head-note)

This dictum in relation to security deposit will also apply to non-compliance of the requirements of mandatory provisions contained in Sections 81 and 82 of the Act.

The second case is the case of Krishan Chander v. Ram Lal, AIR 1973 SC 2513. In this case, the Supreme Court held that Section 82 of the Act is mandatory and non-compliance of its requirements makes the dismissal of the election petition compulsory under Section 81 (1) of the Act. The same consequence will also flow in case of non-compliance of the mandatory requirements of Sections 81 and 83 of the Act.

13. The trend of the decisions of the Supreme Court in the aforesaid cases is in full accord with Article 329 of the Constitution, which runs as follows:

"329. Notwithstanding anything in this Constitution—

- (a)
- (b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

14. The respondent had clearly alleged in her written statement that due to non-compliance of the mandatory requirements of Sections 81, 82 and 117 of the Act, the election petition is bound to fail in limine. Thus, at one point of time, a controversy arose between the parties as to who is to begin in leading evidence on the preliminary issues. General onus of proof is always on the election petitioner. There is an essential distinction between the "burden of proof" as a matter of law and pleading and as a matter of adducing evidence. The burden in the first sense is always upon the party who comes to Court to get a decision on the existence of certain facts he asserts; but the burden to prove in the sense of adducing evidence "shifts from time to time" having regard to the evidence adduced by one party or the other or the presumption of fact or law raised in favour of one or the other. Section 86 (1) of the Act imposes a duty upon the High Court to dismiss an election petition which does not comply with the provisions of Section 81, 82 or 117 of the Act. Section 80

provides that an election can be called in question only in accordance with the provisions of "this part." The election petitioner, therefore, has prima facie to satisfy the High Court that his applications is in accordance with the Ss. 81, 82 and 117 of the Act. In view of the written statement of the respondent, it is the statutory duty of the High Court to be satisfied that the requirements of Sections 81, 82 and 117 of the Act have been fulfilled before proceeding further with the merits of the case. In this legal perspective, if neither party adduced evidence, the election petition is liable to be dismissed in limine. However, at the end of the argument on the question of "who has the right to begin?", the learned counsel for the petitioner agreed to lead evidence without further insisting upon the respondent to lead evidence.

15. Issue No. 4 :— The limitation provided for presenting an election petition is provided in Section 81 of the Act. It says that an election petition may be presented "within forty-five days from the date of election of the returned candidate." The date of election is the date when polling took place, i.e., 26-11-1972. The election petition was presented on 10-1-1973. Under Section 9 of the General Clauses Act, 1897, which has been held to be applicable in computation of the period of limitation by the Supreme Court in K. V. Rao's case, referred to above, 26th of November is to be excluded. So, computing the period of limitation, it is clear that the election petition was filed on the forty-fifth day and was, thus, in time. This Issue is, therefore, answered in the negative.

16. Issues Nos. 1, 3, 6, 7, 8, 10, 11, 12, 14 and 15 :—

These Issues are taken up together because they are admittedly inter-connected. Under Section 86 (1) of the Act, dismissal of the petition is compulsory if the provisions of Sections 81, 82 or 117 are found not to have been complied with. This indicates that non-compliance or indifferent compliance of the provisions of Section 83, would not have the same compulsive consequence of dismissal of the petition, and the High Court may permit the petitioner to fulfil the requirements of that section later. Sub-section (5) of S. 86 of the Act also corroborates this view because it provides that the High Court may allow opportunities of any corrupt practice alleged in the petition to be amended or amplified in such manner as may, in its opinion, be necessary for ensuring a fair and effective trial of the case subject to the limitation that the petitioner shall not be allowed to introduce a new corrupt practice which was not previously alleged in the petition, by way of amendment. The requirements of attestation and verification are provided in this Section 83 of the Act and defects in the same can be allowed to be cured subsequently. Section 87 of the Act provides that the election petition shall be tried by the High Court as nearly

as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. The trial of an election petition is deemed to commence from the date fixed for the respondents to appear before the High Court and answer the claim made in the petition (vide Section 86 (4), Explanation). Thus, everything that is permissible to be done under the Civil P. C. in the matter of permitting irregularities to be cured, may also similarly be done with respect to the election petition.

So far as Section 82 of the Act is concerned, there is no allegation of any non-compliance. As to non-compliance of Sections 81 and 117 of the Act, the respondent's case is :—

- (a) The petitioner is not an "elector" as defined in the Explanation to Sec. 81 of the Act and, as such, the election petition is not maintainable in law;
- (b) The election petition has not been "presented" as required under sub-sec. (1) of S. 81, but has been merely "filed." The election petition is, therefore, liable to be dismissed in limine;
- (c) The election petition was not accompanied by a true copy of the election petition attested by the petitioner under his own signature indicating the copy to be a true copy; and
- (d) The petitioner did not deposit in the High Court in accordance with the Rules of the High Court the amount of security towards costs of the petition at the time of presentation.

I will now proceed to consider these four aspects of the case seriatim.

17. The petitioner in paragraph I of the petition asserts :—

"That the petitioner is an elector entitled to vote at the election from the Cuttack City Assembly Constituency by-election held on 26-11-1972. The petitioner's number is 2444 in part 16 of the Electoral Roll of Cuttack City Assembly Constituency."

The respondent has replied to this part of the petitioner's case in paragraphs 21 and 22 of her written statement. Those paragraphs are :

- "21. That the facts which are not specifically admitted in this written statement shall be deemed to have been denied.
22. That the facts stated in paragraph 1 of the election petition are not admitted."

On these pleadings, the petitioner filed a draft Issue on 10-5-1973 of which Issue No. 17 reads as follows :

- "17. Is the petitioner an elector entitled to vote at the election from the Cuttack City Assembly Constituency by-election held on 26-11-1972."

This draft issue No. 17 is Issue No. 15 framed by the Court which reads as follows :—

- "15. Is the petitioner an elector and entitled to vote at the election from the

Cuttack City Assembly Constituency by-election held on 26-11-1972?"

The explanation to Section 81 (1) of the Act provides that for the purpose of this sub-section an "elector" means a "person who was entitled to vote at the election to which the election petition relates whether he has voted at such election or not." The meaning of "elector" in this Explanation is somewhat different from the definition of "elector" in Section 2 (e) of the Act. Section 62 of the Act deals with right to vote. Sub-section (1) of that section which is relevant for the present purpose is extracted hereinbelow:—

"62. Right to vote.—

- (1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.
- (2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in Section 16 of the Representation of the People Act, 1950 (43 of 1950).

Section 16 of the Representation of the People Act, 1950, provides—

"16. Disqualifications for registration in an electoral roll.—

- (1) A person shall be disqualified for registration in an electoral roll if he—
 - (a) is not a citizen of India; or
 - (b) is of unsound mind and stands so declared by a competent court; or
 - (c) is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections.

(2) x x x x"

Thus, reading Section 81 (2) Explanation along with Section 62 of the Act and Section 16 of the Representation of the People Act, 1950 (hereinafter called the "1950 Act") it is clear that in order to maintain his petition calling in question the by-election, the petitioner is to prove that—

- (a) his name is entered in the electoral roll; and
- (b) he has not incurred any of the disqualifications, in other words, he is entitled to vote at the by-election held on 26-11-1972.

The initial burden of proving these two facts is on the petitioner. Even though one of such facts is a negative one in nature, yet the initial burden may be discharged by a mere assertion of the petitioner that he has not incurred any of the disqualifications by the time of holding of the by-election in question. It is only after the prima facie evidence is led by the petitioner that the burden would shift on to the shoulder of the respondent. It is pertinent to notice here two decisions in this connection. The first is the case of Krishnaswami Naidu v. Secy. of State,

AIR 1943 Mad 15. The relevant passage in that judgment runs as follows:—

".....If a party wishes the Court to believe in the non-existence of certain facts and the existence of the rights asserted by him depends on the non-existence of such facts, it is as much his duty to establish those negative facts as it would be of proving positive facts, if his rights were to depend on their existence When an affirmative fact is to be established, direct evidence to prove that fact can be adduced and the Court has to make up its mind as to its credibility and sufficiency; but when a negative fact has to be proved, it may be that in a large number of cases no more than prima facie evidence as to the non-existence of the fact that is alleged not to have existed is available or can be adduced and in such cases, a plaintiff can be expected to do nothing more than produce such evidence to substantiate his allegations prima facie."

The second case is the case of S. T. Trading Co. v. Union of India, AIR 1966 Guj 116. The relevant passage from this decision runs as follows:—

".....It is true that, in considering the question as to whether the burden is discharged or not, the Court must bear in mind the fact that plaintiff is called upon to prove a negative fact. It may be that very slight evidence may be sufficient to satisfy the Court that the burden has been discharged. It may be that, in some cases, slight evidence may be considered as sufficient to shift the burden of proof on the other side. But, the important point to notice is that there must be some such reliable evidence adduced by plaintiff in the first instance which would permit the Court to hold that the burden has either been discharged or that it has been shifted on the other side....."

18. The learned counsel for the petitioner contends that the burden of proof rests on the respondent to show that the petitioner is not an elector within the meaning of the Explanation to Section 81 (1) of the Act. His reasoning is that the validity of the entry in the electoral roll (Ext. 23) is not open to challenge. In view of Section 30 of the 1950 Act, neither the Civil Courts nor the Election Tribunals which consider the validity of an election have the jurisdiction to entertain or adjudicate upon any question whether any person is or is not entitled to register himself in the electoral roll in a Constituency or to question the legality of the action taken by or under the authority of the Electoral Roll Registration Officer or any decision given by any authority under that Act for the revision of any such roll. Reliance is placed in this connection on the decisions of the Supreme Court in the case of Kabul Singh v. Kundan Singh, AIR 1970 SC 340 and in the case of S. K. Chowdhury v. B. Panjari, AIR 1973 SC 717. It has been further contended, relying upon the provisions of Order 8, Rule 2 of the Code

the opposite party is the complainant. It is directed against the order dated 30-9-1972 passed by Mr. D. N. Singh, Munsif-Magistrate, First Class, Hajipur. Under this order, the Magistrate rejected the prayer of these petitioners for their discharge, and directed the case to be put up on the date fixed for framing charges against them.

2. The facts relevant for the purpose of this application are as follows. The opposite party, on 28-9-1970, filed a written complaint in the Court of the Sub-Divisional Magistrate, Hajipur, making the allegations of theft and assault against these accused persons. On receipt of this complaint, the Sub-Divisional Magistrate examined the complainant on that very day, i.e., 28-9-1970, and referred it to another Magistrate for enquiry and report. That report was received in due course in the office of the Sub-Divisional Magistrate and put up to the Magistrate Mr. S. A. Hassan on 25-11-1970, when he perused it and recorded order, "Report received and perused. Cognizance taken under Section 379, I.P.C. Summon the accused persons. Case transferred to Sri C. S. Singh Magistrate, First Class." There is no difference between the parties that on that day, i.e., 25-11-1970, Mr. Hassan was sitting and transacting the works of sawalkhani for the regular Sub-Divisional Magistrate in latter's absence.

3. On receiving the records of this case, the aforesaid transferee Magistrate, Mr. C. S. Singh, registered it in his file on 25-11-1970 and ordered for issue of summons against the accused persons fixing 22-12-1970 for their appearance. Pursuant to those summonses the accused persons appeared in his Court on different dates and were allowed bail on 22-12-1970 and the Magistrate adjourned the case to 17-3-1971 for evidence before charge. On 17-3-1971, complainant's two witnesses (P. Ws. 1 and 2) were examined and discharged on defence declining to cross-examine them before charge. On 17-12-1971, one more witness of the complainant, i.e., P. W. 3, was examined and cross-examined before charge. On 4-2-1972 this case, under the orders of the Sessions Judge was transferred to the file of aforesaid Munsif-Magistrate, Mr. D. N. Singh. In this Court, on 14-9-1972, one more witness was examined for the prosecution, i.e., P. W. 4. His cross-examination was, however, declined by the defence. After this was done, the accused persons put in a petition dated 14-9-1972 requesting the Court to discharge them on the ground stated in it. The Magistrate directed this petition to be put up on 15-9-1972 for being heard. On 20-9-1972 the Magistrate heard both the

parties on the point of discharge, as claimed by the accused persons in their petition dated 14-9-1972, and then passed the impugned order dated 30-9-1972, against which this revision is directed.

4. Learned counsel Mr. Awadh Kishore Prasad, appearing for the petitioners has urged that the order dated 25-11-1970 of Mr. Hassan taking cognizance in the case and transferring it to the aforesaid Magistrate, Mr. C. S. Singh for disposal was wholly illegal and he lacked inherent jurisdiction to do so in view of the fact that the regular Sub-Divisional Magistrate Mr. G. S. Mazumdar had continued his jurisdiction over this subject-matter even after he had referred it to the Magistrate Mr. R. B. Pandey for enquiry and report. In that situation, according to learned counsel, the enquiry report when received was to be put up before Mr. Mazumdar for necessary action and since Mr. Hassan could not be deemed to be his successor-in-office on that day, he had no power whatsoever to deal with the matter and its jurisdiction still continued with Mr. Mazumdar who had taken cognizance in the case and examined the complainant, and then referred the matter for enquiry under Section 202 of the Code of Criminal Procedure. In his submission, even assuming that Mr. Hassan, on that day, i.e., 25-11-1970, was sitting in the Court of the Sub-Divisional Magistrate and doing sawalkhani works, that did not make him the successor-in-office of the permanent Sub-Divisional Magistrate even for that day. Against this the contention of Mr. Mazhar Hussain, appearing for the opposite party, is that Mr. Hassan on that day was the successor-in-office of the regular Sub-Divisional Magistrate and was, therefore, fully entitled to exercise this power for the latter due to his absence from the Court when this enquiry report was placed before him. Moreover, even if this was to be treated as an irregularity on his part that was curable under the provisions of Section 529 (f) of the Code and the latter Magistrate has rightly refused to agree to their request for discharging them on the ground that the transfer so made was wholly illegal and without jurisdiction and, therefore, vitiated the proceeding ab initio. In this connection, Mr. Hussain has further urged that the instant revision is hit by limitation having been filed much beyond the prescribed period of 90 days from the date of the relevant order which, in this case, should be taken to be Mr. Hassan's order dated 25-11-1970, whose quashing the petitioners would seem to seek in the garb of the Magistrate's order dated 30-9-1972, to escape that limitation.

5. On the facts of the case, there seems no substance in the above objec-

tion regarding this application being time-barred. In this revision, the petitioners' specific prayer is to set aside the order of the Magistrate dated 30-9-1972 under which he has refused their prayer for discharge. The ground made for this discharge was that the cognizance in the case and its transfer by the Magistrate, Mr. Hassan, were illegal and improper. This point they raised by way of support to their prayer for discharge. As it can be seen, their prayer could not be treated as confined to that order of Mr. Hassan. After hearing the parties, the Magistrate came to the conclusion that the defect, if any, in that order of Mr. Hassan was curable under the provisions of Section 529 of the Code. In such a situation, this revision must be treated to be substantially directed against the Magistrate's order dated 30-9-1972 and not against Mr. Hassan's order dated 25-11-1970. That being the position, this application, filed on 20-12-1972, is within the prescribed period of 90 days, vide Article 131 of the Limitation Act, 1963.

6. In paragraph 7 of the revision petition it has been asserted that on the relevant date, i.e., 25-11-1970, when Mr. Hassan transferred this case to another Magistrate for disposal, he was not the successor-in-office of the Sub-Divisional Magistrate Mr. G. S. Mazumdar. Against this the statement in the counter-affidavit filed by the opposite party (paragraph 3) is that the petitioners' statement in paragraph 7 of the revisional petition that Mr. A. Hassan was not the successor-in-office of the permanent Sub-Divisional Magistrate Mr. G. S. Mazumdar is not correct and it is submitted that he (Mr. Hassan) was the Second Officer at the relevant time and, in the absence of the permanent Sub-Divisional Magistrate, he acted as the Sub-Divisional Magistrate and was enjoying the powers of the Sub-Divisional Magistrate, and, was, therefore, his (Mr. G. S. Mazumdar's) successor-in-office in the technical term at that time. There is no official paper from which it can appear that on the relevant date, i.e., 25-11-1970, Mr. Hassan had acted in that way without in any way being authorised to do so. Under Section 114 of the Evidence Act all judicial and official acts are to be presumed as having been regularly performed unless it is shown to be otherwise. The opposite party, as stated above, in his counter-affidavit, has challenged the correctness of the averment of the petitioners in the revision petition regarding the status of Mr. Hassan as the successor-in-office of the regular Sub-Divisional Magistrate Mr. G. S. Mazumdar on that day. It was open to the petitioners to request the Court to call for an official report in this regard to show that Mr. Hassan was ac-

tually without any such status so that what he had done on that day assigning that status to himself was wholly irregular and without any legal sanction. But, for reasons best known to them, they did not choose to do so.

7. This presumption seems to get support from the complete absence of any such challenge by these accused for the long period as above. The transfer order concerned by Mr. Hassan was made on 25-11-1970. Subsequent to that they appeared in Court and the case continued for several dates. Four witnesses were also examined on behalf of the prosecution before charge. One of them was cross-examined by them whereas the cross-examination of the other three they declined. They did not however ever whisper on any date during this long period against such want of powers on the part of Mr. Hassan at the relevant time. It was for the first time that on 14-9-1972 they filed a petition raising this contention when the Magistrate was about to frame charges against them on the basis of the statements made by those four witnesses, whom he had examined in the Court for that purpose.

8. On a consideration of the above facts, I am inclined to think that Mr. Hassan did possess such power on 25-11-1970 when he looked into the enquiry report and after taking cognizance transferred the case to another Magistrate for disposal. On that day, he is said to have been acting in place of the regular Sub-Divisional Magistrate in his absence. As it is pointed out with reference to the order sheet, he (Mr. Hassan) had made this order describing himself as the Sub-Divisional Magistrate. In these considerations, he could well be taken to have been the successor-in-office, for that temporary period, of the permanent Sub-Divisional Magistrate, i.e., Mr. G. C. Mazumdar, who, as shown above, had examined the complainant on solemn affirmation and referred the matter for magisterial enquiry under Section 202 of the Code.

9. In this view of the matter, I am not prepared to subscribe to the stand of the petitioners that Mr. Hassan, on that day, was wholly powerless in the matter and his transferring the case to another Court was absolutely without jurisdiction and consequently conferred no jurisdiction on the transferee Magistrate to proceed with its trial on that basis.

10. Even if it be assumed for a moment, for the sake of argument, that Mr. Hassan did not have this power and the transfer, if any, had to be done under Section 192 of the Code by the regular Sub-Divisional Magistrate who had taken cognizance in the case and examined the

complainant on solemn affirmation, this was, so to say, an irregularity on Mr. Hassan's part, which could be cured under Section 529 of the Code. As clause (f) of this section lays down, if any Magistrate not empowered by law to transfer a case under Section 192 does so erroneously in good faith, the proceeding shall not be set aside merely on the ground of his being not so empowered. This has to be treated as an irregularity on his part which does not vitiate the proceeding. It has been urged for the petitioners that this provision cannot come to the aid of the opposite party inasmuch as the transfer effected by Mr. Hassan could not be regarded as done so in good faith, because, in the circumstances, this action of his was obviously without exercise of due care and caution on his part. In this connection, learned petitioners' counsel has drawn my attention to the provision of Section 52 of the Indian Penal Code which provides that nothing is said to be done or believed in good faith which is done or believed without due care and attention. There is no material on the record on the basis of which it can be presumed that this act of Mr. Hassan lacked requisite care and caution. It is not disputed that on that day Mr. Hassan was doing the Sawalkhani work for the Sub-Divisional Magistrate in his absence. In that course, it was only natural for the office to put up the files meant to be disposed of by the Sub-Divisional Magistrate before him (Mr. Hassan) as he was taking up that Court in the absence of its regular Presiding Officer, i.e., the Sub-Divisional Magistrate. In that circumstance, he (Mr. Hassan), when this file was put up to him, looked into the enquiry report and passed the impugned order for the transfer of the case to the file of another Magistrate after taking cognizance. It will, I think, be too much to think of lack of good faith in his doing so. He can well be thought of having taken that step exercising due care and attention as required in the circumstances.

11. On the above facts, I hold the view that even if Mr. Hassan had made this order without being empowered to do so, this has to be treated as an irregularity curable under Section 529 and that it cannot vitiate the proceeding and make it liable to be set aside for that reason.

12. The Bench decision of this Court in Udit Narayan Patwari v. Emperor, (1938) 39 Cri LJ 778 = (AIR 1938 Pat 369) relied upon by the petitioners to substantiate their contention that Mr. Hassan, in doing so, lacked good faith, does not, to my mind, appear helpful in the context of the instant facts. In that

case, the action of the Second Enquiring Magistrate, who ignored the order under which all that he was directed to do was to make enquiry into the matter and report to the Sub-Divisional Magistrate, actually held a trial inasmuch as he examined some witnesses and discharged some accused persons under Section 253 (2) of the Code and recommended to the Sub-Divisional Magistrate for a proceeding under Section 145 of the Code, was taken to be without care and caution within the meaning of Section 529 and could not, therefore, be sustained. In the present case, the matter stands on a different footing. Here, Mr. Hassan's complained action is wholly dissimilar and the irregularity, if any, is of much less grave nature.

13. Thus, on a careful consideration of all the above facts and circumstances, I find no sufficient reason to revise the Magistrate's order in question dated 30-9-1972. The instant application to set aside this order must, therefore, fail. It is, accordingly, dismissed.

Revision dismissed.

AIR 1975 PATNA 275

B. D. SINGH AND BIRENDRA
PRASAD SINHA JJ.

Bijoy Kumar Bhagat, Petitioner v. The Chairman, State Transport Appellate Tribunal, Bihar and others, Respondents.

Civil Writ Jurisdiction case No. 1993 of 1974 D/- 7-3-1975.

(A) Motor Vehicles Act (1939), Ss. 64 and 62 — Appeal — Grant of temporary permit — Appeal from — Expiry of period of permit on the date of passing order in appeal — Appeal held became infructuous — Appellate Tribunal could not have passed any effective order particularly substituting the appellant in the permit which was existing then in favour of the respondent. AIR 1975 Orissa 3, Rel. on. (Para 10)

(B) Motor Vehicles Act (1939), Ss. 64-A and 62 — R. T. A. deciding to grant temporary permit in favour of A and calling upon him to produce the vehicle and necessary papers within specified time — A requesting for extension of time — Extension granted — Revision by B against extension of time — Expiry of period of permit on the date of passing order in revision — Revision held had become infructuous. (Para 10)

(C) Motor Vehicles Act (1939), S. 62 — Temporary permit — Grant of — S. 62 does not contemplate renewal of permit — After expiry of the maximum pe-

GS/GS/C583/75/LGC

riod of four months a fresh permit is granted. (Para 10)

Cases Referred: Chronological Paras
AIR 1975 Orissa 3 = ILR (1974) Cut 773

AIR 1966 SC 156 = (1965) 3 SCR 786

Basudev Prasad, Radha Mohan Prasad and Mrs. Renuka Sharma, for Petitioner; Saptami Jha, B. P. Pandey and Anil Kumar Sinha, for Respondents.

B. D. SINGH, J.:— This application by Bijoy Kumar Bhagat under Articles 226 and 227 of the Constitution of India is directed against an order dated 28-11-1974 (Annexure 1) passed by the Chairman, State Transport Appellate Tribunal, (respondent No. 1), whereby he has allowed the appeal of Messrs. Agrawal Transport (respondent No. 3). In the Writ application, therefore, the petitioner has prayed for quashing of Annexure '1'.

2. In order to appreciate the points involved in this application it will be necessary to state the facts briefly. In paragraph 2 of the application the petitioner has stated that he was an experienced bus operator and was carrying on his business of transport efficiently since 1970. In the other paragraphs of his application he stated that Chotanagpur Regional Transport Authority (respondent No. 2) (for the sake of brevity hereinafter to be referred to as 'the R.T.A.') invited applications for grant of temporary permit for four months in respect of the route Ranchi-Sessai-Bargaon-Sogara-River Koel (East Bank)-Gumla, in response to which a number of persons, including the petitioner and respondent No. 3, filed applications. On 16-8-1973 a meeting of R.T.A. took place in which it was decided to grant temporary permit for the route in question to the petitioner. In pursuance thereto on 28-8-73, a letter was sent to the petitioner, intimating him of the fact of the grant of temporary permit in respect of the route in question and calling upon him to produce the vehicle and necessary papers. It seems the petitioner could not produce the aforesaid things within the prescribed time and, therefore, he requested for extension of time. It appears, he was twice granted extension of time for the said purpose. On 16-10-1973 the petitioner produced the vehicle and necessary papers. Thereafter he was allowed to operate the bus on the said route. The said temporary permit was valid till four months from 19-10-73 when it was granted to him. Aggrieved with the said order respondent No. 3, in relation to the extension of time to the petitioner for producing vehicle, preferred revision No. 62/73, and against the final order granting temporary permit, it filed appeal No. 97/73. It may be stated here that one

Basant Kumar Lall was also one of the applicants for grant of temporary permit for the aforesaid route, and since he was not granted the said permit, in preference to the petitioner, he also filed appeal No. 99/73 against the said order, by which the petitioner was granted temporary permit. On 28-11-74 the said revision and the two appeals were heard and disposed of by a common order (Annexure 1) by respondent No. 1. I may mention here that in this case we are concerned with the impugned order relating to petitioner and respondent No. 3. The effective part of the order is to be found in paragraph 16, which is as follows:—

"So far as T. A. 97/73 is concerned I shall order that the claim of the appellant in T. A. 97/73 is definitely superior to that of Bijoy Kumar Bhagat and all other persons who had appeared as applicants in response to the notification for grant of the temporary permit and as such I shall order that the temporary permit be granted to this appellant. The order of the Chotanagpur Regional Transport Authority dated 16-8-1973 is set aside and it is directed that the temporary permit so granted by this authority will henceforth cease to be effective. The appellant of 97/73 shall abide by all such terms and conditions which would be imposed on this appellant by the Chotanagpur Regional Transport Authority for running this route. Subject to what I have stated above T. A. 97/73 is allowed."

3. Being aggrieved by the said order, as mentioned earlier, the petitioner filed this application on 12-12-74, which was admitted on 23-12-74. Interim order staying the operation of the impugned order was also passed on that date.

4. Respondent No. 3 filed show cause on 4-1-75 supporting the impugned order, and it again filed a supplementary affidavit on 7-1-75. The petitioner filed a reply thereto on 7-1-75. Both the petitioners and the respondents were heard on the stay matter by this court on 7-1-75 and the order for continuance of the stay till disposal of this application was passed on that date. Later, respondent No. 3 filed a counter-affidavit on 25-1-75 supporting the impugned order and controverting certain facts as alleged in the writ application. The petitioner then filed on 29-1-75 a reply to the counter-affidavit filed on behalf of respondent No. 3.

5. Mr. Basudev Prasad, learned counsel appearing on behalf of the petitioner, has assailed the impugned order and has raised the following points for consideration by this Hon'ble court.

(i) When the order was passed in appeal as well as in revision, the period of temporary permit, under which the

petitioner was authorised to ply his vehicle on the route in question had already expired and on that date respondent No. 1 could not have passed an effective order. In other words, the appeal as well as revision had become infructuous and they had ceased to be maintainable.

(ii) The direction given by respondent No. 1 that the temporary permit would be granted to respondent No. 3 in place of the petitioner was bad because in the impugned order respondent No. 1 observed that temporary permit granted by respondent No. 2 by an order dated 16-8-73 from the date of the order, namely, 28-11-74, would cease to be effective.

6. It will be convenient to take up both the points together. Learned counsel for the petitioner referred to Section 62 of the Motor Vehicles Act, 1939 (hereinafter to be referred to as 'the Act'), which provides for temporary permit. The relevant portion of the said section reads thus:

"(1) A Regional Transport Authority may without following the procedure laid down in Section 57, grant permits, to be effective for a limited period not in any case to exceed four months, to authorise the use of a transport vehicle temporarily—

xx (c) to meet a particular temporary need".

Under the provisions of the said section, it was notified by respondent No. 2, inviting applications in the prescribed form for the said route, for issuing of a temporary permit. Notice was issued on 14-4-73 vide Annexure 'C' to the counter affidavit of respondent No. 3. The petitioner, respondent No. 3 and others filed their application forms in response to the said notice, and their applications were considered by respondent No. 2, by order dated 16-8-73 as would be evident from Annexure '6' to the supplementary affidavit of the petitioner filed on 23-12-73. In view of the said order learned counsel pointed out that permit was granted to the petitioner on 19-10-73 for a period of four months, the validity of which was to expire on 16-2-74. It was against the grant of the said temporary permit, learned counsel pointed out, that respondent No. 3 had preferred an appeal, and its revision was also against extension of time granted to the petitioner for producing his vehicle in respect of the said permit, which had expired after four months, as mentioned above. He submitted that the impugned order was passed on 28-11-74, after several months of the expiry of the period of the permit, that is, 16-2-74. In that view of the matter he contended that on the date of the order, namely, 28-11-74 the appeal as

well as revision had ceased to be maintainable and respondent No. 1 could not have passed any effective order. since the appeal and the revision had become infructuous.

7. In order to find support to his contention he has relied on a Bench decision of the Orissa High Court in Regional Transport Authority v. Purna Chandra, AIR 1975 Orissa 3. In that case their Lordships were considering the issuance of a temporary permit under Section 62 of the Act. He drew our attention to paragraph 2 of the judgment at page 4. In that case also the period of temporary permit had expired when the Appellate Tribunal had passed the order. Therefore, their Lordships held in that paragraph "we have no doubts in our mind that the appeal had ceased to be maintainable with the lapse of time and the reasoning advanced by the appellate Tribunal is not sustainable in law." He also referred to paragraph 3 of the judgment, which is to this effect:—

"Erroneously enough the appellate Tribunal referred to a decision of the Supreme Court reported in AIR 1966 SC 156 (M. P. S. R. T. Corporation v. R. T. Authority) and was of the view that even if the appeal was not maintainable and had to be dismissed it was open to it to indicate guideline. On more than one occasion this court has indicated to the Appellate Tribunal that it is not a court of record and its decisions have no precedent value. They would not even bind him in another case much less his successor. Litigating public before him would not be bound by any observation made by him. Therefore it was not at all necessary for the Appellate Tribunal to have referred to the Supreme Court decision and proceeded to indicate guideline for whom one does not know. The Supreme Court stands on a very different position. Apart from its position as the highest forum in the judicial process, under Article 141 of the Constitution its decisions have been declared to be the law of the land and bind one and all in regard to interpretation of statutes as also the law laid down by it."

8. Mr. Septami Jha, learned counsel appearing on behalf of respondent No. 3, on the other hand, contended that in the instant case, although the order was passed by respondent No. 2 for granting the permit for a period of four months, in reality it was a permanent grant of permit to the petitioner. He submitted that on the basis of Annexure '6', subsequent permits to the petitioner are being renewed from time to time by respondent No. 2 and it is in a way continuity of the order passed under Annexure 6. In other words, it was in

the nature of a permanent permit. Therefore, he urged that on the date of impugned order, namely, 28-11-74, the parties had subsisting interest. Besides, in the impugned order respondent No. 1 has also considered merit of the claim of respondent No. 3, whereby he has held that respondent No. 3 had offered 1973 model vehicle and on merit permit ought to have been granted to respondent No. 3 and not to the petitioner, as mentioned in the final order, already quoted above. Learned counsel for respondent No. 3 further submitted that the revision was also for the illegal extension of the period for producing the vehicle. He pointed out that one extension was granted by the Secretary of respondent No. 2. He urged that it was the Chairman alone, who under the law could have granted extension. He submitted that in the case of temporary permit, which cannot exceed more than four months under Section 62 of the Act, if an aggrieved person prefers an appeal, in most cases the appeal by the Tribunal would not be disposed of within four months and thus in every such case appeal would become infructuous and a great hardship is caused to the litigant public. In the instant case he contended that the Tribunal was not constituted and for that reason also the appeal could not be disposed of expeditiously. If the appellate Tribunal had given its finding in favour of the appellant, that should not be ignored.

9. Mr. Jha referred to Annexure '7' to the supplementary affidavit filed on behalf of the petitioner, which relates to the subsequent grant of permit to the petitioner. In Annexure 7 as well as in other permits, which were subsequently granted after the appellate order (Annexure 6) it is clearly mentioned "on the terms and conditions attached to the previous T. P." This, he has pointed out, was in order to find support to his contention that the same permit, which was granted under Annexure 6, was being continued and it was in existence at the time when the impugned order was passed.

10. In my opinion, on this basis it would be difficult to hold that the same permit, which was granted by the order contained in Annexure 6, was being continued. Instead of writing the terms in every subsequent permit they were merely referred to the previous temporary permit. It was merely a sort of imposing condition by reference. Besides, there is no provision for renewal of temporary permit in the Act. Temporary permit, as mentioned earlier, is granted under Section 62 of the Act, which does not contemplate renewal of permit. On every occasion after expiry of the maximum

period of four months a fresh permit has to be granted under the said section. In my opinion, only in case of permanent permit, contemplated under Section 57 of the Act, there is a provision for duration and renewal of permit under Section 58 of the Act. Besides, by reference to Annexure 'D' to the counter-affidavit filed on behalf of respondent No. 3, it is also apparent that on each subsequent occasion the permit granted to the petitioner, was considered as a fresh grant as it may be noticed that respondent No. 3 also on the second occasion, when temporary permit was being granted to the petitioner, had filed an application for grant of the same to it, but on that occasion, the case of respondent No. 3 was not considered and the petitioner was granted temporary permit. That would at least show that on each occasion there was fresh grant. Therefore, it is clear that on the date, when the impugned order was passed, the period for which the earliest temporary permit was granted to the petitioner, had expired. In my opinion, on the facts and circumstances of the instant case respondent No. 1 could not have passed the effective order, particularly substituting respondent No. 3 in the permit, which was existing then in favour of the petitioner. On that score the impugned order cannot be sustained. The revision, as mentioned earlier, related to the extension of the period for providing the bus by the petitioner in respect of the earliest permit, which had also expired. Therefore, according to me, revision had also become infructuous. It is true that hardship is caused to the litigant public, who choose to file an appeal against the grant of temporary permit. The right to litigant public for preferring an appeal is provided under Section 64 of the Act. In the case of temporary permit, as illustrated above, in almost all the cases it would not be possible for the Appellate Tribunal to dispose of the appeal before the period of temporary permit expires, and, therefore, the appeals are bound to become infructuous. This, I am pointing out in order to bring to the notice of the Legislature to make necessary amendment so that litigant public may have effective right to appeal against the order for grant of permit.

11. After careful consideration, therefore, I allow this application and quash the order contained under Annexure '1'. On the facts and in the circumstances of the present case, since hardship has been caused to respondent No. 3, I direct respondent No. 2 to consider the claim of respondent No. 3, if any such claim is made by it, at the time of fresh grant of permit for the said route.

In the circumstances, however, there will be no order as to costs.

BIRENDRA PRASAD SINHA, J.—
I agree.

Petition allowed.

AIR 1975 PATNA 279

MADAN MOHAN PRASAD AND S. K. CHOUDHURI, JJ.

Mahabir Mistry and others, Appellants v. Sm. Lachhmini Devi and others, Respondents.

A. F. O. D. No. 264 of 1965, D/- 23-12-1974.*

(A) Civil P. C. (1908). O. 1, R. 9 — Non-joinder or misjoinder of parties.

A suit is not to be defeated by reason of non-joinder or misjoinder and the Court may deal with the matter in controversy only in "so far as regards the rights and interests of the parties actually before it". It is thus, obvious that it is not the rights and interests of the respondents who are no more parties to this appeal which can be adjudicated upon in their absence and in spite of a decree already having been passed in their favour. AIR 1962 SC 89 and AIR 1966 SC 1427, Rel. on. (Para 10)

(B) Civil P. C. (1908), O. 41, R. 4 — Enables one of the plaintiffs or defendants to file an appeal in case the grounds are common to both parties — Where all the plaintiffs and defendants have appealed Rule 4 is not applicable. AIR 1963 SC 1901, Rel. on. (Para 10)

(C) Civil P. C. (1908), O. 41, R. 4 — Appellate Court's powers to vary or reverse decree.

Where there is a likelihood of a decree being passed which would be in conflict with a decree already passed, it is not open to the Appellate Court to vary or reverse the decree. The appeal is incompetent. AIR 1962 SC 89 and AIR 1963 SC 1901, Rel. on; AIR 1971 SC 742 and AIR 1970 SC 108, Disting.

(Paras 14, 16)

Cases Referred: Chronological Paras
AIR 1971 SC 742 = (1971) 3 SCR 301

13, 14
AIR 1970 SC 108 = (1970) 1 SCR 296

13, 14
AIR 1966 SC 1427 = (1966) 3 SCR 451

11
AIR 1963 SC 1901 = (1964) 3 SCR 549

12, 14
AIR 1962 SC 89 = (1962) 2 SCR 636

10, 11, 12, 14
AIR 1958 Pat 8

15
AIR 1955 Pat 240 = ILR 32 Pat 1003

15
*(From decision of A. N. Sarkar, 2nd Addl. Sub-J., Gaya, D/- 4-5-1965.)

FS/FS/C110/75/SVM

AIR 1949 Pat 401 = ILR 27 Pat 43 15
AIR 1940 Pat 117 = 20 Pat LT 852 15
AIR 1940 Pat 346 = 21 Pat LT 597 (FB) 12

Janeshwar Singh, S. B. N. Singh and B. N. P. Gupta, for Appellants; Lakshman Sharan Sinha, for Respondents.

MADAN MOHAN PRASAD, J.— In this appeal, a preliminary objection has been taken to the effect that the appeal has become incompetent in view of the same having been dismissed as against some of the respondents.

2. The appeal is directed against a decree dismissing a suit for partition. The short facts relevant for the present purpose are as follows. The plaintiffs filed a genealogy, according to which one Kanhai had three sons, namely, Gangeshwari, Bisesari and Parmeshwari. Gangeshwari died issueless before the survey. Bisesari and his son Jagan also died before survey. The latter, however, left two sons Sahdeo and Mahadeo. Sahdeo also died long before the suit, and his sons were impleaded as defendants 11 to 14 and 18. His brother Mahadeo was impleaded as defendant No. 8 and his sons were impleaded as defendants 9 and 10. It will be relevant to mention that one of the sons of Sahdeo was Dukharan (defendant No. 11) and his minor son, Rajkapur, was impleaded as defendant No. 27 and as respondent No. 26 to the present appeal. Similarly, another son of Sahdeo named Thakur was impleaded as defendant No. 18 and his minor son, whose name was not known, was impleaded as defendant No. 29 and as respondent No. 28 in this appeal. In the branch of Parmeshwari, he had three sons, Gopi, Lalchand and Jagmohan. Gopi's son and grandson were impleaded as defendants 1 and 2 respectively, and Lalchand's son and grandsons as defendants 3 to 7. It needs to be pointed out that one of the sons of Lalchand named Rambaran had a minor son, name not known, who was impleaded as defendant No. 28 and as respondent No. 27. The sons and grandsons of Jagmohan are the plaintiffs.

3. The case of the plaintiffs is that the family had 8.35 acres of land in village Shahpore (mentioned in Schedule No. I) and 75 decimals of land in village Aurangabad (mentioned in Schedule No. II). In the record of survey, Sahdeo and Mahadeo were recorded in respect of 1/3rd share, Lalchand in respect of another 1/3rd and Parmeshwari in respect of the remaining 1/3rd. According to them, Lalchand had separated from his father Parmeshwari and for that reason he was separately recorded in respect of 1/3rd share. At the stage of evidence, the explanation given for the share of Lal-

chand, as stated above, was that he had taken more lands than he was entitled to according to his share in Schedule I lands in lieu of having given up his share in Schedule II lands. On this basis, the plaintiffs said that they were entitled to 1/6th share in Schedule I lands, defendants 1 and 2 to 1/6th share, defendants 8 to 14 (Mahadeo, his sons and heirs of Sahdeo) to 1/3rd and Lalchand to the remaining 1/3rd in view of what has been stated above. According to the plaintiffs, they were further entitled to half share in Schedule II lands, Lalchand getting no share therein on account of his having become separate from his father and the other half being that of defendants 1 and 2. The case of the plaintiffs in respect of Schedule II lands was that they were the separate properties of Parmeshwari and the other branches had nothing to do with them.

4. Defendants 1 and 2 filed a written statement supporting the case of the plaintiffs. Defendants Nos. 3 to 7 however, contested the allegations of the plaintiffs, and some other defendants by their written statements supported his case. The case of these defendants was that the three sons of Kanhai had separated and were only tenants-in-common at the time of survey. Gangeshwari had, therefore, sold his share in Schedule I lands to Lalchand and that was the reason why Lalchand was recorded in respect thereof in survey papers. They denied the allegation of separation between Lalchand and his father. Further, they alleged that the lands of Schedule I had already been partitioned earlier, and the land so allotted to defendant No. 3 is stated in the Schedule to the written statement filed by him. With regard to Schedule II lands, their case was that 42 decimals out of that along with some other lands of Schedule I had been sold by Lalchand to one Bakhori and 25 decimals of Schedule II lands had been sold by him to his cousins, Mahadeo and Sahdeo. Bakhori, in his turn, sold away 42 decimals of land to Surji (defendant No. 20), the daughter of Lalchand, and the lands of Schedule I had reverted to the possession of Parmeshwari and Bisesari. After the death of Parmeshwari, his three sons had come in possession of the properties. The remaining portion of 8 decimals in Schedule II lands was allotted to the father of the plaintiffs. Accordingly, these defendants claimed a share in Schedule II lands as well.

5. The learned Subordinate Judge found in favour of these defendants and dismissed the suit on the grounds that the plaintiffs had failed to prove that Lalchand was separate, that Lalchand had purchased 1/3rd share of Gangeshwari,

that there had been a previous partition of Schedule I lands and that the portion of Schedule II lands having been transferred and the suit having been framed as a suit for partition simpliciter was not maintainable. Hence the present appeal.

6. It appears that by an order dated the 26th October, 1967 this Court had ordered respondents 26, 27 and 28 along with other minor respondents to be placed under the guardianship of the Deputy Registrar. By another order dated the 22nd November, 1967, one month's time was granted to deposit the guardian's cost for the aforesaid respondents, failing which the appeal was to stand dismissed as against them. The order was not complied with. Accordingly, the appeal stood dismissed on the 22nd December, 1967, as against them. It appears that an application for restoration of the appeal as against the aforesaid respondents, being M. J. C. No. 121 of 1968, was filed. It appears next that for non-compliance of the order passed in that proceeding on the 12th of April, 1971 granting one week's time to take steps for service of notice on the opposite parties, the M. J. C. application also stood dismissed for default on the 19th April, 1971. The position thus in respect of respondents 26 to 28 did not improve, and the appeal stood dismissed as against them.

7. It also appears that respondent No. 23 Bhagwan Sao (defendant No. 24) son of Bekora Sao also died during the pendency of the appeal, and by an order dated the 24th September, 1968, it was ordered by this Court that the appeal had abated as against the heirs of the said respondent No. 23. On the prayer of the appellants, it appears an order was passed on the 24th October, 1968, expunging the names of respondents 21 to 24 at the risk of the appellants.

8. It has now been pointed out by the respondents that the appeal having been dismissed against respondents 26 to 28, it cannot now proceed in respect of the remaining respondents, having become incompetent for several reasons; primarily, that there is a likelihood of a conflicting decree being passed. On the other hand, it has been contended on behalf of the appellants that the suit being one for partition and the heads of the different branches being still parties, the appeal can proceed and the Court should adjudicate upon the question irrespective of the fact that the decree stands in favour of the aforesaid respondents who, it is said, were not necessary parties. For the reasons which I shall state hereafter, the contention of the respondents must prevail.

9. There is no doubt, nor has it been disputed by the appellants, that if the appeal is heard further, there is likelihood of a decree conflicting to the one already enuring to the advantage of respondents 26 to 28. If the appeal be allowed after hearing, obviously the findings already given by the learned Subordinate Judge, as mentioned above would be disturbed. If it be found that Lalchand had not acquired 1/3rd share from Gangeshwari and that it was a part of the joint family property, obviously the decree would stand reversed not only in respect of the respondents who are present parties to the appeal but even as against respondents 26 to 28 and that will have the effect of taking away from them what they have already got by virtue of the dismissal of the appeal against them. If the findings in respect of the previous partition of Schedule I lands were to be disturbed, they will not only affect the present respondents but even respondents 26 to 28. So also with regard to Schedule II lands. The suit has been held to be non-maintainable, and, if that finding were to be disturbed again what benefit respondents 26 to 28 have derived will have been lost. It has also been held by the court below that Lalchand had a share in it and thus respondent No. 27, his grandson, against whom the appeal has been dismissed has secured a benefit which is likely to be lost by reversal of that finding of the Subordinate Judge. It is not necessary to dilate upon this point at any length. It is quite obvious that in the circumstances of the present case, a reversal of the decree of the court below will enure to the prejudice of the respondents against whom the decree has already been upheld by virtue of the dismissal of the appeal.

10. The question, thus, is whether the consideration of a conflicting decree likely to be passed can be ignored. The argument of learned counsel for the appellants is exactly that. In spite of his best efforts, he has not been able to cite any authority in support of his argument to the effect that even though the appeal has been dismissed against some of the respondents and the decree has been upheld, the appeal can be proceeded with and a contradictory decree passed in the same appeal simply because the persons who are not now before the Court were at the initial stage not necessary parties. Learned counsel has drawn our attention to the provisions of Order 1, Rule 9 of the Code of Civil Procedure (hereinafter called 'the Code') which reads thus:

"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit

deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

It is obvious that a suit is not to be defeated by reason of non-joinder or misjoinder and the Court may deal with the matter in controversy; but it has to be noticed that the wordings in the rule are that this must be only in "so far as regards the rights and interests of the parties actually before it." It is, thus, obvious that it is not the rights and interests of the respondents who are no more parties to this appeal which can be adjudicated upon in their absence and in spite of a decree already having been passed in their favour. In this connection, I would refer to the case of State of Punjab v. Nathu Ram (AIR 1962 SC 89), wherein (in paragraph No. 5 at page 90), Raghubar Dayal J. speaking for the Court while considering the aforesaid rule, observed as follows:

"It follows, therefore, that if the Court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent, it has to proceed with the appeal and decide it. It is only when it is not possible for the Court to deal with such matters, that it will have to refuse to proceed further with the appeal and therefore dismiss it."

In that case, there was a joint decree in favour of two persons, and, during the pendency of the appeal, one of them was dead and his legal representatives were not brought on record and the appeal had abated as against him. The question was whether the appeal had abated against the other respondent as well. I am tempted to quote further from the aforesaid decision in order to show that when the success of the appeal may lead to the Court's coming to a decision which would be in conflict with the decision between the appellant and the deceased respondent and thus a contradictory decree with regard to the same subject-matter, the Court would not proceed with the appeal:

"The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the

controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent, (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed."

11. It is, thus, well settled that the Court would refuse to proceed with the appeal in case there is likelihood of conflicting decree. Learned counsel for the appellants has, however, urged that all the three circumstances mentioned in the aforesaid observation of the learned Judge of the Supreme Court must be present in order that the Court may refuse to proceed with the appeal. The argument has merely to be stated in order to be rejected. The circumstances of different cases may differ, and any one or more of the tests laid down have to be applied. I am definitely of the view that even if one of the tests is applicable, the Court must refuse to proceed with the appeal. Learned counsel for the respondents pointed out, in support of the aforesaid proposition, what has been said in the decision of *Sri Chand v. M/s. Jagdish Pershad Kishan Chand*, (AIR 1966 SC 1427). In that case, while affirming the principle laid down in the case of AIR 1962 SC 89 (*supra*) *Shah, J.* speaking for the Court, said:

"It may be pointed out that the three tests suggested by *Raghubar Dayal, J.*, in *Nathu Ram's case* [(1962) 2 SCR 636 = (AIR 1962 SC 89)] are not cumulative tests. Even if one of them is satisfied, the Court may, having regard to all the circumstances hold that the appeal has abated in its entirety." The argument of the learned counsel for the appellants to that effect must, therefore, be rejected.

12. Learned counsel for the appellants has next contended that in view of Order 41, Rule 4 of the Code, it is open to him to obtain a reversal of the whole decree since it proceeds on grounds common to the case of the minor respondents against whom the appeal stands dismissed and the remaining respon-

dents. I will read here the rule aforesaid which runs as follows:

"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

The effect of this rule has been considered in several cases. I will first refer to a decision of our own Court in *Ramphal Sahu v. Babu Satdeo Jha* (AIR 1940 Pat 346). A Full Bench of this Court held that there is nothing in Order 41, Rule 4 of the Code which permits the Court to disturb the finality of the decree, already passed. It was said that the rule was intended to apply to cases where all the plaintiffs or the defendants were alive and that only one or more of such plaintiffs or defendants had appealed from the decree. The wording of the rule was held not appropriate to cases where one of the plaintiffs or defendants-appellants was dead during the pendency of the appeal. It was, therefore, held that the appellate Court had no power to proceed with the hearing of an appeal and to reverse or vary the decree in favour of all the plaintiffs or defendants under Order 41, Rule 4, if all the plaintiffs or defendants appeal from the decree and one of them dies and no substitution is effected within time and the application for setting aside the abatement, so far as the deceased appellant is concerned, has been refused. This decision was noticed and approved by the Supreme Court in the case of *Rameshwar Prasad v. Shambhari Lal* (AIR 1963 SC 1901). In that case also, their Lordships held that where a number of persons have filed an appeal and pending the appeal one of the appellants dies, the surviving appellants cannot be said to have filed the appeal as representing the deceased appellant, and, if in respect of the appellant deceased the appeal has abated and the decree in favour of the respondents has become final against his legal representatives, these not having been brought on record in time, it will be against the scheme of the Code to hold that Rule 4 of Order 41 empowers the Court to pass a decree in favour of the legal representatives of the deceased appellant on hearing an appeal by the surviving appellants even though the decree against him has become final. Reliance was also placed on the decision in *Nathu Ram's case*, AIR 1962 SC 89 (*supra*). It must be noted that Rule 4 of Order 41 enables one of the plaintiffs or defendants to file an appeal in case the

grounds are common to all the plaintiffs or defendants. Where all the plaintiffs and defendants have appealed, there is no question of applying this rule.

13. Learned counsel for the appellants has drawn our attention to a few other decisions of the Supreme Court which I shall presently notice. The first one is in the case of Mahabir Prasad v. Jage Ram, (AIR 1971 SC 742). Their Lordships distinguished the case from the case of Rameshwar Prasad (supra) on facts and followed an earlier decision of that Court in the case of Ratan Lal Shah v. Firm Lalmandas Chhadamma Lal (AIR 1970 SC 108). In the case before the learned Judges, it was pointed out that there was an order against the decree-holder, but all the decree-holders had not appealed. Only one of them had appealed, and the other two were joined as party respondents. In Ratan Lal Shah's case, the Court had allowed the appeal to be prosecuted even though one of the joint decree-holders impleaded as a party-respondent had not been served with the notice of appeal. The principle laid down in Rameshwar Prasad's case was, therefore, found to be inapplicable to the facts of the case before the learned Judges deciding the case of Mahabir Prasad (supra). Shah. C. J. said:

"Power of the appellate Court under Order 41, Rule 4 to vary or modify the decree of a Subordinate Court arises when one of the persons out of many against whom a decree or an order had been made on a ground which was common to him and others has appealed. That power may be exercised when other persons who were parties to the proceeding before the Subordinate Court and against whom a decree proceeded on a ground which was common to the appellant and to those other persons are either not impleaded as parties to the appeal or are impleaded as respondents."

14. It is not necessary for us to dilate upon the point. These decisions are upon the facts, distinguishable from the instant case before us. The present one is not a case where Order 41, Rule 4 has any application. In the cases aforesaid, the questions were different. In the case before us, the question is whether the decree having already been confirmed on account of dismissal of the present appeal as against respondents 26 to 28, it is now open to this Court to proceed to hear the appeal and vary or reverse the decree in favour of the appellants and against all the respondents. In my view, the principle laid down by the Supreme Court in Nathu Ram's case (supra) and Rameshwar's case, AIR 1963 SC 1901 (supra) applies and not those laid down

in the case of Ratan Lal, AIR 1970 SC 108 or Mahabir Prasad, AIR 1971 SC 742 (supra) cited by learned counsel for the appellants.

15. Learned counsel for the respondents has drawn our attention to several other decisions of our Court in Dhanuka Singh v. Saudagar Singh (AIR 1955 Pat 240), Janak Sahu v. Anant Jha, (AIR 1958 Pat 8), Deo Narain Singh v. Bibi Khatoon (AIR 1949 Pat 401) and Prahlad Das v. Dasarathi Satpathi. (AIR 1940 Pat 117). The question in most of these cases was whether the whole appeal had abated in view of its abatement in respect of some of the respondents, and, as I have said earlier, the question before us is not whether the appeal has 'abated' as a whole, but the question is whether the appeal is now competent and can be heard in view of the existence of a decree already enuring to the benefit of defendants-respondents 26 to 28. It will not, therefore, be necessary to refer to these cases at any length.

16. In view of my finding that there is a likelihood of a decree being passed which would be in conflict with the decree already passed in favour of respondents 26 to 28 and this being not open to us to do, the present appeal must be held to be incompetent. The appeal is accordingly, dismissed. In the circumstances, there will be no order for costs.

S. K. CHOUDHURI, J. :— I agree.

Appeal dismissed.

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FULL BENCH

UNTWALIA, C. J., K. B. N. SINGH AND S. K. JHA, JJ.

Ram Nandan Sharma and another. Petitioners v. Mt. Maya Devi and others. Opposite Parties.

Civil Revn. Nos. 1314 of 1970 and 856 of 1971, D/- 10-9-1974.*

(A) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947). S. 11-A — Denial of relationship of landlord and tenant by tenant — Court not debarred from making order under S. 11-A. AIR 1968 Pat 415 (FB), Rel. on. (Para 5)

(B) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11-A (inserted by Amending Act of 1955) — "Arrears of rent" — Meaning of — Expression is confined to period after institution of and during pendency of the suit

*(Against order of N. K. Sinha, Munsif 2nd Court, Patna, - D/- 22-7-1970 and against order of A. N. K. N. Sinha Munsif, Hazaribagh, D/- 17-6-1971.)

— 1967 BLJR 397; AIR 1973 Pat 60; AIR 1973 Pat 424; AIR 1973 Pat 361, Overruled.

On a comparison of the relevant provision of the various State Statutes with that of Section 11-A of the Bihar Act, it would be noticed that the Bihar provision stands in glaring contrast to similar provision in the other Acts. Even on payment of all arrears of rent it does not relieve the tenant from his liability to be evicted on the ground of non-payment of rent. It is therefore just and proper that the "arrears of rent" occurring in Section 11-A must be interpreted to mean arrears of rent falling due during the period of the suit, which expression, in certain circumstances, may mean period of appeal or appeals, on the basis of the well-known principle that an appeal is a continuation of the suit. But the expression will not embrace within its ambit arrears of rent which had accrued due prior to the institution of the suit. As the expression means arrears of rent accruing due during the pendency of the suit, the question of the claim being barred under Order II, Rule 2 (2) of the Code of Civil Procedure does not arise at all. A second suit would be maintainable obviously for realisation of arrears of rent accruing due during the pendency of the first suit. If restricted meaning were not to be given to the expression "arrears of rent" occurring in Section 11-A, remedy by suit may be barred, but the remedy by Section 11-A will not be barred, resulting in great injustice to tenants and depriving them of their right to contest the suit for ejectment under coercion of striking out their defence if all arrears, whether barred or not, are not paid. Hence no arrears of rent in respect of any period prior to the institution of the suit can be directed to be deposited under Section 11-A. Filing of an application under Section 11-A is not circumscribed by any period of limitation. Such an application is not governed by Article 52 of the Limitation Act, which applies to suits only. 1967 BLJR 397; AIR 1973 Pat 60; AIR 1973 Pat 424; AIR 1973 Pat 361. Overruled.

(Paras 13, 14, 17, 19, 21)

Cases Referred: Chronological Paras
 AIR 1973 Pat 60 = 1972 BLJR 818 14, 22
 AIR 1973 Pat 361 = 1974 BLJR 531 1. 3, 8, 14, 15, 19, 22
 AIR 1973 Pat 424 14, 19
 AIR 1970 SC 196 = 1970 Lab IC 256 21
 AIR 1970 SC 209 = 1970 Lab IC 269 21
 AIR 1969 SC 1335 = 1969 Lab IC 1538 21
 AIR 1968 Pat 415 = 1968 BLJR 447 (FB) 5
 1967 BLJR 397 14, 22
 AIR 1962 Punj 256 = 64 Pun LR 255 (FB) 10, 16

AIR 1961 SC 1107 = (1961) 2 SCR 295 23
 AIR 1959 Punj 328 = (1958) 28 Com Cas 402 16
 AIR 1951 SC 115 = 1951 SCR 145 23
 AIR 1939 Bom 494 = 41 Bom LR 1002 17
 (1935) 1 KB 200 = 104 LJKB 249 17
 AIR 1933 PC 63 = ILR 54 All 1067 18
 1898 AC 735 23
 (1889) 42 Ch D 424 = 62 LT 278 17
 (1884) 14 QBD 394 = 54 LJQB 422 17

Gupteshwar Prasad (in C. R. No. 1314 of 1970); Sushil Kumar Mazumdar and Krishna (in C. R. No. 856 of 1971), for Petitioners; Guneshwar Prasad (in C. R. No. 1314 of 1970), for Opposite Parties.

UNTWALIA. C. J.:— These two Civil Revision Applications, in the first instance, came up for hearing before a learned Single Judge of this Court. He referred them for disposal by a Division Bench. When they were placed before two of us for hearing, we doubted the correctness of the Division Bench decision of this Court in Sashadhar Das v. Harihar Prasad (AIR 1973 Pat 361) and desired constitution of a larger Bench for disposal of these two civil revision applications. Since the points involved in the two cases are common and identical, they were heard together and are being disposed of by this judgment.

2. Civil Revision No. 856 of 1971 filed by the tenant-defendant proceeded to hearing ex parte as the plaintiffs-landlords-opposite party did not appear to contest it. The plaintiffs filed a suit on the 1st August, 1970 for eviction of the defendants out of whom the main contesting defendant is the petitioner. During the pendency of the suit, the plaintiffs filed an application on the 22nd May, 1971, under Section 11-A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (hereinafter called 'the Bihar Act') for a direction to the defendants to deposit arrears of rent due in respect of the suit premises with effect from the 1st April, 1964 till the date of institution of the suit, at the rate of Rs. 80 per month. It is somewhat unusual to find in this case that no prayer was made in the application under Section 11-A of the Bihar Act for deposit of rent which had accrued due during the pendency of the suit and rent month by month. It may be stated that no decree for arrears of rent for any period was asked for in the suit. The application was resisted by the petitioner on the short plea that he had taken the suit premises, namely, two shops, from the father of the plaintiffs on a monthly rental of Rs. 34 and not on a monthly rental of Rs. 40 each shop, as stated by the plaintiffs. The entire rent had been duly paid till the

institution of the suit, but no receipt was granted either by the father of the plaintiffs or by the plaintiffs. The learned Munsif, *prima facie*, believed the case of the plaintiffs that the two shops were let out at Rs. 80 per month and rent was due with effect from the 1st April, 1964. Accordingly, he directed full arrears of rent to be deposited within fifteen days of the date of the order, from 1-4-1964 to 1-8-1970, at the rate of Rs. 80 per month.

3. Mr. S. K. Mazumdar, learned counsel for the petitioner challenges this order on the following grounds:—

(1) That no arrear of rent in respect of any period prior to the institution of the suit could be directed to be deposited under Section 11-A of the Bihar Act;

(2) That the claim for arrears of rent prior to the institution of the suit was barred under Order II, Rule 2 of the Code of Civil Procedure (hereinafter called 'the Code'), inasmuch as no decree in this respect having been asked for in the suit, recovery under Section 11-A of the Bihar Act was barred;

(3) That in any view of the matter, no direction for deposit of rent in respect of a period beyond three years of the date of institution of the suit could be given under Section 11-A of the Bihar Act. In other words, direction could be given for deposit of arrears of rent only from 1-8-1967 and not from 1-4-1964.

In support of all the three points learned counsel relied upon the observations and decision of the Bench in *Sashadhar Das's case*. (AIR 1973 Pat 361) (*supra*).

4. The facts of Civil Revision No. 1314 of 1970 are as follows. The plaintiffs-opposite party instituted a suit against the defendant-petitioner on the 20th August, 1968 for his eviction on the ground of non-payment of rent, the rent of the suit premises being Rs. 7 per month. In the suit, a decree for arrears of rent to the tune of Rs. 252 was asked for, for the period 31-8-1965 to 31-8-1968 at the rate of Rs. 7 per month. The petitioner filed a written statement on the 22nd December, 1969 and contested the suit for eviction on several grounds. One of the grounds was a denial of the relationship of landlord and tenant. On the 8th April, 1970 the plaintiffs filed an application under Section 11-A of the Bihar Act claiming arrears of rent from 15-3-1957 to 31-3-1970, amounting to Rupees 1095/50 paise and also for a direction to deposit rent month by month. In substance and effect the learned Munsif found that the denial of the relationship of landlord and tenant by the petitioner was not sustainable in view of the his-

tory of the prior litigation between the parties. It was without substance. He has directed the petitioner to deposit arrears of rent at the rate of Rs. 7 per month from 15-3-1957 to 30-6-1970 (the date of the order being 22-7-1970) amounting to Rs. 1116/50 paise within fifteen days from the date of the order and also to deposit current and future monthly rent at the rate aforesaid per month by the fifteenth of the following month.

5. Mr. Gupteshwar Prasad, learned counsel for the petitioner could not and did not advance any argument in regard to the view of the court below that the denial of relationship of landlord and tenant by the petitioner was not such as to fetter its hands in making an order under Section 11-A of the Bihar Act. The matter is squarely covered by the Full Bench decision of this Court in *Mahabir Ram v. Shiv Shankar Prasad*, (AIR 1968 Pat 415) (FB) to which two of us were parties. Learned counsel for the petitioner, however, adopted and argued all the points urged in the other case. Mr. Gupteshwar Prasad resisted the rule on behalf of the landlords-opposite party and seriously combated all the points urged on behalf of the petitioner.

6. The Bihar Act was drastically amended by Bihar Act 16 of 1955. Prior to the amendment, the order of eviction could be made by the Controller on an application made to him in that regard. By the amending Act of 1955 proceedings for eviction of tenants have got to be initiated by institution of suits in Civil Court. In this background Section 11-A was introduced in the Bihar Act. It reads as follows:—

"11-A. Deposit of rent by tenants in suits for ejectment.— If in a suit for recovery of possession of any building the tenant contests the suit, as regards claim for ejectment, the landlord may make an application at any stage of the suit for order on the tenant to deposit month by month at a rate at which it was last paid and also the arrears of rent, if any; and the Court, after giving an opportunity to the parties to be heard, may make an order for deposit of rent at such rate as may be determined month by month and the arrears of rent, if any and on failure of the tenant to deposit the arrears of rent within fifteen days of the date of the order or the rent at such rate for any month by the fifteenth day of the next following month, the Court shall order the defence against ejectment be struck out and the tenant to be placed in the same position as if he had not defended the claim to ejectment. The landlord may also apply for permission to withdraw the deposited rent without prejudice to his right to claim decree for ejectment and

the Court may permit him to do so. The Court may further order recovery of cost of suit and such other compensation as may be determined by it from the tenant."

It would be noticed from the provision aforesaid that an application under Section 11-A can be made in a suit for recovery of possession of any building, if the tenant contests the suit as regards the claim for ejectment. Such an application can be made by the landlord at any stage of the suit. The prayer in the application can be made for an order on the tenant to deposit rent month by month, that is to say, all current and future rent payable during the pendency of the suit. An order may also be sought for directing the tenant to deposit arrears of rent, if any. The serious question for consideration would be, as to what is the meaning of the expression "arrears of rent" having regard to the place and context in which it occurs in Section 11-A of the Bihar Act. After hearing the parties, the Court may make an order for deposit of rent month by month and the arrears of rent, if any. The statute requires the tenant to deposit all arrears of rent within fifteen days of the date of the order. In numerous decisions of this Court a view has been taken that the Court has no power to extend this time. Rent for any month has also got to be deposited by the fifteenth day of the next following month. On failure of the tenant to deposit either arrears of rent for one month by the time specified in the statute, the Court has got to order the defence against ejectment to be struck out and the tenant to be placed in the position as if he had not defended the claim to ejectment. It has also been pointed out in several decisions of this Court that striking out defence is only in respect of the claim to ejectment and not in regard to the claim for arrears of rent made in the suit and that striking out the defence to the claim to ejectment is not tantamount to hearing of the suit *ex parte*. The tenant still has a right to take part in the hearing of the suit without there being his defence in the written statement in regard to the claim to ejectment. The landlord may be permitted to withdraw the deposited rent without prejudice to his right to claim decree for ejectment.

7. It would thus be seen that in a suit for ejectment of the tenant either on the ground of personal necessity, non-payment of rent or any other ground envisaged under Section 11 of the Bihar Act, a provision has been made to compel the tenant to pay all arrears of rent, current and arrears, falling due during the pendency of the suit. Although the

main object of the Bihar Act as also of similar statutes in other States is to protect the tenant from unreasonable eviction, provisions have been made in almost all the State statutes in regard to deposit of rent so that a tenant may not go on fighting litigation without payment of rent. I shall presently show, with reference to various State statutes, that except in the Bihar Act, in the main, provisions have been made of two kinds—(1) payment of arrears of rent which fell due prior to the institution of the suit, and (2) payment of arrears of rent or rent month by month falling due during the pendency of the suit. In some statutes in express language it has been provided that arrears of rent which were not recoverable on the date of the suit could not be directed to be deposited. In some there is no such provision and then, on the analogy of Section 114 of the Transfer of Property Act a view has been taken that arrears of rent would mean all arrears irrespective of the question whether their recovery was barred under the law of limitation on the date of the suit. But the significant difference between other State statutes and Section 11-A of the Bihar Act is that while in the former on payment of all arrears of rent the tenant is relieved of the order or decree for eviction on the ground of non-payment of rent, under Section 11-A of the Bihar Act, even if the tenant deposits arrears of rent, assuming for the time being that arrears of rent mean all arrears which had fallen due prior to the institution of the suit—all arrears irrespective of the question of limitation—the tenant is not relieved of the decree for eviction. Even after payment of all arrears, if clause (d) of subsection (1) of Section 11 was attracted, decree for eviction will follow in spite of payment. The tenant has a right under the Code to defend the claim to ejectment. On a very careful consideration of the matter, it seems to me that it is highly unjust to curtail the right of the tenant to defend the claim to ejectment under the pain of striking out such defence, if the tenant does not pay all arrears of rent, irrespective of the question whether they accrued before the institution of the suit or after, and rent month by month. Ordinarily and generally, the contest in the suit by the tenant would be within a short period of, say, about six months or a year. The landlord at once thereafter may make an application under Section 11-A. Arrears of rent accruing due from the date of the institution of the suit till the making of the application or the date of the order will not be very high in comparison with the arrears of rent for the total period prior to the institution of the suit. In my opinion, the Legislature

by providing the same period of fifteen days for deposit of rents in arrear as also rent month by month did envisage arrears of rent accruing due during the pendency of the suit only and not prior to it.

8. A landlord when he institutes a suit for eviction of the tenant is obliged to frame his suit under Order II, Rule 1 of the Code so as to afford grounds for final decision upon the subjects in dispute and to prevent further litigation concerning them. On the date of the suit he can claim recovery of such amount of arrears of rent under Article 52 of the Limitation Act, 1963 as had fallen due within three years of the institution of the suit and not beyond that. If he does not make any claim for any arrears in the suit on payment of the necessary court-fees, his second suit would be barred under Order II, Rule 2 (2) of the Code. If he has already made claim for arrears of rent accruing due within a period of three years from the date of institution of the suit, there will be no necessity of institution of a second suit for claiming the same amount. Rather, the second suit will not be maintainable for the same relief on the same cause of action. In such a situation, is it possible or reasonable to take the view that Section 11-A of the Bihar Act, which merely permits the tenant to defend the claim to ejectment and does not relieve him from that, was meant to be a remedy for the landlord to compel the tenant to pay all arrears of rent? If it is permissible to travel beyond the period of the suit for directing deposit of arrears of rent, then on a plain meaning of the expression "arrears of rent" occurring in Section 11-A, I see no justification to stop at the period of arrears of rent for three years only prior to the institution of the suit and not the entire arrears. It is a fundamental, well known and well established principle of law that the Statute of Limitation merely bars a particular remedy, but does not extinguish the debt or right to recover it by some other method. The debt remains lawfully payable. It may not be lawfully recoverable by action. Any amount of rent which is lawfully payable—whether it is barred by the Statute of Limitation or not—can be realised or recovered in any other manner.

No tenant can be compelled to pay any amount of rent which is not lawfully payable by him. Nor Order II, Rule 2 of the Code in terms will apply to an application under Section 11-A of the Bihar Act as it applies to a suit only. Merely because by a second suit the amount cannot be recovered, it cannot make the arrears of rent as not lawfully

payable. It may not be lawfully recoverable by a suit. I am, therefore, of the view that the expression "arrears of rent" occurring in Section 11-A of the Bihar Act either must be allowed to have its full play covering all arrears of rent which had fallen due prior to the institution of the suit, whether barred by limitation or whether claimed in the suit or not; or, the expression must be confined to the period of pendency of the suit. I see no justification for striking out a *via media* and to take the view as taken by the Bench in *Sashadhar Das's* case (AIR 1973 Pat 361) (*supra*).

9. I now proceed to briefly refer to the relevant provisions of some other State statutes. In the Delhi Rent Control Act, 1958, an order for eviction can be made by the Controller on the ground of non-payment of rent under proviso (a) to Section 14. In such a case, under Section 15 (1) the Controller shall—

"Make an order directing the tenant to pay to the landlord or deposit with the Controller within a month of the date of the order, an amount calculated at the rate of rent at which it was last paid for the period for which the arrears of the rent were legally recoverable from the tenant including the period subsequent thereto upto the end of the month previous to that in which payment or deposit is made and to continue to pay or deposit, month by month, by the fifteenth of each succeeding month, a sum equivalent to the rent at that rate."

It would thus be seen that arrears can be directed to be deposited only in respect of the period for which they are legally recoverable. Even so sub-section (6) of Section 15 of the Delhi Rent Control Act, 1958 provides—

"(6) If a tenant makes payment or deposits as required by sub-section (1) or sub-section (3), no order shall be made for the recovery of possession on the ground of default in the payment of rent by the tenant, but the Controller may allow such costs as he may deem fit to the landlord."

Thus, on payment of all recoverable arrears of rent, the tenant is relieved of his liability to be evicted.

10. Under Section 13 (2) of the East Punjab Urban Rent Restriction Act, 1949, a landlord who seeks to evict his tenant has got to apply to the Controller for a direction in that behalf. Clause (1) of that section makes the tenant liable to be evicted if he has not paid or tendered the rent due by him in respect of the building as provided therein. The proviso to clause (1) reads as follows:—

"Provided that if the tenant on the first hearing of the application for eject-

ment after due service pays or tenders the arrears of rent and interest at six per cent. per annum on such arrears together with the cost of application assessed by the Controller, the tenant shall be deemed to have duly paid or tendered the rent within the time aforesaid."

Thus, on payment of all arrears of rent, the tenant is relieved of his liability to be evicted on the ground of non-payment. In *Rullia Ram v. S. Fateh Singh*, (AIR 1962 Punj 256) (FB), a Full Bench of the Punjab High Court took the view that the expression "arrears of rent" occurring in the proviso to Section 13 (2) (i) of the Act aforesaid is not limited only to those arrears the realisation of which is not barred by the law of limitation. The language of the Delhi Rent Control Act is different as pointed out by Mahajan, J. at page 259, column 2. The expression was given a wide meaning to include also arrears of rent recovery of which was barred by the law of limitation.

11. In Section 11 (1) of the Madras Buildings (Lease and Rent Control) Act, 1960 it has been provided—

"No tenant against whom an application for eviction has been made by a landlord under Section 10 shall be entitled to contest the application before the Controller under that section, or to prefer any appeal under Section 23 against any order made by the Controller on the application, unless he has paid or pays to the landlord or deposits with the Controller or the appellate authority, as the case may be, all arrears of rent due in respect of the building upto the date of payment or deposit and continues to pay or to deposit any rent which may subsequently become due in respect of the building until the termination of the proceedings before the Controller or the appellate authority, as the case may be." On failure of the tenant to pay or deposit rent as aforesaid, the Controller or the appellate authority, as the case may be, shall, unless the tenant shows sufficient cause to the contrary, stop all further proceedings and make an order directing the tenant to put the landlord in possession of the building in accordance with sub-section (4) of the Section aforesaid. It would be noticed that the tenant is relieved of this rigour if he shows sufficient cause for his alleged failure. Under Section 11-A of the Bihar Act, in numerous decisions a view has been taken that, the Court cannot excuse the failure to deposit rent as per direction given in Section 11-A of the Act for any cause sufficient or otherwise. Moreover, it is significant to find under the proviso to sub-section (2) of Section 10 of the Madras Act—

"Provided that in any case falling under clause (i), if the Controller is satisfied that the tenant's default to pay or tender rent was not wilful, he may, notwithstanding anything contained in Section 11, give the tenant a reasonable time not exceeding fifteen days, to pay or tender the rent due by him to the landlord upto the date of such payment or tender and on such payment or tender, the application shall be rejected."

It would thus be seen that by rejecting the application for eviction of the tenant, the tenant is relieved of the liability to be evicted.

12. Section 13 (4) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 says—

"In a suit for eviction on the ground set forth in clause (a) of sub-section (1), with or without any of the other grounds referred to in that sub-section, the tenant shall, on the first day of hearing or on or before such date as the court may, on an application made to it, fix in this behalf, or within such time, not exceeding two months, as may be extended by the court, deposit in court or pay to the landlord an amount calculated at the rate of rent at which it was last paid, for the period for which the tenant may have made default including the period subsequent thereto upto the end of the month previous to that in which the deposit or payment is made together with interest on such amount calculated at the rate of six per cent. per annum from the date when any such amount was payable upto the date of deposit and shall thereafter continue to deposit or pay month by month, by the fifteenth of each succeeding month a sum equivalent to the rent at that rate."

Under sub-section (6) of that Section if the tenant fails to deposit or pay any amount referred to in sub-section (4) on the date or within the time specified therein, the Court shall order the defence against eviction to be struck out. But the significant thing to note is that if he pays, then sub-section (7) provides:

"no decree for eviction on the ground specified in clause (a) of sub-section (1) shall be passed by the Court....."

Similar are the provisions in Section 17 (1) for deposit in the West Bengal Premises Tenancy Act, 1956. The defence is liable to be struck out under sub-section (3). But then, if deposit is made, no decree or order for delivery of possession of the premises to the landlord on the ground of default in payment of rent by the tenant is to be made by the Court.

13. On a comparison of the relevant provisions of the various State Statutes aforesaid with that of Section 11-A of the Bihar Act, it would be noticed that

tion as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion, satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant Article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian Justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue."

Transposing the latter part of the observations relating to the consultation with the Chief Justice of India under Article 217 (3) to the field of the control vesting in the High Court under Article 235 in relation to the power of the Governor to dismiss or remove a member of the subordinate judiciary, it was canvassed on behalf of the first respondent that the opinion of the High Court in matters of dismissal or removal of a member of the subordinate judiciary which is tendered in exercise of the power of control would be binding on the Governor and that it would be of no consequence if the formal decision is taken by the Chief Minister or the Minister for Justice. While considering this aspect, it would be worthy of notice that the question whether the Governor was bound to accept the High Court's recommendation did not directly arise in this case and was in fact shelved for decision in some other appeal pending before the Supreme Court as appears from the following observations—

"However, we do not pursue this question further since, in the present case, Government has agreed with and acted on the High Court's 'recommendation' and moreover, the methodology of conflict resolution, when the view of the High Court is unpalatable to the Executive, falls to be directly considered in a different set of pending appeals." leaving this apart, in the observations referred to above it was not intended to

take a different view of the jurisdiction of the President under Article 217 (3) which clothed him with the power to determine the age of a judge finally from what had been expressed by the Supreme Court in this regard in AIR 1965 SC 961, and *Union of India v. Jyoti Parkash Mittar*, AIR 1971 SC 1093. It was not intended to convey that as a matter of law the advice of the Chief Justice would be binding, but that in all conceivable cases the advice would be accepted by the Government of India. If a departure was made from the advice given by the Chief Justice, ordinarily it would be regarded as based on extraneous considerations if an occasion arises for the Courts to examine the circumstances which necessitated the departure. It would not be out of place to mention here that consultation between the two wings of the Government, especially the executive and the judiciary, is not only provided in Art. 217 (3) but also in some other Articles of the Constitution including Article 233. The true scope of the nature of the consultation required under Article 233 having already been settled by the Supreme Court in *Chandramouleshwar Prasad's case*, a departure from that interpretation could not have been intended. I am, therefore, unable to persuade myself that the observations of Krishna Iyer, J., in *Shamsher Singh's case* advance the case of the first respondent in any manner or help in resolving the conflict in the present case.

39. Reference on behalf of the first respondent was then made to para. 78 of *Shamsher Singh's case* wherein Ray, C. J. had made the following observations:—

"The Governor will act on the recommendation of the High Court. That is the broad basis of Article 235."

In *Shamsher Singh's case* the matter under consideration was the effect of the recommendation of the High Court in a matter relating to the termination of the probation of a judicial officer which exclusively fell within the competence of the High Court and the above observations would, therefore, not help while resolving the conflict in the matter of dismissal or removal from service of a judicial officer. Moreover, only the broad basis of the power of control has been stated and not its detailed implications especially in relation to Article 311.

40. In the second case (referred to as *N. S. Rao's case*) the question before the Supreme Court was whether the confirmation of a District and Sessions Judge was to be made by the High Court or the Governor and while considering this matter the following observations were made by Ray, C. J., who delivered the judgment on behalf of the Court:—

"The Governor has power to pass an order of dismissal, removal or termination on the recommendations of the High Court which are made in exercise of the power of control vested in the High Court. The High Court of course under this control cannot terminate the services or impose any punishment on District Judges by removal or reduction. The control over District Judges is that disciplinary proceedings are commenced by the High Court. If as a result of any disciplinary proceedings any District Judge is to be removed from service or any punishment is to be imposed that will be in accordance with the conditions of service."

Though in the above case the exact scope of the recommendations of the High Court made in exercise of the power of control regarding dismissal or removal of a judicial officer was not expressly considered, but what seems to be implied in the above observations is that the recommendations of the High Court, though entitled to the highest consideration by the Governor and even to their acceptance in almost all cases, would yet not be binding on the Governor in the sense that a departure therefrom would be violative of Article 235.

41. Only one more argument of the first respondent remains to be considered, which may be formulated thus. In case it is held that it is open to the Governor at the stage of the second opportunity to come to the conclusion that no case has been made out against the delinquent officer for taking any disciplinary action in spite of the recommendation of the High Court suggesting dismissal or removal from service, it would impinge on the control of the High Court envisaged in Article 235, as in that situation the High Court would not be in a position to even impose the minor punishment which otherwise it could have done if it had not recommended for the imposition of one of the major penalties. A harmonious construction, keeping in the forefront the principle of the independence of the judiciary, would dispel the cloud and resolve the absurdity suggested above. Under Article 311 (1) the Governor being the appointing authority of the judicial officers can only pass an order of dismissal or removal from service and in a case where for any reason such an order is not passed, it would only imply that the circumstances did not warrant the passing of such an order and that the proposed action was found not to have been called for. Even after the passing of such an order it would be open to the High Court to consider the question whether the circumstances justified the imposition of any of the minor punishments and in coming to a conclusion on this point the High Court need not be influenced that the

Governor had found that no case at all had been made out for taking disciplinary action. Even if this method of conflict resolution is not accepted, the matter can be looked at from another standpoint. The High Court has the jurisdiction to impose one of the minor punishments after the first stage of the inquiry is over, but if it does not take necessary steps in that direction and decides to make a recommendation to the Governor to impose the penalty of dismissal or removal after considering the explanation of the delinquent officer, the matter then passes beyond the pale of control which vests in the High Court and falls within the jurisdiction of the Governor to decide in accordance with Article 311 of the Constitution. The exercise of this power by the Governor will not imply an encroachment on the power of control which vests in the High Court, as the dismissal or removal relates to conditions of service. This view finds support from the ratio of the decision of the Full Bench of the Orissa High Court in Registrar of Orissa High Court v. Baradakanta Misra, AIR 1973 Ori 244 (FB). In this case the scope of the power of control which vests in the High Court under Article 235 of the Constitution had arisen for consideration, and while examining whether an appeal against the decision of the High Court in disciplinary proceedings could lie outside the High Court or not, it was noticed as follows:—

"It was contended by the learned Advocate General that some checks and balances have been provided under the Constitution and provision of a right of appeal to the Governor would be such check and balance. We are unable to accept this argument. Checks and balances have been provided in Articles 233 to 235 in Chapter VI by providing that the power of dismissal and removal of District Judges and Munsifs vests in the Governor. So also those powers would vest in the Governor if Subordinate Judges and A. D. Ms. (J.) are directly recruited and not appointed by promotion. This is sufficient check and balance. Though the ultimate power of dismissal and removal of District Judges has been conferred on the Governor, the control of the Subordinate Judiciary has been taken out of the powers of the Governor to effectuate the independence of the judiciary. The disciplinary proceeding is to be started by the High Court. When the High Court suggests punishment of dismissal or removal in certain cases the Governor may not agree with the proposal. But that would not amount to interference with the control vested in the High Court to impose other categories of penalties on District Judges, and dismissal or removal in cases

of Subordinate Judges and A. D. Ms. (J) where they have been appointed by promotion. Rather, if the power of appeal is vested in the Governor there will be no checks and balances and the entire control will vest in the Governor. The independence of the judiciary will vanish." In my opinion, these observations represent the correct view as to where lies the ultimate power of dismissal or removal of district Judges and other subordinate judicial officers. The contention that this would amount to an encroachment on the power of the control which vests in the High Court under Article 235 was also rightly negated in the above case.

42. Another facet of the contention raised on behalf of the first respondent is that this would impose a dual control on judicial officers, which in turn would hamper the smooth working of the judicial system. This aspect of checks and balances and of the duality of control was considered by a Full Bench of the Calcutta High Court in, AIR 1961 Cal 1, in these words:—

"It is no doubt true that under Article 311 read with Articles 310, 233 and 234 of the Constitution the appointing authority in respect of a member of the judicial service of a State being the Governor, the actual dismissing authority must also be the Governor. That only means that the actual order of dismissal has to be made by the Governor. It does not however mean that in supersession of the control of the High Court under Art. 235 of the Constitution the Governor or the Government will be entitled to conduct disciplinary proceedings or set up disciplinary Tribunal apart from the High Court. Different Article of the Constitution on the same subject should, wherever possible, be read consistently and not in resistance with one another. The best reconciliation of these different articles of the Constitution will lie in the High Court conducting the disciplinary enquiry and sending its report at the conclusion of the enquiry to the Government to make the appropriate order of dismissal or removal. That the Government may not in a particular case accept the report and recommendation of the High Court exercising disciplinary jurisdiction cannot alter the interpretation of the Constitution when it provides dual authority first by vesting control in the High Court under Article 235 and secondly by resting appointment, tenure and dismissal with the Government under Articles 233, 234, 310 and 311 of the Constitution. This duality is not an unmixed evil but is an example of that wholesome constitutional principle of checks and balances so that no one institution can afford to be tyrannical in the exercise of its powers and thereby

ensuring the much needed security of public services in India."

The above observations provide a complete answer to both the aspects of the argument of the first respondent and, with respect, I adopt the reasoning expressed above in support of the conclusion that, by the exercise of the power of dismissal or removal by the State Government, the control of the High Court over the subordinate judiciary is not affected and the interpretation of Article 311 which enables it to have full effect and provide a safeguard to the public services envisaged by the Constitution is not open to challenge on the ground that it would lead to absurd results.

43. In the light of the entire discussion made above, the position that finally emerges could be formulated thus. Keeping the cardinal principle of the independence of the judiciary in the forefront, the control envisaged in Art. 235 must be taken to be complete in all respects and in all fields including the power to initiate and hold departmental proceedings except to the extent it is limited by Articles 233, 234 and 311 of the Constitution. The power to initiate and conduct departmental proceedings further includes the power to impose punishment other than of dismissal or removal from service which power can only be exercised by the Governor acting under Article 311 of the Constitution. While exercising such a power the Governor has to proceed on the basis of the inquiry held by the High Court and the recommendation made by it in regard to the punishment to be imposed after the High Court has taken into consideration the explanation offered by the delinquent officer. These recommendations are made by High Court in the exercise of its power of control. Though the final decision in the matter of imposing the punishment of dismissal or removal from service is to be taken by the Governor but while arriving at the final conclusion the Governor must have due regard for the recommendation of the High Court and should in all conceivable cases act according to these recommendations. However, if in an isolated case the Governor takes a view, different from the one recommended by the High Court, it cannot be said in law that the order of the Governor is without jurisdiction. If a departure has been made by the Governor from the advice tendered by the High Court, it may be open to examination by a Court whether extraneous considerations are the basis of such a decision, but the decision is not open to challenge on the ground of lack of jurisdiction. The acceptance of this view does not cause any erosion in the power of control vesting in the High Court and its only implication is that the

principle of checks and balances envisaged in the Constitution would also come into play. Such an interpretation being in consonance with the objective which the framers of the Constitution had in view while providing a safeguard to the services under Article 311 would be the only appropriate one if a harmonious construction is to be placed on Arts. 235 and 311 of the Constitution and neither of them is to be allowed to render the other nugatory. Looked at from this standpoint, the legality of the order of the State Government dated August 24, 1968 finding that no case for dismissal or removal of the petitioner had been made out is not open to challenge. As, however, this order is illegal on the ground that extraneous material has crept in and extraneous circumstances have entered into the verdict, it was rightly ignored by the High Court. The result would be that no relief can be granted in this petition which would consequently merit dismissal.

BY THE COURT

44. For the reasons recorded and the unanimous conclusion arrived at in the above judgments, this petition is dismissed, but the parties are left to bear their own costs.

Petition dismissed.

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R. S. NARULA, C. J.

Jit Singh and others, Appellants v. Karnail Singh and others, Respondents.

Second Appeal No. 1036 of 1964. D/- 27-2-1975.*

(A) Punjab Custom (Power to Contest) Act (2 of 1920), Section 7 as amended by Section 3 of the Act (12 of 1973) — Alienation of non-ancestral property — Words "non-ancestral immovable property" in Section 7 substituted by the words "immovable property, whether ancestral or non-ancestral" — Whether ultra vires Article 254 of Constitution. (Constitution of India, Art. 254, Entry 18, List II and Entry 5, List III).

In Section 7 of the Act (2 of 1920) for the words "non-ancestral immovable property" have been substituted the words "immovable property, whether ancestral or non-ancestral". The effect of the amendment of Section 7 by Section 3 of amending Act (12 of 1973) is that the suit for contesting alienation of even ancestral agricultural property on the ground of

the same being contrary to custom is barred. The Act (2 of 1920) as well as the amending Act relate to the matters covered by Entry 18 of the State List, and inasmuch as the State Legislature has the exclusive power to legislate on those subjects, nothing contained in these Acts touches any matter in the Concurrent List. The second part of Entry 5 in List III i.e. "all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law" relates to the matters covered by the earlier part of the entry. The expression "personal law" used in Entry 5 of List III is not synonymous with all kinds of laws including Customary Law. Held that the amending Act does not deal with any subject in respect of any matter covered by Entry 5 of the Concurrent List, and is, therefore, not ultra vires Article 254 (1) of the Constitution. 1974 Rev LR 80 and AIR 1960 Punj 666 (FB). Ref. to. (Para 5)

Cases Referred: Chronological Paras

1974 Rev LR 80 = 76 Pun LR 125 3

AIR 1960 Punj 666 = 62 Pun LR 655 (FB) 5

K. L. Sachdev, for Appellants; K. C. Puri, for Respondent No. 2.

JUDGMENT:— Bachittar Singh and Khazan Singh defendant-respondents Nos. 3 and 4 were real brothers. Certain alienations of ancestral agricultural land by Bachittar Singh made in 1955 were called in question in September, 1962, by Karnail Singh and Jarnail Singh plaintiff-respondents Nos. 1 and 2 who are the sons of Khazan Singh, on the usual ground that the same were without legal necessity and contrary to the agricultural custom governing the parties. The declaratory suit of Karnail Singh and Jarnail Singh plaintiff-respondents was dismissed by the judgment and decree of the Court of Shri N. S. Swaraj, Subordinate Judge First Class, Muktsar, dated Nov. 20, 1963. The appeal of the plaintiff-respondents against the decree of the trial Court was, however, allowed by the Court of Shri Jagwant Singh, Senior Subordinate Judge, Ferozepore, on May 19, 1964, and it was declared that the impugned sale dated November 7, 1955, would not affect the reversionary rights of the plaintiffs after the death of Bachittar Singh except to the extent of Rs. 6,050/-. Defendants 7 to 16 to the suit who were the vendees in the impugned sale then filed this second appeal wherein they have prayed for the reversal of the judgment and decree of the Lower Appellate Court and for substituting therefor the judgment and decree of the trial Court.

2. In the circumstances hereinafter detailed it is unnecessary to travel into

*(From decree of Jagwant Singh, Sr. Sub J. with enhanced Appellate Powers, Ferozepore, D/- 19-5-1964).

the merits of the issues on which the decisions of the Courts below were based. Section 7 of the Punjab Custom (Power to Contest) Act, 1920 (hereinafter called the principal Act) was enacted with a view to provide restrictions, inter alia, on the power of descendants or collaterals to contest alienations of immovable property on the ground that such alienations were contrary to custom. The relevant part of Section 7 of the principal Act was in the following terms:—

"Notwithstanding anything to the contrary contained in Section 5, Punjab Laws Act, 1872, no person shall contest any alienation of non-ancestral immovable property on the ground that such alienation is contrary to custom."

3. By Section 3 of the Punjab Customs (Power to Contest) Amendment Act (12 of 1973) (hereinafter referred to as the amending Act), in Section 7 of the principal Act for the words "non-ancestral immovable property" have been substituted the words "immovable property, whether ancestral or non-ancestral". The effect of the amendment of Section 7 of the principal Act by Section 3 of the amending Act is that a suit for contesting alienation of even ancestral agricultural property on the ground of the same being contrary to custom is now barred. It is conceded by Mr. K. C. Puri, learned counsel for the plaintiff-respondents, that in view of the amendment of Section 7 of the principal Act, and the law laid down by a recent Division Bench judgment of this Court in Charan Singh v. Gehil Singh, 1974 Rev LR 80, this appeal of the defendant-vendees has to be allowed and the suit of the plaintiff-respondents has to be dismissed. As this appeal is a continuation of the suit, any decree passed by this Court dismissing the defendant-vendees' appeal is expressly barred by the principal Act as subsequently amended. Mr. Puri, however, submits that the amending Act itself is unconstitutional, and, therefore, inoperative and this appeal should not be allowed on that short ground without going into the merits of the controversy. Once again it is the common case of both sides that if the amending Act is unconstitutional and the amendment of S. 7 and the repeal of S. 6 of the principal Act by the amending Act is held to be inoperative and void, the appeal has to be heard and decided on merits, and there is no bar to the Court dismissing the appeal if it is found to be without merit.

4. After hearing counsel for the parties on the question of the constitutionality of the amending Act, I have not been able to persuade myself to hold in favour of Mr. Puri, and I have, therefore,

not considered it necessary to give notice of the issue raised by Mr. Puri to the Advocate-General for the State of Punjab under Rule 1 of Order 27-A of the Code of Civil Procedure. Mr. Puri wants me to hold that the amending Act is ultra vires Article 254 of the Constitution as the principal Act is an "existing law" within the meaning of Article 366 (10), and the relevant provisions of the amending Act are repugnant to the relevant provisions of the principal Act with respect to matters of "succession" which are covered by Entry 5 in List III of the Seventh Schedule to the Constitution. The relevant part of Article 254 extracted from the main provision would read as follows:—

"(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2) the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provisions repugnant to the provisions of an existing law with respect to that matter, then, the law so made by the Legislature of State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that "Existing law" has been defined in Article 366 (10) of the Constitution to mean any law passed or made before the commencement of the Constitution by any Legislature. There is no doubt that the principal Act is an existing law within the meaning of Article 366 (10) of the Constitution. There is also no dispute about the fact that the relevant provisions of the amending Act are repugnant to the corresponding relevant provisions in the said existing law. The only question which calls for decision in these circumstances is whether the matters to which the said provisions in the existing law relate are matters enumerated in the Concurrent List or not, and if so, whether the amending Act was or was not reserved for the consideration of the President, and has or has not received his assent. The amending Act does not appear to have been reserved for consideration or to have received the assent of the President of India. Whereas the submission of Mr. Kashmiri Lal Sachdeva is that the principal Act (which is the existing law) as well as the amending Act fall squarely within Entry 18 in the State List

(List II), the submission of Mr. Puri is that they fall under Entry 5 in List III. Entry 18 of List II reads as follows:—

"Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."

5. It appears to me that the expression "rights in or over land" is of a very wide amplitude and includes collateral rights over land. It also includes the question of settlement of disputes relating to land and restriction or extinction of existing interest in land including provision for the statutory purchase of the landlord's land by the tenants. The exclusive power of the State Legislature to legislate on subjects relating to the transfer and alienation of land is no doubt confined to agricultural land, but the present suit also relates to such land. I am, therefore, of the opinion that the principal Act as well as the amending Act relate to the matters covered by Entry 18 of the State List, and inasmuch as the State Legislature has the exclusive power to legislate on those subjects nothing contained in these Acts touches any matter in the Concurrent List. The only entry in the Concurrent List in which Mr. Puri has tried to fit in the principal Act is Entry 5 of that List. It reads:—

"Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."

Counsel submits that the principal Act as well as the amending Act deal with "intestacy and succession", and, therefore, fall within Entry 5 of List III. It is secondly contended that agricultural custom is as much personal law as Hindu Law or Muslim Law, and, therefore, the enactments in question would in any event be covered by the expression "all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law". Succession is the transmission of the rights and obligations of a deceased to his heirs and may certainly comprehend devolution by survivorship under the Hindu Law. Mr. Puri has invited my attention to Section 5 of the Punjab Laws Act, 1872, which states, *inter alia*, that in questions relating to succession, etc., the rule of decision shall be any custom applicable to the parties, or the Muslim Law or the Hindu Law as the case may be, as amended by the Legislature or by the custom governing the parties. The argument of Mr. Puri

is that subject to the restrictions laid down by the principal Act, the usual declaratory suits were decided according to custom by operation of Section 5 of the Punjab Laws Act. Relying on a Full Bench judgment of this Court in *Amar Singh v. Baldev Singh*, AIR 1960 Puri 666 (FB), counsel contended that as Section 14 of the Hindu Succession Act was held to be properly and appropriately covered by Entry 5 of List III, surely the provisions of the amending Act should also be held to be covered by that entry. I am unable to agree with counsel in this respect. Section 14 of the Hindu Succession Act relates to succession. The provisions of the principal Act and the amending Act do not deal directly with succession. The second part of Entry 5 in List III that is "all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law" relates to the matters covered by the earlier part of the entry. The expression "personal law" used in Entry 5 of List III is not synonymous with all kinds of laws including Customary Law. For all these reasons I hold that the amending Act does not deal with any subject in respect of any matter covered by Entry 5 of the Concurrent List, and is, therefore, not ultra vires Article 254 (1) of the Constitution, and did not require to be reserved by the Punjab Legislature for the consideration of the President and is not dependent for its validity on receiving the President's assent within the meaning and purview of clause (2) of Article 254 of the Constitution.

6. No other point having been argued by the counsel for the parties, this appeal must, for the reasons already recorded, succeed. I accordingly allow it, reverse the decree of the learned Senior Subordinate Judge, Ferozepore, dated May 19, 1964, and substitute for the same the decree of the trial Court, dated November 20, 1963, dismissing the suit of the plaintiff-respondents. The parties are, however, left to bear their own costs throughout.

Appeal allowed.

AIR 1975 PUNJAB & HARYANA 294
BAL RAJ TULI, J.

The State of Punjab and others, Appellants v. Lal Chand Sabharwal, Respondent.

First Appeal No. 17 of 1962, D/- 10-2-1975.*

*(From decree of H. S. Ahluwalia, Addl. Sub. J., 1st Class, Ambala City D/- 3-10-1961).

DS/ES/B292/75/MBR

(A) Limitation Act (1908), Arts. 2 and 22 — "Act in pursuance of any enactment" — Alleged arrest of plaintiff under Section 149 of Criminal P. C., 1898 without warrant — His conveyance from one place to another in police van for his dispersal — No apprehension of commission of any cognizable offence by him at that time — Such conveyance cannot be said to be in pursuance of Section 149. (Criminal P. C. (1898), Ss. 149, 127, 128).

Moreover, the conveyance of an arrested or a detained person to place of the choice of the State with a view to his dispersal, cannot be said to be a sovereign act. After a citizen is arrested or detained, he has to be dealt with under the law of the land and not according to the whims of the officers of the State. There is no provision in any statute authorising the State Government or its officers to take a detained person somewhere with a view to disperse him. (Para 7)

In the present case, the accident took place when the plaintiff was being conveyed from one place to another in a police van with a view to his dispersal and the suit was filed for compensation on account of permanent disability of the plaintiff's left arm. As the conveyance of the plaintiff from one place to another was not in pursuance of S. 149, Criminal P. C. and Sections 127 and 128 of the Criminal P. C. were also inapplicable at that time, Article 2 of the Limitation Act has no application and the case is governed by Article 22 of that Act. (Paras 5, 6, 7)

(B) Tort — Negligence — Where accident takes place as a result of dozing off of the driver, it is not a case of act of God, but a case of negligence on the part of the driver—(Motor Vehicles Act (1939), Section 110-B). (Para 8)

J. S. Wasu, Advocate General (Punjab) with S. K. Saval, for Appellants; D. C. Ahluwalia, for Respondent.

JUDGMENT:— Lal Chand Sabharwal (plaintiff-respondent) filed a suit for the recovery of Rs. 50,000/- on account of damages on the following counts:—

1. Rs. 10,000/-, for loss of professional practice and actual medical expenses.
2. Rs. 30,000/- on account of permanent disability of left arm, including weakness to the left shoulder, elbow, hand, eye-sight and all mental and physical sufferings therefrom, and
3. Rs. 10,000/- on account to illegal arrest, wrongful confinement, insulting and inhuman treatment and harassment caused to him during the course of his wrongful confinement.

2. The facts pleaded were that the plaintiff was the Vice-President of Bhartiya Jan Sang, Punjab State, which started 'Save Hindi' agitation in the State of

Punjab in May, 1957, in collaboration with some other organisations. The plaintiff offered himself for this peaceful mission and reached Chandigarh Railway Station by train at about 4 A. M. on July 15, 1957, accompanied by a batch of 250 volunteers. On arrival, he and the members of his party were put under arrest and taken to different police stations under the escort of police force under the orders of Shri A. K. Kaul, Assistant Inspector General of Police, defendant No. 2. The plaintiff and his six companions were unlawfully detained, in Chandimandar Police Station in an area infested with snakes, without service of any water and meals and were meted out a most inhuman treatment. At about midnight, the plaintiff and his companions were taken from Chandimandar Police Station to an unknown destination towards Ambala City in a bus under police escort, under the orders of Shri A. C. Tuli, Magistrate 1st Class. On the way they were forced to board police van No. PNE 4615 and the plaintiff was made to sit on the front seat and the driver was directed by Shri A. C. Tuli, Magistrate, to follow his jeep. When they reached Ambala City, the police van in which the plaintiff was travelling, turned towards Jullundur City, but the driver of the van was instructed by Shri Tuli to turn towards Karnal side. When the van reached Shahbad following the jeep of the Magistrate, another bus carrying Shri Jagdish Narain and others also arrived and then the Magistrate directed both the vehicles to proceed towards Jullundur City. At that stage, defendant No. 3, Gian Chand, Constable, who was driving the police van, expressed his inability to perform his duties as a driver any longer on account of fatigue caused by constant duty without any rest, respite or refreshment for several hours, and requested for being relieved. His request was not accepted in spite of the plaintiff's pleadings for him and he was directed to drive the police van towards Raipura. At about 4 A. M. on July 16, 1957, the driver lost control over the vehicle which struck against a tree on one side of the road. As a consequence of that accident, the left arm of the petitioner was crushed and fractured followed by profuse bleeding. The Punjab State and its police force escorting the van did not render any first aid to the plaintiff in spite of the request made by him and his companions and he was admitted in Raipura Civil Hospital in a precarious condition at about 5 A. M. His condition grew so serious that he had to be removed to Rajendra Hospital, Patiala, at 8.15 A. M. The petitioner then narrated the course of treatment and claimed the amounts as stated above. The suit was resisted by the defendants and the following issues were framed:—

1. Did the plaintiff and other members of his party go to Chandigarh on 15th July, 1957, with a view to commit some cognizable offence?

2. Was the plaintiff not kept in illegal confinement and unlawful detention by the defendants from 15th July, 1957, till his release?

3. Was the plaintiff maltreated by the defendants while in their custody as alleged in para. No. 5 of the plaint and did it tantamount to infliction of mental torture on the plaintiff?

4. Whether the accident occurred due to the gross negligence and carelessness of defendant No. 3, in driving the van carrying the plaintiff?

5. If issue No. 4 is proved, is defendant No. 1 not liable for the damages, if any, suffered by the plaintiff on account of the accident?

6. Did the plaintiff and defendant No. 3 bring it to the notice of Mr. Tuli, representative of defendant No. 1, that defendant No. 3 was incapable of driving for reasons stated in para. 6 of the plaint and para. No. 6 of the written statement of defendant No. 3 and still the van was ordered to be driven by Mr. Tuli for reasons given in para. No. 13 of the plaint, and if so, what is its effect?

7. Whether the accident was an act of God?

8. What injuries the plaintiff suffered on account of the said accident?

9. To what amount of damages is the plaintiff entitled and from whom?

10. Whether the suit is time-barred?

11. Whether the plaintiff served a valid notice upon the defendants under Section 80, Civil Procedure Code?

12. Whether the Civil Court has no jurisdiction to determine the dispute?

13. Relief.

3. The findings of the learned trial Court on the above issues were as under:—

1. While there was no proof that the plaintiff and other members of his party went to commit a cognizable offence, the Government and its employees were justified in presuming that it was their intention.

2. Though there were some technical irregularities in the procedure, the plaintiff's interception and detention were not wholly improper in order to effectively control the situation and at least there was nothing mala fide in the mind of the officers who took those proceedings.

3. The treatment meted out of the plaintiff at the Chandimandar Police Station was not very proper when it was certain that the plaintiff was a man of high status, had not committed any offence till then and was not charged of any matter involving moral turpitude.

4. The negligence was of the employees for which the State was liable.

5. Even if the accident was due to the negligence of the driver alone, the State was certainly liable for it.

6. The driver, Gian Chand, had made a request to be relieved from his duty as driver due to fatigue, etc., but his request was not accepted. The rejection of his request however, had no bearing on the decision of the case.

7. The accident could not be called an act of God.

8. The injuries were suffered by the plaintiff on account of the accident.

9. The plaintiff was held entitled to Rs. 10,000/- on account of loss of professional income as a lawyer and on account of the amount spent on medicines, etc. He was also entitled to Rs. 30,000/- on account of permanent disability of the arm and pain and suffering as a result of the accident. He was not entitled to any amount on account of his arrest and detention in Chandimandar Police Station.

10. The suit was within time under Article 22 of the First Schedule to the Limitation Act and Article 2 of that Schedule did not apply.

11. A valid notice under Section 80, Civil Procedure Code, had been served by the plaintiff on the defendants.

12. This issue was not argued by the learned counsel for the defendants and was thus decided against them.

In the result, a decree for Rs. 40,000/- was passed in favour of the plaintiff and against defendants 1 and 3. The suit against Shri A. K. Kaul, Assistant Inspector General of Police (defendant No. 2) was dismissed. The State of Punjab was held liable to pay proportionate costs to the plaintiff in respect of the amount decreed in the suit and to recover the costs in respect of the amount for which it was dismissed. Against that decree the State of Punjab has filed the present appeal.

4. Three points have been argued by the learned Advocate General, namely, (1) the suit was barred by time; (2) the State of Punjab was not liable because the accident, as a result of which injuries were caused to the respondent, occurred when the driver was acting in the performance of delegated sovereign functions of the State and (3) the amount of Rs. 30,000/- awarded by way of damages on account of permanent disability of the arm, etc., is excessive. No other point has been argued and, therefore, I need not refer to the other points which were canvassed before the learned trial Court.

5. As regards limitation, it has been contended by the learned Advocate General that the case is governed by Article 2 of the First Schedule to the Indian Limitation Act, 1908, which reads as under:—

Description of suit.

Period of
limitation
Ninety
daysTime from which period
begins to run.
When the act or omission
takes place.

2. For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in India.

The other Article, which has been held
(contd. on col. 2)

applicable to the case, is Article 22 which
reads as under:—

Description of suit

Period of
limitationTime from which period
beings to run.

22. For compensation for any other injury to the person.

One year

When the injury is com-
mitted,

The burden of the argument is that the respondent was being taken in the police van in the performance of the duties imposed on the State and the police by the Code of Criminal Procedure and the Police Act. Reference has been made to Section 149 of the Code of Criminal Procedure, 1898, and it is submitted that it was in exercise of that power that the respondent had been arrested and detained and was being conveyed to another place. This section reads as under:—

"149. Police to prevent cognizable offences.—Every police officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence." Under this section the police officer has the right to interpose for the purpose of preventing the commission of any cognizable offence. That power was exercised in the morning of July 15, 1957, when the respondent was arrested at Chandigarh Railway Station and taken to Chandimandar Police Station. Thereafter he was detained there till midnight and then he along with his companions was taken in a bus towards Ambala, and on the way he was transferred into a police van which met with the accident. The respondent had been arrested and detained without any order of a Magistrate or in pursuance of any warrant of arrest issued by a competent Court. Although there was ample time to produce him before a Magistrate, he was not so produced till midnight. Shri A. C. Tuli, Deputy Secretary, Finance, Punjab Government, who was invested with the powers of Magistrate 1st Class of Ambala District, received orders from the Government to assist the police for scattering the intercepted agitators of the Hindi Raksha Samiti. In pursuance of those instructions, Shri Tuli was to take a jatha from Chandimandar Police Station to Jullundur while Shri Kapoor was to take a jatha to Karnal. In pursuance of that arrangement, the respondent was seated in the police van and when the party reached Ambala, Shri Tuli, who was in a jeep which was going ahead of the police van, turned towards Jullundur, but the police van went towards Karnal. When Shri Tuli had covered some distance, he looked behind and found that the van was not following his jeep. He,

therefore, returned to Ambala and went towards Karnal under the impression that the van might have gone towards that side. He met that van at Shahbad and asked the driver to proceed towards Jullundur instead of Karnal. On the way from Shahbad to Raipura, the driver dozed off with the result that the van struck against a tree which resulted in various injuries to the respondent. It is thus evident that the purpose of conveying the respondent and his companions in the police van was to disperse them at some place and not to produce them before a Magistrate. At that time there was no apprehension of the commission of any cognizable offence by the respondent or his companions and, therefore, the action of the police and the Magistrate in taking the respondent from Chandimandar Police Station towards Ambala and then towards Jullundur, could not be said to be in pursuance of Section 149 of the Code of Criminal Procedure. Sections 127 and 128 of the Code of Criminal Procedure were also inapplicable at that time. It cannot, therefore, be said that the action of the Magistrate and the police in taking the respondent from Chandimandar Police Station was in pursuance of any enactment in force for the time being in India.

6. Section 23 of the Police Act, on which reliance has been placed by the learned Advocate General, reads as under:—

"It shall be the duty of every police officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority; to collect and communicate intelligence effecting the public peace; to prevent the commission of offences and public nuisance; to detect and bring offenders to justice and to apprehend all persons whom he is legally authorised to apprehend, and for whose apprehension sufficient ground exists; and it shall be lawful for every police officer, for any of the purposes mentioned in this section, without a warrant, to enter and inspect any drinking-shop, gambling-house or other place of resort of loose and disorderly characters." This section also had no application because the respondent had already been apprehended in the morning of July 15, 1957. In my opinion, therefore, Art. 2 of

the Limitation Act has no application and the case is governed by Article 22 of that Act and having been filed within one year of the date of accident, the suit cannot be thrown out as barred by time.

7. The next point for consideration is whether the police van was being driven by Gian Chand, driver, in the exercise of any delegated sovereign power of the State. It is, no doubt, true that the preservation of law and order in the State is the sovereign function of the State, but the conveyance of an arrested or a detained person to a place of the choice of the State with a view to his dispersal, cannot be said to be a sovereign act. After a citizen is arrested or detained, he has to be dealt with under the law of the land and not according to the whims of the officers of the State. There is no provision in any statute authorising the State Government or its officers to take a detained person somewhere with a view to disperse him. If he has been lawfully arrested, he has to be produced before a Magistrate within 24 hours as has been provided in Article 22 of the Constitution. Admittedly there was no warrant issued by any Court for the arrest or apprehension and detention of the respondent in police custody or elsewhere, and therefore, his conveyance in the police van for an unknown destination could not be said to be in the performance of sovereign function of the State. The State Government is clearly liable for the injuries caused to the respondent as a result of the accident which was caused by the negligence of the driver of the police van.

8. That the driver was at fault and negligent in the performance of his duties, is abundantly clear on the record. He had complained to the Magistrate, Shri A. C. Tuli, to be relieved of the duty of driving the vehicle on the ground that he was suffering from fatigue and exhaustion as he had been given no rest or respite during the previous two or three days. That request was not granted with the result that under the influence of exhaustion he dozed off and lost control of the vehicle. The dozing off of the driver cannot be said to be an act of God as was pleaded by the State Government before the learned Court. The accident resulted as a result of negligence on the part of the driver and the State Government, as his employer, is clearly liable to compensate the respondent for the injuries caused to him in that accident. The suit has been rightly decreed against the State Government and the driver of the vehicle.

9. The only other point requiring consideration is whether the sum of Rs. 30,000/- awarded to the respondent

on account of permanent disability suffered by him as a result of the injuries and physical and mental pain and suffering during the period of his treatment in the hospital, is excessive. The respondent had suffered the following injuries on his person:—

1. Big lacerated wound on posterior aspect of left upper arm in its lower part and it extended down the elbow upto the middle of forearm. There was fracture of ulna in its upper part and dislocation of upper radio ulnar joint and the head of the radius and upper end of the lower fragment of broken ulna were projecting out of the wound. There was a detached portion of the bone about 1½" long lying fallen from the bone but attached to muscle. There were a few other smaller pieces of bone lying in similar way. The muscles were badly torn. Dimensions of lacerated wound were 10" × 5".

2. Fracture of left humerus about its middle.

3. Lacerated wound elliptical, 3" × 1½" on postero-lateral aspect of left forearm. Muscles were torn in places. Certain muscle bellies were not reacting to stimuli and not bleeding. X-Ray for fracture was advised and done by the department, which revealed:—

(i) Communated fracture humerus bone near its mid shaft. No callus formation at the level.

(ii) Communated fracture of upper part of ulna bone at the junction of olecranon process with its shaft. No callus detected.

(iii) A communated fracture upper hand of radius bone involving its head and neck. No callus detected.

He had remained under treatment for a long time. The statement of the respondent on this point is as under:—

"The treatment that was given to me in Police Station, Chandimandar, as referred to was insulting and inhuman. I could not even sit for about one month during the period I remained in the V. J. Hospital so much so I could not move from my bed even for the calls of nature and to ease myself. I had to remain on bed throughout for that month. As a result of the medical treatment I had to lie absolutely flat with my arm in bandages tied upwards in vertical shape. The blood and the pus oozed out from the wounds of my arm gave such a stinking smell that nobody could even pass by my room. The wounds were washed about one month after the previous washing done to them. I ran temperature of about 104 degree fahrenheit to 105 degree fahrenheit continuously during a period of 1½ months that I remained in Rajindra Hospital, Patiala, in the beginning. It came down from 104 degree to 102 degree

fahrenheit when I left Rajindra Hospital. I was administered treatment by a number of injections every day and the injections turned my hips black. The slightest movement of my body gave me an acute pain while I was in the Rajindra Hospital.

There is no movement in my little finger and the index finger even now. All the four fingers of my left arm cannot be moved backward. They always remained in bended position. The wrist has ceased to move i.e. there is no wrist movement left. There is absolutely no movement in the elbow of my left arm on either side. Shoulder of my left arm is always in an 'N' position. I cannot move my shoulder upward or backward. I cannot touch my head, face, right shoulder and right side of the waist and back. I thus feel a great difficulty at the time of bathing. In case my right hand is occupied, I cannot even help in removing mosquitoes, fly and other insects if they sit on my body or stick to it. As there is absolutely no movement in this arm, a peculiar pain starts when it is in a standstill position for about continuous 15 minutes. I have as such always to keep pressing my left arm while talking, moving, sitting and doing any other work. My sleep breaks after about every two hours as I cannot take a left side turn while sleeping. This arm remains in vertical 90 degree angle position while sleeping, as the forearm muscles had been fixed on the back of the arm by the medical men instead of fixing it in the front side of the forearm. I feel constant pain in the arm."

In view of the above evidence, the mental and physical suffering undergone by the respondent, the injuries suffered and the resultant permanent disability of his arm, it cannot be said that the amount of Rs. 30,000/- awarded to him as compensation, is, in any way, excessive or on the high side. The respondent is a practising lawyer and an eminent leader of an important political party and has to work pretty hard and, therefore, he has to be adequately compensated for the sufferings undergone by him.

10. The sum of Rs. 10,000/- awarded to the respondent on account of loss of professional income and the costs of medicines, etc., has also been duly supported by the evidence and has not been disputed before me by the learned Advocate General.

11. In the result, the appeal is without any merit and is dismissed with costs.

Appeal dismissed.

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R. S. NARULA, C. J. AND
M. R. SHARMA, J.

Gobind Dev Mehta and another, Appellants v. Union of India and another, Respondents.

Letters Patent Appeal No. 230 of 1973, D/- 22-5-1974.*

(A) Displaced Persons (Compensation and Rehabilitation) Rules (1955), R. 95 (3), Proviso — Condonation of delay — Administrative expediency or convenience cannot be a basis for refusing to condone delay. Order in C. W. No. 3343 of 1971, D/- 27-11-1972 (Punj & Har). Reversed.

The authorities under the Act who are charged with the duty of determining the amount of compensation payable to the displaced persons exercise quasi-judicial functions. The question whether they should condone the delay or not has to be decided in each individual case in the light of its attendant circumstances. Furthermore, the decision has to be given on judicial considerations and not on the basis of executive expediency or inconvenience. The decision has to be given by the authority concerned without any outside interference or suggestions on the basis of administrative policy.

(Para 9)

Even if the claimant had filed an application before the Chief Settlement Commissioner that officer should have returned it for presenting it to the Settlement Commissioner who alone had jurisdiction to decide whether delay should be condoned or not. When the claimant had filed applications for verification in time to various authorities the authorities could not press into service their own neglect or default in deciding these applications for urging that they formed a different class. In such a situation, the relevant statutory provisions, even if they are capable of more than one interpretation should be applied in such a manner that a citizen should get equal protection of laws. Order in C. W. No. 3343 of 1971, D/- 27-11-1972 (Punj & Har). Reversed.

(Para 10)

Cases Referred: Chronological Paras

(1966) 68 Pun LR (D) 253 = ILR (1967) 1

Punj. 422 10

1965 Delhi LT 293 10

AIR 1959 Punj 222 = 61 Pun LR 68 9

L. S. Wasu, with H. S. Wasu, Sr. Advocate, for Appellants; Kuldeep Singh.

*(Against judgment of Rajendra Nath Mittal, J., in C. W. No. 3343 of 1971, D/- 27-11-1972 (Punj & Har)).

CS/DS/A832/75/RSK

(R. S. Mongia, with him). for Respondents.

M. R. SHARMA :— The appellants are displaced persons from West Pakistan where they held urban and rural property. According to the Jamabandi for the year 1944-45, they had 42 kanals of urban agricultural land, residential house and three shops within the municipal limits of Multan City. There is no dispute regarding rural property left by them because in lieu of that property, they were allotted agricultural land in village Kharkhara, tehsil and district Hissar on 26th of August, 1949. In February, 1951, they filed a claim for Rs. 60,000/- in respect of the urban immovable property left by them. At that time, the Displaced Persons (Claims) Act, 1950 (hereinafter referred to as the 1950 Act) held the field. However, the authorities did not take any action for verification of the claim of the appellants in spite of various reminders. Vide his letter dated 29th of July, 1953 (Annexure C), the Officer in-charge Records, Ministry of Rehabilitation, Metcalph House, Delhi, informed them that their claim could not be verified as the 1950 Act was no longer in force. The appellants then filed an application through the District Relief and Rehabilitation Officer/District Magistrate, Bahraich, to the Chief Settlement Commissioner (Claims Wing) Metcalph House, New Delhi, praying therein that their claim for urban property should be verified. It is alleged that the appellants remained under the impression that this application filed by them would receive sympathetic consideration of the authorities and their claim would be verified. No such action was, however, taken by the authorities concerned. The 1950 Act expired on May 17, 1953. For the claims which could not be verified under the 1950 Act, the Displaced Persons (Claims) Supplementary Act, 1954, (hereinafter referred to as the 'Supplementary Act') was passed on March 18, 1954. Section 4 of this Act provided that a Settlement Officer shall have jurisdiction to decide such claims or such classes of claims as may, by general or special order, be transferred to him by the Chief Settlement Commissioner. Section 5 conferred revisional powers on the Chief Settlement Commissioner.

2. The appellants approached the Punjab Lands Claims Department praying that their claim application should be decided, but their prayer was not acceded to. The Settlement Officer/Managing Officer, Urban Section, Land Claims Office, Jullundur, merely reported that at the time of allotment of rural land to the appellants no area was allotted to them in lieu of the property left by them in vil-

lage Taraf Ravi, Hadbast No. 101, Tehsil and District Multan, and as such, no area was deductible from their allotment. With these observations, the application submitted by them was filed. This fact bears repetition that there was no question of any deduction to be made from the allotment of rural land to the appellants. They were merely crying for getting compensation in respect of urban property left by them.

3. In November, 1963, the Government of India had issued a Press Note in which it was stated that the claims which had been filed in time containing the required particulars but which could not be verified on account of reasons other than the default of the claimants would be verified provided a request in writing to that effect had been made prior to the expiry of the 1950 Act. This Press Note shows that there was no intention on the part of the Central Government to deny the displaced persons their legal rights to get their claims verified for purposes of receiving compensation, provided they had made applications in time. On December 26, 1963, the appellants filed yet another application for getting their claim verified. It was returned by the Settlement Officer (Urban) with the endorsement dated 14th January, 1964, with the cryptic remark that no allotment could be made at that time. The appellants then sent several reminders to the Rehabilitation authorities repeating their prayer for the verification of their claim. They also approached the Chief Settlement Commissioner through a Member of Parliament, Shri Rama Reddy, who received a reply from the Chief Settlement Commissioner in which it was admitted that a Press Note had been issued in November, 1963 prescribing the last date for submitting applications for condonation of delay in filing compensation application and applications for rehabilitation grants. It was also admitted that in response to this Press Note, over 7000 applications were received by this office for condonation of delay in filing rehabilitation grant applications and after a careful consideration, a decision was taken that the delay should not be condoned and the applications were consequently filed. The appellants filed Civil Writ No. 3343 of 1971 (Punj & Har) in this Court challenging the action of the authorities concerned in refusing to verify their claim. This petition was dismissed by a learned Judge of this Court on 27-11-1972. They have come up in appeal under Clause 10 of the Letters Patent.

4. Before the learned Single Judge, no written statement was filed on behalf of the respondents, nor did they appear to oppose the petition. The learned Judge observed that the executive in-

structions conferred no right on the appellants and their application was not addressed to the Settlement Commissioner who alone was competent to decide whether the delay in filing the application should be condoned or not. With these observations, he dismissed the petition filed by the appellants.

5. It is a matter of regret that some important statutory provisions on the subject were not brought to the notice of the learned Judge in Chambers. On October 9, 1954, the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (hereinafter called the Act) was brought on the statute book. Section 7 of this Act entitles the Settlement Commissioner to make an enquiry in the prescribed manner to ascertain the amount of compensation which an applicant is entitled to. Section 8 is couched in peremptory language. It lays down that a displaced person shall be paid out of the compensation pool the amount of net compensation determined under sub-section (3) of Section 7 as being payable to him in the manner prescribed. S. 40 (1) of the Act reads as under:—

"40. Power to make rules:

(1) The Central Government may, by notification in the official Gazette, make rules to carry out the purposes of this Act."

In sub-section (2) of this Section, some of the purposes are mentioned by way of illustration. In exercise of the powers conferred by Section 40 of the Act, the prescribed authority framed the Displaced Persons (Compensation and Rehabilitation) Rules, 1955 (hereinafter called the Rules). Chapter XVI of the Rules relates to payment of rehabilitation grants. Rule 95 of the Rules reads as under:—

"95. Rehabilitation grant to non-claimants:

(1) The Central Government may from time to time—

(a) specify the classes of displaced persons having no verified claim to whom rehabilitation grant may be paid and the extent and manner of payment of such grants.

(b) issue a notification inviting applications in the form specified in Appendix XXVI for the payment of rehabilitation grants from the class of persons referred to in clause (a).

(2) Every application under sub-rule (1) by displaced person who has left immovable property in West Pakistan and who came to India before 31st July, 1952, shall be accompanied by—

(a) title deeds of the property or documentary evidence in respect of the title to the property left in West Pakistan in respect of which a claim could have

been filed under the Displaced Persons (Claims) Act, 1950 (XLIV of 1950);

(b) an affidavit giving particulars of such property;

(c) an affidavit containing reasons for the claim not having been filed in respect of such property under the Displaced Persons (Claims) Act, 1950 (XLIV of 1950);

(3) No application under this rule for the payment of rehabilitation grant shall be entertained unless it is made within ninety days from the date of publication of the notification inviting such applications:

Provided that any such application may be entertained after the said date if the Settlement Commissioner is satisfied that the applicant was prevented by sufficient cause from filing the application in time.

(4) Every application which is not made within time or which does not comply with the provisions of sub-rule (2) shall be rejected summarily.

(5) Where the application is not rejected summarily under sub-rule (4), the Settlement Commissioner after holding such inquiry as may be necessary shall make such order thereon as he may deem fit:

Provided that the Settlement Commissioner shall reject such application unless he is satisfied that the applicant was prevented by sufficient cause from filing a claim in respect of property left in West Pakistan under the Displaced Persons (Claims) Act, 1950 (XLIV of 1950):

Provided further that no rehabilitation grant shall be payable in respect of any property other than agricultural land in any urban area which the applicant had failed to include in a claim filed in respect of other properties under the Displaced Persons (Claims) Act, 1950 (XLIV of 1950)."

6. The aforementioned rule clearly provides that even those displaced persons who were not in possession of a verified claim were also entitled to receive rehabilitation grants, provided, of course, they could produce documentary evidence in respect of the title of the property left by them in West Pakistan and they file an affidavit containing reasons for the claim not having been filed in respect of such property. Sub-rule (3) of this rule provides that an application for payment of grant should be made within 90 days from the date of the publication of the notification inviting such applications, but the Settlement Commissioner was entitled to entertain even the time-barred applications if he was satisfied that the applicant was prevented by sufficient cause from filing the application in time.

7. It cannot be disputed that the appellants did apply for the verification

of their claim before the expiry of the Act. They reiterated their demand for grant of compensation when the Supplementary Act was in force. All the reminders sent by them in this behalf went unheeded. The order dated August 7, 1961, passed by the Settlement Officer shows that he did not even apply his mind to the matter in issue. Whereas the appellants claimed compensation for the urban property left by them, he observed that allotment of rural property in their favour was in order and no deductions from the allotment need be made. It was not a case in which the appellants had not made any application within time. Their numerous applications were already present with the authorities. As and when the authorities were invested with the jurisdiction to decide these applications on merits, it was their bounden duty to do so. If the claim could not be verified, the applications sent by the appellants could have been treated for payment of rehabilitation grant under Chapter XVI of the Rules. If a petitioner is entitled to get some relief, the same cannot be denied to him merely because he approaches the authorities concerned under one or other provision of the law. The rules of procedure are meant to advance the interests of justice. They cannot be interpreted in a manner which whittles down the undisputed right vested in a claimant. I am of the considered view that the authorities should have at least considered the request of the appellants on merits instead of dismissing the same on grounds of executive propriety.

8. In reply to the application submitted by the appellants through Shri Rama Reddy, M. P., the Chief Settlement Commissioner wrote as under:—

"It is true that a Press Note was issued in November, 1963, prescribing the last date for submitting applications for condonation of delay in filing compensation applications (with regard to verified claim) and also rehabilitation grant applications. In response to this Press Note, over seven thousand applications were received for condonation of delay in filing rehabilitation grant applications. After careful consideration, a decision was taken that the delay should not be condoned and these applications were filed. As we are not at this late stage condoning the delay in filing rehabilitation grant applications, I regret to say that no assistance can be rendered to Sarvshri Gobind Dev and Bhagwan Dass."

9. No return has been filed on behalf of the respondents nor has the record been produced. The language of the above quoted reply given by the Chief Settlement Commissioner makes it abundantly

clear that the 7000 applications were considered jointly and merely on administrative grounds it was decided not to condone the delay. Perhaps the authority concerned lost heart because of the large number of applications. The authorities under the Act who are charged with the duty of determining the amount of compensation payable to the displaced persons exercise quasi judicial functions. The question whether they should condone the delay or not has to be decided in each individual case in the light of its attendant circumstances. Furthermore, the decision has to be given on judicial considerations and not on the basis of executive expediency or inconvenience. The decision has to be given by the authority concerned without any outside interference or suggestions on the basis of administrative policy. While interpreting Section 40 of the Administration of Evacuee Property Act, a Division Bench of this Court presided over by A. N. Bhandari, C. J. in *The State v. Mehr Singh*, (1959) 61 Pun LR 68 = (AIR 1959 Puni 222), laid down as under:—

"The power vested in the Custodian to grant or reject an application for confirmation is derived from the Legislature and the extent of any discretion in the exercise of such power must depend upon the language which the Legislature has chosen to employ. The language, as we have seen, confers a wide discretion on the Custodian to reject an application for confirmation if he is of the opinion that the transaction ought not to be confirmed. The discretion must, however, be exercised in accordance with established principles of justice and not arbitrarily or capriciously, fraudulently or without factual basis. It must be exercised in good faith and in the best interest of the persons affected. It must be exercised in consonance with principle of justice, equity and good conscience. It must not cause unnecessary hardship. If discretion is exercised in accordance with these principles the Courts will be powerless to interfere. If, on the other hand, the Custodian bases his action upon an erroneous theory of law or if the action is so arbitrary, capricious, fraudulent, or grossly unjust as to constitute abuse of discretion justifying judicial interference, this Court will not hesitate to interfere by the exercise of its superintending power."

The aforementioned observations aptly apply to the instant case. Even if the appellants had filed an application before the Chief Settlement Commissioner, that officer instead of throwing it in the waste paper basket should have returned it to the appellants with the observation that the same should be presented to the Settlement Commissioner who alone was competent to consider whether the delay

should be condoned or not. As already noticed, the appellants had approached almost every authority under the various Acts and their applications had not been disposed of because the various Acts under which they had been made had subsequently expired.

10. Article 14 of the Constitution is in the nature of a command to the States to afford equality before laws to every citizen. Every displaced person who had left property in Pakistan had the right to receive compensation from the evacuee pool. The laws regarding the grant of compensation are to be administered in such a manner that no discrimination results in the case of any displaced person. I have asked myself the questions — What is the fault of the appellants in this case? Did they not make applications in time? Were they not entitled to compensation? The obvious answer to these questions is that they were not at fault inasmuch as they had filed their applications for verifications of claims within time. The authorities could not press into service their own neglect or default in deciding these applications for urging that they formed a different class. In such a situation, the relevant statutory provisions, even if they are capable of more than one interpretation, should be applied in such a manner that a citizen should get equal protection of laws. If the appellants did have a right to get rehabilitation grant under the Rules, then they cannot be non-suited merely because the Government of India issued a Press Note which is not contrary to the statutory provisions. In *Chief Commr. v. M/s. Madan Engineering Tool Products*, (1966) 68 Pun LR (D) 253, the Court did not go into the question whether the Press Note was binding or not. What was held was that the Press Note did not apply to the facts and circumstances of that case. The Court observed—

"And when this press note on its very face is inapplicable to the plot in dispute, whether the press note has a binding force of law as held in *Anand Singh v. Union of India*, 1965 Delhi LT 293, may not be strictly necessary for the Court on the present occasion to consider and decide."

The other observations made in that case really help the appellants. They are—

"I must, however, point out that it is not in view of law in this Republic that whatever the Government says is the law a position which may prevail in some despotic systems of Government. In our democratic set-up even the Government itself is ruled by law and all its actions have to be justified by reference to law made in accordance with our Constitution. Law of our conception is a link be-

tween man and freedom and, broadly speaking, should be the will of the people expressed in accordance with our Constitution rather than mere will of the State as different "from the people; for in the latter case it may well be an instrument of tyranny."

11. I am of the considered view that the authorities concerned did not exercise the jurisdiction vested in them under the law by dismissing the applications of the appellants.

12. For the reasons mentioned above, I allow this appeal and direct respondents to decide the question whether the appellants are entitled to get rehabilitation grant or not, and if they come to the conclusion that the appellants are in fact entitled to receive this grant, to order its payment to them in accordance with law. The appellants will have costs of this appeal which are assessed at Rs. 300/-.

R. S. NARULA, C. J.:— I agree.
Appeal allowed.

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R. S. NARULA, C. J. AND
A. S. BAINS, J.

Triloki Nath Bhargava and another, Appellants v. Smt. Jaswant Kaur and others, Respondents.

Letters Patent Appeal No. 447 of 1971, D/- 18-3-1975.*

(A) Motor Vehicles Act (1939), Section 110-D — Appeal under — Respondent can file cross-objections — AIR 1973 Gauhati 142 and 1974 ACJ 269 (Gauhati), Dissented from—(Civil P. C. (1908), O. 41, R. 22).

As soon as the High Court becomes seized of an appeal under S. 110-D, the rules of practice and procedure of the High Court become applicable to the appeal as there is no special rule to the contrary in the Act or the rules framed thereunder, and, therefore cross-objections under O. 41, R. 22, Civil P. C. can be filed. AIR 1973 Gauhati 142 and 1974 Acc CJ 269 (Gauhati), Dissented from; 1968 Acc CJ 1 (MP) and 1972 Acc CJ 403 (Delhi) and AIR 1975 Kant 18 (FB) and 1972 Acc CJ 426 (Delhi) and AIR 1974 Orissa 153 and AIR 1972 Punj & Har 65 (FB). Followed. (Para 5)

(B) Letters Patent (Punjab), Cl. 10 — New Point — Objection as to deficit court-fee not taken in appeal before single Judge nor raised in grounds of Letters Patent Appeal — Objection cannot be

*(Against judgment of C. G. Suri, J. in F. A. O. No. 34 of 1967, D/- 23-4-1971 — Punj & Har).

urged without obtaining leave of Bench hearing appeal. (Para 7)

(C) Motor Vehicles Act (1939). Section 110-D — Punjab M. V. Rules, R. 22 — Appeal against award of Tribunal — Claimant filing cross-objections is not liable to pay ad valorem court-fee. (Obiter) — (Court-fees and Suits Valuations — Court-fees Act (1870), Sch. I, Art. 1 and Sch. II, Art. 11). (Para 7)

Cases Referred: Chronological Paras
AIR 1975 Kant 18 = (1974) 2 Kant LJ 433 (FB) 5

1974 Acc CJ 269 (Gauhati) 4

AIR 1974 Orissa 153 = 1973 Acc CJ 308 5

AIR 1973 Gauhati 142 4

1973 Cri LJ 1682 = (1973) 1 Mys LJ 319 4

1972 Acc CJ 403 (Delhi) 4

1972 Acc CJ 426 (Delhi) 5

AIR 1972 Punj & Har 65 = 73 Pun LR 543 (FB) 5

(1970) 1 Mys LJ 319 4

AIR 1968 SC 384 = (1968) 1 SCR 372 5

1968 Acc CJ 1 = 1967 MPLJ 972 4

R. M. Suri, for Appellants: J. S. Virk and Gurdial Singh, for Respondents.

JUDGMENT:— Major Triloki Nath Bhargava appellant No. 1 was driving his car No. RJL -3436 at about 10-50 A. M. on April 27, 1964, while going from Jullundur to his village Daroli Kalan in that district. His car ran from behind into the bicycle of late Ganesha Singh, a retired Junior Commissioned Officer, aged about 59 years, when the latter was pushing his bike in the kutchra portion on the left side of the road. The car was being driven by the first appellant himself. The car could not stop for several yards after the impact, the deceased was dragged with it, and sustained as many as 18 injuries, including several fractures. The first appellant took Ganesha Singh in his car to the hospital where the latter succumbed to his injuries. Jaswant Kaur respondent No. 1, widow of the deceased, filed a claim for Rs. 30,000/- under Section 110-A of the Motor Vehicles Act (4 of 1939) (hereinafter called the Act) in the Court of the Motor Accident Claims Tribunal, Punjab. Since the car of the first appellant was insured with the second appellant, she preferred the claim against both the present appellants. She also impleaded as pro forma respondents the mother, the daughter and sons of the deceased, and claimed that they did not contest her right to receive the compensation which might be allowed to her. The claim was contested by the owner and insurer of the car, that is by both the appellants. From the pleadings of the parties the Tribunal framed the following three issues:—

(1) Whether the accident was due to the negligence of the driver of the car?

(2) What is the quantum of compensation due if any?

(3) Relief.

By his judgment and award, dated August 18, 1966, the Tribunal held on issue No. 1 that the accident was due to the negligence of the driver of the car, i.e., due to the negligence of the first appellant. The finding on issue No. 2 was that the deceased was 59 years old at the time of his death, that he was getting a pension of Rs. 102/- per mensem besides his income from agricultural land, that out of his income the deceased used to spend about half the amount on his own person, and that the loss occasioned to the widow by the death of the deceased came to Rs. 50/- per mensem. Treating the expectancy of the balance of the life of the deceased as 11 years, that is up to the age of 70, and calculating the quantum of loss on the above basis the Tribunal awarded a sum of Rs. 6,364/- as compensation to the first respondent under Section 110-B of the Act. He arrived at the figure of Rs. 6,364/- by deducting from the sum of Rs. 6,600/- (calculated at the rate of Rs. 50/- per mensem for eleven years) the sum of Rs. 235.60 P. representing one-fifth of the total sum of Rs. 1,178/- which was lying to the credit of the deceased in his account with the Punjab National Bank.

2. Not satisfied with the award of the Tribunal, the present appellants preferred F. A. O. 34 of 1967, against the said award to this Court on February 21, 1967. On getting notice of the appeal and within 30 days thereafter the first respondent filed on May 27, 1967, cross-objections for enhancement of the quantum of compensation from Rs. 6,364/- to Rupees 30,000/-. Suri, J. (as he then was) by his judgment and order, dated April 23, 1971, dismissed the appeal of the present appellants, but allowed the cross-objections of the first respondent and enhanced the amount of the award in her favour to Rs. 12,000/-. The driver-owner of the car and its insurer have preferred this appeal under clause 10 of the Letters Patent against the judgment of the learned Single Judge in the cross-objections. The first respondent has not preferred any further appeal in the matter of the quantum of damages.

3. Mr. Ravinder Mohan Suri, learned counsel for the appellants, has confined his arguments in this appeal to the following three points:—

(i) the judgment of the learned Single Judge is liable to be reversed and the order enhancing the amount of compensation is liable to be set aside as the first respondent had not preferred any appeal against the judgment and award of the Tribunal, and not having done so, she was not entitled to file any cross-objections as the provisions of Order 41;

Rule 22 of the Code of Civil Procedure have no application to proceedings for award of compensation under the Act:

(ii) the order of the learned Single Judge enhancing the amount of compensation is not justified even on the facts and merits of the case; and

(iii) the learned Single Judge should have rejected the cross-objections of the first respondent even if the same are held to be maintainable on the ground that the same had not been sufficiently stamped. The court-fee payable on the cross-objections had to be calculated on ad valorem basis under Article 1 of Schedule I to the Court-fees Act, and not on fixed basis under Article 11 of Schedule II or otherwise.

4. In support of his first contention Mr. Suri has relied on the judgments of the Gauhati High Court in the Motor Owners Insurance Co. Ltd. v. Srimati Renuka Roy, AIR 1973 Gauhati 142 and M/s. Oriental Fire and General Insurance Co. Ltd. v. Nani Choudhury, 1974 Acc CJ 269 (Gauhati), as also on the judgment of a Division Bench of the Mysore High Court in A. Rahiman v. M. Webber, 1973 Cri LJ 1682 (Mys). The earliest of these judgments is of the Mysore High Court in the case of A. Rahiman (supra). The learned Judges held in that case that the Motor Vehicles Act is a complete code by itself, and, therefore, the provisions of Order 41 of the Code of Civil Procedure cannot be brought to bear on matters under the Act. They followed the earlier judgment of their Court in Union of India v. Narasivappa, (1970) 1 Mys LJ 319. The argument advanced on behalf of the claimant on the authority of the decision of the Madhya Pradesh High Court in Manjula Devi v. Manjusri Raha, 1968 Acc CJ 1 (Madh Pra), to the effect that when once an appeal is preferred to the High Court, the usual practice and rules of procedure applying to the appeals to be dealt with by the High Court should become applicable, and, therefore, a right to file cross-objections would accrue in such appeal was repelled. In adopting the view which prevailed with the learned Judges of the Mysore High Court they also differed from the decision of the Delhi High Court in Delhi Transport Undertaking v. Raj Kumari, 1972 Acc CJ 403 (Delhi). In the case of the Motor Owners Insurance Co. Ltd. (supra), the learned Single Judge of the Gauhati High Court took the same view as had found favour with the Mysore High Court particularly in view of the provision of Rule 20 of the Assam Motor Accidents Claims Tribunals Rules, 1960, which has made certain provisions of the Code of Civil Procedure specifically applicable to the trial of a claim under the Act, and the fact that the provisions of

Order 41, Rule 22 of the Code of Civil Procedure are not covered by the said Rule 20. The judgment of the Gauhati High Court in the case of the Motor Owners Insurance Co. Ltd. was followed and approved by another learned Single Judge (R. S. Bindra J. as he then was) of the Gauhati High Court (the High Court for the States of Assam, Nagaland, etc.) in M/s. Oriental Fire and General Insurance Co. Ltd. v. Nani Choudhury, 1974 Acc CJ 269.

5. It is a matter of regret that Mr. Suri has cited the judgment of the Division Bench of the Mysore High Court in the case of A. Rahiman which has subsequently been expressly overruled by a Full Bench of the same Court in K. Chandrashekara Naik v. Narayana, AIR 1975 Kant 18 (FB). After discussing the entire law on the subject the learned Judges of the Karnataka High Court (earlier known as the Mysore High Court) held on the basis of the law laid down by their Lordships of the Supreme Court in Collector, Varanasi v. Gauri Shanker Misra, AIR 1968 SC 384, that in an appeal under Section 110-D of the Act the respondent can file cross-objections by invoking the provisions of Order 41, Rule 22 of the Code of Civil Procedure as the Act does not expressly lay down the procedure to be followed by the High Court in dealing with appeals filed before it, and the Karnataka Motor Vehicles Rules do not contain any provision relating to such procedure. The learned Judges held that in such a contingency the special Act being silent in regard to the procedure by the appellate Court, such an appellate jurisdiction has to be exercised in the same manner as the High Court exercises its general appellate jurisdiction, and that the appeal so filed must be regulated by the practice and procedure of the High Court. The Supreme Court has held in the case of Collector, Varanasi (supra) that since neither the Defence of India Act, 1939, nor the rules framed thereunder prescribe any special procedure for the disposal of appeals preferred to the High Court under Section 19 (1) (f) of the Defence of India Act, appeals under that provision have to be disposed of just in the same manner as other appeals to the High Court. It was observed that as soon as the appeal reaches the High Court, it has to be determined according to the rules of practice and procedure of the High Court as it is well settled that when a statute directs that an appeal shall lie to a Court already established, then that appeal must be regulated by the practice and procedure of that Court. I have already referred to the judgment of a Division Bench of the Madhya Pradesh High Court in the case of Manjula Devi Bhuta (supra). The learned Judges ob-

served in that case that the High Court has the jurisdiction to grant relief even to a party who has not filed an appeal while disposing of the appeal of the other side, and held that by virtue of the said rule, the High Court has extensive jurisdiction to interfere even in favour of a party who has not filed an appeal in order to do substantial justice. The Delhi High Court has consistently taken the view that the cross-objections can be filed within limitation after service of notice of an appeal under the Act. In the case of Delhi Transport Undertaking (supra) it was held that as soon as the High Court becomes seized of an appeal under Section 110-D of the Act, the rules of practice and procedure of the High Court become applicable to the appeal as there is no special rule to the contrary in the Motor Vehicles Act or the rules framed thereunder, and, therefore, the cross-objections under Order 41, Rule 22 of the Code can be filed. Again in Vanguard Insurance Co. Ltd. v. Bahoti, 1972 Acc CJ 426 (Delhi), the same view was taken. A Single Judge of the Orissa High Court also adopted the same reasoning in order to uphold the maintainability of cross-objections in an appeal under Sec. 110-D of the Act in Madhusudan Rai v. Smt. Basanti Kumari Devi, 1973 Acc CJ 308 = (AIR 1974 Orissa 153). The basis of the argument of Mr. Suri regarding the non-maintainability of cross-objections is two-fold; (i) that the award of a Motor Accident Claims Tribunal cannot be equated to a decree; and (ii) that the Motor Accident Claims Tribunal is not a Court, and, therefore, it cannot be held that the procedure laid down by the Code relating to appeals against decrees can be applicable to an appeal under the Act. It is unnecessary to deal with this argument at any length as this kind of a plea has already been authoritatively repelled by a Full Bench of this Court (of which I happened to be a member) in Smt. Shanti Devi v. General Manager, Haryana Roadways, Ambala, AIR 1972 Puri & Har 65 (FB). It was expressly held in that case that the High Court while hearing appeals under S. 110-D of the Act acts as a Court and a proceeding even if at its inception has a semblance of an arbitration proceedings, does not retain its character as such in appeal. It was further observed that the award of a Motor Accident Claims Tribunal amounts for all practical purposes to a decree. After carefully considering all the judgments cited before us by both sides, I am of the considered view that the view taken by the Full Bench of the Karnataka High Court in the case of K. Chandrashekara Naik (supra), and by the Delhi, Orissa and Madhya Pradesh High Courts in the various cases referred to above, is the

correct one, and that the view taken by the Gauhati High Court, with the greatest respect to the learned Judges of that Court, does not lay down the correct law. I, therefore, hold that the cross-objections are maintainable at the hands of a respondent in an appeal under Sec. 110-D of the Act. Consequently, the cross-objections filed by the claimant respondent in response to the appeal of the owner and the insurer of the vehicle were maintainable, and the objection of Mr. Suri against the maintainability of the same is without force and is repelled.

6. It is the common case of both sides that the basic criterion for determining the quantum of compensation payable to the heirs of the victim in a fatal running down action is the pecuniary loss occasioned to the claimant on account of the death. The next relevant thing which is not in dispute is that the sources of income of the deceased were mainly two, namely (i) his pension of about Rs. 102/- per mensem; and (ii) his income from agricultural land. It is also in the evidence of the claimant-respondent that the deceased being a retired army officer used to do manual work on his own land. Even if the value of his work is assessed as that of an agricultural labourer, its worth would be not less than Rs. 150/- per mensem. In order to get the same income which was coming to the family of the deceased and was shared by the claimant-respondent during the lifetime of the deceased from the land in question, the claimant would now have to engage manual labour in place of the work that was being done by her husband. Mr. Suri himself assessed the personal expenses of the deceased as Rs. 50/- per mensem. Normally the personal expenses of an old retired man living in a joint family along with his large number of family members are practically negligible. Even if, however, the suggestion of the learned counsel for the appellants is taken on its face value that the deceased should be deemed to have been spending Rs. 50/- per mensem out of his income on himself, the net pecuniary loss occasioned by his death would be about Rs. 202/- per mensem. The deceased was 59 years old at the time of his death. It is in evidence and is not disputed that he was in robust health. This is also obvious from the fact that he used to do agricultural labour. The expectancy of his life has been calculated by the learned Single Judge at 70 years. In view of the fact that the mother of the deceased is about 80 years old and was still alive at the time of the accident and even subsequently gives an indication about the expectancy of life in the family of the deceased. Taking into consideration all these factors, it appears to me that if at all the

learned Single Judge erred, he erred in favour of the appellants in fixing the life expectancy of the deceased at 70 years. Even if the pecuniary loss occasioned by his death is calculated at a round sum of Rs. 200/- per mensem for eleven years, it would come to Rs. 26,400/-. The claim filed in this case for a sum of Rupees 30,000/- was, therefore, not at all exorbitant. In any case the learned Single Judge has allowed a sum of Rs. 12,000/- only. No appeal having been preferred against the decision of the learned Single Judge on this point by the claimant, the minimum we can do is to maintain the award for that amount in favour of the claimant-respondent. We are unable to agree with Mr. Suri that the life expectancy of the deceased should have been fixed at 65 years and the pecuniary loss should be calculated only at the rate of Rs. 50/- per mensem ignoring the value of the manual work which the deceased used to do at his farm. The second ground of attack levelled by Mr. Suri against the decision of the learned Single Judge also, therefore, fails.

7. The last submission of the learned counsel is that the cross-objections filed by the claimant-respondent should not have been entertained as the same were insufficiently stamped. Inasmuch as the first respondent had claimed in her cross-objections that the amount of the Tribunal's award of Rs. 6,364/- should be raised to Rs. 30,000/-, she should according to Mr. Suri have paid ad valorem court-fee on the sum of Rs. 23,636/-, that is on the difference between the two figures. Admittedly no such objection was taken before the learned Single Judge at the hearing of the cross-objections. Nor has any such point been urged in the grounds of appeal filed against the decision of the learned Single Judge. In these circumstances the appellants have no right to urge this new and absolutely fresh ground of attack in an appeal under clause 10 of the Letters Patent without obtaining leave of the Bench hearing the appeal. After carefully considering all the circumstances of the case we decline to grant such leave. Even otherwise we are of the opinion that in view of the special provisions of the Motor Vehicles Act and Rule 22 of the Rules framed thereunder which require that no court-fee at all is payable on a third party claim under Section 110-A of the Act, no question of paying ad valorem court-fee by a claimant on his appeal or on his cross-objections should normally arise. Even Mr. Suri had to concede that if the claimant's petition had been dismissed by the Tribunal, and she had to prefer an appeal against the dismissal of her claim, she would not have been required to pay

ad valorem court-fee on her memorandum of appeal. For purposes of court-fee there is hardly any difference between an appeal and the cross-objections. Prima facie, therefore, we are not inclined to agree with Mr. Suri even on the merits of his contention in this regard.

8. No other point having been argued by the appellants, this appeal must fail, and is accordingly dismissed with costs.

Appeal dismissed.

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MUNI LAL VERMA, J.

M/s. Indian Oil Corporation Limited, Petitioner v. The Union Territory of Chandigarh and another, Respondents.

Civil Writ No. 2393 of 1974, D/- 7-3-1975.

(A) T. P. Act (1882), S. 105 — Permanent tenancy — Circumstantial evidence as to.

Where the intention of the parties as revealed in correspondence was to create a tenancy for a fixed period of one year and that too on a temporary basis, the mere erection of the structures, installation of the petrol pump and investment of money for running the business held could not convert the nature of the lease from temporary into permanent. AIR 1962 SC 413, Distinguished. (Para 6)

(B) Capital of Punjab (Development and Regulation) Act (27 of 1952), S. 3 (1) — Lease under — Applicability of T. P. Act is not excluded.

There is nothing in the Act which excludes the application of the ordinary law governing the other leases to the lease of the site granted in exercise of power under Section 3 (1), or to debar the Chandigarh Administration from determining the said lease. (Para 7)

(C) Capital of Punjab (Development and Regulation) Act (27 of 1952), S. 22 — Rules under — Punjab Capital (Development and Regulation) Building Rules (1952), R. 2 (1vi) and Clause (xxxi) — Change of use — What is.

The word 'change' means 'to substitute another for something or to make its form or nature different from what it is or from what it would have been, had it been left alone'. Thus where the existing road and the double carriage way proposed to be constructed thereon was subservient to the commercial purpose for which the said spaces were reserved, the widening of the road in order to construct double carriage way held would not tantamount to change of the purpose for

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which the spaces were reserved in the Zoning Plan requiring sanction of Parliament. (Para 9)

(D) Capital of Punjab (Development and Regulation) Act (27 of 1952), S. 3 (1) — Power to grant lease — Includes power to terminate lease — When lease is terminated on its expiry reason given for terminating it becomes immaterial.

(Para 12)

Cases Referred: Chronological Paras
(1973) Civil Writ No. 2656 of 1973, D/- 7-11-1973 (Punj) 9.10
1966-68 Supp Pun LR 594 9
AIR 1964 Punj 533 = ILR (1964) 2 Punj 150 9.10
AIR 1962 SC 413 = (1962) 3 SCR 876 6

C. D. Dewan and S. P. Jain, for Petitioner; Anand Swaroop, Sr. Advocate. (K. G. Chaudhry with him), for Respondents.

ORDER:— Shorn of details, the material facts leading to the institution of this writ petition as well as Civil Writ Petition No. 6156 of 1974 (hereinafter called the second writ petition) are, in brief, as under:

2. The petitioner obtained a site measuring 100 feet X 120 feet abutting V-5 road (hereinafter called the road) in sector 17-F on June 19, 1967 on lease for one year at monthly rental of Rupees 599.38, payable in advance by 10th of each month, for a petrol pump from the Chandigarh Administration. It was agreed upon that the structure for running petrol pump-cum-service station would be installed on the site by the petitioner with the prior approval of the Chief Administrator in writing. In accordance with the said term of the lease, the petitioner had constructed petrol pump-cum-service station (hereinafter called the petrol pump) at an expense of Rs. 2 lakhs and in accordance with the policy of the Central Government and a condition of the lease the petitioner had appointed ex-servicemen, viz., Wing Commander K. S. Taunque and Squadron Leader T. S. Shihm, who constituted partnership concern under the name and style of M/s. Kay Tee Service Station, which is petitioner in the second writ petition, as its dealers for operating the petrol pump. Later, on June 13, 1968, the period of the said lease was extended for five years. About a year after the expiry of the period of the said lease, the Chandigarh Administration felt the necessity of widening the road, as a result of which the petrol pump was to be dislocated from the site. Therefore, the Chandigarh Administration sent a communication in that respect to the petitioner on August 29, 1973, and the latter agreed to surrender a portion of the site measuring 74 feet. The Chandigarh Administration, however, terminated the

lease on May 22, 1974 and served a notice to quit (Annexure P-8) on the petitioner, indicating that the site was required for construction of a double carriage way on the road. The petitioner impeached the said notice to quit as illegal, void, capricious, mala fide, unconstitutional and without jurisdiction on various grounds, inter alia:—

(1) That the lease in favour of the petitioner was indeterminable and permanent.

(2) That it could not be determined without payment of compensation for the super-structure, loss of business and good will.

(3) That the zoning plan was statutory in character and could not be changed without the sanction of the Parliament and that the construction of double carriage way on the road would amount to alteration and change of the zoning plan. This could not be done by the Chandigarh Administration without obtaining sanction of the Parliament.

(4) That the termination of the lease was discriminatory and arbitrary and violative of the fundamental rights available to the petitioner under Arts. 14, 19 and 31 of the Constitution of India.

3. Being dealer M/s. Kay Tee Service Station, who are petitioners in the second writ petition, too challenged the notice to quit on the grounds identical to the one raised by the petitioner in this writ petition. The averments in the second writ petition were also similar to the one made in this petition. It was, however, averred in the second writ petition that M/s. Kay Tee Service Station had invested Rs. 1,50,000/- for running the business on the site and had earned goodwill.

4. Both the writ petitions were contested by the Chandigarh Administration (Respondent 1) and the Estate Officer (Respondent 2). The Estate Officer put in affidavits by way of returns in both the writ petitions. The broad facts were admitted. The material averments, including that the lease was of permanent nature or that widening of the road would amount to changing of the zoning plan, were controverted and it was pleaded, inter alia, that the growth of traffic had necessitated the construction of double carriage way on the road in the interest of the general public and that M/s. Kay Tee Service Station had no locus standi to maintain the writ petition because there was no relationship between it and the Chandigarh Administration. Since common questions of fact and law are involved in both the writ petitions, the same are being disposed of by one judgment.

5. The contentions raised by Shri C. D. Dewan, learned counsel, for the petitioner, are mainly two; firstly, that the lease granted to the petitioner by the Chandigarh Administration was permanent and indeterminable and that it was statutory and could not be revoked by the Chandigarh Administration; and, secondly, that the zoning plan was creation of statute and the construction of double carriage way on the road would tantamount to alteration and changing of the zoning plan which was not permitted without the sanction of the Parliament. In addition to the aforesaid two principal contentions, Shri Dewan also argued that the notice to quit was bad and illegal because the date of commencement of the tenancy had been wrongly mentioned therein as 24th instead of 19th day of every month and that no amount of compensation and no offer of compensation for the damages which the petitioner would have to suffer due to the demolition of the structures erected on the site had been offered therein. The contentions advanced by Shri Dewan were adopted by Shri Manmohan Singh, learned counsel for the petitioner in the second writ petition, and the points urged by him were similar to the one urged by Shri Dewan.

6. It is accepted rule of interpretation that while construing all documents, including leases and statutes, the ordinary and grammatical meaning must be given to the words used therein. The intention and also the meaning have primarily to be sought from the words used in the documents or the statute. When the words are plain and unambiguous, the same have to be so construed. The nature of a tenancy granted by any document can be determined by construing the document as a whole. Admittedly, the site was leased out to the petitioner for petrol pump on June 19, 1967 by the Estate Officer by a letter. The copy of the said letter is Annexure P-1. A bare reading of the said letter (Annexure P-1) points out unmistakably that the lease of the site granted to the petitioner was on temporary basis and was for one year only. The words "on temporary basis" and "for one year only," mentioned in the said letter (Annexure P-1), are wholly inconsistent with the permanency of the tenancy claimed by the petitioner. The said lease, which was for one year only, was to expire on June 19, 1968. Before the expiry of the period of the said lease, the Estate Officer had addressed another letter (Annexure P-2) on June 13, 1968, extending the period of the said lease to five years, stating clearly therein that the possession of the site had been delivered to the petitioner on June 19, 1967. The said letter, if the same is construed

as lease deed, required compulsory registration for the reason that it granted a lease for more than one year. A copy of the draft of the lease deed signed by the District Manager of the petitioner, was put in by Respondents 1 and 2. Since it has not been signed by Respondent 1 or by Respondent 2, it remained an inchoate document. Therefore, no help can be invoked from it. Further, the lease deed, the draft of which has been put in, was also compulsorily registrable being for five years. Since the letter (Annexure P-2) and the inchoate lease deed were not registered, the same cannot be used or looked at for determining the nature of the tenancy. Even otherwise, there is nothing in the letter (Annexure P-2) or in the draft of the lease deed which can give an indication, even to slightest extent, that the lease granted to the petitioner was of permanent nature. Since letter (Annexure P-2) and the draft of the lease deed have to be ignored for want of registration, the only document that can be taken into consideration for determining the nature of the lease remains the letter (Annexure P-1). The said letter when read as a whole, as indicated above, reveals that the intention of the parties was to create tenancy for a fixed period of one year and that too on temporary basis. True, the petitioner must have spent some amount in raising the structures and the petrol pump on the site and M/s. Kay Tee Service Station must have invested some amount in running the business, but all that was done by them with the full knowledge of the fact that the lease was for a definite period and was on a temporary basis. Therefore, the mere erection of the structures, installation of the petrol pump and investment of money for running the business cannot, in my opinion, convert the nature of the lease from temporary into permanent.

The facts of the case reported in *Sivayogeswara Cotton Press, Devangere v. M. Panchaksharappa*, AIR 1962 SC 413, relied on by the learned counsel for the petitioner to support his contention that raising of the structures or erection of petrol pump had the effect of rendering the tenancy permanent, were entirely different. In that case, the lease was of extensive land and it was granted to the lessee with a view to raise substantial structures by way of factory premises, residential quarters and other appurtenant buildings. It was firstly for a period of 20 years and after the lapse of the said period of 20 years the lessee had been given the option to give up the lease at any time and the lessor bound himself not to call upon him (the lessee) at any time to give up possession of the leasehold so long as he (the lessee) was pre-

pared to observe the terms of the lease. The lessee had also been given powers to sublet and re-let the demised land to any person and on any terms. It was in the background of the said facts that the lease deed was construed to evidence an intention to create a permanent lease. In the case in hand, letter (Annexure P. 1) contains unreservedly that the lease was on temporary basis and it was for one year only and had been granted for running the business. Later on, it was extended to five years. Therefore, the terms of the lease in the case in hand are contrary to the argument that the intention of the parties was to create a permanent lease simply because the lessee had been allowed to raise structures or to instal petrol pump with the prior approval of the Chief Administrator in writing. I am, therefore, of the opinion that the lease of the site was on temporary basis, may be taken to be for a fixed period of five years which had expired long before the notice to quit was given, and am in disagreement with the learned counsel for the petitioner that the lease of the site granted to the petitioner was of permanent nature.

7. A statutory tenancy, as I understand, would be one which is created by statute. To put it differently, when a statute grants rights of tenancy to a lessee, it may be termed as statutory tenancy. There is no material on the record to show, and it is nobody's case that the petitioners had obtained lease-hold rights in the site under any statute. True, it was in exercise of the provision contained in sub-section (1) of Section 3 of the Capital of Punjab (Development and Regulation) Act, 1952 (hereinafter called the Act), that the Chandigarh Administration granted lease of the site to the petitioner. But that would not, in my opinion, be a ground or basis for contending that the lease had been created under the statute. Section 3 (1) of the Act simply empowered the Chandigarh Administration to lease out any land, including the site, and it was in exercise of the said power that the Chandigarh Administration had leased the site to the petitioner. So, it had the effect of creating relationship of landlord and tenant between the Chandigarh Administration being the landlord and the petitioner being the tenant. Their relationship and the lease would, therefore, be governed by the ordinary law which is applicable to any other lease. There is nothing in the Act which excludes the application of the ordinary law governing the other leases to the lease of the site granted to the petitioner, or to debar the Chandigarh Administration from determining the said lease. Though the Punjab Capital (Development and Regulation) Building Rules, 1952 have been

made, but no rules relating to leases have been framed or made. Therefore, I find no force in the contention of the learned counsel for the petitioners that the lease was determinable or that the Chandigarh Administration could not revoke it.

8. True, according to letter (Annexure P-1), the lease seems to have commenced from June 19, 1967, and similar deduction can be made from letter (Annexure P-2), but in the notice to quit (Annexure P-8), it was mentioned that the lease had commenced with effect from June 24, 1967, and the petitioner was required to deliver possession of the site to the Chandigarh Administration on June 24, 1974. The question as to whether the aforesaid notice to quit can be assailed as bad because the petitioner had been required to deliver possession of the site on June 24, 1974, instead of June 19, 1974, can be better decided in the suit or any other proceedings if and when the same are instituted by the Chandigarh Administration for evicting the petitioner from the site. To me the said question appears to be beyond the scope of these proceedings of writ jurisdiction. Similarly, the question as to whether the petitioner is entitled to any compensation for demolition of the structures and the petrol pump and removal of the same can be better agitated in the suit or proceedings, if and when the same are instituted by the Chandigarh Administration. The said question and also the quantum of compensation if the same would be allowable, appear to me to be foreign to these writ proceedings.

9. The Zoning Plan is not defined in the Act. It is, however, defined in clause (1vi) of Rule 2 of the Punjab Capital (Development and Regulation) Building Rules, 1952 (hereinafter called the Rules), thus:—

" 'Zoning Plan' shall mean the numbered plan signed by the Chief Administrator and kept in his office defining the layout of any numbered sector of the Master Plan of Chandigarh showing the streets, boundaries of building plots, open spaces, position of protected trees or other features, and showing in colour or by other means the specified land-use, building lines, permissible heights of buildings, site coverages and such other restrictions on the development of land or buildings as may be prescribed."

In view of the judgments reported in *Daya Swarup Nehra v. The State of Punjab*, AIR 1964 Punj 533, *B. L. Bhandari v. Chief Commissioner, Union Territory, Chandigarh*, 1966-68 Suppl Pun LR 594 and *Prem Chand v. The Chief Administrator, Chandigarh Administration*, Civil Writ No. 2656 of 1973, decided on November 7, 1973, I have no reluctance to

accept the contention of the learned counsel for the petitioner that the Master Plan and the Zoning Plan are statutory in character and that being so, the same cannot be changed at the sweet-will of the Chandigarh Administration. In order to change the Master Plan of the Chandigarh Capital or Zoning Plan relating to any sector, the sanction of the Parliament seems to be necessary. The word 'change' means 'to substitute another for something or to make its form or nature different from what it is or from what it would have been, had it been left alone'. The Zoning Plan shown at the time of arguments contained, and it was not disputed, that the open spaces abutting the road and lying towards sector 18 were reserved for commercial purposes, and undoubtedly the road now existing and the double carriage way intended to be constructed on the road would cater to the needs and purposes for which the aforesaid spaces had been reserved. So, the road now existing and the double carriage way to be constructed thereon would be subservient to the commercial purposes for which the said spaces had been reserved. In that view of the matter, the widening of the road in order to construct double carriage way would not tantamount to change of the purpose for which the aforesaid spaces had been reserved in the Zoning Plan. The definition of 'material change of use' given in clause (xxx1) of Rule 2 of the Rules, which runs thus:

" 'Material change of use' shall mean a change from one class of building to another."

also lends support to my aforesaid view. The aforesaid spaces, which were reserved for commercial purposes would not be used for any other purpose after or by construction of double carriage way. The matter would have been different if the said spaces were auctioned or used for residential purposes or the like. Roads have to be widened in the interest of the public and because the necessity of the same arises due to growth of traffic. Therefore, it would not be correct to say that the mere circumstance that double carriage way, which is intended to be constructed on the road with a view to cater to the commercial purposes for which the aforesaid spaces are reserved and Sector 17 has been erected, would tantamount to change of the Zoning Plan, especially when the portion or the area to be covered by the double carriage way along the aforesaid commercial spaces would be to a very small extent.

10. The facts of Daya Swarup Nehra's case, AIR 1964 Punj 533 and B. L. Bhandari's case, C. W. No. 2656 of 1973, D/- 7-11-1973 (Punj) were different.

In Daya Swarup Nehra's case (supra), there was open space about 300' X 300' on the entrance junction of sectors 9-C and 9-D from Madhya Marg facing sector 17 and in the said Zoning Plan the said site was shown as Public Space for landscape features, educational, public and community buildings and public amenities. An attempt was made for construction of a petrol pump on a portion of the said site which was against the specifications made in the Zoning Plan and also contrary to the provisions of the Act and the Rules made thereunder. The said attempt was challenged in a writ petition and it was held that the petrol pump-cum-service station would be commercial building and it would be abnoxious trade and the same was contrary to the purpose for which the site had been left. So, the construction of the petrol pump-cum-service station in the circumstances of that case did tantamount to changing of the Zoning Plan. In B. L. Bhandari's case (supra), he had purchased a preferential plot and for that he had to pay 10% more in addition to the price fixed by the Rules. A preferential plot, according to the definition, is one which has one or more side boundaries abutting on an open space at least 40 feet in width or which opens on two or more than two streets. The plot purchased by B. L. Bhandari abutted on only one street but it had an open space to a distance of 40 feet in width on one of its sides. B. L. Bhandari had built his house on the aforesaid plot. When he had been away to the United Kingdom, the Chandigarh Administration constructed a building to be used for a club. Its construction was within 40 feet from the boundary of the plot of B. L. Bhandari. Thereafter, the Chandigarh Administration wanted to raise additional constructions extending up to 16 feet from the boundary wall of the house of B. L. Bhandari. Therefore, he impeached the said act of the Chandigarh Administration in the writ petition. It was in these circumstances that it was held that the construction of the additional buildings extending up to 16 feet from the boundary wall of B. L. Bhandari was in contravention of the Zoning Plan and, therefore, the same was disallowed. In the case in hand, as remarked above, the widening of the road to provide double carriage way would be subservient to the commercial purposes for which the spaces had been reserved in the Zoning Plan and, as such, the same cannot be said to be use of whatever little space that would be covered by the double carriage way, different from the one for which the spaces had been reserved. To put it differently, the construction of double carriage way cannot be said to be change or altering of the Zoning Plan.

Viewed thus, the contention of the learned counsel for the petitioner that construction of double carriage way on the road could not be taken up without sanction of the Parliament appears to be devoid of any force.

11. In the Zoning Plan, produced at the time of arguments, the site was never reserved for the petrol pump. It was only in the layout, which was prepared later on when the site was leased for the petrol pump, that it (the petrol pump) had been shown on the site. Therefore, no assistance can be invoked by the petitioner by the mere fact that the site had been shown for petrol pump in the layout which had to be prepared at the time of leasing of the site for the petrol pump. No other petrol pump has either been installed or is being worked abutting the road, much less that demolition of any petrol pump which is similarly situated like the one in hand has been avoided. Therefore, the argument that the notice to quit (Annexure P-8) was discriminatory is not borne out by the facts or circumstances of the case.

12. Section 3 of the Act empowered the Chandigarh Administration to grant leases. It does not provide any provision for regulating the leases. The authority to grant the lease includes the power to determine the lease, of course in accordance with its terms. The period of the lease had expired. Therefore, the Chandigarh Administration had undoubtedly the right to terminate it. There is nothing in the Act, the Rules or in the material on record which can give an indication that the petitioner had any right to preclude the Chandigarh Administration from terminating the lease. Therefore, the argument raised on behalf of the petitioner that the notice to quit suffered from arbitrariness is without any basis. When the period of lease had expired and the Chandigarh Administration had the right to terminate the lease, the reason given by it for terminating the lease becomes immaterial. Even otherwise, as pointed out above, the Chandigarh Administration required the site for widening the road in order to construct double carriage way thereon due to growth of traffic and in the interest of the general public and the said widening of the road does not tantamount to the changing of the Zoning Plan and, as such it, cannot be maintained that the reason stated in the notice to quit (Annexure P-8) that the site was required for construction of double carriage road amounts to a purpose which can be termed as illegal or unauthorised. Therefore, the contention that the notice to quit was bad because the purpose for which the site was required by the Chandigarh

Administration was, according to the learned counsel for the petitioner, against law, is wholly unacceptable. There was the relationship of lessor and lessee between the Chandigarh Administration and the petitioner. The petitioner did not possess and did not acquire any right to remain in possession of the site or to carry on business of petrol pump there for all times. So, it cannot be maintained that the petitioner had any absolute, much less fundamental, right to remain in possession of the site or to carry on business of petrol pump thereon for all times, much less to deprive the Chandigarh Administration of its right to terminate the lease or to use the site for the purpose for which it is required by it (the Chandigarh Administration). Therefore, the question of violation of fundamental rights claimed by the petitioner under Articles 14, 19 and 31 of the Constitution of India on account of the issuance of the notice to quit does not arise.

13. For the foregoing reasons, I find that all the contentions raised on behalf of the petitioner are without any merit and the same are repelled. So, there is no substance in this writ petition and it must fail.

14. M/s. Kav Tee Service Station in the second writ petition were appointed as dealers by the petitioner. So, their right to remain in possession of the site or to impeach the notice to quit cannot be better than the right of the petitioner in Civil Writ Petition 2393 of 1974, who had been lessee. In view of the failure of the said writ petition, M/s. Kav Tee Service Station cannot have any luck in the second writ petition and the same is also bereft of any merit and fails.

Consequently, I dismiss both the writ petitions with costs. Counsel's fee to be determined at Rs. 200/- in each of the two writ petitions.

Petitions dismissed.

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MAN MOHAN SINGH GUJRAL, J.

Smt. Har Kaur, Petitioner v. Gurmit Singh and others, Respondents.

Civil Misc. No. 4179-C of 1974 in Second Appeal No. 1560 of 1963, D/- 6-2-1975.

(A) Limitation Act (1963), Art. 123 — Application to set aside appellate decree passed ex parte — Service of notice of appeal implies notice of date of hearing of appeal and not merely of the filing of the appeal.

The service of notice contemplated by Article 123 implies service of the notice

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of the date of hearing of the appeal and not merely notice of the institution of the appeal. When the notice of the date of hearing of the appeal is not served, time for an application to set aside the *ex parte* decree passed in appeal runs from the date of the knowledge of the decree. AIR 1963 All 311. Rel. on.

(Para 6)

Cases Referred: Chronological Paras

AIR 1973 Raj 29 = 1972 Raj LW 475	4
(1970) 72 Pun LR 776	4
AIR 1963 All 311 = 1963 All LJ 246	4.6
AIR 1954 Punj 137 = 56 Pun LR 50	4
AIR 1940 Lah 49 = 42 Pun LR 38	4
AIR 1933 Lah 882 = 35 Pun LR 146	4
AIR 1932 Lah 539 = 33 Pun LR 838	4

K. L. Sachdeva, for Petitioner; G. R. Majithia, for Respondents.

ORDER:— This is an application under Order 41, Rule 21, read with Section 151 of the Civil Procedure Code whereby a prayer is made that the *ex* (contd. on col. 2)

parte order dated the 22nd March, 1974, in Regular Second Appeal No. 1560 of 1963 be set aside and the appeal be set down for hearing afresh. It may be stated at the outset that when the appeal was called for hearing nobody appeared on behalf of the respondents with the result that it was decided in their absence and was partly allowed.

2. Notice of this application was issued to the counsel for the opposite party. Mr. K. L. Sachdeva appearing on their behalf has strenuously opposed this application. The only ground on which the application is opposed is that it is time-barred. In order to appreciate the respective contentions of the parties in this respect, reference will have to be made to Articles 164 and 169 of the First Schedule to the Limitation Act, 1908, and Article 123 of the Schedule to the Limitation Act, 1963. For facility of reference the relevant provisions are set down below.

"Description of application"	Period of limitation	Time from which period begins to run.
164. By a defendant, for an order to set aside a decree passed <i>ex parte</i> .	Thirty days	The date of the decree or, where the summons was not duly served, when the applicant has knowledge of the decree.
169. For the re-hearing of an appeal heard <i>ex parte</i> .	Thirty days	The date of the decree in appeal or, where notice of the appeal was not duly served, when the applicant has knowledge of the decree.
123. To set aside a decree passed <i>ex parte</i> or to rehear an appeal decreed or heard <i>ex parte</i> .	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

Explanation. — For the purpose of this article, substituted service under rule 20 of Order V of the Code of Civil Procedure, 1908 shall not be deemed to be due service."

The application in this case was filed after more than three months from the date of the decree and would, therefore, be clearly time-barred under Article 123 if the starting point of limitation is the date of the decree. The case of the petitioners, however, is that they learnt about this decision only on the 11th July and then they filed this application on the 15th July, 1974, and as the time was to start running from the date of the knowledge of the decision the application was within limitation.

3. At this stage it would be necessary to notice a few facts regarding the service of notice regarding the appeal. The respondents were first served for a farzi date for the 19th October, 1963. As the respondents were not represented by any counsel, actual date notices were sent for the 28th May, 1973, which were served on all except respondent No. 4. The case subsequently came up before

M. L. Verma, J. who on the 6th December, 1973, ordered that fresh actual date notices be issued to all the respondents for the 7th January, 1974. The appellant's learned counsel was directed to file correct addresses of the respondents particularly of Harkewal Singh. These notices were not served on any of the respondents. This fact not having been brought out at the hearing of the appeal, the appeal was decided on the 22nd March, 1974.

4. The argument raised on behalf of the respondents is that notice of appeal having been once duly served, the starting point of limitation under Art. 123 would be the date on which the first notice was served. Support for this argument is sought from Sodhi Harnam Singh v. Sodhi Mohinder Singh, 1954-56 Pun LR 50 = (AIR 1954 Punj 137) wherein while interpreting Article 164 of the Limitation Act it was held that the expression "summons" referred to the summons

issued in the first instance and not to notices issued to parties subsequently whether such notices were necessary under the law or not. In this case a suit was transferred from the Court of the Subordinate Judge, Ferozepore to that of Subordinate Judge, Muktsar, under Section 24 of the Civil Procedure Code and the parties were directed to appear at Muktsar on the 18th March, 1950. On that date the defendant did not put in appearance and the case was heard *ex parte*. An application for setting aside the *ex parte* decree was moved after more than thirty days of the date of the decree and was dismissed on the ground that it was time-barred. In appeal a Single Judge of this Court came to the conclusion that the expression "summons" did not only include notices issued to the parties subsequently but also notices sent by the Court to which a suit is transferred. As these notices had never been sent by the Subordinate Judge, Muktsar, to the parties it was held by the learned Single Judge that the application was in time. In Letters Patent Appeal the question of law was examined and on the basis the following observations of Bhide, J. in *Sham Sundar Khushi Ram v. Devi Ditta Mal*, AIR 1932 Lah 539, it was concluded that the wording of Article 164 refers to summons issued in the first instance and not to notices issued to parties subsequently whether such notices were necessary under law or not:—

"To me also this seems to be the correct interpretation. The intention apparently is to give an extended period of limitation in cases where the defendant has not knowledge at all of the suit. But when he has knowledge of the suit, the mere fact that he did not get the due notice of a subsequent hearing can hardly be considered to be a ground for extension of the period. The words 'the summons' are significant If the intention was to allow an extended period in any case where a notice of the date of hearing is not duly served during the course of the suit, the wording would have been, I think, different. In this case the suit was no doubt transferred to another Court, but such a transfer has not the effect of starting the proceedings *de novo*. The suit is merely continued from the stage it had reached in the first Court. Following the interpretation accepted in the two rulings cited above, I hold that the learned Subordinate Judge had no jurisdiction to set aside the decree merely on the ground that the notice after the transfer was not duly served." The same view was followed in *Dharam Pal v. Gajjan Singh*, 1970-72 Pun LR 776 and *Badri Narayan Sharma v. Panchavat Samiti, Dhariawad*, AIR 1973 Raj 29, and it was held that in Article 123 the

expression "the summons" refers to summons for the first hearing and if that has been duly served, the period will commence from the date of the decree, regardless of whether the notice for further hearing by the transferee Court was duly served or not.

While challenging the applicability of the ratio of the above decisions it was pointed out on behalf of the applicant that all those cases related to suits and were, therefore, not relevant so far as the question of limitation in relation to the hearing or disposal of an appeal was concerned. Continuing the argument it was urged that in case of appeal the expression "notice of appeal" implies notice of the date on which an appeal is disposed of and not farzi notice regarding filing of the appeal and for this contention support is sought from *Thakar Nil Chand v. Thakar Hamal Chand*, AIR 1940 Lah 49, and *Bachcha v. Kameshwar Prasad Singh*, AIR 1963 All 311. In the first of these cases in an appeal which was pending before the District Judge, Hoshiarpur, the counsel for the parties were directed to appear for argument in the case at Dharamsala on the 20th July, 1937. The petitioner's counsel reported that he had not been engaged for appearance at Dharamsala. Proceeding on the basis that the pleader was bound to appear the learned District Judge decided the appeal and also dismissed the application for setting aside the *ex parte* decree as it was filed after more than thirty days of the date of the decree. In appeal against this order, it was contended that the petitioner had notice of the appeal as he had been served with notice of the filing of the appeal and that the absence of notice of the adjourned hearing was of no consequence. While rejecting this contention it was held as follows:—

"As regards the first argument of the learned counsel for the respondents, it must be said that the language of Article 169 is not very happy and its interpretation is not free from difficulty as I have remarked in AIR 1933 Lah 882. It would be unfair to expect a party to attend the Court on a date of which no due notice has been given and I am inclined to think that the expression "notice of appeal" should be taken to mean notice (actual or constructive) of the date on which the appeal is disposed of. Any other interpretation would lead to obvious injustice. If, for instance, a Court adjourns an appeal *sine die* for some reason and later on takes it up in the absence of a party who had no notice of the date of hearing and then decides it against him that party cannot be expected to know the result of the appeal. It would be obviously unjust to dismiss the petition

of such party for setting aside the ex parte order merely on the ground that it was not presented within 30 days. The mere fact that the party had been originally served with notice of the appeal would seem to be wholly immaterial in such circumstances and cannot be considered to be any justification for the ex parte decision. AIR 1933 Lah 882 had reference to the special rules of this Court and was decided on its own facts."

In Bachcha's case the same view was taken and it was ruled that the words "notice of the appeal" in Article 169 imply the notice of the day fixed for hearing and disposal of the appeal and not merely notice to the respondent that an appeal has been filed. In this case the entire case law on the subject was examined and the observations of Bhide, J. in AIR 1932 Lah 539, were cited with approval.

5. Faced with the view taken in the above authorities, the respondents' learned counsel drew my attention to the difference in the language of Article 169 which was interpreted in the above two authorities and the language of Art. 123 which is applicable to the present case. In the Limitation Act of 1908 there were separate articles regarding suit and appeal. Whereas in Article 164 which related to suits the starting point of limitation was the date of knowledge where the summons was not duly served, in the case of appeals the starting point of limitation was knowledge of the decree where notice of appeal was not duly served. In the Limitation Act, 1963, with which we are concerned, Arts. 164 and 169 have been consolidated into Article 123 with the result that so far as appeal is concerned, the starting point of limitation would be knowledge of decree when "notice was not duly served." The words "of the appeal" are missing in Article 123. A question, therefore, arises whether this has made any difference to the interpretation to be placed on Article 123 and whether the observations which were made in relation to Art. 169 were still attracted or not.

6. Under Article 123 of the Limitation Act, 1963, in the case of appeal the time would start running from the date when the applicant had knowledge of the decree if notice was not duly served. The expression "notice" occurring in this article would have relation to the date of hearing of the appeal and not merely to the date of filing of the appeal. I am of the considered view that the omission of the words "of the appeal" from Art. 123 of the Limitation Act, 1963, is of no consequence and has only been made as the words "of the appeal" occurring in Article 169 of the Limitation Act, 1908, were redundant. When read in the context of

the words "to rehear an appeal" the word "notice" could only imply notice of the day fixed for hearing the appeal. In coming to this conclusion, I am influenced by the reasoning adopted in Bachcha's case, AIR 1963 All 311. In arriving at the conclusion that the words "notice of appeal" should be taken to mean notice (actual or constructive) of the date on which an appeal is disposed of, regard was had to the scheme of the Civil Procedure Code in so far as it related to the procedure in respect of suits and the procedure provided for hearing of the appeals. The following observations in this respect may be read with advantage:—

"The words in Article 169 'where notice of the appeal was not duly served' when read along with Rules 12 and 14 of Order XLI to which they obviously intended to refer back, lend themselves to the only reasonable construction as meaning the day fixed for hearing and disposal of the appeal and not merely notice to the respondent that an appeal had been filed. If any other meaning was to be given to these words it would lead to absurd results and it would place an undue burden, apart from the wastage of public time and money, on the parties or their counsel to an appeal to go to the appellate Court at least once in every 30 days to ascertain whether any date had been fixed for the hearing of the appeal; otherwise they would run the risk of the appeal being decided ex parte against them, and what is worse their application for a rehearing of the appeal decided ex parte stood to be dismissed as being barred by limitation notwithstanding that they had never received notice of the day fixed for hearing of the appeal as required by the mandatory provisions of Order XLI, Rules 12 and 14 of the Civil P. C."

In view of what has been stated above, I hold that under Article 123 of the Limitation Act, 1963, the expression "service of notice" implies notice of the date on which the appeal is to be disposed of or heard and not merely notice regarding institution of the appeal. Taking this view of the matter, I find the application to be within time, it not being disputed that the notices issued in obedience to the orders of M. L. Verma, J. were not served on the respondents and the period of limitation in this case would, therefore, run from the date of knowledge of the decision of the appeal. The applicants' case is that they only came to know on the 11th July, 1974, and they filed the application within a few days. This contention of the applicants has not been contested. The application is consequently allowed and the order dated the 22nd March, 1974, is set aside and it is

directed that the appeal be set down for rehearing. The parties will bear their own costs in this application.

Application allowed.

AIR 1975 PUNJAB & HARYANA 316

R. S. NARULA, C. J.

Chhota Singh, Petitioner v. Jit Singh and others, Respondents.

Civil Revn. No. 444 of 1971, D/- 27-2-1975.*

(A) Court-fees and Suits Valuations — Court-fees Act (1870), Section 7 (iv) (c) — Suit for declaration that gift-deed was obtained by fraud and for cancellation thereof — Relief of cancellation is only consequential — Section 7 (iv) (c) applies. AIR 1973 SC 2384, Relied on. (Para 7)

Cases Referred: Chronological Paras

AIR 1973 SC 2384 = 1973 SCD 884 2, 5
1970 Cur LJ 80 1, 3

AIR 1968 Punj 495 = 1968 Cur LJ 95 4

(1964) 66 Pun LR 916 = ILR (1965) 1
Pun 265 3

AIR 1954 Raj 170 = 1954 Raj LW 136 2

AIR 1944 Pat 17 = 24 Pat LT 446 (FB) 2

AIR 1941 Lah 97 = 43 Pun LR 106 (FB) 6

AIR 1932 All 485 = 1932 All LJ 684 (FB) 6

6

Harbans Lal, for Petitioner; H. C. Garg, for Respondents.

ORDER:— This is a petition for revision of the order of the Court of the Subordinate Judge Second Class, Mansa, dated March 25, 1971, whereby he decided the preliminary issue relating to proper valuation of the plaint for purposes of court-fee and jurisdiction of the suit filed by the plaintiff-petitioner for a declaration to the effect that the gift-deed made by him was null and void as having been procured by fraud and for cancellation of the same. The plaintiff valued the suit for purposes of court-fee as well as for jurisdiction (vide paragraph 14 of the plaint) at Rs. 350-10 P. calculated on the basis of 30 times the land revenue of Rs. 11.67 P. Relying on the judgment of P. C. Pandit, J. (as he then was) in Jagat Singh v Avtar Singh, 1970 Cur LJ 80, the trial Court held that ad valorem court-fee was payable on the plaint under Article 1 of Schedule I to the Court-fees Act 1870, on the value of the property involved that is on Rs. 37,000/- which was the value of the property mentioned in the impugned gift-deed. Having given a finding to that effect, the

learned Subordinate Judge did not fix any time for making up the deficiency in court-fee as on the basis of the valuation determined by him, the suit was beyond his pecuniary jurisdiction. He therefore, directed that the same should be transferred to a Court having jurisdiction to try the same.

2. When this petition came up for hearing before P. C. Pandit, J. on March 21, 1972, he directed the same to be referred to a Full Bench in view of the divergence of judicial opinion noticed by the learned Judge on the point whether Article 1 of Schedule I or Section 7 (iv) (c) applies to a suit of this type. Reference was made in this connection to the Full Bench judgment of the Patna High Court in Mt. Rupia v. Bhatu Mahton, AIR 1944 Pat 17, and a Division Bench judgment of the Rajasthan High Court in Sukh Lal v. Devi Lal, AIR 1954 Raj 170. On a subsequent date when the case was put up before the learned Judge again on December 11, 1973, it was contended before him that the controversy had in fact been settled by the Supreme Court in Shamsher Singh v. Rajinder Parshad, AIR 1973 SC 2384. The learned Judge, therefore, recalled his previous order and directed the office to set down the case for rehearing as the counsel for the parties wanted to argue the matter in the light of the above mentioned Supreme Court judgment. This is how the case has now been placed before me.

3. Mr. Harbans Lal, learned counsel for the plaintiff-petitioner, has contended that the suit filed by his client is in fact for a pure declaration and the prayer made for cancellation of the gift-deed is at best a mere surplusage, which according to the law laid down in Sheel Kumar v. Aditya Narain, (1964) 66 Pun LR 916, be ignored for purposes of determining the value of the suit for purposes of court-fee. In the Division Bench judgment of this Court in Sheel Kumar's case it was held that the suit for mere declaration that the partition between the son, the father and step-mother was merely a sham transaction and was entered into for ulterior purposes, and, therefore, in fact there was no partition which affected the plaintiff's status as a member of the joint Hindu family was competent, and that a prayer for the cancellation of the deed of partition was purely a surplusage and could be ignored for purposes of court-fee and jurisdiction, as on recording the finding that there was no partition, eventually nothing would remain to be cancelled. That is not the situation here. The case of the plaintiff in the present case is not that the gift-deed was in fact never executed or that it was a sham transaction. On the con-

* (Against order of Madan Mohan Aggarwal, Sub. J., 2nd Class (A) Mansa, D/- 25-3-1971).

trary his case is that the document was executed by him, but the execution thereof had been brought about by fraud etc. If the case of the plaintiff is proved, it would not be held that no gift-deed was in fact ever executed, and none was in existence or that the same was a sham transaction, but it would in that eventuality be held that the gift-deed was not binding on the plaintiff as it was void on account of fraud, etc. Jagat Singh's case 1970 Cur LJ 80 has been correctly distinguished by counsel on the ground that whereas possession had been claimed in that suit, the plaintiff petitioner is admittedly in possession of the property in dispute, and, therefore, there is no question of paying court-fee on the value of the property by treating this as a suit for possession.

4. Mr. Harbans Lal next referred to the Division Bench judgment of this Court in *Inder Singh v. Mst. Nihal Kaur*, 1968 Cur LJ (Punj and Har) 95 = (AIR 1968 Punj 495). It was held in that case that where a plaintiff claims a declaration for adjudging the disputed document to be void, it is not necessary for him to claim for the document to be delivered up and cancelled, and that it is in the discretion of the Court to do so if it finds necessary to adopt that course. No prayer had at all been made in that case for the cancellation of the document. In the instant case, however, specific prayer has been made for that relief. The observations of the Division Bench in *Inder Singh's* case (*supra*) have, therefore, no application to the facts of the present case.

5. Learned counsel for the plaintiff-petitioner has lastly contended that according to the authoritative pronouncement of the Supreme Court in AIR 1973 SC 2384, a suit of the kind filed in the instant case can at best be held to be a suit for declaration accompanied by a prayer for setting aside or cancellation of the gift-deed, and that it would then be covered by Section 7 (iv) (c) of the Court-fees Act, and would not even in that eventuality attract the provisions of Article 1 of Schedule I. Counsel points out that in *Shamsher Singh's* case, AIR 1973 SC 2384 valuation of the suit for purposes of jurisdiction had been mentioned as Rs. 16,000/- and, therefore, a direction to pay ad valorem court-fee was given. As against that, contends counsel, the value of the present suit for jurisdiction has also been given in the plaint as Rs. 350-10 P., and even if Section 7 (iv) (c) of the Court-fees Act is held to be applicable, correct court-fee has been paid on the plaint of this suit.

6. It appears to me that the prayer for cancellation of the gift-deed has

to be taken into consideration for determining the court-fee payable on the plaint of this suit. In fact even if the plaintiff had not asked for such relief, it would have to be implied. The gift-deed on the face of it transferred the property covered by it to the donees, and unless the said document is cancelled on one ground or the other, the plaintiff would not be able to avoid it. Even so, contends the counsel, the plaint of the suit would be covered by Section 7 (iv) (c). The view expressed earlier in some judgments to the effect that cancellation of a document must always be treated as substantial relief, and cannot be treated to be consequential one does not appear to hold the field now in view of the authoritative pronouncement of the Supreme Court in *Shamsher Singh's* case. The difficulty which was felt by Pandit J. at the earlier stage was that according to the Full Bench judgment of the Lahore High Court in *Mt. Zeb-ul-Nisa v. Chaudhri Din Mohammad*, AIR 1941 Lah 97, and the Full Bench judgment of the Allahabad High Court in *Kalu Ram v. Babu Lal*, AIR 1932 All 485, the expression 'consequential relief' in Section 7 (iv) (c) means some relief which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained, and which is not specifically provided for anywhere in the Act, and cannot be claimed independently of the declaration as a substantive relief. That question no more arises in view of the judgment of the Supreme Court.

7. Mr. H. C. Garg, learned counsel for the respondents, submits that unless the gift-deed is first cancelled, the declaration prayed for by the plaintiff cannot be granted to him, and, therefore, ad valorem court-fee has to be paid on the value of the property mentioned in the gift-deed. In fact this does not appear to me to be the position. The plaintiff would first have to prove that the gift-deed was got executed from him by fraud. If he is able to prove the allegation made by him in that behalf, he would be entitled to the declaration claimed by him, and in that event he would also be entitled to the consequential relief to have the gift-deed cancelled. I, therefore, hold that the case is covered by Section 7 (iv) (c) of the Court-fees Act, and the plaint of the suit is properly valued.

8. This revision petition, therefore, succeeds, the order of the lower Court is reversed, and the trial Court is directed to proceed with the trial of the suit on merits in accordance with law. The parties are directed to appear before the Subordinate Judge First Class, Mansa, on

March 24, 1975. Costs of these proceedings shall abide the result of the suit.

Revision allowed.

AIR 1975 PUNJAB & HARYANA 318

BAL RAJ TULI AND A. S. BAINS, JJ.

Sangit Mohinder Singh, Appellant v. The Punjabi University, Patiala, Respondent.

First Appeals Nos. 82 and 115 of 1968. D/- 24-1-1975.*

(A) Land Acquisition Act (1894), Section 54 — Acquisition by Government for the benefit of the University — Award of compensation — Appeal against, must be against the Government and not the University — Appeal filed making only the University a party is incompetent. AIR 1974 Andh Pra 299, Rel. on. (Para 3)

(B) Civil P. C. (1908), O. 41, R. 22 — Two appeals filed by opposite parties against same judgment — One appeal not maintainable for not impleading proper parties, if can be treated as cross-objections in the other.

Where two appeals are filed by opposite parties against the same judgment and one appeal is found to be incompetent as not having impleaded the proper parties, it can be treated as cross-objections to the other appeal only if it is filed after the filing of the other appeal and not if it has been filed before the filing of the other appeal. AIR 1944 Lah 76, Rel. on. (Para 4)

(C) Land Acquisition Act (1894), Section 25 (1) — "Shall not exceed the amount so claimed" — Meaning of.

The expression "shall not exceed the amount so claimed" only means that the total amount that may be awarded by the Court on a reference under Section 18 shall not exceed the total amount claimed by the claimant under Section 9. It may be that the claim consists of various items and it is open to the Court to enhance the compensation in respect of some items and reduce it in respect of others. The overall limit is that the amount of compensation awarded is not to exceed the total amount of compensation claimed by the claimant in reply to a notice under Section 9 of the Act. AIR 1967 Cal 631, Rel. on. (Para 6)

Cases Referred: Chronological Paras

AIR 1974 Andh Pra 299 = (1974) 1 APLJ 69 3
AIR 1967 Cal 631 = 72 Cal WN 235 6
AIR 1945 Cal 312 = 49 Cal WN 206 6
AIR 1944 Cal 247 = ILR (1943) 1 Cal 69 6

*(From order of Surjit Singh Raikhy. Addl. Dist. J., Patiala, D/- 30-12-1967).

DS/ES/B305/75/KNA

AIR 1944 Lah 76 = 46 Pun LR 148 (FB) 6

AIR 1939 PC 98 = 66 Ind App 104 6

AIR 1937 Nag 105 = ILR (1937) Nag 401 4

AIR 1936 Lah 362 = 162 Ind Cas 336 4

AIR 1930 PC 64 = 57 Ind App 100 6

AIR 1925 Lah 57 = 79 Ind Cas 132 4

AIR 1922 Lah 423 = 67 Ind Cas 478 4

K. N. Tewari, for Appellant; Atma Ram with S. S. Dhaliwal, for Respondent.

JUDGMENT:— This judgment will dispose of R. F. A. 82 of 1968 Sangeet Mohinder Singh v. The Punjabi University, Patiala, and R. F. A. 115 of 1968, State of Punjab v. Sangeet Mohinder Singh, as they are cross appeals arising out of the award of the learned Additional District Judge, Patiala, dated December 30, 1967.

2. The Punjab Government acquired about 316 acres of land situated in villages Sheikhpura Kamboan, Nasinpur, Karheri and Phaloli, by notification dated March 27, 1963. The land of Sangeet Mohinder Singh (hereinafter called the claimant), measuring 41 bighas 12 biswas formed part of the acquired land. Not satisfied with the award made by the Land Acquisition Collector, the claimant filed an application under Section 18 of the Land Acquisition Act (hereinafter referred to as the Act) for reference of the dispute with regard to the compensation to the Court of District Judge, Patiala. That reference was heard and decided by the learned Additional District Judge, Patiala. Both the parties have felt aggrieved and filed the present appeals which are being disposed of together.

3. The learned counsel for the State of Punjab and the Punjabi University has raised a preliminary objection to the maintainability of the appeal filed by the claimant. The claimant in his appeal only made the Punjabi University respondent and not the Punjab State. The land was acquired by the State of Punjab and not by the Punjabi University. It has been held by a learned Single Judge of the Andhra Pradesh High Court in the Andhra Pradesh Agricultural University v. Bezari Sayanna, AIR 1974 Andh Pra 299, as under:—

"Part VII of the Act deals with acquisition of land for companies and provides for agreements to be entered into by the company with the Government for the payment of the cost of the acquisition, among other matters. This brief survey of the provisions of the Act shows that the land is acquired by the Government, the land vests in the Government after acquisition, compensation has to be paid to the claimant by the Government and it is to the Government alone that a

claimant must look for payment of compensation. If any issue is raised by the claimant the issue has to be settled with the Government only and none else. The lis, if any, is between the Government and the claimant. The person for whose benefit the land is acquired and who may ultimately pay to the Government the cost of acquisition has nothing to do with the lis."

According to this dictum, the Punjab State was a necessary party to the appeal as the claimant could only claim enhanced compensation from the Punjab State and not from the Punjabi University. There is thus merit in the preliminary objection of the learned counsel for the Punjab State and the Punjabi University to the effect that the appeal filed by the claimant is not competent.

4. The learned counsel for the claimant, however, submits that the appeal can be considered as cross-objections to R. F. A. 115 of 1968 filed by the State of Punjab and Punjabi University and reliance is placed on a Full Bench judgment of the Lahore High Court in *Labhu Ram v. Ram Partap*, AIR 1944 Lah 76 (FB), wherein the following observations occur:—

"The third question whether the cross-appeal submitted by Labhu Ram and others can be treated as cross-objections is also not free from conflict of authority. Under Order 41, Rule 22, Civil Procedure Code, cross-objections are entertainable if filed within one month from the date of service on the respondent or his pleader of notice of the day fixed for hearing the appeal or within such further time as the appellate Court may see fit to allow. Counsel for the appellants urges that inasmuch as their appeal had been filed after the appeal of Ram Partap and others had been admitted to a hearing and notice to the respondents had been issued, it could be heard as cross-objections to the appeal of Ram Partap and others, even if as appeal it was not competent. Reliance in this connection is placed on *Dasrual Bhagchand Lal v. Narayan Mahadeo*, AIR 1937 Nag 105, *Bawa Singh v. Thakur Singh*, AIR 1922 Lah 423 and *Bhagat Ram v. Raghbar Dial*, AIR 1925 Lah 57. Counsel for the respondents, on the other hand, relied on a Bench judgment of this Court as reported in *Mt. Koshalia v. Riaz-ud-Din*, AIR 1936 Lah 362, and urges that this could not be done inasmuch as the cross-appeal had not been filed after the service of notice on Labhu Ram and others but before. That a cross-appeal can be treated as cross-objection admits of no doubt and there is no authority contrary to the rulings relied upon by the appellants in this connection. The only question is

whether the right of a respondent to file his cross-objections is so restricted as is adumbrated in AIR 1936 Lah 362. In other words, could it be the intention of the Legislature in enacting Order 41, Rule 22 to specify the point of time in which such cross-objections could be filed at both ends? After giving this matter my careful consideration, I have reached the conclusion that it could serve no purpose to restrict the right of a respondent to prefer his cross-objections in the manner suggested. No doubt, they cannot be presented after the expiry of one month from the date of the service of the notice on him or his pleader, but the right to submit his cross-objections, in my view, accrues to a respondent as soon as an order is made issuing notice of the date of hearing of the appeal to him and it is not necessary for him to wait until the service is actually effected on him. It is even open to him to appear in a Court of appeal on the date of hearing and present his objections there and then though not served at all. To put the restricted interpretation upon this provision of law would create situations which may look anomalous. I would, therefore, hold that, in the circumstances of this case, the cross appeal presented by Labhu Ram and others could be treated as cross-objections.

Counsel for the respondents, however, argues that inasmuch as the list of parties attached to the cross-objections did not contain the names of the two respondents, Krishen Kumar and Inder Kumar, that defect would still be fatal to the cross-objections, as they would not be heard as against those two respondents. There is, however, no substance in this objection. The cross-objections are always preferred to an appeal that is pending and the title of the cross-objections remains the same as that of the appeal. It is admitted that the names of these respondents appear in that memorandum of appeal and consequently the appellants' cross-objections in respect of the decree granted against them would be entertainable even as regards those respondents."

According to this judgment, the cross-objections are preferred to an appeal which means that the appeal must have been filed prior to the filing of the cross-objections. In the instant case, the claimant had filed his appeal before the State of Punjab and the Punjabi University filed their appeal and, therefore, his appeal cannot be treated as cross-objections to the appeal of the Punjab State and the Punjabi University. Moreover, we find no merit in the appeal of the claimant even if it is considered as cross-objections to the appeal filed by the State of Punjab and the Punjabi University.

5. The following issues were framed by the learned Additional District Judge for determination of the amount of compensation to which the claimant was entitled:—

1. Whether the market value of the land acquired on 27th March, 1963, was more than what had been awarded by the Land Acquisition Collector and if so, what was that price?

2. Whether the claimant is entitled to enhanced compensation for the building and tube-well existing on the land acquired, if so, how much?

3. Whether the claimant is entitled to enhanced compensation in respect of the fruit-trees standing in the land acquired and if so, to what extent?

4. Whether the claimant filed a claim in pursuance to the notice served on him under Section 9 of the Land Acquisition Act, if so, what is its effect?

5. In case no such claim was filed, whether the claimant is entitled to any enhancement and this petition is not barred under Section 25 of the Land Acquisition Act?

6. Relief.

Under issue No. 1 it has been held that the claimant was entitled to the market value of the land comprised in Khasra Nos. 45, 46, 47, 48, 51 and 52 (total 31 bighas and 13 biswas) at the rate of Rs. 1,500/- per bigha and for the land comprised in Khasra Nos. 49 and 50 (9 bighas and 19 biswas) at the rate of Rs. 1,000/- per bigha. This market value has been determined on the basis of the instances considered in the case of Ravendra Singh. We have upheld the award of the Additional District Judge with regard to that land in R. F. A. No. 174 of 1968, decided today. For the reasons stated in that judgment, the decision of issue No. 1 by the Additional District Judge is affirmed. There is thus no scope either for enhancement or reduction in the amount of compensation with regard to the land.

6. However, the learned counsel for the State of Punjab and the Punjabi University has submitted that in his claim filed in pursuance of the notice under Section 9 of the Act, the claimant had claimed only Rs. 50,000/- for the land whereas the learned Additional District Judge has allowed Rs. 57,425/- which he could not do in view of the provisions of Section 25 of the Act. According to that provision, the claim for compensation of the land could not exceed Rs. 50,000/-. We are of the opinion that the learned counsel has misread that provision. Sub-section (1) of Section 25 is in the following terms:—

"25 (1). When the applicant has made a claim to compensation, pursuant to any

notice given under Section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under Section 11."

It only means that the total amount that may be awarded by the Court on a reference under Section 18 of the Act shall not exceed the total amount claimed by the claimant under Section 9 of the Act. It may be that the claim consists of various items and it is open to the Court to enhance the compensation in respect of some items and reduce it in respect of others. The overall limit is that the amount of compensation awarded is not to exceed the total amount of compensation claimed by the claimant in reply to a notice under Section 9 of the Act. A reference in this connection may be made to the observations of a Division Bench of the Calcutta High Court in *Charu Prokash v. State of West Bengal*, AIR 1967 Cal 631, which are contained in para. 12 of the report and are pertinent on the point:—

"It was urged further on behalf of the State that, in any view, the claimant was not entitled to any amount beyond Rs. 1,50,000 for the structures as that was the figure, mentioned by the claimant for the said structures in his petition of reference. This objection was overruled by the learned Land Acquisition Judge upon the view that the claimant was not restricted to the different valuations for the different items in his petition of reference, although he might be held limited to the amount, claimed for the entire property in the said petition. This view appears to us to be well supported by the decision of this Court, reported in *Province of Bengal v. P. L. Nun*, AIR 1945 Cal 312, explaining the earlier decision of this Court, reported in *Province of Bengal v. Ram Chandra*, AIR 1944 Cal 247, in the light of the two Privy Council decisions, reported in *Pramatha Nath v. Secy. of State*, 57 Ind App 100 = (AIR 1930 PC 64) and *V. Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatnam*, 66 Ind App 104 = (AIR 1939 PC 98). We are, accordingly, of the view that the State's objection to the award of the learned Land Acquisition Judge is unsustainable and its appeal F. A. No. 133 of 1965, would fail."

The objection is thus repelled.

7. The claimant had claimed Rs. 10,000/- on account of the value of the fruit trees in his application under Section 18 of the Act against which the learned Additional District Judge allowed Rs. 3,498.20. It is worthy of note that in his claim before the Land Acquisition Collector under Section 9 of the Act, the claimant had claimed only Rs. 2,000/- as

AIR 1975 RAJASTHAN 193

B. P. BERI, C. J. AND M. L. SHRIMAL, J.

Mor Mukat Singh and others, Petitioners v. The Board of Revenue for Rajasthan and others, Non-Petitioners.

Civil Writ Petn. No. 1492 of 1966, D/- 1-11-1974.

(A) Rajasthan Land Revenue Act (15 of 1956), S. 10 — "Decision of single member" — Only one member of Division Bench hearing review application (other member having retired) — His decision is not decision of single member but decision on behalf of Division Bench — No appeal is competent before Division Bench. (AIR 1963 Andh Pra 277 and AIR 1917 Cal 88, Rel. on). (Civil P. C. (1908), S. 114). (Paras 6, 8)

Cases Referred : Chronological Paras

AIR 1975 Raj 55 = Civil Misc. Writ: Case No. 2032 of 1971, D/- 4-10-1974 5

AIR 1963 Andh Pra 277 = (1963) 1 Andh WR 146 3

AIR 1917 Cal 88 = 21 Cal WN 652 3, 5

H. C. Rastogi, for Petitioners: R. P. Dave, for Non-Petitioners.

B. P. BERI, C. J.:— This is a petition under Article 226 of the Constitution of India directed against the judgment of the Board of Revenue dated June 30, 1966, whereby the learned Members of the Board of Revenue reversed the order of Shri R. N. Hawa—a member of the Board of Revenue, which order he had passed while accepting a review against the judgment which was rendered by the Bench consisting of Shri Kanwar Bahadur and himself dated December 3, 1962.

2. The point involved in this petition is small but the history of this legal dispute is long. There are four parcels of land measuring 9 Bighas, 4 Bighas, 3 Bighas and 7 Bighas situate in village Soter, Tahsil Bonli, District Sawai Madhopur. A suit was instituted by Mor Mukat Singh and others against Ram Sukh and others, for ejectment which was decreed in favour of the petitioner Mor Mukat Singh by a decree dated May 31, 1956. Ram Sukh and others appealed before the Additional Commissioner, Jaipur, but without success. They then went up to the Board of Revenue and by its judgment dated January 9, 1960 Shri Kanwar Bahadur and Shri R. N. Hawa as members of the Board of Revenue accepted the appeal. Aggrieved by this, Mor Mukat Singh and others moved an application for a review of the judgment. By this time Shri Kanwar Bahadur had retired and the review was heard by Shri R. N. Hawa and he found, according to his judgment dated December 3, 1962, that

a review was called for and he restored the second appeal which was decided by him and Shri Kanwar Bahadur on January 9, 1960 for rehearing. By that time Ram Sukh had died but his successors who were already on record, preferred an appeal under Section 10 of the Rajasthan Land Revenue Act, before a Division Bench consisting of Shri R. K. Chaturvedi and Shri G. B. K. Hooja. Notwithstanding the objection raised on behalf of Mor Mukat Singh and others that no appeal under Section 10 lay before them, the learned Members allowed the appeal and set aside the judgment of Shri R. N. Hawa dated December 3, 1962 and affirmed the judgment of the Board dated January 9, 1960. Mor Mukat Singh is before us and challenges the decision of the Board of Revenue on the ground that the Board had no authority to hear an appeal under Section 10 of the Rajasthan Land Revenue Act.

3. Mr. H. C. Rastogi appearing for the petitioners urges that Shri R. N. Hawa heard the review alone, although the notice was issued by both the learned members namely Shri Kanwar Bahadur and Shri R. N. Hawa, on January 2, 1961. Shri Kanwar Bahadur having retired, Shri R. N. Hawa was compelled by the situation to hear the review application himself in view of the provisions of Order 47, Rule 5, Civil P. C. as applicable to Revenue Courts by virtue of Section 86 of the Rajasthan Land Revenue Act. The judgment that Shri R. N. Hawa passed was, urged the learned counsel, in fact the judgment of the Division Bench of the Board of Revenue although it was rendered by only one Member of the Bench and therefore no appeal under Section 10 of the Rajasthan Land Revenue Act lay before a Division Bench. In support of this submission, he has placed reliance on Achyutam v. Annapurnamma, AIR 1963 Andh Pra 277 and Kailash Chandra v. Revati Mohan, AIR 1917 Cal 88.

4. Mr. R. P. Dave learned counsel for the respondents supports the judgment of the Board of Revenue on the ground that in fact it was a judgment of the learned Single Judge against which an appeal lay.

5. Recently we have had occasion to consider the rationale of the remedy of review in Civil Procedure. We had said that this remedy has for its foundation and implied admission of human fallibility and a desire to serve truth so that ends of justice may be attained. A review lies if a party discovers some evidence which it could not, despite due diligence at proper time produce and this is intended to serve the cause of truth. If there is an error apparent on the face of the record which clearly indicates that hu-

man judgments cannot always be free from error and if a patent error is there it should be corrected. But to safeguard these two principles, however, Order 47, Rule 5, C.P.C. lays down that if a matter is decided by more than one member of a Court and the other one is not available for a period of six months for any reason whatsoever, the review after that period has to be heard by the member of the Court who is available. The reason for this review as we have observed in *Bhera v. Board of Revenue*, Civil Misc. Writ Case No. 2032 of 1971 decided on 4-10-1974 = (reported in AIR 1975 Raj 55) is that it is easier for a person who had heard a dispute to discover and recognise his own error rather than a person who had not heard it. Therefore, the law insists that it is the member who is available alone should hear the case wherein review is sought by an aggrieved party. Basically, a review is re-examination at the same level. But, when such a member of the Court decides the review does he decide it on his own personal behalf or on behalf of the Bench which had disposed of the matter under review? This question was posed in a case where a review application was rejected by a learned Member of the High Court of Andhra Pradesh and an appeal was sought to be preferred against that judgment before a Division Bench under Clause 15 of the Letters Patent of the Andhra Pradesh High Court. It was held that no such appeal lay because such an appeal was only available when the case was decided by a single member of the Court as such. When a review application is decided by a single Member on account of certain exigencies and non-availability of other members then in point of form and substance he is deciding it for and on behalf of the Bench which had originally decided the matter and the decision was held to be a decision of the Bench which originally disposed of the dispute. The same was the view taken in the Calcutta case AIR 1917 Cal 88.

6. The case before us is of the opposite variety. Here, a learned single Member of the Board recognised that there was an error in the decision which was delivered by two members of the Board of Revenue. The learned single Member said, let the matter be heard again as civil second appeal on merits. The question is whether such a judgment of Shri R. N. Hawa was a judgment of the single Member or a judgment of the single Member on behalf of the Divisions Bench. If we were to treat this as a judgment of a single Member of the Board against which an appeal lies then it would be saying that while the person who delivered the original judgment recognised that it was a fit case for review, the two Members who are quite fresh to the dispute take a contrary view. Such a proposition appears to run con-

trary to the very spirit of the remedy of review. In substance, Shri Hawa prima facie recognised that he and his colleague had either committed an error apparent on the face of the record or there was other similar ground as envisaged by O. 41, R. 1, C. P. C. and the judgment delivered by them on January 9, 1960 did require a review. It was not a finding given by a learned single Member on his behalf alone but on behalf of a Bench of two Members.

7. Section 10 of the Rajasthan Land Revenue Act bereft of unnecessary words says.

".....
Provided that a party aggrieved by a decision of a single member shall have the right to make a special appeal to a bench consisting of two or more members of the Board within one month from the date of decision of the single member."

8. On principle, we have found that it was not a decision by a single member but a judgment of single member on behalf of the Division Bench, and this provision is clearly inapplicable. Thus no appeal was competent before the Division Bench of the Board.

9. The result is that judgment of the Board of Revenue dated June 30, 1966 is set aside and the judgment of Shri R. N. Hawa dated December 3, 1962 is restored.

10. Parties will bear their own costs.
Petition allowed.

AIR 1975 RAJASTHAN 194

C. M. LODHA, J.

Mishrilal and others, Petitioners v. Jankinandan, Respondent.

Second Appeal Nos. 363 and 359 of 1971, D/- 1-7-1974.*

(A) Civil P. C. (1908), O. 22, R. 2 — Right to sue partly surviving — Ejectment suit by two plaintiffs — Suit dismissed — Second appeals by plaintiffs — Cause of action partly common to both plaintiffs and partly personal to plaintiff No. 1 — Death of plaintiff No. 1 during second appeal — Personal cause of action perishing with him — Other cause of action surviving to plaintiff No. 2 — Held, plaintiff No. 2 entitled to proceed with appeal.

Suit for ejectment of tenant was instituted by two plaintiffs on the ground that premises were required for their own residence as well as for residence of their family. Allegations constituting cause of action were (i) one of the plaintiffs was blind due to old age and could not walk the streets in the loca-

*(Against judgment and decree passed by D. D. Gupta, Dist. J., Jaipur in Civil Appeals Nos. 222 of 1969 and 81 of 1971, D/- 5-4-1971).

HR/JR/D589/74/KKK

lity where they were already living; (ii) His son though cured of tuberculosis was in convalescent state and needed to reside in suit premises outside the city; (iii) other plaintiff who was selected for I. A. S. was required to reside in suit premises in keeping with his status. Thus allegations Nos. 2 and 3 were common to both plaintiffs and allegation No. 1 was personal to plaintiff who died later.

Held, that part of the cause of action must vanish with him but other allegations constituted cause of action which survived to other plaintiff and he had right to sue, or for the matter of that to proceed with appeal. AIR 1973 SC 2110, Distinguished.

(Para 7)

(B) Civil P. C. (1908), O. 22, R. 3. — Rule applies to appeals — Lease deed executed in favour of two plaintiffs — Suit for ejectment of tenant — Second appeal by both plaintiffs against dismissal of suit — Death of one appellant — Right to enforce lease vests jointly in surviving appellant and legal representatives of deceased appellant.

The application by the legal representatives of deceased appellant to be substituted in his place as appellants has to be considered. In view of finding that the cause of action for the suit has not perished and the right to sue survives there is no impediment in the way of the legal representatives of deceased appellant to come on the record in his place for the simple reason that the right to enforce the terms of the lease deed vests jointly in surviving appellant as well as the heirs of the deceased as the lease deed has been executed in favour of both the appellants.

(Para 8)

Cases Referred: Chronological Paras
AIR 1973 SC 2110 = (1973) 3 SCR 679

3, 6, 7.

C. L. Agarwal, for Appellants; M. B. L. Bhargava and S. N. Bhargava, for Respondent.

JUDGMENT:— These are two connected appeals filed by the plaintiff-landlord Mishrilal against two sets of tenants in respect of different premises in the same building, situated in 'C' Scheme, Jaipur.

2. Both the suits were instituted by Motilal and one of his sons Ramkumar on identical grounds, viz. (i) that the premises in question were required by the plaintiffs for their own occupation as well as for occupation of their family and (ii) that the premises had been unlawfully sublet by the tenants. The suit against Jankinandan was dismissed and the judgment and decree by the trial court were upheld by the District Judge, Jaipur City, Jaipur, whereas the suit against Hariprasad was decreed by the trial court, but dismissed, on appeal by the defendant, by the District Judge, Jaipur. Hence both these appeals by the plaintiffs.

3. During the pendency of these appeals plaintiff No. 1 Motilal died on 27-7-

1973; and an application was made on behalf of the legal representatives of Motilal through their counsel Shri R. S. Khejariwal that they may be ordered to be substituted as appellants in place of Motilal. This application has not been decided so far. When the learned counsel for the appellants started arguing the case on merits, a preliminary objection was raised by Mr. Bhargava on behalf of the respondents that Motilal having expired during the pendency of these appeals, the cause of action perished with him and does not survive. It has been urged by the learned counsel that the dismissal of the two suits must be maintained on the simple ground that the right to sue does not survive on the death of the plaintiff Motilal. In support of his contention he has relied on Phool Rani v. Naubat Rai, AIR 1973 SC 2110.

4. Mr. Agarwal, on the other hand, has argued that the facts in the case of Smt. Phool Rani (supra) are distinguishable and the principle laid down therein has no application to the present case. He has also pressed the application filed by the legal representatives of the deceased plaintiff Motilal, and has submitted that since the lease deed has been executed in favour of deceased Motilal as well as the co-plaintiff Ram Kumar, all the legal representatives of Motilal may be ordered to be brought on record in place of deceased Motilal.

5. The preliminary objection raised by Mr. Bhargava is very much connected with the prayer made by the legal representatives of Motilal in their application dated 26-9-1973, and I, therefore, propose to dispose of the preliminary objection as well as the said application dated 26-9-1973 by a single order.

6. In Smt. Phool Rani's case AIR 1973 SC 2110 (supra) there was one plaintiff who sought possession of the premises from the tenant on the ground that the premises were required by the plaintiff for occupation as a residence for himself and members of his family. The plaintiff died during the pendency of the appeal and on an objection by the tenant-defendant the High Court took the view that the right to sue did not survive to the heirs of the plaintiff and on that ground the prayer of the legal representatives of the plaintiff for ejectment was dismissed leaving it open to the heirs to bring a fresh proceeding founded on their own requirements. The correctness of this decision was challenged by the plaintiff's heirs in appeal before their Lordships of the Supreme Court and their Lordships were pleased to hold that the requirement pleaded in the ejectment application that the premises were required for occupation as a residence for the plaintiff himself and members of his family was a personal requirement of the plaintiff and the mere fact that the plaintiff had pleaded that the premises were also required for members of his family did not make the requirement any the less a personal requirement of the plaintiff. It was held "that the members of

his family must reside with him is his requirement, not theirs." In this view of the matter it was held that it was a personal cause of action which must perish with the plaintiff. The reason which persuaded their Lordships to take this view was that if the heirs were permitted to continue the proceedings, the lis would assume a complexion wholly beyond the compass of the original cause of action, and that without a fundamental alteration of the pleadings, the appellants could not continue the proceedings. However, regarding the cases in which the death of the plaintiff occurred after a decree for possession was passed in his favour, say, during the pendency of an appeal filed by the unsuccessful tenant, it was held by their Lordships that the legal representatives are entitled to defend further proceedings like an appeal which constitute a challenge to the benefit accrued to them under the decree.

7. Thus in view of the decision of the Supreme Court it is amply clear that in case of a suit instituted by the sole plaintiff for ejectment against a tenant for occupation as a residence for himself and members of his family, if the plaintiff dies during the pendency of the appeal in such circumstances as if he had died during the pendency of the suit, the right to sue would not survive and the heirs of such a plaintiff have no remedy left to them except to file a fresh suit. But the facts of the present case are distinguishable. The suit has been instituted by two plaintiffs viz. Motilal deceased and one of his sons Ram Kumar. The lease deed has been admittedly executed in favour of Motilal as well as Ramkumar. The allegation contained in para No. 5 of the plaint is that the suit premises are required by the plaintiffs for their own residence as well as for the residence of their family and then it has been further pleaded that Mishrilal son of plaintiff No. 1 and brother of plaintiff No. 2, though cured of tuberculosis of lungs, is still in a weak state of health, and according to medical advice is required to live outside the city in open and healthy surroundings, and, therefore, the premises are required for him. Then again it has been pleaded in the same paragraph that the plaintiff No. 1 Motilal has lost his eye-sight being of extreme old age i.e. 80 years and he cannot walk in the streets where the plaintiffs and their family are residing at present. Lastly, it has been averred that the plaintiff No. 2 Ram Kumar has been selected for Indian Administrative Service, and it would be convenient for him to attend to his duties if he resides in the premises in question instead of in the city house and it would also be in keeping with his status and position to reside in a bungalow outside the city rather than in the city house. Thus it would be clear from what has been stated above that certain allegations for ejectment which go to constitute the cause of action in the suit are common to both the plaintiffs and only one is clearly personal to

plaintiff No. 1 Motilal, and that is the requirement based on the personal reasons of Motilal viz. loss of his eye-sight and his extreme old age. That part of the cause of action of the suit undoubtedly is a personal cause of action of Motilal alone and must be taken to have perished with him. But so far as the other allegations are concerned, I am clearly of the opinion that they constitute a cause of action which survives and the other plaintiff Ram Kumar has a right to sue or for the matter of that to proceed with the appeal. The case on hand is therefore taken out of the per-view of the principle laid down by their Lordships in Smt. Phool Rani's case AIR 1973 SC 2110, and I am unable to accept the contention raised on behalf of the respondent that both the appeals must be dismissed on the simple ground that the right to sue does not survive to the surviving plaintiff Ram Kumar.

8. This brings me to the application by the legal representatives of Motilal to be substituted in place of Motilal as appellants. In view of my finding that the cause of action for the suit has not perished and the right to sue survives there is no impediment in the way of the legal representatives of Motilal to come on the record in place of Motilal deceased for the simple reason that the right to enforce the terms of the lease deed vests jointly in Ramkumar as well as the heirs of Motilal as the lease deed has been executed in favour of both Motilal as well as Ram Kumar.

9. Accordingly, I overrule the preliminary objection, allow the application by the heirs of Motilal dated 26-9-1973 and direct that the heirs of Motilal be substituted as legal representatives of Motilal in place of Motilal. Let the necessary corrections be made on the record of the two cases. The appellants are directed to file corrected cause title in both the cases and the appeals be listed for bearing after a fort-night.

10. Let a copy of this order be placed on the file of each of the two appeals.

Order accordingly.

AIR 1975 RAJASTHAN 196

C. M. LODHA, J.

Sobhraj, Appellant v. Bhanwar Lal. Respondent.

Second Appeal No. 475 of 1972, D/-22-4-1974.*

(A) Evidence Act (1872), S. 114 — Money order remitted to addressee residing in same town—M. O. coupon bearing endorsement "refused"—Tender of M. O. and its non-acceptance may be presumed.

(Para 6)

*(Against judgment and decree passed by Chander Shekhar Goyal, Civil J., Ajmer in Civil Appeal No. 183 of 1971. D/-1-8-1972).

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(B) Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), S. 19-A — Tender of rent refused by landlord once — Rent need not be tendered to landlord again — But it must be deposited in court for immunity from ejection as defaulter.

Where the tender of rent by the tenant to the landlord has been refused once, the tenant need not tender the rent to the landlord again but must deposit it in Court under Section 19-A to escape the liability of being ejected on the ground of non-payment of rent for six months. AIR 1974 Raj 136 (FB), Rel. on: (Para 13)

(C) Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), S. 13 (7), Proviso — Applicability.

For the applicability of the proviso to Section 13 (7) what is required is that the tenant must have obtained the benefit under Section 13-A previously and it is not necessary to show also that the tenant had committed default previously. (Para 14)

(D) Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), S. 13 — Tenancy commencing on first of month — Mode of payment of rent changed from first to 13th — Month of tenancy is not changed. (T. P. Act (1882), S. 105).

Where the date of commencement of tenancy was first of Calendar month but the mode of payment of rent was changed from the first of Calendar month to 13th of the month, the tenancy cannot also be deemed to have been changed. (Para 15)

Cases Referred : Chronological Paras
AIR 1974 Raj 136 = 1974 Raj LW 115 (FB) 9

1970 Raj LW 315 = 1970 Ren CR 186 9, 10

1963 Raj LW 105 = ILR (1963) 13 Raj 470 9

1959 Raj LW 81 = ILR (1959) 9 Raj 97 9, 10

S. L. Mardia, for Appellant; Miss Rama Goyal and V. L. Mathur, for Respondent.

JUDGMENT :— This is a defendant-tenant's second appeal arising out of a suit for ejection in respect of a portion of a house situated in the city of Ajmer.

2. The suit was based on three grounds :—

- (i) default in payment of rent for the period 13-1-1968 to 31-12-1968;
- (ii) material alterations having been made in the suit premises by the defendants without permission of the landlord; and
- (iii) sub-letting a part of the premises by the tenant without the consent of the plaintiff.

3. It may be stated here that the plaintiff had previously filed a suit for ejection in respect of the suit premises against the defendant which was registered as Civil Suit No. 270 of 1964: That suit for ejection was also based on default of payment of rent. On the introduction of Sec. 13-A in the Rajasthan Premises (Control of

Rent and Eviction) Act, 1950 (which will hereinafter be referred to as 'the Act'), the defendant deposited the arrears of rent along with interest and costs of the suit so that the suit for ejection was dismissed. The plaintiff's case is that after having taken benefit of Section 13-A of the Act in the previous suit the defendant again committed default in payment of rent for more than six months, and, therefore, he was liable to be ejected. As already stated above he relied on two more grounds for ejection viz. material alterations by the tenant in the premises and sub-letting by him, but both these grounds have been repelled by the courts below and none of them has been relied upon before me. The only short question, therefore, for my decision is whether the decree for ejection granted by the courts below on the ground of default in payment of rent is sustainable?

4. The defendant's case is that he tendered the amount of rent due from him to the plaintiff personally as well as by money order but the plaintiff did not accept the same. The question of oral tender has not been substantiated and it is only tender by money order which has been relied upon by the appellant. The relevant documentary evidence in this connection consists of the money order receipt issued by the Post Office dated 19-3-1968 for Rs. 48/- only and the money order coupon Ex. A.16. It appears from Ex. A.16 that the name of the payee has been mentioned as Bhanwar Lal Goyal. In the space for message it has been mentioned that two months' rent for the months of February and March 1968 Rs. 48/- is being remitted. There is a further endorsement on Ex. A.16 that the money order was refused on 22-3-1968. The contention on behalf of the defendant-appellant is that since the landlord had declined to accept the rent for two months remitted by money order Ex. A.16, he was not bound to send rent every month thereafter, and repeat this useless formality. It is contended that the Act of the tenant in sending the rent for two months February and March 1968 clearly indicates readiness and willingness on his part to pay the rent and therefore it cannot be said that the tenant had not tendered the amount of rent due from him.

5. On the other hand the contention raised on behalf of the respondent is that even though the rent for the month of January 1968 had fallen due the same was not remitted and the rent for the month of March was sent in advance which the plaintiff was not bound to accept. It is thus submitted that there was no valid tender. In the alternative it is submitted that even though the plaintiff did not accept the rent sent by money order Ex. A.16, it was imperative for the tenant to have deposited the rent fallen due in the court under Section 19-A of the Act. It has also been contended that there

is no evidence on the record that the rent was offered to and refused by the plaintiff.

6. D. W. 1 Sobhraj has stated that he had sent the money order to the plaintiff at his usual address namely Hindu Modi Mohalla, Ajmer, and that the coupon Ex. A.16 was written by him. On the other hand the plaintiff P. W. 1 Bhanwar Lal has stated that he cannot say whether the money order corresponding to the receipt Ex. A.14 was brought at his house or not. Under Section 114 of the Evidence Act the Court may presume that the common course of business has been followed in particular cases (Illustration (F)). In the present case the money order has been remitted for delivery to the addressee residing in the same town. The correctness of the address at which the money order was remitted as stated by D. W. 1 Sobhraj has not been denied by the plaintiff. In such circumstances it would be reasonable to presume in the absence of any evidence to the contrary that the money order was tendered in the ordinary course to the addressee. The money order coupon bears the endorsement "refused". It would, therefore, be not unreasonable in the circumstances of the case also to presume that the money order Ex. A.16 was tendered to the plaintiff and he did not accept the same. It is significant that he has not specifically stated that he did not refuse Ex. A.16. His reply on the point is evasive inasmuch as he states that he does not know whether the money order was brought to his place or not. It is not his case that on 22-3-1968 which is the date mentioned of refusal, he was not at his house. I, therefore, find myself in agreement with the court below that the money order Ex. A.16 was refused by the plaintiff.

7. Now the question is what is the effect of this refusal? Admittedly the rent due from the defendant was from 13-1-1968 as alleged in para 2 of the plaint. Consequently, two months' rent had fallen due on 13-3-1968 when the money order in question was remitted, i.e. from 13-1-1968 to 12-2-1968 and from 13-2-1968 to 12-3-1968. These two months covered part of January 1968, whole of February 1968 and a part of March 1968, but the defendant did not specify the period in detail in the money order coupon and merely mentioned "Two months — February and March." The argument advanced on behalf of the respondent that the rent for January 1968 had not been remitted at all but that the rent for the month of March 1968 had been remitted in advance is, in my opinion, devoid of force. It should have been clear to the plaintiff that the rent was for two months for the period which had elapsed. I am unable to accept the respondent's contention that the rent for the month of January 1968 had not been remitted at all and the rent for the month of March 1968 had been sent in advance. In my opinion, this money order covered the period of two months from 13-1-1968 to 12-3-1968, which fact is obvious

by the method of calculation adopted by both the parties after the decision of the previous suit. There is, therefore, no substance in the respondent's contention that there was no valid tender by the money order Ex. A.16.

8. The next important question that arises is whether the defendant must be treated as a defaulter for not having remitted the rent month to month after 13-3-1968 upto 31-12-1968. Section 13 (3) of the Act provides that for the purpose of clause (a) of sub-section (1) a tenant shall be deemed to have paid or tendered the amount of any rent due from him, if he has remitted such amount to the landlord by postal money order, at his ordinary address. By virtue of this provision the tenant shall be deemed to have tendered the amount of rent due from him in time.

9. In *Babu Ram v. Narayan Dass*, 1959 Raj LW 81 it was held that once it is established that the rent was tendered to the landlord by the money order and the landlord refused the same it was not necessary for the tenant to make useless offer subsequently and send the rent to the landlord by money order. This view was followed by another Single Bench of this Court in *Shiv Shanker v. Sanwal Singh*, 1963 Raj LW 105. Thereafter Section 19-A was introduced in the Act on 9th June, 1965. In *Jagdish Kumar v. Roopchand*, 1970 Raj LW 315 Jagat Narayan, J., observed that "it was to nullify the effect of the aforesaid ruling that Section 19-A was introduced." It was held that if the landlord refuses to accept rent when it is tendered to him either personally or by money order, then it is the duty of the tenant to deposit the rent in court. The aforesaid three rulings came up for consideration before the Full Bench in *Martin & Harris (Pvt.) Ltd. v. Prem Chand*, 1974 Raj LW 115 = (AIR 1974 Raj 136) (FB).

10. One of the questions referred to the Full Bench was

"whether under Section 19-A of the Act it is necessary for the tenant every time before making a deposit of rent in court to tender the same to the landlord and to have his refusal or once the landlord has refused the tender of rent, then for every subsequent deposit in court the tenant will not be required to first tender the rent to the landlord and have it refused. In other words, which of the two cases namely 1959 Raj LW 81 or 1970 Raj LW 315 lays down the correct law?" The answer to this question has been returned by the Full Bench in the following words:—

"Section 19-A of the Act requires that every tenant shall pay rent within the time fixed by contract or in the absence of such contract, by fifteenth day of the month next following the month for which it is payable and where the landlord does not accept the rent tendered to him within the time aforesaid the tenant may deposit such rent with the court. It is not necessary that on each subsequent occasion he should first tender the

rent to the landlord and obtain his refusal and thereafter deposit the rent in court."

11. The point for decision before their Lordships was whether it is necessary for the tenant before making a deposit of rent under Section 19-A to tender the same to the landlord when the landlord has refused it once? The point involved in the present case is however a bit different. Here the question is whether it is obligatory on the tenant to make the deposit of rent as provided under Section 19-A after the landlord has refused to accept the rent once? No doubt in view of the Full Bench case the tenant need not tender the rent every time after it has been refused once, but the question is whether immunity from tendering the rent also absolves the tenant from depositing the rent in court as provided under Section 19-A (2) of the Act. In order to appreciate the point I may reproduce here Section 19-A (1) and (2) for ready reference:—

"19-A— Deposit of rent by tenant:—

- (1) Every tenant shall pay rent within the time fixed by contract or in the absence of such contract, by the fifteenth day of the month next following the month for which it is payable.
- (2) Where the landlord does not accept any rent tendered by the tenant within the time referred to in sub-section (1) or where there is bona fide doubt as to the person or persons to whom the rent is payable, the tenant may deposit such rent with the court and such deposit of rent shall be a full discharge of the tenant from the liability to pay rent to the landlord."

12. The Full Bench has observed,

"These provisions (Section 19-A) as we read them, provide a machinery to immunise a tenant from being labelled as a defaulter if despite the tenant's tender the landlord refused to accept rent. The deposit of rent is not only notified to the landlord personally but is also published by its being fixed on the notice board. The landlord may, if he chooses, withdraw such rent. The payment to the Court by fiction of the law would mean payment to the landlord so far as the tenant's liability for rent is concerned."

13. From the above observations made by the Full Bench it appears that their Lordships' view was that in order to obtain immunity from being ejected as a defaulter despite the refusal by the landlord to accept the rent, the tenant must make the deposit under Section 19-A. Under sub-section (5) of Sec. 19-A a notice is sent to the landlord to receive the rent so deposited by the tenant and this has been held by the Full Bench as "again an offer to the landlord, by tenant through the court to receive the rent."

The Full Bench goes on to observe that

"thus each deposit in Court and a notice thereof to the landlord would imply a tender enabling the landlord to ask the tenant to

pay the rent directly. The landlord is thus given repeated options to ask for the rent directly, if he so wishes."

It further appears to me that Sec. 19-A was introduced with a view to avoid dispute between the landlord and the tenant regarding tender and non-acceptance of rent by the landlord. Consequently, there is no escape from the conclusion that if the tenant wants to escape from the liability of being ejected on the ground of rent having not been paid or tendered for six months he must make the deposit as provided under Section 19-A even though the tender of rent by the tenant to the landlord has been refused once. If he does not do so and rests content by merely tendering the rent once which has been refused by the landlord he shall be deemed to have committed default in payment of rent due, and if such arrears amount for six months or more it would certainly become a ground for the landlord to seek ejectment on that basis. In the present case the tenant admittedly did not make deposit of rent as required by Section 19-A and has thereby committed default in respect of the amount of rent due from him for more than six months and is therefore liable to be ejected.

14. Another point urged by the learned counsel for the appellant is that proviso to Section 13 (7) cannot apply in the present case inasmuch as it is not proved that the appellant had committed default previously. It is true that in the previous suit no enquiry was held into the allegation of default because the appellant had applied under Section 13-A of the Act within the time prescribed therein and consequently the suit for ejectment was dismissed without holding any enquiry into the allegations made by the parties. The proviso however makes it clear that a tenant shall not be entitled to any relief under this sub-section (sub-section (7)), if having obtained such benefit or benefit under Section 13-A in respect of any such accommodation, he again makes a default in the payment of rent of that accommodation for six months. It is not the requirement of law that there must be a finding as to the previous default. What is required is that the tenant must have obtained the benefit under Section 13-A. That the appellant has admittedly done previously. As already held above he has again made a default in the payment of rent for more than six months and consequently he cannot save himself from ejectment by making deposit under Section 13 (4).

15. The last point urged by the learned counsel is that the notice of ejectment served by the landlord was invalid inasmuch as it did not expire with the end of the month of tenancy. Admittedly the date of commencement of the tenancy was first of calendar month and the tenancy has been terminated by notice Ex. 2 by the end of the calendar month. The contention of the learned counsel for the appellant is that since

the mode of payment was changed from first of the calendar month to 13th on account of the decree in the previous suit the month of the tenancy should also be deemed to have been changed. This argument is not correct. It is not the case of either of the parties that there was alteration of the month of the tenancy either by the agreement of the parties or by operation of law. Apart from that there is a clear condition in the notice that the tenancy may be considered to have been terminated on such other date as the tenancy month expires according to the tenant. This clause, in my opinion, remedies the defect, if any, though according to me there is none.

16. The result of the foregoing discussion is that this appeal has no force and is hereby dismissed, but in the circumstances of the case the parties are left to bear their own costs.

17. Learned counsel for the appellant prays for leave to appeal under Section 18 (2) of the Rajasthan High Court Ordinance. The prayer is refused.

Appeal dismissed.

AIR 1975 RAJASTHAN 200

C. M. LODHA, J.

Chander Singh, Petitioner v. The Collector, Sikar and others, Non-Petitioners.

Civil Writ Petn. No. 1619 of 1972, D/-19-3-1974.

(A) Rajasthan Panchayat Act (21 of 1953), S. 19 (2) — "The total number of members of the Panchayat" — Meaning.

The expression "the total number of members of the Panchayat" used in Section 19 (2) of the Act refers to "the total number of members of the panchayat holding office at the relevant time" and not "the total number of the members determined by the State Government" under Sec. 4 (b) of the Act. 1960 Raj LW 359 and 1967 Raj LW 156, Explained. (Para 4)

(B) Rajasthan Panchayat and Nyaya Panchayat (General) Rules (1961), R. 14 (2) — Notice of no confidence motion — Notice need not be accompanied by a draft resolution — Only proposed motion must be set out in detail. (Para 5)

(C) Panchayat and Nyaya Panchayat (General) Rules (1961), S. 14 (2) — Attestation of signature of mover — Endorsement of a person to whom the notice of motion is delivered can be taken as an attestation. (Para 9)

Cases Referred: Chronological Paras

AIR 1969 SC 1147 = (1969) 3 SCR 513 9

1967 Raj LW 156 = ILR (1969) 19 Raj 943 4

1960 Raj LW 359 = ILR (1960) 10 Raj 890 2, 3, 4

DR/FR/B687/74/GDR

M. R. Calla, for Petitioner; P. N. Dutt, for Non-Petitioners Nos. 5 to 12.

ORDER:— By this writ application under Article 226 of the Constitution of India, the petitioner, who was Sarpanch of Gram Panchayat, Bibipur Chhota, District Sikar, has challenged the motion of no-confidence passed against him on 27-9-1972. The validity of no-confidence motion is being challenged on the following grounds:—

(1) It has not been passed by 4th of the total number of members of the Panchayat including Sarpanch as provided by Section 19 (2) of the Rajasthan Panchayat Act, 1953 (which will hereinafter for the sake of brevity be referred to as "the Act.")

(2) That the notice of no-confidence motion dated 12-9-1972 marked Ex. 1A is bad because,—

- (a) it does not set out the proposed motion of no-confidence in extenso as required by Rule 14 (2) of the Rajasthan Panchayat and Nyaya Panchayat (General) Rules, 1961 (which will hereinafter be called "the Rules");
- (b) the notice is not addressed to the Deputy District Development Officer as required by Rule 14 (1) of the Rules;
- (c) the proceedings for calling a special meeting of the Panchayat for consideration of the motion were conducted not by the Deputy District Development Officer as required by Rule 15 (1) of the Rules, but were conducted by the Additional District Development Officer, who had no authority to do so;
- (d) the signatures of the mover of the no-confidence motion in the notice has not been attested by an official of the State Government or of a Panchayat Samiti.

I propose to take up these points ad seriatum.

2. So far as the interpretation of S. 19 (2) of the Act is concerned learned counsel for the petitioner has submitted that there are two conflicting Single Bench decisions of this Court on the point and, therefore, the matter may be referred to a larger Bench. In the alternative he has argued that the view taken by Modi, J., in Gokulchand v. Chief Panchayat Officer, Rajasthan, Jaipur, 1960 Raj LW 359 is correct and according to that view the motion cannot be said to have been passed in the present case by the requisite number of members of the Panchayat. It may be pointed out that the number of Panchas determined by the State Government under Section 4 (b) of the Act of Gram Panchayat Bibipura Chhota is 10 and by including Sarpanch the total number of the members of the Panchayat, the learned counsel for the petitioner contends, would be 11. The motion of no-confidence has been passed by 7 members only who were present in the meeting and voted for the motion. Seats of two members were admittedly lying vacant on the relevant date. Therefore, there is no denying the fact that there were only 9 members functioning at the time when the motion of

no-confidence was passed. If the phrase "the total number of members of the Panchayat" occurring in Section 19 (2) of the Act is so interpreted as to mean the number of Panchas determined by the State Government under Section 4, there is no doubt that the motion has not been passed by the requisite number of members. On the other hand if the phrase "the total number of members of Panchayat" is construed to refer only to those members who were functioning at the relevant time, then, there is no gain-saying the fact that the motion has been passed by the requisite number of members.

3. In Gokulchand's case, 1960 Raj LW 359 it was held that the total number of Panchas of a Panchayat can only be a certain number, that number being fixed for it by the Government. In other words, this is the number not exclusive but inclusive of the vacancies on a certain Panchayat at a given time.

4. The question of interpretation of the term "the total number of Panchas" again came up for consideration before Jagat Narayan, J., as he then was, in Bansidhar v. State of Rajasthan, 1967 Raj LW 156. He took a different view. According to his interpretation "total number of Panchas" would mean "the total number of the Panchas holding office at the Particular time". Apparently these cases seem to take divergent views, but a closer study of the two judgments referred to above would go to show that the conflict is reconcilable. Jagat Narayan, J., relied upon Section 2 (16) of the Act and also S. 2 (16) of the Rajasthan Panchayat Samitis and Zila Parishads Act as also Section 3 (36) of the Rajasthan Municipalities Act, 1959. Under Section 2 (16) of the Act "words and expressions used but not defined in this Act and defined in the Rajasthan Panchayat Samitis and Zila Parishads Act, 1959 shall have the meaning assigned to them in the latter." The phrase "total number of Panchas" has not been defined in the Act nor has it been defined in the Rajasthan Panchayat Samitis and Zila Parishads Act. But Section 2 (16) of the Rajasthan Panchayat Samitis and Zila Parishads Act lays down that "words and expressions" used but not defined in this Act shall have the meanings assigned to them in the law for the time being in force relating to Panchayats, Municipalities and District Boards." Section 3 (36) of the Rajasthan Municipalities Act 1959 reads as follows:—

"whole number" or "total number", when used with reference to the members of a board, means the total number of members holding office at the time."

This definition was held by Jagat Narayan, J., to be applicable to the Rajasthan Panchayat Act and it was further held that the total number of Panchas under Section 19 (2) would mean the total number of Panchas holding office at the time. Section 2 (16) of the Act was introduced on 9-9-1959. Gokulchand's case 1960 Raj LW 359 was decided on

24-2-1960. But there is no reference to Section 2 (16) of the Act in that case. It is very likely that if this Provision had been brought to the notice of Modi, J., he might have also taken the same view as was taken by Jagat Narayan, J., in the latter case. However, in my opinion, the two views are reconcilable on account of the provision contained in Section 2 (16) of the Act to which I have made reference above. In the circumstances I do not consider it necessary to refer the matter to a larger Bench and hold that the expression "the total number of members of the Panchayat" used in Section 19 (2) of the Act refers to "the total number of members of the Panchayat holding office at the relevant time" and not "the total number of the members determined by the State Government under Section 4 (b) of the Act." In this view of the matter the motion of no-confidence cannot be struck down as not having been carried out by the requisite majority.

5. Now coming to the notice Ex. 1-A, it is true that it does not contain a draft motion of no-confidence. Rule 14 (2) provides that the notice shall set out the proposed motion in extenso. In the notice it is specifically mentioned that the notice is for motion of no-confidence against the Sarpanch and the grounds in support of the motion have been set out. It does not appear to be the intention of the Legislature that the notice must be accompanied by a draft resolution. All that is required is that the proposed motion must be set out in detail so that the person against whom the motion is put may be in a position to meet it and the members participating in the debate may also be fully apprised of the proposed motion. Looked at from this stand point, there is no escape from the conclusion that there has been substantial compliance with the provision and the impugned resolution cannot be struck down on this score.

6. Another contention in this connection is that the notice was not addressed to the Dy. District Development Officer as required by R. 14 (1) of the Rules. Learned counsel for the petitioner is correct in his contention that the notice has been addressed to the Collector, Sikar, but it is clear from Annexure A-5 & Annexure A-6 that it was presented before the Additional District Development Officer. The contention of the learned counsel for the petitioner is that the Additional District Development Officer was not competent to receive the notice nor was he competent to call a meeting and conduct the proceedings. I shall deal with this contention a little later, but for the present I wish to point out that the mere fact that the notice was addressed to the Collector, Sikar, would not in any way invalidate it provided it has been delivered to the competent authority. As already pointed out above, the notice was delivered to the Additional District Development Officer and if the Additional District Development

Officer was competent to receive it, then the notice would not be invalidated.

7. At this juncture I may also deal with the question whether the Additional District Development Officer was competent to receive the notice of the motion of no-confidence. It appears that the provision prescribing the authority who would entertain the notice of no-confidence motion has undergone changes from time to time. Prior to 6-6-1966 it was the Collector. By an amendment published in the Rajasthan Gazette part 4 (c) (Extra ordinary) dated 6-6-1966 'Deputy District Development Officer' was substituted for 'Collector'. Then by an Order dated 28-11-1972 the Government of Rajasthan directed that an officer in senior scale of R. A. S. holding the post of Deputy District Development Officer would be designated as Additional District Development Officer. This notification has been reproduced in extenso by the respondents Nos. 5 to 11 in their reply dated 12-3-1974 at page 76. It is mentioned in the notification that the Government vide letter dated 15th June, 1972, addressed to the Accountant General, Rajasthan, Jaipur has conveyed the sanction to the designation of the post of Deputy District Development Officer held by in the senior scale of R. A. S. being changed to Additional District Development Officer. It has been contended on behalf of the petitioner that there is nothing on the record to show that the Deputy District Development Officer, Sikar, was a senior scale R. A. S. Officer and consequently the Deputy District Development Officer, Sikar did not become the Additional District Development Officer. It is true that it has not been mentioned in the reply by respondents Nos. 5 to 11 in so many words, but since the notice was received by the Additional District Development Officer, it would be reasonable to presume that the erstwhile Deputy District Development Officer, Sikar, was redesignated as Additional District Development Officer. Regularity of official acts, in the circumstances of the case, must be presumed, specially when there was no provision for Deputy District Development Officer and Additional District Development Officer to be posted side by side in the same District. I am, therefore, of the opinion that the Additional District Development Officer was competent to receive the notice of motion of no-confidence and to call a special meeting and conduct the proceedings for consideration of the motion.

8. There is yet another defect pointed out by the learned counsel for the petitioner in the notice and that is regarding the attestation of the signature of the mover of the motion. In the copy of the notice Ex. 1A submitted by the petitioner the signature of Shivnath Rai, mover of the motion, is not attested at all, whereas in the certified copy of the notice Annexures A-5 and A-6 submitted by respondent No. 4 the signatory

Shivnath Rai, has been identified by Shri Jagan Singh, Advocate, and there is a further endorsement by Shri Roop Ram Vyas, Additional District Development Officer, marked Annexure A-6, wherein it is mentioned that the notice had been presented by Shivnath Rai, who was identified by Shri Jagan Singh, Advocate, who was known to the officer and that Shiv Nath Rai admitted his signature on the notice before the officer.

9. Learned counsel for the petitioner submitted that in the first place respondent No. 4 Shiv Nath Rai who produced copies of Annexures A-4 and A-6, has not appeared to contest the writ petition and, therefore, the other respondents cannot take advantage of these documents. This argument is to be stated only to be rejected. I fail to see any reason why the co-respondents are not entitled to use documents produced by one of them, if they are admissible and relevant. His contention further is that this is no valid attestation of Shivnath Rai's signature. In support of his contention he has relied on Abdul Jabbar v. Venkata Sastri, AIR 1969 SC 1147 wherein their Lordships have laid down the essential ingredients of the word 'attested' as defined in Section 3 of the Transfer of Property Act. In my opinion the Supreme Court case is not applicable to the facts and circumstances of the present case. Rule 14 (2) lays down that the signature of the mover shall be attested by an official of the State Government or of a Panchayat Samiti. The purpose behind this provision is that there may not be any forgery or impersonation. There is no denying the fact that Shri Roop Ram Vyas, Additional District Development Officer was an official of the State Government and also of the Panchayat Samiti. The mover of the motion Shivnath Rai admitted before him that the notice bore his signature. Shivnath Rai was identified by Shri Jagan Singh, Advocate. Thus, in my opinion, the provision was substantially complied with. The objection by the learned counsel for the petitioner, however, is that Shri Vyas is the person to whom the notice of the motion was delivered and his endorsement cannot be taken as an attestation. He has argued that just as an endorsement of a Registrar in case of a registered document, cannot be taken as an attestation so also the endorsement by the Additional District Development Officer is of no avail. In my opinion it would not be proper to import the provisions pertaining to 'attestation' of a registered document into a case like the present which is governed by the provisions of the Act. As already stated above, the provision regarding attestation of the signature of the mover of the motion has been substantially complied with. In this view of the matter the defect regarding attestation pointed out by the learned counsel cannot invalidate the notice or the resolution on its basis.

10. The net result of the foregoing discussion is that this writ application has no

force and is hereby dismissed. But there will be no order as to costs.

Petition dismissed.

AIR 1975 RAJASTHAN 203

C. M. LODHA, J.

Kandhari Babu, Petitioner v. State Transport Appellate Tribunal, Rajasthan, Jaipur and others, Non-Petitioners.

Civil Writ Petn. No. 427 of 1975, D/- 3-4-1975.

(A) Constitution of India, Art. 226 — Petition against order of the Tribunal in matter of grant of permit for plying stage carriage — Interference by High Court.

The paramount consideration in granting permits for plying stage carriages is the interest of the travelling public. While judging the merits of each applicant from this point of view if the Tribunal bases its findings on evidence, direct or circumstantial and thereafter exercises its discretion either way, the High Court would be chary to entertain an application against the Tribunal's order in exercise of its writ jurisdiction.

Where the Tribunal, while granting permit to one of the applicants by cancelling that of the petitioner, based its findings qua the petitioner on no evidence, wrong presumptions and unwarranted assumptions despite a clear averment of the petitioner in his affidavit,

Held that the proper course in such circumstances is to quash the order of the Tribunal with a direction to it to reconsider the matter afresh according to law.

(Paras 4, 9, 11)

(B) Motor Vehicles Act (1939), S. 47 — Applications for grant of stage carriage permit — Exercise of power to grant permit is to be judged on the touchstone of the interest of the public generally. AIR 1975 SC 123, Foll.

(Para 5)

(C) Motor Vehicles Act (1939), S. 47 — Application for grant of permit for plying stage carriages — Person holding one or more permits — Not a disqualification or a factor against him. (Para 11)

Cases Referred : Chronological Paras
AIR 1975 SC 123 5

Raj Narayan Munshi, for Petitioner; Ram Raj Vyas, for Non-Petitioners Nos. 3 and 4.

ORDER :— The dispute in this case is between two rival claimants for grant of permit to ply stage carriage on Chittorgarh-Banswara route via Shambhupura, Nimbahera, Chhotisadri, Dhamotra, Pratapgarh, Peopleroot, Khamera and Ghatol. This route was surveyed on the application of the petitioner Kandhari Babu. Originally scope of three Buses with one return service was fixed and the petitioner was granted a temporary permit to ply on this route. Later on, the Regional Transport Authority, Udaipur, re-

vised the scope and fixed it as five Buses with two return services by its Resolution dated 18 April, 1973. By a Notification dated 10 May, 1973 published in Rajasthan Rajpatra dated 14 June, 1973, the Regional Transport Authority, Udaipur invited applications for grant of non-temporary stage carriage permits on this route and the petitioner submitted his application on 4 July, 1973. The non-petitioner No. 3 Rooplal, who is the contesting non-petitioner in the present writ petition, also applied for one permit on this route. In all, there were 29 applicants including the petitioner and the non-petitioner No. 3, Rooplal (who, for the sake of brevity, will, hereinafter, be referred to as 'the non-petitioner'). The applications were considered by the Regional Transport Authority, Udaipur on 6, 7 and 8 February, 1973 and by its Resolution No. 43 (Ex. 8 at page 59 of the Paper Book), the Regional Transport Authority granted five permits — one each, to Nathuram, Gopikishan, Fakirchand, Jamnalal and the petitioner respectively.

2. Aggrieved by the aforesaid Resolution of the Regional Transport Authority, Udaipur, the non-petitioner filed appeal before the State Transport Appellate Tribunal, Rajasthan, Jaipur (to be referred to hereinafter as S. T. A. T.) impleading all the five persons to whom permits had been granted by the Regional Transport Authority as respondents. The S. T. A. T., by its order dated 5 February, 1975 (marked Exhibit 9) allowed the non-petitioner's appeal and while setting aside the permit granted to the petitioner, allowed one permit to the non-petitioner. The present writ petition has been directed against the aforesaid order of the S. T. A. T. marked Exhibit 9.

3. Learned counsel for the petitioner has urged that the S. T. A. T. has made wrongful presumptions and its findings against the petitioner are based on no evidence. It has been pressed upon me that the impugned order is arbitrary and capricious and has been passed in disregard of the well established principles in the matter of such grant and is, therefore, liable to be quashed by a writ of certiorari. On the other hand, the writ petition has been strongly opposed by Mr. Ram Raj Vyas on behalf of the non-petitioner. It has been argued, in the first instance, that the S. T. A. T. had jurisdiction to grant permit to one party in preference to another, and the discretion exercised by the S. T. A. T. should not be interfered with by this Court in exercise of its extraordinary jurisdiction.

4. The law as to the powers of this Court in exercise of its writ jurisdiction in such matters is so well established that it hardly needs any citation or detailed discussion. Mere wrong exercise of discretion does not furnish a sufficient ground for exercise of writ jurisdiction by this Court. But if the Tribunal has based its findings on no evidence

and its inferences are based on wrongful presumptions or unwarranted assumptions or there are errors apparent on the face of the record or if the Tribunal has recorded its findings in disregard of the mandatory provisions of law or in violation of the principles of natural justice, it cannot be denied, that this Court has jurisdiction to correct such palpable errors.

5. Now, the principles governing grant of permits for plying stage carriages also seem to be well established. In *Ajantha Transport (P) Ltd., Coimbatore v. M/s. T. V. K. Transports, Pulampatti*, AIR 1975 SC 123 their Lordships were pleased to observe that "an exercise of the permit issuing power, under Section 47 of the Act (Motor Vehicles Act No. 4 of 1939) must rest on facts and circumstances relevant for decision on the question of public interest, which has to be always placed in the forefront in considering applications for grant of permits." It was held that considerations of matters which are not relevant to or are foreign to the scope of powers conferred by Section 47 will vitiate the grant of a permit under Section 47. In the words of their Lordships "it appears that. Section 47 (1) (a) gives the dominant purpose and Section 47 (1) (b) to (f) are only its sub-categories or illustrations." Thus, the exercise of power to grant permit is to be judged on the touchstone of the interest of the public generally.

6. In view of the aforesaid recent pronouncement of their Lordships of the Supreme Court on the point in issue, I do not think it necessary to refer to earlier case law either of the Supreme Court or of the High Courts and would content myself by stating that in such matters what the Court has to look into is to find out whether the Tribunal has taken into consideration at the time of grant of permits all the relevant factors which would serve best the interests of the public generally.

7. I propose to examine the merits of the impugned order by the S. T. A. T. from this standpoint. While dealing with the non-petitioner's claim for grant of permit, the S. T. A. T. has said that "he is a resident of Chittorgarh and holds driving licence since 1961 and holds no stage carriage permit" and consequently, according to the Tribunal, there appears no reason why a permit should not be granted to him. Coming to the petitioner's case, the Tribunal has said that "the permit granted to Shri Kandhari Babu deserves to be quashed because he had already a number of permits and admittedly he has sold them, which shows that either he could not manage the permits properly or he sold them for profit." The Tribunal therefore, came to the conclusion that it would not be in public interest to grant any more permit to him merely because he was interested in getting the route opened.

8. A word may be said, here regarding the opinion framed by the Regional

Transport Authority while allowing the application of the petitioner and disallowing that of the non-petitioner. In case of the non-petitioner, it has been pointed out by the Regional Transport Authority that he is a resident of Chittorgarh which falls on the route in question and that he is a young man holding driving licence since 1961 but has no permit. As regards the petitioner, it has been observed by the Regional Transport Authority that he, too, is a resident of Chittorgarh and holds driving license since 1937. But the consideration which tilted the scales in his favour were that the route was surveyed on his application and that he had a lot of experience in transport business and had also plied on the route in question on a temporary permit.

9. It may be interesting to point out, here, that apprehending an onslaught by the non-petitioner against him at the hearing of the appeal, the petitioner filed an affidavit to fortify the view taken by the R. T. A. in his favour. The averments in the affidavit, unfortunately for the petitioner, furnished a handle to the non-petitioner for demotion of the petitioner's case for grant of permit. A copy of this affidavit has been placed on the record of this Court also by the petitioner himself and is marked Exhibit 10. In this affidavit, the petitioner stated that he came to India from Sukkar after division of the country and his joint family constituted by him and his brothers got stage carriage permits on Kota-Khanpur, Kota-Bensorgarh and Kota-Board routes, he has further stated that in 1957 he left Kota and migrated to Chittorgarh and purchased a permit along with the Bus from one Lakhimal on Vijaypur-Nimbahara route on which he plied from 1957 to 1968 and since it ceased to be profitable, he sold the Bus to Safi Mohammad and got the permit transferred in his name and, later on, Safi Mohammad also sold the Bus to one Ram Kishan Rathi and got the permit transferred in the vendee's name. In this connection, he has also deposed that he did not charge any premium from Safi Mohammad. Similarly, he deposes that he purchased a vehicle from one Abdul Rehman and plied the same on Chittorgarh-Mandalgarh route and got the permit transferred in his name. After plying on this route for about 11 years, he transferred the bus as well as the permit on this route also to one Puroshottam Choudhary. There was yet a third instance in which he had to transfer the permit and the bus which he had purchased from one Harisingh of Begun on Chittorgarh-Begun route. From the aforesaid averments the learned S. T. A. T. has drawn an inference that the petitioner must have transferred the stage carriages and the permits held by him for either of the two reasons viz., that either he could not manage the business properly or he may have sold them for profit. It may be pointed out that there was no material before the S. T. A. T. on this point except the

affidavit of the petitioner (Exhibit 10) to which a detailed reference has been made above. The petitioner has deposed in unmistakable terms that he did not charge any premium at the time of transferring the permits. It is undisputed that the permits were transferred with the permission of the Regional Transport Authority. Therefore, the inference drawn by the S. T. A. T. that the petitioner may have sold the permits for profit is, arbitrary and based on no material but is against the clear averment in the affidavit.

10. Then the Tribunal has opined in the alternative that the petitioner sold back the permits and vehicles presumably because he could not manage the permits properly. Now, it may be observed that the petitioner had plied on the Vijaypur-Nimbahera route for a period of 11 years, so also on the Chittorgarh-Mandalgarh route he had plied for about 11 years. The non-petitioner could not controvert this position. As regards Chittorgarh-Begun route, the petitioner's case is that he was able to ply on this route only for 4 years as this transaction did not prove profitable to him. The finding of the Tribunal does not show as to what were the acts of mismanagement by the petitioner. It was open to the Tribunal to further probe into the matter, if it was not satisfied with the averments made in the affidavit. But it was, in my opinion, not just and proper to raise an inference against the petitioner that he was not able to manage the transport business. By no stretch of imagination can it be said that the act of the petitioner in transferring the permits on some of the routes mentioned above is explicable only on the two hypotheses mentioned by the Tribunal. On the other hand, the explanation given by the petitioner in his affidavit in absence of anything to the contrary is quite plausible. Thus, the allegation made by the non-petitioner that the petitioner was trafficking in the matter of transport permits and the finding of the learned Tribunal in accepting this allegation, though in a milder tone that the petitioner may have transferred the permits and the vehicles as aforesaid either for profit or on account of his own acts of mismanagement, are, in my opinion, based on wrongful presumptions and unwarranted assumptions. The non-petitioner did not put any material whatsoever before the Tribunal to demolish the petitioner's case and the findings given by the Regional Transport Authority. Consequently, unless there is anything in the affidavit clearly leading to an adverse inference against its deponent or unless there were any clear circumstances pointing to the contrary, the Tribunal was not justified in condemning the petitioner. I may state, here, that on account of the said finding by the Tribunal against the petitioner, all other factors in favour of the petitioner received no consideration at the hands of the Tribunal. In view of the order, I propose to make I do not wish to comment on the merits of the claim of either

party, but I wish to point out that while considering the merits and demerits of the claims of the parties, the past experience in the matter of transport business and the knowledge about the sector could have very well been taken into consideration.

11. It has been pointed out that the cases of Kailash Chandra and Roshanlal which stand on equal footing with that of the non-petitioner, have been rejected by the Tribunal, whereas the case of the non-petitioner has received weightage at the hands of the Tribunal for no other consideration except that he holds a driving licence since 1961 and has no permit. It is sufficient to point out that Kailash Chandra and Roshanlal have not made any grievance against the impugned order of the Tribunal and it is, therefore, not necessary for me to examine the comparative merits of the claims put forth by Kailash Chandra and Roshanlal vis-a-vis the non-petitioner. However, it would not be out of place to point out that the fact that a person already holds one or more permits is not necessarily a disqualification or a factor against him. As I have already stated above, the paramount consideration in such matters is the interest of travelling public and while judging the merits of each applicant from this view point if the Tribunal bases its findings on evidence direct or circumstantial and thereafter exercises its discretion either way, it need hardly be pointed out, that this Court would be chary to entertain an application against the Tribunal's order in exercise of its writ jurisdiction. But since I have come to the conclusion that in the present case the findings arrived at by the Tribunal particularly qua the petitioner are based on unwarranted assumptions, I have no alternative but to set aside the order of the S. T. A. T. so far as it relates to the grant of permit to the non-petitioner in place of the petitioner. The only proper course to adopt in the circumstances of such a case would be to quash the impugned order of the S. T. A. T. with a direction to it to reconsider the matter in the light of the observations made above.

12. In the result, I partially allow this writ application, set aside the order of the S. T. A. T. dated 5 February, 1975 and direct it to decide the appeal No. 63 of 1974 filed by the non-petitioner afresh in accordance with law. No order as to costs.

13. The S. T. A. T. is further directed to dispose of the matter expeditiously.

Order accordingly.

AIR 1975 RAJASTHAN 206

C. M. LODHA, J.

Bherulal, Petitioner v. The State Transport Appellate Tribunal, Rajasthan, Jaipur and others, Non-Petitioners.

Civil Writ Petn. No. 404 of 1975, D/-20-3-1975.

(A) Motor Vehicles Act (1939), Ss. 45 (1) first Proviso and 63 (4) and 2 (20) — Application for temporary carriage permit — Section 45 (1) first proviso applies.

Section 45 (1) first proviso applies to an application for a temporary stage carriage permit also. AIR 1968 Raj 161, Rel. on.

(Para 10)

The word 'Permit' includes both a non-temporary stage carriage permit as well as a temporary stage carriage permit. The heading of Section 45 is mentioned as "General provision as to application for permits." Hence, unless there is a mention anywhere in the section to specific type of permits, it would not be unreasonable to include non-temporary stage carriage permits as well as temporary stage carriage permits in the word 'permit' wherever it has been used.

(Paras 8 and 9)

Section 63 (4) does not deal with the competence or jurisdiction of the Regional Transport Authority to issue a temporary permit. Therefore it is not correct to say that by virtue of Section 63 (4) the case of grant of a temporary permit is taken out of the purview of the first proviso to sub-section (1) of S. 45.

(Paras 6 and 7)

Cases Referred: Chronological Paras
AIR 1968 Raj 161 = 1968 Raj LW 213 4, 10

R. R. Vyas, for Petitioner; D. S. Shisodiya, Addl. Govt. Advocate, for the State; G. S. Bafna and N. L. Pareek, for Non-Petitioner No. 3.

ORDER:— This writ application raises an important question viz. whether the first proviso to sub-section (1) of S. 45 of the Motor Vehicles Act, 1939 (Act No. 4 of 1939) (which will hereinafter be referred to as 'the Act'), applies to the case of an application for a temporary permit also. It reads as under:

"45. General provision as to applications for permits: (1) Every application for a permit shall be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle or vehicles:

Provided that if it is proposed to use the vehicle or vehicles in two or more regions lying within the same State, the application shall be made to the Regional Transport Authority of the region in which the major portion of the proposed route or area lies, and in case the portion of the proposed route or area in each of the regions is approximately equal, to the Regional Transport Authority of the region in which it is proposed to keep the vehicle or vehicles."

2. The question arises in the following circumstances.

There is Shahpura-Kekri route of 40 miles, out of which 16 miles lie in Udaipur region and 24 miles lie in Jaipur region. The petitioner applied for a temporary permit on this route to Regional Transport Authority, Udaipur. The non-petitioner No. 3 Messrs. Kailash Bus Service, which is the existing operator on this route, opposed the application filed by the petitioner on two grounds viz. (1) that applications for grant of a new permit on the route in question under Section 46 of the Act were pending before the Regional Transport Authority, Jaipur and, therefore, no temporary permit could be granted in respect of this route, and (2) that the Regional Transport Authority, Udaipur has no jurisdiction to entertain the application, as the major portion of the route lies within the region of the Regional Transport Authority, Jaipur. The objections raised by the non-petitioner No. 3 were overruled and the Regional Transport Authority, Udaipur by its resolution dated 27th November, 1974 (Ex. P/1) allowed the petitioner's application and granted temporary permit to him on the route in question for a period of four months commencing from 9 December, 1974 to 8 April, 1975.

3. Aggrieved by the decision of the Regional Transport Authority, Udaipur, the non-petitioner No. 3 filed appeal and the State Transport Appellate Tribunal, Rajasthan, Jaipur, by its order dated 10 February, 1975, allowed the appeal and set aside the resolution of the Regional Transport Authority, Udaipur dated 27 November, 1974 holding that it had no jurisdiction to entertain the petitioner's application for grant of a temporary permit on the route in question, as the major portion of the route admittedly lies within the jurisdiction of the Regional Transport Authority, Jaipur. The other ground raised by the non-petitioner No. 3 in opposition to the petitioner's application, that two applications for grant of new permits on the route in question were pending under Section 46 of the Act, was, however, not decided, as the petitioner was granted the desired relief on the first ground. It is this order of the State Transport Appellate Tribunal, Rajasthan, Jaipur dated 10 February, 1975 (Ex. P/10), which has been called into question by the petitioner in this writ petition.

4. It has been held by this Court in *Aman Khan v. Sheo Onkar*, AIR 1968 Raj 161 that "Section 45 is in the nature of a complete Code so far as the filing of applications over inter-regional routes is concerned." It was observed that "the obvious purpose underlying the proviso (1) to sub-section (1) to S. 45 of the Act, therefore, was to remove uncertainty about the forum which had to be approached and it was, therefore, clearly provided as to before which authority an application for a permit on the inter regional route was to be made."

5. Learned counsel for the petitioner tried to distinguish the aforesaid ruling on the ground that it applies only to applications for non-temporary stage carriage permits and not to applications for temporary stage carriage permits. He has further invited my attention to Section 63 (4) of the Act in support of his arguments that a Regional Transport Authority within whose region even a minor portion of the route lies has jurisdiction to issue a temporary permit. Section 63 (4) reads as thus :—

“63 (4) Notwithstanding anything contained in sub-section (1), a Regional Transport Authority of one region may issue a temporary permit under clause (a) or clause (c) of sub-section (1) of S. 62 to be valid in another region or State with the concurrence, given generally or for the particular occasion, of the Regional Transport Authority of that other region or of the State Transport Authority of that State, as the case may be.”

6. The argument of the learned counsel for the petitioner is that by virtue of Section 63 (4) of the Act, the case for grant of a temporary permit is taken out of the purview of the first proviso to sub-sec. (1) of S. 45. He has frankly stated that there is no direct authority on the point and that his contention is based solely on the interpretation of Section 63 (4).

7. It may be observed that Section 63 deals with validation of permits for use outside the region in which they are granted. Now if sub-section (4) of S. 63 is read in this context, it means that a temporary permit issued by the Regional Transport Authority of one region will become valid in another region also provided the Regional Transport Authority of the other region gives its concurrence. But it pre-supposes that the Regional Transport Authority issuing the permit must have jurisdiction and must be competent to issue the same. In my opinion, it does not deal with the competence or jurisdiction of the Regional Transport Authority to issue a temporary permit. That matter has been dealt with in proviso to sub-s. (1) of S. 45, which lays down as to which Regional Transport Authority will be competent to entertain an application for a stage carriage permit when it is proposed to use the vehicle in two or more regions lying within the same State or in different States and I do not see any warrant for holding that the operation of this proviso is restricted only to non-temporary stage carriage permits and not to temporary stage carriage permits.

8. It is important to note that the word used in Section 45 is ‘a permit’. There is nothing in the section to restrict its operation to a non-temporary stage carriage permit only.

9. ‘Permit’ has been defined by Section 2 (20) as follows :—

“‘Permit’ means the document issued by the Commission or a State or Regional Trans-

port Authority authorizing the use of a transport vehicle as a contract carriage, or stage carriage, or authorizing the owner as a private carrier or public carrier to use such vehicle.”

Thus the word ‘Permit’ includes both a non-temporary stage carriage permit as well as a temporary stage carriage permit. The heading of Section 45 is mentioned as ‘General provision as to applications for permits’. Hence, unless there is a mention anywhere in the section to specific type of permits, it would not be unreasonable to include non-temporary stage carriage permits as well as temporary stage carriage permits in the word ‘permit’ wherever it has been used.

10. It is true that in Aman Khan’s case AIR 1968 Raj 161 the Court was dealing with an application under Section 46 of the Act and the case of temporary stage carriage permits was not directly in issue. But, in my opinion, the observations made in the case as to the jurisdiction of a Regional Transport Authority to entertain an application for a permit apply with equal force to temporary stage carriage permits also. The previous state of law before Section 45 was amended in its present form was examined and so also the provisions of Section 63 of the Act. Their Lordships were pleased to hold that “this proviso (referring to first proviso to sub-section (1) of S. 45), therefore, clearly lays down in unmistakable terms the jurisdiction of a Regional Transport Authority in the matter of entertaining applications.” I am, therefore, of opinion that the first proviso to sub-section (1) of S. 45 applies to an application for a temporary stage carriage permit also and, therefore, the application in the present case for a temporary stage carriage permit should have been filed before the Regional Transport Authority, Jaipur within whose region, admittedly, the major portion of the route in question lies and as a necessary corollary the Regional Transport Authority, Udaipur, had no jurisdiction to entertain the application and allow the same.

11. Faced with this position, learned counsel for the petitioner submitted that the non-temporary stage carriage permit granted to the predecessor in title of the non-petitioner No. 3 in the year 1960 suffers from the same infirmity. I have not examined this aspect of the case. But even assuming the contention of the petitioner in this respect to be correct, two wrongs cannot make one right and I cannot uphold the validity of the permit granted to the petitioner which, according to me, was without jurisdiction, merely because the non-petitioner No. 3 was also able to get a permit in violation of the mandatory provisions contained in first proviso to sub-section (1) of Section 45. The petitioner may, if so advised, take appropriate action in this respect, in case any remedy is open to him.

12. Learned counsel for the respondents tried to support the impugned order of

the State Transport Appellate Tribunal, Rajasthan, Jaipur (Ex. P/10) on the alternate ground not decided by the State Transport Appellate Tribunal viz. that the application did not lie because two applications for grant of new permits on the route in question under S. 46 of the Act were pending. Learned counsel for the petitioner has tried to refute this contention on the ground that no application was pending before the Regional Transport Authority, Udaipur, but, as a matter of fact, they were pending before the State Transport Authority, Jaipur and there was no vacancy against which a new permit could be granted. I do not consider it necessary to deal with this point and decide it for the reason that decision on the first point is sufficient to uphold the impugned order of State Transport Appellate Tribunal, Rajasthan, Jaipur, dated 10 February, 1975.

13. In the result, this writ petition is dismissed, but, without any order as to costs. Petition dismissed.

AIR 1975 RAJASTHAN 208

P. N. SHINGHAL, C. J. AND
M. L. SHRIMAL, J.

Fakira and another, Petitioners v. Board of Revenue for Rajasthan at Ajmer and others, Respondents.

Civil Writ Petn. No. 68 of 1968, D/-21-3-1975.

(A) Civil P. C. (1908), O. 22, Rr. 3, 4, 11 — Abatement of appeal — Question of — Determination — Mode — One of legal representatives of appellant or respondent already on record — No application for bringing on record other legal representatives — Appeal will not abate.

The question of abatement for failure to bring one of the legal representatives on the record within the prescribed time limit, has to be examined with reference to the question of the sufficiency of the representation of the deceased, and an appeal will not therefore abate for the omission to bring the remaining legal representatives on the record in time. But when some of the legal representatives have not been brought on the record, it would of course be the duty of the appellant to bring them also on the record to complete the array of the parties. (Para 4)

Therefore, in a case where one of the legal representatives of the deceased appellant or respondent is already on the record, even though in another capacity, the appeal will not abate simply because the other legal representatives are there and an application has not been made in time to bring them on the record. AIR 1954 Raj 287 and AIR 1965 SC 1049 and (1903) ILR 26 Mad 230 and AIR 1967 SC 49 and AIR 1971 SC 742, Rel. on; AIR 1963 SC 901 and AIR 1972 SC 1181, Explained. (Paras 6, 7)

FS/GS/C142/75/SSG

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S. C. Bhandari, for Petitioners; H. M. Parekh, for Respondents Nos. 2 to 4.

P. N. SHINGHAL, C. J. :— This petition for a writ of certiorari is directed against the appellate judgment Ex. F of the Board of Revenue dated November 8, 1967, by which the petitioners' first appeal has been dismissed on the ground that it had abated on the death of Aladin who was one of the co-appellants.

2. The suit giving rise to the impugned judgment was instituted in the court of Sub-Divisional Magistrate, Ratangarh, for the ejectment of Fakira, Aladin and Ladu as trespassers. It was dismissed by judgment Ex. D of the Sub-Divisional Officer dated June 24, 1963. The plaintiffs filed an appeal before the Revenue Appellate Authority. It was allowed by judgment Ex. E dated May 14, 1964, and the suit was decreed for ejectment of the defendants from the suit land. All the three defendants Fakira, Aladin and Ladu filed a second appeal to the Board of Revenue. Aladin died on April 15, 1966, during the pendency of the appeal, and his name was struck off from the array of the appellants on an application of appellant Fakira. An objection was then raised against the maintainability of the appeal, and the Board of Revenue dismissed the appeal as aforesaid by its impugned judgment Ex. F dated November 8, 1967 holding that Ladu, who was admittedly the son of the deceased Aladin, was not his sole heir and could not represent his other eight heirs. A review petition was filed against that judgment, but it was dismissed on December 20, 1967, by judgment Annexure G and this is why Fakira and Ladu have approached this Court for a writ of certiorari.

3. It is not in dispute before us that the provisions of Order XXII, Rule 3 or 4 of the Code of Civil Procedure will be applicable in the case of the death of one of the several appellants or respondents, or of the sole appellant or the sole respondent, so that if the right to sue survives, the court shall, on an application made in that behalf, cause the legal representative of the deceased ap-

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